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## Donald A. Giannella Memorial Lecture

### CONCEPTUALIZING SHARI'A IN THE MODERN STATE<sup>1</sup>

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**T**HIS Article addresses the animated and evolving role that Shari'a, i.e., the system of Islamic jurisprudence collectively or generally, and Shari'a conceptions play in the contemporary world. There are various manifestations of this evolving role in the often dynamic, subtle, highly negotiated, and far from formalistic ways that Shari'a is animated in today's world.

There are three main points that I will address in this Article. First is to provide some insight into the various ways that Shari'a has been manifesting in the recent revolutions sweeping through the Arabic-speaking world, while at the same time contrasting the rather curious case of the various anti-Shari'a legislations proposed in parts of the United States, as well as some of the anti-Shari'a European discourses taking place. Second, I will address two basic conceptualizations of Shari'a that we find historically not just persistent, but historically competing and often wrestling for space. Although these conceptualizations have clear points of demarcation and delineation, they are quite broad and disagree in some fundamental and basic assumptions, particularly in epistemological, as well as ontological and deontological, assumptions. Finally, I will address the way that the assumptions of each of these conceptualized perspectives or schools of thought in Shari'a have expressed themselves in various ages and historical contexts. Indeed, we find that there are very particular attributes or particular characteristics to the way that each conceptualized view of Shari'a expresses itself in various historical contexts.

Before addressing the dynamics directly relevant to the conceptualization of Shari'a and its role, I would like to explore further the multi-faceted ways that Shari'a, in general, interacted especially with the Egyptian Revolution. Analyzing these interactions will help us in identifying what may be described as the "living and lived traditions" of Shari'a and the

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1. This Article is based upon the Donald A. Giannella Lecture delivered by the author at the Villanova University School of Law on March 23, 2011.

articulation of theoretical normative models for the role that Shari'a is supposed to play.<sup>2</sup>

I will start with some elaborations on observing the obvious. Anyone following the world today must be struck by some extremely powerful and memorable images. On the one hand, there is the striking image of Tunisians, Egyptians, Yemenis, and Libyans standing together in hundreds of straight lines of prayer, especially in the case of Egypt in Tahrir Square, where people are prostrating and standing up in tandem in a remarkable show of religiosity and solidarity. On the other hand, the collective prayer is not exclusively a religious ritual congruent with an aspiration for a particular theological or theocratic state. Rather, it is done in the context of expressing religiosity in the midst of political dissent—an act that from the perspective of, for instance, Wahhabi Islam or puritanical Islam is seen as fundamentally a-religious and fundamentally contrary to God's purposes. While it would be inaccurate to claim that this display of religious symbolism was simply an expression of cultural proclivities devoid of normative ideological commitments, the Egyptian Revolution and the rebellions and revolutions sweeping through the Arab world place into focus the role of religion, and more specifically Shari'a, in the modern state.

So, for instance, it is an invitation for reflection and study that in past revolutionary occasions across the Arabic-speaking world, the traditional call or slogan in various events of social empowerment was "*Allahu Akbar*" ("God is Greater"). But in the recent events from Tunisia to Egypt to Libya, Yemen, Bahrain, Oman, Jordan, and Syria, the traditional Islamic call of "*Allahu Akbar*" was consistently bolstered by calls for "*Hurriya, hurriya!*" ("Liberty, liberty!" or "Freedom, freedom!"). The crowds would cheer "*Allahu Akbar*" and then "*Hurriya, hurriya!*" alternating between the two. In all of the revolutions, except perhaps the Libyan one for obvious reasons, the crowds also added "*Silmiyya, silmiyya!*" ("Peacefully, peacefully!"). Depending on the occasion, circumstance, or context, we could find that the phrasing could alternate between "*Allahu Akbar!*", "*Hurriya!*", and "*Silmiyya!*". What is the animated association or relationship between liberty, peace, and God's supremacy in the collective consciousness of Muslims in this case?

Furthermore, one cannot fail to notice that the pace of many of the revolutions going forward in the Arab world was regulated by the Friday congregational prayers, such that the very developmental stages of the revolutions were organized around the weekly services. In Egypt, for example, there was one week designated as "the week of endurance," named after the Friday congregational prayer (known as *jum'a*). Thus, we have *jum'at al—*or "the Friday of" endurance, the Friday of perseverance, the Friday of liberation, the Friday of victory, and so on. Far from being a

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2. My discussion of the Egyptian Revolution draws upon a previous article. See generally Khaled Abou El Fadl, *The Language of the Age: Shari'a and Natural Justice in the Egyptian Revolution*, 52 HARV. INT'L L.J. ONLINE 311 (2011), [http://www.harvardilj.org/2011/04/online\\_52\\_el-fadl/](http://www.harvardilj.org/2011/04/online_52_el-fadl/).

formalistic process of labeling, these designations grew out of the very powerful normative dynamics of the congregational prayers as being vehicles for moral and social solidarity, collective aspirations, and mobilization. The reason that the pace of the revolution is regulated by such Islamic symbolisms is that the sermons given at these congregational prayers act as powerful rallying points. Indeed, if you study the history of political rebellion, whether pre-modern or modern, one of the most consistent and systematic difficulties that political powers experience in regulating Muslim polities is exactly the Friday congregational prayer. They try to regulate, control, manipulate, and direct it in a variety of ways. Yet, when you observe the recent revolutions, you see exactly why that intense concern about the congregational prayer on Friday continues. These Friday prayers are nearly an automatic rallying point for Muslims of various classes, various orientations, and various ideological persuasions.

Now, add to this picture the very powerful symbolic, as well as spiritual, impetus in the revolutionary discourses of today's Islamic world—as well as in the rebellions against colonialism by various Muslim populations in the eighteenth, nineteenth, and twentieth centuries, and centuries before that in various conflicts: the very powerful imagery of the martyr. One of the contested spaces and powerful religious symbolisms is the labeling of those killed in the revolutions as *shuhada'*, or those who bear witness in martyrdom on behalf of God. In the case of the Egyptian Revolution, for instance, the point at which one realized that the revolution was won was the point at which the Egyptian government accepted referring to those killed in the revolution as martyrs. In Yemen and Libya today, both sides are contesting this exact space of who earns this extremely honorific, significant, powerful, and moving designation of the *shahid*, or the martyr.

All of the above, in the view of some commentators, is an indication of ideological commitments that are fundamentally and profoundly inconsistent with liberal democratic commitments, and perhaps even liberal humanitarian commitments. In my view, such commentators—both Muslim and non-Muslim—suffer from having highly mechanistic and formalistic ways of properly understanding “the other” in general, but in this case, the “other Muslim” or the “Muslim other” in particular. Without citing numerous examples of this, one can imagine an interlocutor arguing that because in these various revolutions, one of the rallying cries is “*Al-shahidu habibu Allah*,” or “Martyrs are the closest or the most beloved to God,” and because this is the same rallying cry we have heard in other radical contexts, then this must mean that these revolutions have ideological commitments of various social orders, theocratic social orders in particular, that are Shari'a-based in one form or another. Of course, I would describe this argument as formalistic and dogmatic, but most importantly, it is highly inaccurate. At the same time that these various Islamic symbolisms—or what I call animations of Islamic moral commitments and moral understandings—cannot be claimed to be devoid of ideological understandings

and dogmatic commitments, I think that it is equally untenable, if not a very long way from asserting, that these various displays of Islamic symbolism mean by definition that this crowd is espousing a particular conception of Shari'a.

In fact, I could go on to give many other examples of the various ways in which we witnessed the animation of the normative foundations of Shari'a in many of the transformative and highly fluid moments currently besieging a number of Muslim nations. Yet these various revolutionary contexts were very notably devoid of calls for a determinate Shari'a-based social order. Notably absent were the popular clichés of the 1970s and 1980s, espoused especially by fundamentalist or puritanical movements, proclaiming that sovereignty belongs only to God (*al-hakimiyya li'llah*), or that the Qur'an is the only legitimate constitution (*al-qur'an dusturuna*), or that Islam is the only solution (*al-Islam huwa al-hall*). Even the Muslim Brotherhood throughout the course of the Egyptian Revolution has not called for the imposition of Islamic law, but like many of the revolutionaries, has argued that the Shari'a of Islam not only supports this revolution, but also mandates it.

Nevertheless, for some, this amalgamation of blended and hybridized systems of Islamic and liberal values will be seen as a sign of the lack of cultural rootedness of democratic commitments in Muslim societies. Other observers tend to see this as part of a process of the displacement of religious cultures and Muslim values by the irrepressible forces of Western modernity and Western-directed globalization. In this latter view, the cultural displays witnessed in the Egyptian Revolution, for instance, are evidence of the retreat and deconstruction of Islamic values in Muslim societies in the age of modernity. Such views, however, fail to account for or explain the formation of the internal convictions of so many Muslims—internal Muslim convictions that by participating in a revolution that raises the banner of democracy, dignity, and liberty, Muslims are at the same time not rebelling against their Islamic tradition but embracing it. Yet, it is exactly the dynamic and complex expression of liberal and religious commitments in the context of contemporary revolutions (and many of the revolutions of early Islam) that is the evidence of the need to re-conceptualize our understanding of the role of Shari'a in many contemporary Muslim societies.

It is important to note that Shari'a conceptualizations are not just contested in the Muslim world. One of the very interesting developments in the West, a development that I think has been absent at least since the height of the colonial age, is that of non-Muslim parties becoming interested in conceptualizations of Shari'a of their own. Here, I am referring very specifically to the various anti-Shari'a legislations proposed in several states. When we read their definitions of Shari'a—and at least a good number of them attempt some definition of Shari'a—we find that it is their own construction of Shari'a; the non-Muslim party is definitely en-

gaging in an active process of producing a conceptualization of Shari'a that is fitting for their party. I note that we also find in the anti-Shari'a legislation phenomenon that the appropriate and reasonable role of law in arbitrating the boundaries of religiosity and religious propositions and normativities remains contested even in secular liberal democracies such as our own. The anti-Shari'a phenomenon is a fascinating story in its own right, but what I especially find intriguing is the way that it impacts Muslim conceptualizations of Shari'a. Because we live in a world that is increasingly small, it cannot be possible that the state of Tennessee would pass a law defining Shari'a in a certain way, and that this definition would not have a direct and clear impact on all types of Muslim countries from Turkey to Yemen to Bahrain. It is just the type of world in which we live, and increasingly, people are very aware of what all others do.

Evaluating Shari'a and its role in the world today cannot and should not be insulated from the conceptualization of Shari'a in numerous other contexts. But the challenge in conceptualizing Shari'a is that, for a myriad of reasons, all conceptualizations are highly contested—from the highly prejudicial approaches found in so many Islamophobic discourses, including the anti-Shari'a legislations proposed in the United States, to the highly fluid, normatively transcendent, and complex ways that we witness in the age of revolutions in the Arab world. Indeed, I think the revolutionary age in the Arab world will prove to be one of the most historically significant moments of the modern human being.

So, what are the conceptualizations at work, where do they come from, and where might they go? Before I speak to this, let me be very clear that the idea of martyrdom itself is meaningless unless placed in the context of Shari'a discourses. The idea of Friday prayer is meaningless unless placed in the context of Shari'a discourses. The idea of the various cries that condemned the *istibdad* (despotism) is again very difficult to make sense of unless one has some awareness of the *istibdad* or anti-*istibdad* discourses in the Shari'a tradition. So, whether the people who are employing these symbolisms are aware of it consciously or not, they are invoking a Shari'a tradition that exists in the fabric of society, that has become woven into the fabric of society through centuries of practice and representation, and that has become quite natural to society.

To help phrase the issue from a comparative point of view, many in the West believe that tolerance, human dignity, the rule of law, representative governance, and constitutionalism are founded on values rooted in the Judeo-Christian tradition. Whether one ultimately agrees with this thesis or not, the argument from the Judeo-Christian tradition is well understood and represented, especially in the West. But one can conceive of a similar school of thought in the Islamic context—a school of thought that believes that the same values mentioned above are equally rooted in the Islamic tradition and especially, in the Shari'a. What many Muslim and non-Muslim intellectuals rarely appreciate is the impact that this

school of thought—the school of Islamic rootedness of liberal political values—has had in shaping the way that contemporary Muslims relate to their religion, the Shari’a, and the modern world. Before unpacking this point, it is necessary to briefly describe the basic and agreed upon meaning of Shari’a, and then two distinct and competing historical constructions of Islamic law.

Let us go back to some fundamental and basic understandings. One of the most important points to note about Shari’a for the unfamiliar reader is that in the linguistic practices of theologians, ethicists, and jurists in the Islamic tradition, the term *Shari’a* or *Shar’* quite literally means “the path,” i.e., either the fountainhead or the source of the fountain of goodness, or the path to well-being or goodness (both are correct depending on how it is used). But in the various discourses employed by jurists, theologians, ethical thinkers, and so on, Shari’a is always correlated with the idea of a life source, a source for well-being and thriving.

Moreover, the term Shari’a is not limited to the Islamic law context, but is actually used in a variety of contexts. In some usages, especially in literary contexts, it could refer to a pasture for animals or a pasture that is life-sustaining for beings. Sometimes it refers to previous generations or the traditions and practices of prior generations. So, for instance, when one says, *shar’ ala falina*, it means the practices and ways of our forefathers. Sometimes one can use it more specifically: For example, in Islamic sources you will often read *shari’at al-yahud*, or *shar’ al-yahud*, meaning the Jewish way of life. Depending on the context, it could mean Jewish law, for instance, in the way that Yemeni Jews and Egyptian Jews used it in the writings on Jewish law at the end of the nineteenth century and beginning of the twentieth century. Or, it could have the broader meaning of “the way of life of the Jewish people.” Furthermore, it could be used to refer to a methodology as in *shar’ al-falasifa* or *shari’at tariqat al-falasafa*, which means the methodology of Greek philosophers. To a reader who knows enough about this type of discourse, a reference to *shar’ al-falasafa* immediately alerts the reader that the text is referring not just to any philosopher, but to the methodologies and the methods employed by Greek logicians in particular.

The Islamic connection or the connection to normative values in Islam comes from the expression *shari’at Allah* or *shar’ Allah*, which means the path *to* God but also equally important, the path *from* God. In that context it is inclusive; it is a vague reference to anything from or to God or anything from or to the Divine. Very quickly we find that in the Islamic discourses developing by the third-century Islamic, and possibly earlier as we have seen from surviving manuscripts, that the *shari’at Allah*, or the path of God or from God or to God, is equated by necessity to a path leading to and resulting from social goodness. Social goodness is often referred to as *ma’ruf*, while moral goodness is often referred to as *husn* or *haqq*. *Shar’* or Shari’a in itself does not necessarily denote a positive set of

Divine commandments with which human beings must comply. However, it does refer to normatively transcendent and evaluative criteria for the good and for goodness. These normative transcendent or evaluative criteria—and here I use “normative” and “evaluative” quite purposefully—are derived and inseparable from God’s fundamental and essential goodness. Earlier Muslim authorities used to debate whether the whole meaning of Shari’a had to be altered to mean *life sustaining* or whether the terminology was inaccurate in itself if we assume a divine being who is not thoroughly good. The context for this debate was that early Islam encountered various religious orientations including dualistic views of God as the evil god and the good god. The early jurists were quite aware of these theological positions and, in various religious polemics, engaged and debated them ad nauseum. So the idea of the Divine goodness and its relationship to a pathway or path of life is very consciously invoked and discussed in Islamic sources throughout the Islamic civilization and even in contemporary Islam.

When we talk about Islamic law, or what is called *ahkam al-Shari'a* (meaning the rules of Shari'a), or *ahkam al-shar'*, or *ahkam al-Shar'iyya*, you will notice that all of these terms are preceded by the word *ahkam*. Here we are referring to a cumulative body and system of jurisprudential thought of numerous communities and schools of thought about the Divine Will and its relation to the public good. We are also referring to the linguistic practices of a specialized community of individuals who claim that they are employed in the business of negotiating the relationship between *shar'* or Shari'a as a transcendental concept, and how it applies to specific social orders and human conflicts. Islamic law is thus the fallible and imperfect attempt by human beings over centuries to explore right and wrong, and to discern what is good for human beings.

So for instance, Ibn 'Aqil, Ibn Tufayl, and other jurists have discussed in various sources—for example, in *Risalat al-Hayy bin Yaqzan*, the original treatise behind the story of Robinson Crusoe—whether in the original condition it would make any sense to talk about legal specialists or rule specialists if human society did not exist. At what point in our hypothetical human social constructs do we start saying that we need social order experts or conflict experts? Views on this point differed from jurists such as Ibn Rushd (Averroes), who took the view that the minute there are three or more people we need such experts, to Ibn Tufayl, who said the minute there are two or more people we need them, and then others, who imagined larger cities and polities. But the critical point is that it is this notion of *ahkam*, the legal propositions derived from studying and pondering the transcendent good, that is usually called *fiqh*, which quite literally means “understanding” or “comprehension”—not *the* understanding or *the* comprehension, but *an* understanding or *a* comprehension. It is an interesting epistemological question as to why Muslim jurists co-opted the word for “understanding” or “comprehension” specifically to the legal context. At the same time that the term *fuqaha* is usually used to refer to



jurists, one will also find in traditional usages that *fuqaha* can be used to refer to specialists in other professions such as medicine, e.g., *fuqaha al-tibb* or the specialists in medicines.

What is fascinating is that even in some of the proposed anti-Shari'a legislation that we have seen in Tennessee and some other states, the lawmakers have shown an awareness of the difference between Shari'a and *fiqh*, but at the same time, have done their very best to ignore any distinction between Shari'a and *fiqh*. Typically, in such legislation it will be set out that the law refers to Shari'a and *fiqh* and all other things referring to Islamic law. So, it is an interesting point to notice how even very superficially specialized views of the legal systems of others can enter into our public consciousness and our debates about the space that religion or religiosity ought to occupy in our society. But it is important to note that the basic distinction between Shari'a and *fiqh* is no longer just an esoteric point referred to by specialists in Islamic law. The significant point, though, is that taking *fiqh* to mean the understanding, and Shari'a to refer to the transcendental norms in itself, ultimately does not indicate any particular conceptualization of Shari'a. So, we really cannot tell by the mere fact that someone accepts a distinction between Shari'a and *fiqh* what their particular conception of human or Divine good is, or what their views on moral norms or virtues are. Indeed, all conceptualizations of Shari'a accept the distinction between Shari'a and *fiqh*; that is not the material distinction in, for instance, the puritanical orientation versus a more liberal orientation. All schools of thought accept this differentiation between Shari'a as more divine and *fiqh* as the result of human comprehension, apprehension, and understanding. And furthermore, they accept the distinction between Shari'a, *fiqh*, and *ahkam* (the positive commandments that result from the process of understanding and analyzing transcendental values).

So if the distinction between Shari'a and *fiqh* is not the material distinction in understanding the various conceptualized schools of thought that we see behind major historical thinkers and movements, what is? Here I will primarily address two schools of thought because in the field of law, unlike philosophy or theology, these two major orientations are constantly jockeying for position, space, and authoritativeness in Islamic history, and they are at play even today in the background to all of the revolutions.

The term I will adopt for the first school of thought in this paper is the positivist school of thought. Here, historically I am referring to various orientations, including the *ahl al-hadith*, *ahl al-sunna wa al-jama'a*, and in modern contexts, the Salafis and the Wahhabis. Regardless of the particular label of choice, the positivist school shares common characteristics that we find throughout the historical and socially animated manifestations of Shari'a. The positivist school of thought does maintain a difference between Divine law (or Shari'a, or the normative transcendental

values) and human law (or *ahkam al-fiqh*). This is recognized as elementary and basic not just to jurisprudential theory but also to theological premises and theological dogma. In the positivist school, while Divine law is perfect and maintains its perfectedness, and is immutable and maintains its purified characteristics, they also completely accept the possibility that human law could be imperfect and could be changeable and contextual. So, that itself is not the distinction.

In the positivist school of thought, the human law derived in the process of apprehending Divine law is expected to produce a determinative social order of rules in its engagement with the Divine law. Furthermore, in this school, this process fully exhausts and occupies the space for any possible evaluative function for a human intellect, whether it be the rational intellect or intuitive discerning. So this engagement, whatever the mechanics for it, takes the space thoroughly and completely from the Divine to the human. The human can articulate it contextually through parameters that are predetermined and defined by the Divine, and the imperfections of human law come from lack of comprehension but there is no further role for either rational discernment or intuitive discernment for the reasons that I will identify below. This is one main characteristic.

The second element is that the role of the text is seen as prior to and *a priori* to any notions of right or goodness. It is a text that mediates between the human and the Divine, and whatever contingencies are recognized in the law are recognized through the text and only through the text, not through any independent rational inquiry or independent intuitive discernment. And that is why you will find that the positivist school will often use, with a great degree of pride, labels or titles that celebrate the role of the text; for example, *ahl al-hadith*, which refers to the people who celebrate the role of the *hadith* (the oral tradition), or Salafis, which is really a reference to the texts that memorialize and document the actions and activities of prior generations. Thus, put differently, while recognizing the role of contingency and context in discerning the legal obligations that follow from the transcendent normative values of Shari'a, adherents to the positivist school believe that the Divine text fully embodies and represents the Divine law in all its contingencies and particularities. In this positivist approach, human law does not enter into a dialectical dynamic and discourse with the Divine text because the Divine law is fully captured, represented, and embodied by the Divine text—discernments of the human intellect are mostly limited to apprehending the contingencies recognized by the text.

The third characteristic is that the social order that the positivist school derives from the Divine law, although it is not claimed to be Divine, is fundamentally seen as a semi-divine social order. Here, I may be correcting myself in my earlier scholarship because I might have overstated the case. I do not know of a Salafi or a Wahhabi or an *ahl al-hadith* who would really go as far as claiming that it is completely divine. Yet funda-

mentally, they see the act of engaging Divine law as producing a semi-divine social order. The divinity or the repository of sanctity is in the very social order or positive rules that result from engaging the Divine law. So that sanctity or divinity is transferred, although imperfectly and relatively, not in an absolute fashion, to be embodied in the social order that is the result of the engagement mediated through the text.

The second conceptual school is what I will refer to as the natural school of law. Here I am including various people who have written on Islamic jurisprudence, from the famous Averroes, or Ibn Rushd, to even his grandfather, also named Ibn Rushd, or Abd al-Jabbar, or Ibn Tufayl, or Mulla Sadra, or Ibn 'Arabi, or Suhrawardi, or even the poet Rumi, and so on. What is common to both the naturalist school of thought and the positivist school of thought is that they agree that Shari'a is supposed to be about transcendental, normative, and evaluative values, although I should note that some belonging to the naturalist school of thought believed that Shari'a can only embody evaluative values and not normative values. This is a view that has been forgotten by a lot of modern scholars. I will set this specialization or specification aside and say that at least, whether normative or evaluative values, proponents of the naturalist school accept the Shari'a as possessing values.

However, in the naturalist school of thought, Shari'a does not exhaust the role of rational or intuitive discernment. Whether rational or intuitive depends on the school of thought and the particular theorist we are talking about, partly because the process of engaging in rational and intuitive discernment is in itself an act of worship (*ibadat*), i.e., a sanctified act of supplication of divinity. This is why in some of my writing I discuss the school of *al-Musawwiba* and their view that it does not matter what result one reaches; what matters is that one searches for the law, and in searching for the law one praises God. Ultimately, the result is completely marginal but it is the search that matters. In fact, the influence of this view was such that the Islamic legal tradition developed the notion of *al-ta'abbud bi'l hukm*, which translated literally means to supplicate in the process of finding the legal judgment. Now of course some students, who are terrible Arabic students and terrible students of Islamic law, will read this and think that what is meant is that the jurist prays and sits under a palm tree and after musing over it, the jurist says, "Oh well, God's judgment is x" (and this is similar to the *qadi* justice of Max Weber). This is not what the notion of *al-ta'abbud bi'l hukm* means. Rather, what the jurists are talking about here is that there are rational and intuitive principles that one must apply, and they went to great lengths to elaborate on and elucidate these principles. For example, al-Qadi 'Abd al-Jabbar, who was a judge in the tenth and eleventh centuries, wrote some twelve volumes, each volume about 600 pages in our modern print, on just the rational principles for the process of *ta'abbud bi'l hukm al-Shar'i*, the process of worshipping God, or supplicating, praising, or sanctifying the Divine, through the process of using rational principles in engaging the Divine law. So the first point is

that the naturalists argue persistently that it cannot be that Shari'a or Shari'a-transcendental values can exhaust the role of intellectual or intuitive discernment, because the act of intuitive discernment is an act of worship in itself and it does not make sense otherwise.

The second identifying characteristic of the naturalist school of thought is that they argue very vehemently and persistently that the good is *a priori* to the text and prior to the text, and that the text is not prior to good, but in fact, Divine goodness in itself as Divine goodness is prior to the text. The very concept of goodness is prior to the text as well. Moreover, the text cannot embody the Divine law because the Divine law is prior to and *a priori* to the Divine text.

Importantly, and I think critically, the third element is that they argue that while Divine goodness is absolute and non-contingent, and human goodness is non-absolute and contingent—which is something they share with the positivist school of thought as discussed above—they further insist that the source of obligation, whether legal or moral, is not the text, but rather that the source of obligation arises from the very nature of Divine goodness. That is, the point of *taklif* (obligation), What is the source of obligation, and how do we know that we are supposed to do x or y or z? The positivists say that you primarily search the text. The naturalists are of the view that the text should be used in the process, but the text does not exhaust the process because what is good is prior to the text, preexisting to the text, and more fundamental to the text, and that obligation itself would arise even if the text never existed. Critically, the source of obligation (moral as well as legal) is not the text but the goodness of God. Furthermore, the differentiation between Divine law and human law is asserted to be categorical and absolute. This is in part because the goodness of God is absolute and non-contingent while human goodness is contingent and relative. Most importantly, any determinative social order, even if based on an attempt to comprehend Divine transcendental values, remains thoroughly human, relative, non-transcendental, and not Divine. Equally as important is that the claim or pretense of any such social order to attempt or strive to implement Divine values does not preclude the role of human discernment in evaluating the moral worthiness of this social order. To put it bluntly, a social order not directly inspired by the Divine law could be more morally worthy than a social order that claims to be based on the Divine law.

The reader may be wondering, How is this relevant to what is going on in the world today? Between the positivist and naturalist schools of thought, what inspires Muslims seeking change or rejecting the status quo in the modern world? Returning to the discourses prevalent in the Egyptian Revolution and other revolutions in the Arab world, we notice that the call for an imposition of Islamic law or a set of positive legal commandments is conspicuously absent. The revolutionary discourses place a great

deal of emphasis on civil society, civic duties and rights, rule of law, limited and accountable government, social and political justice, and citizenship.

Consider the following. In the wake of the Egyptian Revolution, the Shaykh of al-Azhar Ahmad Al-Tayyib, after being criticized for being late to the scene, issued a proclamation on February 16, 2011. The proclamation stated, among other things, that the objectives and principles of Shari'a are to promote knowledge and *'ilm* (science), to establish justice and liberty, and to protect liberty and human dignity. Then he went on to say that whatever political system upholds basic moral values and natural principles of justice, which he insisted are shared by all religions, is the system mandated by Islam and that is the Islamic system. Next, he argued that democracy should be considered fundamental and basic to any Shari'a-based system because it is the political system most likely to lead to upholding the dignity of all, to the prohibition of cruel and degrading treatment and torture, and to bringing an end to political and economic corruption and an end to despotism. Finally, the Shaykh stated that as an institution, Al-Azhar calls for a system of governance that respects the rights of all citizens, and that despotism is inherently and fundamentally a breach of Shari'a. He explained that, among other things, despotism creates social ills such as cowardice, hypocrisy, social alienation, and a lack of a collective or communal ethos, all of which are contrary to Shari'a.<sup>3</sup>

Partly in response to the Wahhabi position, the prominent Egyptian jurist Yusuf al-Qaradawi spoke out in clear support of a number of revolutions including the Egyptian and Libyan Revolutions. Qaradawi appealed to the principles of Shari'a in arguing that it is a religious and moral obligation upon Muslims to support the revolution and to rebel against despotism, degradation, and injustice. Qaradawi argued that democracy, or a political system that respects human dignity, is more fundamental to the fulfillment of Shari'a than the enforcement of a set of positive legal commandments, such as the prohibition of usury, that ultimately might or might not lead to the realization of justice.

Thus, the conceptualization of Shari'a as embedded in a set of values that are fundamentally at odds with human suffering, injustice, indignity, and despotism has been expressed and articulated in historically contingent ways. The belief in an organic relationship between Shari'a and the above-mentioned values is not merely a product of the modern age or an interaction with contemporary Western values. This organic relationship is rooted in various discourses that negotiated and interpreted the Qur'anic condemnation of coercion or duress (*ikrah*) and corruption (*fasad*), as well as the Qur'anic denunciations against the despotism (*istibdad*) of the Pharaoh of Egypt and repression and exploitation of a peo-

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3. Yet, al-Azhar was placed on the defensive because of the criticism that its proclamation came late or that it should have been issued in the first days of the revolution. Islamic authorities or institutions that chose to support Mubarak's despot regime increasingly found themselves marginalized and sidelined.

ple (*istid'af*).<sup>4</sup> This organic relationship between Shari'a and moral goodness traces its lineage to a variety of historical discourses and sources from Platonic intuitionism to Aristotelian virtues. This lineage can also be traced to Muslim historical practices such as the Caliph Umar's famous declaration that human beings are entitled to freedom because they are born free, as well as the early Islamic political discourses on participatory governance (*hukm al-Shura*),<sup>5</sup> and early virulent attacks on tyrannical governance (*mulk 'adud*).<sup>6</sup> In its most sophisticated forms, it traces its lineages to the writings and teachings of a large number of Sufi and rationalist jurists on the relationship of natural justice and Shari'a law, some of whom are discussed further below.

All of this is tied together in the language of the relationship between goodness and human dignity, and in the case of Ahmad Al-Tayyib, I know for a fact that he has read the literature of the naturalists, and so I cannot say that he embodies the naturalist school unconsciously. But he is not unusual in the context of various contemporary Muslims. This naturalistic conceptualization is eloquently captured in 'Abd al-Rahman Kawakibi's (d. 1902) brilliantly articulated analysis of how despotism breeds social hypocrisy and false religiosity.<sup>7</sup> It is also captured by Rashid Rida (d. 1935), who issued a *fatwa* very similar to many *responsa* issued by the *Shi'a* jurist Mirza Muhammad Husayn Gharawi Na'ini (d. 1936) that argues that if the purpose of constitutionalism is to establish good governance and limit and hold power accountable then it is in harmony with Shari'a, and that the innate and organic relationship with the principles of natural justice is fundamental to Shari'a. Even the prominent Egyptian jurist Rifa'a al-Tahtawi (d. 1873) visited France and commented that in Egypt he finds many Muslims but no true Islam, whereas in France he finds Islam but no Muslims; meaning that in his view, the values animated by French society are a truer embodiment of Shari'a than the values animated by Egyptian society.

Whether you agree with Tahtawi or not is not the issue, but rather the point is that people like Tahtawi or Rashid Rida or Muhammad Abdu or Kawakibi or Ahmad Al-Tayyib, a contemporary of ours, they are all invoking a tradition that exists in the cumulative Islamic memory. Sometimes, like Muhammad Abdu, Rashid Rida, or Ahmad al-Tayyib, they are invoking this tradition very consciously, because they have read the works of naturalist theorists. But many have not read any of the rationalist treatises or any of the rationalist literature, like the demonstrators in Tahrir Square

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4. See THE QUR'AN, *Al-Araf* 7:88, *Al-Baqarah* 2:60, *Hud* 11:116, *Al-Qasas* 28:77, *Yunus* 10:74–92, *Al-Muminun* 23:45–48, *Ash-Shuara* 26:10–22, *Al-Baqarah* 2:49.

5. See HICHEM DJAIT, *LA GRANDE DISCORDE: RELIGION ET POLITIQUE DANS L'ISLAM DES ORIGINES* 73–79 (1989).

6. See KHALED ABOU EL FADL, *REBELLION AND VIOLENCE IN ISLAMIC LAW* 32–161 (2001).

7. See 'ABD AL-RAHMAN KAWAKIBI, *TABA'I' AL-ISTI'BAD WA-MASARI' AL-ISTI'BAD* 95–114 (1931).

who see a natural, innate, and organic relationship between Shari'a and justice, or Shari'a and liberty, who yell, "*Allahu Akbar*" and at the same time, "*Hurriya, hurriya*" ("Liberty, liberty"). Much of it is written in dense philosophical jurisprudential language that is inaccessible to many contemporary Muslims and many contemporary Arabic speakers. It is very much like reading Thomas Aquinas, who refers quite liberally to various Muslim thinkers from Averroes to Avicenna to Ibn Bajja and so on, who are all within the naturalistic paradigm, sometimes taking sides with one Muslim thinker against another.

The third point, which was mentioned briefly above, is the fact that we notice in a quite pronounced fashion that the demonstrators, whether in Tahrir Square in Egypt, or Libya, Yemen, or the vast majority of other uprisings, have not raised the banners usually associated with the positivist school—particularly the contemporary manifestation of the positivist school—banners that say, *al-hakimiyya li'llah* (sovereignty belongs to God), or *al-Qur'an dusturuna* (the Qur'an is our constitution), and so on. The absence of these banners is quite a conscious act. Similarly, across the board we find that in these vast revolutions all of the discourse is one civil discourse, which talks about dignity, justice, rights, corruption, and the right to choose. It is not talking about the veil, antiquated criminal laws, or outdated rules.

In fact, in the case of the Tunisian and Egyptian Revolutions, we notice that while a large number of moderate Islamists (such as Rachid Ghannouchi, Amr Khaled, Fahmi Huwaidi, Muhammad Umarah, and Muhammad Salim al'Awa) supported or participated in the protests, in stark contrast, the puritanical Salafi and Wahhabi organizations boycotted the revolutions. Among other things, the objection raised by puritanical groups and activists was that the revolutions did not call for the imposition of Shari'a law. Furthermore, Saudi jurists and Wahhabi activists issued legal proclamations appealing, unsuccessfully, to God-fearing and pious Muslims to boycott the revolutions. In these proclamations, Wahhabis contended that Shari'a law prohibited demonstrations and also prohibited rebelling against a ruler who is unjust or despotic. Conversely, one of the remarkable naturalistic doctrines invoked in various revolutions as part of the legitimating discourse was the language stating that God is morally obligated to support and aid the just over the unjust, even if the unjust is Muslim and the just is non-Muslim. This language, which says that God is about moral goodness and not religious labels, dates back through at least 1,200 years of history and often stood at the line demarcating the positivist versus naturalist conceptions of Shari'a—it often stood at the line separating those who believed that the moral values or goodness are prior to the law, and those who believed that moral goodness follows the law. This discourse is typical in classical naturalistic discourse and naturalist doctrinal usage, and yet to see it re-acknowledged in the contemporary age in the context of discussing democracy and liberty is quite fascinating.

This brings us to my final point, which is to address why the revolutionaries phrase their discourse in terms of democracy and liberty and freedom and so on. Whether the positivistic school or the naturalistic school, although they argue theology, philosophy, or jurisprudence as the case might be, ultimately, when it comes to translating their positions to social demands or political movements, they invariably use the language prevalent in their day and age. In other words, although this innate relationship between the principles of natural justice and Shari'a is a firm and unwavering part of Muslim consciousness, from the inception of Islam and to the current age, the way that this relationship is expressed varies a great deal from one historical context to another. So, for example, the way that Egyptian revolutionaries or the Shaykh of al-Azhar expressed and attempted to assert this relationship is deeply influenced by the prevalent epistemological categories and ideas of their age. Hence, it is not at all surprising that the way that contemporary Muslims express their understanding of this relationship will be heavily influenced by the dominant discourses on human rights and democracy. This does not mean that the relationship between the principles of justice, human dignity, or the ethical virtues at the heart of human goodness and Shari'a is a Western transplant or the product of Western influence.

There is no doubt that the way that Muslims articulate the organic relationship between the transcendental normative values of justice and goodness and Shari'a is expressed in different languages in different times and different places. But we can clearly delineate and identify the moral imprint of the naturalistic school. So, the naturalists that supported some of the early rebellions in Islam used the language of anti-despotism and the condemnation of tyranny and equated tyranny to corrupting the earth, while in other periods we find Aristotelian philosophy and the Platonic idea of intuitive discernment quite prevalent in the way that people chose their expressions and expressed the same basic ideas. Today we find the language of liberty, democracy, human rights, and so on. This does not mean that these concepts are alien; in fact, I would argue that if one is willing to risk one's life for them, then they are not alien at all, but more fundamental to this person than to many people who would not imagine risking their lives for them, or who live entirely self-absorbed and narcissistic lives. But the question is, What in the Islamic psyche are these people tapping into? I am not arguing here that they are tapping into what the Prophet clearly said or what the Qur'an said because I believe that is always negotiated by human beings. Nevertheless, they are drawing from the cumulative tradition of the naturalistic theologians and jurists, well-represented in the inherited Islamic tradition, which has existed at least from the third Islamic century to this very day. In my view, it is only the retreat of the positivist approaches to Shar'ia law in the past decade that has given the naturalistic conceptions of law, that which we witness manifesting in so many revolutions taking place in the Muslim world, the breathing space to emerge.



