

# Sisters in Law – Using *Maqāṣid al-Shari'ah* to Advance the Conversation between Islamic and Secular Legal Thinking

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## Abstract

The conversation between Islamic and secular scholars of law has been going on for a long time. Publications in European languages are flooding the market on almost any conceivable topic related to Islam. Yet, there is still little evidence of a proper dialogue, but merely of an exchange of monologues. Both sides are wary of engaging in open-ended discussion. For the Muslims, the divine origins of their religion, and consequently their attitude to the foundations of law-making, would seem non-negotiable; any addition based on secular thinking is likely to be viewed as forbidden innovation and watering-down of Islam and, in extreme cases, as an attack on the very identity of Islam. The secularists will consider some core Muslim teachings as being in breach of the fundamental freedoms for which people in the 'West' have fought for generations and with great sacrifice. This article advocates the use of the *maqāṣid al-shari'ah* as a tool for advancing the debate.

## Keywords

*Maqāṣid al-shari'ah*; general principles of law; secular legal theory; comparative law

This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency.

US Supreme Court, *Terminiello v. City of Chicago*, 1949  
(337 U.S.1 at 11 per Frankfurter J)

Equity is a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a Chancellor's foot; what an uncertain measure would this be? One Chancellor has a long foot, another a short foot, a third an indifferent foot: 'tis the same thing in a Chancellor's conscience.

John Selden, *Table Talk*, 1689<sup>1</sup>

When the Apostle of Allah ... intended to send Mu'ādh ibn Jabal to the Yemen, he asked: How will you judge when the occasion of deciding a case arises?

He replied: I shall judge in accordance with Allah's Book. He asked: [What will you do] if you do not find any guidance in Allah's Book? He replied: [I shall act] in accordance with the Sunnah of the Apostle of Allah. ...

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<sup>1</sup> See, e.g., the entries on John Selden in C.N. Douglas (Ed.), *Forty Thousand Quotations: Prose and Poetical*, 1917 – available online at [www.bartleby.com/348/authors/486.html](http://www.bartleby.com/348/authors/486.html).

He asked: [What will you do] if you do not find any guidance in the Sunnah of the Apostle of Allah ... and in Allah's Book?

He replied: I shall do my best to form an opinion and I shall spare no effort.

The Apostle of Allah ... then patted him on the breast and said: Praise be to Allah Who has helped the messenger of the Apostle of Allah to find something which pleases the Apostle of Allah.

*Sunān Abū Dāwūd*, Ḥadīth No. 3592

## 1 The Need for a New Style of Conversation

The conversation between Islamic scholars and what we shall call, for want of a better word, secular scholars of law, has been going on for a long time. It is, however, an indisputable fact that since the rise of world-wide Islamist terrorism, aggressive Islamist propaganda, as well as more legitimate emanations of political Islam<sup>2</sup> and the increasing visibility of Muslim sections of society in non-Muslim countries and fears of parallel communities<sup>3</sup> in countries across the globe, the religion and with it its cultural and legal aspects have come much more clearly into the limelight. Many more people now want to know about 'the Shari'ah', and some of them not least out of a combination of culturally superior voyeurism and possibly perverse titillation based on the Gothic medieval horrors of cutting off hands and feet, stoning, lashing, beheading, etc. Many new publications on all things Islamic in European languages have appeared and are continuing to flood the market; symposia and conferences on the 'dialogue with Islam' take place everywhere and on almost any conceivable topic.

### 1.1 *Dialogue – Not Exchange of Monologues*

However, this article, which is meant to be the first in a series around a research project into the figure and potential of the *maqāṣid al-shari'ah* or the so-called Higher Intents of Islamic Law, is going to argue that currently there is little evidence of a proper dialogue, but rather an exchange of monologues. A dialogue means thrust and repartee, argument and counter-argument, thesis and anti-thesis based on the mutual preparedness of the participants to consider their own stance and position in the light of the points put forward by the other side. In my experience, both sides are wary of engaging in such an open-ended discussion, for obvious reasons. For the (traditional) Muslims, on the one hand, the divine origins of their religion and consequently their attitude to the foundations and moral boundaries of law-making with all its consequences would seem non-negotiable; any addition based on secular thinking is likely to be viewed as forbidden innovation and watering-down of Islam and, in extreme cases, as an attack on the very identity of Islam itself. This is the case notwithstanding the fact that the bulk of Islamic jurisprudence is actually man-made and based on human deductions from the original sources in similar ways, as we will see, as secular scholars would arrive at jurisprudential findings.<sup>4</sup> The secularists, on the other hand, will see any reference to a religious basis as obsolete and anachronistic and consider some of the traditional interpretations of Muslim scholars and institutions in breach of fundamental

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<sup>2</sup> Although some are of the view that political Islam in its modern form was never intended in the original meaning of Islam and indeed never existed in its history; see M. Rohe, *Das islamische Recht*, 2<sup>nd</sup> edn. (Munich: C.H. Beck, 2009), p. 396.

<sup>3</sup> See, e.g., in the German context, J. Wagner, *Richter ohne Gesetz – Islamische Paralleljustiz gefährdet unseren Rechtsstaat*, (Berlin: Ullstein, 2011), and the recent debate in the UK about the place of the Shari'ah in the domestic legal order.

<sup>4</sup> See the overview of the different streams of arguments for possible reform and the counter-reform movements in Rohe, *supra* note 2 at 189; W.B. Hallaq, *Shari'a. Theory, Practice, Transformations*, (Cambridge: CUP, 2009), p. 500.

rights and freedoms for which people in the ‘West’ have fought over many generations and with great human sacrifice, most prominently the freedoms of speech and belief, as well as the role of women. Conservative and political Islam in particular are seen as a threat to the secular open and democratic society.

## 1.2 *Openness to Critical Discourse*

Nonetheless, criticism, especially of the hard-hitting sort, of material aspects of Islamic law is often considered culturally disrespectful and hence politically incorrect in the secular ‘West’, a concern from which many of their Muslim colleagues do not seem to suffer to the same degree vis-à-vis secular legal systems – indeed the unquestionable superiority of Islam as a way of life and law is, for example, openly expressed in the Preamble to the 1990 Cairo Declaration of Human Rights in Islam,<sup>5</sup> and can still be found in modern textbooks on Islamic law, such as, for example, Attia’s treatise on the Higher Intents of Islamic Law, the very topic we shall engage with in this article: “The Apostle received from God the most consummate of all laws, one that offers benefits which human beings alone would not be able to realize”.<sup>6</sup>

Although maybe not so much of an issue in academic debate,<sup>7</sup> the aggressive and not infrequently violent response to criticism of Islam, and especially its prophet Muhammad, encountered within the more extreme sections of Muslim society, may have had a severe chilling effect on the willingness of secular scholars to speak their mind freely, depending on the setting and context, as they would with regard to any other religion or ideology. An anecdote from my own experience may help to clarify the point: At a public lecture on the Shari’ah in 2013 at a German university, one of the professors there told me about an essay she had set that year for her students. They had to discuss whether it would be permissible under freedom of speech principles to defame Muhammad or the Pope. Whilst almost all of them said it was perfectly acceptable under freedom of speech rules to slander the Pope, virtually no-one said the same thing with regard to Muhammad. The professor could not explain from the answers why that difference had occurred, given that neither person holds divine status in the respective religions and are merely messengers and/or representatives of the deity on earth. Could the fact that the Christian/Catholic reaction to such vilifications as a matter of experience does not entail violence against persons or objects have had something to do with it, and that the students had already internalised this reality in their academic value-ranking framework?<sup>8</sup>

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<sup>5</sup> Online at <http://www1.umn.edu/humanrts/instree/cairodeclaration.html>.

<sup>6</sup> G.E. Attia, *Towards Realization of the Higher Intents of Islamic Law*, (London: The International Institute of Islamic Thought, 2007) 153.

<sup>7</sup> However, even there one can sometimes experience drastic reactions. After sending my paper “Political Islam and Non-Muslim Religions: A Lesson from Lessing for the Arab Transition”, *Islam and Christian-Muslim Relations*, 25 (2014): 27, to a number of Muslim colleagues, I was promptly disinvited from teaching on a course at a law school in a Muslim country, which shall remain unnamed.

<sup>8</sup> Despite what I said in the preceding footnote, this potential internalisation in an academic context may, however, sometimes be based on insufficient first-hand evidence and ignorance of the actual reaction, which may often be based simply on linguistic or cultural barriers, as the following anecdotal piece of evidence may help to clarify. At an international conference in 2007 on Islamic criminal justice at a university in the UAE, I spoke about the Western view of certain more glaring aspects of the Islamic system which are by and large seen as barbaric and/or draconian or questionable under the rule of law as understood by scholars and practitioners in the West, and I said so quite clearly. When I was finished, there was a deathly silence in the 400+ seats lecture theatre and only maybe five or six Egyptian judges in the front row gave some polite applause. In the discussion, I received some flak from a Muslim colleague that I allegedly misquoted Muhammad (which I had not) and a (quite friendly) comment from a Saudi academic which more or less went into the direction that we should let each other abide in our respective systems and not criticise each other. Not very encouraging for a critical dialogue, it seemed to me. Yet, a British Muslim colleague who spoke Arabic told me afterwards that my paper

### 1.3 *Using the Maqāṣid al-Shari'ah and General Principles of Law to Enhance the Conversation*

Be that as it may, the time is ripe for a fact-based discussion between Islamic and secular scholars, one that does not get bogged down by ever-present concerns of ideological and religious sensitivities but which focuses on the *maqāṣid* and *principles of law* which guide both paradigmatic approaches. A debate that, while it pulls no scholarly punches, is prepared to risk the revelation that both systems may be less different than their theoretical foundations might lead one to assume and less than their more vocal proponents are prone to claim. The apparent innate conviction of many Islamic scholars as, for example, evidenced by Attia's quote above, that the Shari'ah is the best system imaginable for everyone, is as wrong as the secular view of the Islamic jurisprudential approach is outdated. We need to stop talking to each other merely about our own respective systems in a more or less descriptive explanatory or at best apologetic fashion and should start to engage in talking together about both systems in a proper scholarly and analytical manner that also recognises social and political realities and does not restrict itself to a doctrinal *Glasperlenspiel*. Otherwise there will never be progress to a dialogue as the word is commonly understood. There should, to put it bluntly, be no more holy cows on either side.

Every society, no matter on what foundation its cultural and moral environment is based, at some stage develops a set of fundamental guiding principles which inform the interpretation and application of morals, and in the formal framework of regulation by the state, of its laws. In Islamic law, we have as a prime example the so-called five higher intents or *maqāṣid*, which aim at the protection of certain basic values in society, namely religion, life, lineage, intellect and property. It contains material ethical principles for the implementation of these five ideals, such as *maṣlaḥah murṣala*, i.e. enhancing the benefit for the public interest of every action, *istiḥṣan* (juristic preference) the 'blocking of means' (*sadd al-dhari'ah*) and the ban on manipulation (*tahayyul*) if using lawful means could lead to an unlawful or immoral effect, the idea of necessity (*ḍarūrāt*), etc. While secular law does no longer recognise the protection of religion and lineage<sup>9</sup> as legitimate purposes per se but has, for example, moved to the protection of freedom and exercise of religion and speech or the protection of children's inheritance rights even if born out of wedlock, it does contain principles that refer to the protection of life (homicide and abortion offences, for example, as well as social welfare in the wider sense and medical care provision) and naturally property (in all areas of law: civil, criminal, administrative and constitutional). The protection of the intellect is also clearly a major interest, as can be seen at the example of legislation relating to

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was the talk of the town over lunch, as it were, among the locals. I am unsure to what extent that really was the case, but if it was, then it seems remarkable that no-one approached me for further discussion – whether that had to do with customary Arab politeness towards a guest which did not allow for any expression of criticism, with genuine lack of academic interest to pursue the matter, or because my talk had struck a chord with some people who did, however, not wish to acknowledge it vis-à-vis a non-Muslim, I do not know. This lack of a clear indication, for whatever reason, provides no sound basis for progress.

<sup>9</sup> Especially sexual offences such as adultery, rape, etc., are either no longer recognised as worthy of criminal sanction (adultery) or have been based on different legal interests than 'lineage' in its original sense would suggest. Similarly, distinctions based on social status as made by Mālik ibn Anas in his *Al-Muwatta'* for rape are massively outdated. See the *Al-Muwatta'* of Imām Mālik Ibn Anas, translation by Aisha A. Bewley, (London: Portobello Books, 2001), para. 36.16., where Mālik advocates that the rapist of a slave girl should "pay what he has diminished of her worth". No modern Muslim would still consider this an acceptable rule. Indeed, modern Islam also frowns upon slavery, while neither the Qur'ān nor Muhammad demanded its immediate abolition at the time – much like the views of St. Paul in the Christian textual tradition. See his *Letter to Philemon* which is referenced, for example, in the Encyclical 'Spe Salvi' of Pope Benedict XVI of 30 November 2007, in which he states that Christianity did not bring a "message of social revolution" (original: "*Christianismus non proclamaverat socialem et turbulentum nuntium.*") – Spe Salvi, para. 4 (link to the English version online under 'Encyclicals' at: [www.vatican.va/holy\\_father/benedict\\_xvi/index.htm](http://www.vatican.va/holy_father/benedict_xvi/index.htm)).

drug and alcohol consumption, the protection of juveniles from (hard) pornography and depictions of violence, etc. – obviously there are differences in the views as to what degree of protection is needed and almost all protection of that sort usually totally or gradually ends when a person comes of age, be it at the ages of 18 or 21. Secular law also possesses ethical implementation principles that are close mirror images of those in Islamic law: the principle of protecting the public interest or public policy, the ban against abuse of formal legal positions, necessity, etc. A few examples from German and English law shall highlight these similarities. German civil law in the Civil Code<sup>10</sup> contains numerous general provisions that speak to principles that Islamic law would very likely put under the general categories mentioned above, and they merit being reproduced here in some detail:

(a) Sections 133, 134 and 138 on the interpretation of declarations under law and the effect of violations of certain rules:

Section 133: Interpretation of a declaration of intent

When a declaration of intent is interpreted, it is necessary to ascertain the true intention rather than adhering to the literal meaning of the declaration.

Section 134: Statutory prohibition

A legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion.

Section 138: Legal transaction contrary to public policy; usury

(1) A legal transaction which is contrary to public policy is void.

(2) In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance.

(b) Sections 226 and 228 on abuse of rights and necessity:

Section 226: Prohibition of chicanery

The exercise of a right is not permitted if its only possible purpose consists in causing damage to another.

Section 228: Necessity

A person who damages or destroys a thing belonging to another in order to ward off from himself or from another a danger emanating from the thing does not act unlawfully if the damage or destruction is necessary to ward off the danger and the damage is not out of proportion to the danger. If the person acting in this manner caused the danger, he is obliged to pay damages.

(c) Section 242, one of the central provisions of German civil law, on good faith:

Section 242: Performance in good faith

A debtor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.

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<sup>10</sup> Taken from [http://www.gesetze-im-internet.de/englisch\\_bgb/index.html](http://www.gesetze-im-internet.de/englisch_bgb/index.html) – with some modifications by the author.

(d) Section 817 on unjust enrichment:

Section 817: Breach of law or public policy

If the purpose of performance was determined in such a way that the recipient, in accepting it, was violating a statutory prohibition or public policy, then the recipient is obliged to make restitution. A claim for return is excluded if the person who rendered performance was likewise guilty of such a breach, unless the performance consisted in entering into an obligation; restitution may not be demanded of any performance rendered in fulfilment of such an obligation.

An example of 'blocking the means' comes – hardly surprisingly – from tax law, in the following sections of the German Fiscal Code:<sup>11</sup>

Section 40: Actions contrary to law or public policy

It shall be immaterial for taxation when an action that is completely or partly taxable violates a statutory regulation or prohibition or is contrary to public policy.

Section 41: Invalid legal transactions

(1) Where a legal transaction is or becomes invalid this shall be immaterial for taxation to the extent that and as long as the persons involved nevertheless allow the economic outcome of this legal transaction to occur and to remain. This shall not apply where the tax laws provide otherwise.

(2) Fictitious transactions and actions shall be immaterial for taxation. Where a fictitious transaction conceals another legal transaction, the concealed legal transaction shall be decisive for taxation.

Section 42: Abuse of tax planning schemes

(1) It shall not be possible to circumvent tax legislation by abusing legal options for tax planning schemes. Where the element of an individual tax law's provision to prevent circumventions of tax has been fulfilled, the legal consequences shall be determined pursuant to that provision. Where this is not the case, the tax claim shall in the event of an abuse within the meaning of subsection (2) below arise in the same manner as it arises through the use of legal options appropriate to the economic transactions concerned.

(2) An abuse shall be deemed to exist where an inappropriate legal option is selected which, in comparison with an appropriate option, leads to tax advantages unintended by law for the taxpayer or a third party. This shall not apply where the taxpayer provides evidence of non-tax reasons for the selected option which are relevant when viewed from an overall perspective.

English law has the law of equity, which arose as a corrective to the often overly harsh application of the Sovereign's law as implemented by the King and/or his judiciary (also called the 'common law'), and was developed by the Chancellor of the Exchequer, as set out in one of the quotes at the beginning. The principles of equity also tie in very well with the general purpose behind the concept of *maṣlahah* in its wider sense, and just a few shall be mentioned here:

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<sup>11</sup> Taken from [http://www.gesetze-im-internet.de/englisch\\_ao/englisch\\_ao.html#p0234](http://www.gesetze-im-internet.de/englisch_ao/englisch_ao.html#p0234).

- Equity follows the law.<sup>12</sup>
- Where the equities are equal, the law prevails. Where the equities are equal, the first in time prevails.<sup>13</sup>
- Equity looks to the substance rather than the form.<sup>14</sup>
- Equity will not permit a statute to be used as an instrument of fraud.<sup>15</sup>
- Equity regards as done that which ought to be done.<sup>16</sup>
- He who seeks equity must do equity.<sup>17</sup>
- He who comes to equity must come with clean hands.<sup>18</sup>

The picture that emerges from these few examples is that all of the above have overlapping basic rules and ethical ideas about how the public interest should be served – whether they are ultimately based on religious commands or not. This realisation should ideally serve as a basis for further conversation. However, there are some issues which may impede this conversation, and we turn to them next.

## 2 Obstacles to a Genuine Dialogue – Systemic Sensitivities and Ambiguities

### 2.1 *Allegations of Backwardness and Being Unprincipled*

Traditional Islamic law, or the Shari‘ah, has often been seen as a backward and unprincipled legal system by lawyers in advanced secular jurisdictions, as exemplified by the first quotation above. However, as the second citation shows, not so long ago similar concerns were raised in England about the lack of contours of the new stream of law called ‘equity’ which was then administered not by the King’s Courts but by the Lord Chancellor as a remedy against the often overly strict interpretation of the common law. Based on the two main sources from the 7<sup>th</sup> century CE, the Qur’ān and the sayings and acts, or the Sunnah, of Muhammad, the prophet of Islam, the Shari‘ah had over the centuries been expounded and explored mainly by a class of private religious and jurist scholars, the *ulama* or *fuqahā*, from the Arabic expression for the discipline of jurisprudence, *uṣūl al-fiqh*. The discipline flourished in the early period of Islam with scholars operating in a search for consensus (*ijmā’*) and the use of analogical reasoning (*qiyās*), although the latter is called into question as a permissible method by Shi’a teaching. There was and is doubt among the more traditional Islamic scholars whether, to what extent, and in which framework any new jurisprudential developments, based on independent reasoning, or *ijtihād*, after the 10<sup>th</sup> century were possible or needed at all – the so-called closure of the gate to *ijtihād*.

Others argue that Islamic law was and is flexible and – within certain parameters set by allegedly clear and undisputable guidance from the two primary sources – amenable to being adapted to the needs and exigencies of the changing times.<sup>19</sup> In modern times, however, there are also calls for a return to the roots of the time of the Companions and the state of

<sup>12</sup> *Re Diplock* [1948] 2 All ER 318.

<sup>13</sup> *Pilcher v. Rawlins* (1872) LR 7 Ch App 250; *Abigail v. Lapin* [1934] AC 491.

<sup>14</sup> *Parkin v. Thorold* (1852) 16 Beav 59.

<sup>15</sup> *Bannister v. Bannister* [1948] 2 All ER 133.

<sup>16</sup> *Rayner v. Preston* (1881) 18 Ch D 1.

<sup>17</sup> *Haywood v. Cope* (1858) 25 Beav 140; *Chappell v. Times Newspapers* [1975] 2 All ER 233.

<sup>18</sup> *Cross v. Cross* (1983) 4 FLR 235; *Dering v. Earl of Winchelsea* (1787) 1 Cox 318.

<sup>19</sup> On the development at the example of major juristic figures, see O. Arabi, D.S. Powers and S.A. Spector (Eds.), *Islamic Legal Thought – A Compendium of Muslim Jurists*, (Leiden: Brill, 2013). However, a paper by W.B. Hallaq from 1985 seems to suggest that this may not be the case: “The Logic of Legal Reasoning in Religious and Non-Religious Cultures”, *Clev. St. L. Rev.*, 34/79 (1985–1986): 17.

affairs in Medina, where Muhammad formed the nucleus of what one might call the rules of government and relations between its citizens in an Islamic body politic – an issue which had already had a major impact on the legal thinking of one of the great four school founders, Mālik ibn Anas, founder of the Mālikī tradition. As the third and famous quote above shows, Islamic law very early on subscribed to a hierarchy of norms which in theory, albeit a methodologically not yet very sophisticated theory, belies the allegation that Islamic judges were entirely free-wheeling in their application of whatever sources came to hand, and its wisdom about the inevitable *lacunae* in any body of law resonates with secular lawyers who operate within a system of hierarchical norms, most often with a constitution at its apex and primary and secondary legislation below, all of which are in need of interpretation, and occasionally, careful extension by analogy.

That being said, it is nonetheless striking that if one looks even at modern textbooks and explanations of Islamic law and finance, for example, often written by people with massive experience in the modern world of capital markets, asset-backed securities and financial derivative products, one finds examples from the early Islamic period of agriculture and cattle herding being used to explain Islamic ideas about contract law, etc.<sup>20</sup> Not infrequently, the kind of argument employed in these treatises, seems also bound by the prevailing ethics and business morals<sup>21</sup> at the time of early Islam. Even academic writings by modern Muslim scholars about Islamic law, depending on how conservative they are, may feature a ritualistic element, anachronistic and out of place to Western eyes in the context of academia, when they add in brackets behind every mention of Muhammad the acronym ‘pbuh’ meaning ‘peace be upon him’, sometimes using the Arabic letters in transliteration, or even calligraphic Arabic in a kind of miniature inset; similar formulae are used for God or the Companions or other major historic figures of Islam. The material style of argument is sometimes reminiscent of the European period of scholasticism and not that dissimilar to, for example, the patterns of reasoning employed in the *Summa Theologiae* of St. Thomas Aquinas, and it is acknowledged by some modern Islamic scholars that Islamic law to this day lacks sufficient attempts at abstraction.<sup>22</sup> The exposition furthermore often suffers from an idealisation of the Islamic sources which overlooks the compromises made in practice over time as, for example, those made by Islamic rulers with foreign powers in the so-called ‘capitulations’, i.e. treaties which allowed foreign traders and merchants to use their own laws when dealing in Muslim countries, which led to Muslim businessmen using Christian and Jewish intermediaries, who as *dhimmi* were allowed to retain their own legal culture and courts.<sup>23</sup> This seems especially true with one of the main contentious topics, the taking of interest on loans, which is prohibited as *ribā*.<sup>24</sup>

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<sup>20</sup> Consistent and recurring usage of such examples, for example, in Muhammad Ayub, *Understanding Islamic Finance*, (Chichester: Wiley, 2007); and Muhammad al-Tahir Ibn Ashur, *Treatise on Maqāṣid al-Shari’ah*, translation by Mohamed el-Tahir el-Mesawi, (London/Washington: The International Institute of Islamic Thought, 2006).

<sup>21</sup> At the same conference mentioned in *supra* note 8, a distinguished professor from Oman argued in a private conversation in our hotel that corporal punishment including cutting off hands, etc., was to be preferred over prison sentences, because the latter had a secondary criminogenic and stigmatising quality – which is as such correct – and that the offender under Islamic law could return to society immediately, thus aiding his resocialisation and rehabilitation and avoiding the massive costs entailed by a custodial sentence. Another academic whose topic was the application of Shari’ah law to IT crime – a really breath-taking idea as such – used the example of boys using their mobile phones for sending text messages to girls.

<sup>22</sup> Wallaq, *supra* note 4.

<sup>23</sup> T. Kuran, *The Long Divergence – How Islamic Law Held Back the Middle-East*, (Princeton: Princeton University Press, 2011), p. 209.

<sup>24</sup> *Ibid.*, p. 143.



## 2.2 *Linguistic Hurdles*

Furthermore, as this very article has shown on the first few pages, the discourse about Islamic law outside the Arab world is beset by the need – or maybe only by a largely unquestioned custom – to use arcane Arabic terminology, in Latin script transliteration for those who do not speak Arabic, which in turn needs lengthy explanations to match it to modern European legal linguistic concepts, because as someone once quipped, “every Arabic word means either itself, its direct opposite or a camel”:<sup>25</sup> Arabic words have a rich variety of idiomatic connotations depending very much on context and since the prevailing direction of exposition in the trans-systemic conversation so far has been the explanation from the Islamic view to the outside world and not a mutual critical dialogue, there has been an apparent lack of endeavour to come to a common terminology that does not require non-Arabs to have a dictionary with them at all times or learn Arabic from scratch, an option that will seriously reduce the participation of the European linguists in the debate and which can serve, as I have observed on occasion, as a knock-down argument by Arab colleagues that since one does not speak the language (properly), one does not really know what one is talking about.<sup>26</sup> This applies particularly to the Qur’ān of which it is said that no translation can be made but only translations of its *meaning* – which, since the vast majority of Muslims worldwide do not speak Arabic as their mother tongue, let alone classical Qur’ānic Arabic, seems to defeat the purpose of translating it in the first place – and raises the question of what is more important, the words or their meaning. Using the Arabic original in that manner can thus also be abused into a bid to retain the *Deutungshoheit*, i.e., the interpretational supremacy, over the text. Even non-Arabs trained in the language to an appropriate standard will have difficulties arguing with native speakers, as is the case in any language.

## 2.3 *Conceptual Incongruence*

Combined with the virtual absence of a joint non-Arabic legal terminology, which one could always say is after all not the Arabs’ problem, we find a much more problematic concern, and that is the apparent incongruence of the sources of law. Going back to what we saw earlier, the primary sources of all Islamic law in the traditional sense are in Islamic understanding either divine (Qur’ān) or quasi-divine (Sunnah) and thus in principle exempt from all and any criticism, in the case of the Sunnah with the added qualifier that any individual *ḥadīth* has to be accepted as an authentic tradition, a matter over which there has always been a lively debate, both as far as their chain of authoritative references as well as their contents are concerned. Any other source, such as custom and especially if it stems from pre-Islamic times, must be in compliance with the primary sources. Historical-critical research as understood, for example, in biblical studies, into the origins of the Qur’ān is mostly discouraged outright because it carries with it the idea of a constitutive human involvement in its creation rather than of a merely receptive role of Muhammad. The Qur’ān, as most Muslim scholars will readily accept, is not primarily meant to be a book of law but an account of God’s relationship to and purpose for creation, and humans in particular. It does contain some legal verses, the number of which varies according to who does the counting, but they are few and far between. There are more sayings of Muhammad that may have a law-related content in the wider sense, but even with them a Western observer cannot always shake the impression that in quite a number of cases that content is minimal or vague at best and/or appears to be used in the sense and for the purposes of the person using it to support a

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<sup>25</sup> See, e.g., <http://itre.cis.upenn.edu/~myl/language/og/archives/003264.html>.

<sup>26</sup> See also my paper, M. Bohlander, “Political Islam and Non-Muslim Religions – A Lesson from Lessing for the Arab Transition”, *Islam and Christian-Muslim Relations*, 27 (2014): 39.

certain conclusion based on the user's prior understanding,<sup>27</sup> a practice not unknown in secular legal argument, either. Muhammad himself is on record as having strongly discouraged his followers from writing down and thus institutionalising his own sayings as opposed to his recitations of the Qur'ān on certain occasions: "Do not take down anything from me, and anyone who has taken down anything from me, except the Qur'ān, should efface it".<sup>28</sup>

However, and this is foreshadowing the analytical lens of ambiguity addressed in the next section, there is also some evidence to the contrary as, for example, with the instance at Muhammad's dying bed when he asked the Companions to bring him paper so he could dictate some final instructions to prevent them from falling into error after his death. Because they actually started to argue in front of Muhammad about the permissibility of writing down anything but the Qur'ān, even though he himself had initiated it, he ultimately sent them away, saying he was better in his state than they with their squabbling.<sup>29</sup>

Ibn Ashur, for example, sees this "lack of keenness to perform an act" as a sign of a lack of will on Muhammad's part to legislate within the context of the Sunnah.<sup>30</sup> From the verse in Q3:144, which states that Muhammad is only an apostle, Ibn Ashur deduces that as far as the "general condition of the Muslim community" is concerned, Muslims should consider "statements and deeds" of Muhammad as a "matter of legislation, unless there is circumstantial evidence to the contrary"<sup>31</sup> – in effect leaving a back door open to deviate from the Sunnah. I have pointed out elsewhere the findings of modern *ḥadīth* research<sup>32</sup> that the conceptual ontological hierarchy between Qur'ān and Sunnah has not been observed in the Islamic history of jurisprudence, with the latter de facto gaining interpretative supremacy over the former.

## 2.4 The 'Culture of Ambiguity' and Jurisprudence

From arguments such as these and similar ones on Islamic jurisprudential history, most prominently for example, Thomas Bauer's work on the "culture of ambiguity",<sup>33</sup> some scholars such as Rüdiger Lohlker – who explicitly references Bauer<sup>34</sup> – deduce that there is already a mixture of the religious and the secular in Islamic law-making, with the 'secular' referring to the purely juridical patterns of argument based on contextual logic and not directly on religious influence – these work together not in a hierarchically structured top-down fashion as most often depicted in a typical tree-diagram, but as interdependent yet distinct points of departure like the webs of plant roots observed in botanical sciences, the so-called 'rhizomes', a simple form of which looks like as shown in Fig. 1.

<sup>27</sup> A telling recent example is the judgment of the Federal Shariat Court of Pakistan in *Qureshi v. Pakistan* [1991] XLIII All Pakistan Legal Decisions, 10.

<sup>28</sup> *Ṣaḥīḥ Muslim*, Ḥadīth No. 3004. – Ibn Ashur, *supra* note 20 at 138, opines that Muhammad may perhaps have said that with respect to rulings in individual cases, to prevent 'generalization and particularization'.

<sup>29</sup> *Ṣaḥīḥ Bukhārī*, Ḥadīth No. 3053.

<sup>30</sup> Ibn Ashur, *supra* note 20, at 50.

<sup>31</sup> *Ibid.*

<sup>32</sup> "There is no compulsion in religion" – Freedom of religion, responsibility to protect (R2P) and crimes against humanity at the example of the Islamic blasphemy laws of Pakistan: *Journal of Islamic State Practices in International Law*, 8 (2012): 36.

<sup>33</sup> Thomas Bauer, *Die Kultur der Ambiguität – Einde andere Geschichte des Islams*, (Berlin: Verlag der Weltreligionen, 2011).

<sup>34</sup> Rüdiger Lohlker, *Islamisches Recht* (Vienna: Facultas, 2012), pp 15, 35.

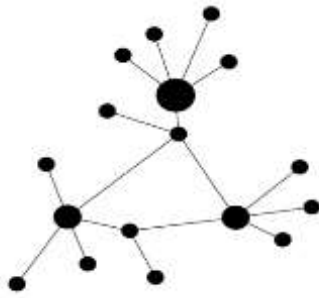


FIGURE 1 *Rhizome model I*<sup>35</sup>

A more complex model with multiple interlocking connections which better fits the picture used by Lohlker for Islamic legal thinking could be imagined as in Fig. 2.

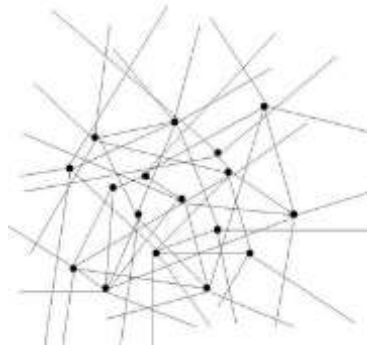


FIGURE 2 *Rhizome model II*<sup>36</sup>

Lohlker<sup>37</sup> bases this theoretical approach on the philosophical work of Deleuze/Guattari.<sup>38</sup> Yet while this model may be useful in describing the *process* of juridical argument, it is less helpful in explaining the *substance* of the rules thus arrived at, which may be under a much stronger influence of the religious than the process. In other words, even if one uses general juridical logic, the original building blocks will still largely emanate from the religious foundation, unless one wanted to argue that the jurists' extrapolations over time have become sources in themselves and are in that sense removed from the religious, an argument which I do ultimately not find convincing since they function at best as a sort of shorthand reference for their own underlying views in a chain of regression to the primary sources. Insofar as Lohlker appears to argue that the temporal rulers in Islamic history not infrequently opposed the teachings of the Islamic scholars of the *ulama* (who did so vice-versa) and thus may have helped create a less religiously strict or traditional legal framework<sup>39</sup> that has allowed the rise of more secular facets of inductive reasoning, he is, of course, potentially making an inadmissible argument from individual *factual* rule violation to general *normative* rule

<sup>35</sup> Source: [http://www.urbagram.net/images/topo\\_rhizome2.jpg](http://www.urbagram.net/images/topo_rhizome2.jpg).

<sup>36</sup> Source: <http://www.librarystudentjournal.org/index.php/ljsj/article/view/34/36>.

<sup>37</sup> *Supra* note 34, at 41.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*, 33 pp.

*genesis* – in other words, he may be arguing from an illegal is to a legitimate ought. While this may to some extent be feasible in a purely custom-based system of norm creation, it is a questionable exercise in the context of an already existing overarching normative framework determined by the Qur’ān and the Sunnah as its joint primary parameters, and as Lohlker himself admits<sup>40</sup> does not match the drift of the modern attempts by the Salafist movement, for example, to return to those primary roots and strip away the centuries of jurisprudential overgrowth – notwithstanding the fact that the Salafist arguments overlook the banal fact that even they will need interpreters of these primary sources which will make the process of overgrowth start anew. Even in the temporal manifestations of the legal foundations of Islamic countries, i.e., their written constitutions, we will find evocations of the Shari’ah as the supreme law of the land.<sup>41</sup> It is therefore doubtful whether this reference to a partially ‘secular’ nature of Islamic jurisprudence substantially advances the debate.

## 2.5 *Secular Comparisons*

Secular sources of law, while undoubtedly owing in their development over the centuries, for example, to Judeo-Christian values, many of which now have turned into seemingly independent and free-standing humanistic values, are no longer seen as in any way divine, despite the ubiquitous invocations of God or faith-based references in some national constitutions.<sup>42</sup> Because a large number of people these days no longer recognise why religion should hold any sway over their social interactions and their personal lives, the ethical and moral principles embedded in previous religious commands have taken on a life of their own. This can, however, also make it difficult to justify their continued observance with the changing times, customs or even major geopolitical transmogrifications based on mass migration, for example. They have become decoupled from their source and consequently a different kind of ambiguity has arisen in the secular system. While those who still hold religious beliefs have to confront the need for a harmonisation of the manifold and diverse contemporary interpretations of the religiously based rules of their own and possibly of other religious frameworks, those who do not hold such beliefs find themselves robbed of a safe and clear measure<sup>43</sup> that would help them determine right ethical behaviour, and are thrown back upon the necessity of balancing competing interests in a quasi-utilitarian fashion. In its most extreme form, this decoupling leads to superficially ‘scientific’ ideologies such as the *reductionism* favoured by Richard Dawkins and his ilk who decry any references to supernatural factors or a God as unnecessary and indeed deluded.<sup>44</sup> All human activity, including neural activity, is biology; all biology is chemistry and ultimately all chemistry is physics, which in the final analysis is particle physics and quantum mechanics. The assumption or realisation that no God may be needed to explain natural phenomena has led many to *believe* – and the word is chosen intentionally here – that absence of need implies absence as such, a logically impermissible fallacy. In any event, while decoupled but nonetheless observed moral rules may in turn fall under utilitarian attack and struggle to mount a believable ontological defence, a reductionist world view struggles to make a case for ethical principles in the first place. On a philosophical and theoretical level, the secular approach, despite its intellectual preening, is thus not that far removed from the ambiguity of Islamic jurisprudence.

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<sup>40</sup> *Ibid.*, pp. 21, 47.

<sup>41</sup> See, e.g., the constitutions of Egypt, Afghanistan, or Iraq.

<sup>42</sup> See, e.g., the constitutions of Germany, the United States and the practice in the United Kingdom, where the monarch as head of state and of the Church of England is called the ‘defender of the faith’.

<sup>43</sup> Incidentally, this is one reason why conservative or radical ideologies of any kind have such great appeal to many people these days.

<sup>44</sup> So the title of the book by Richard Dawkins, *The God Delusion* (London: Black Swan, 2007).

This theoretical ambiguity is mirrored on the legal ‘factory floor’, as it were. Secular common and civil law systems use either a doctrine of binding precedent (*stare decisis*) in a pattern of inductive law-making or more or less wide-ranging codifications to achieve legal certainty in a deductive fashion top-down. In most cases a mixture of both will operate, because even in code-based systems the corrective and corrosive effects of judicial interpretation are well known and the restrictive effect of binding precedent can be avoided by creative use of the instrument of distinguishing or by plainly – albeit illogically – “restricting a case to its own facts”.<sup>45</sup> Even in systems that do not subscribe to judicial rules of *stare decisis*, the practical necessities of judicial economy lead to a factual observance of the views of the appellate courts of the respective jurisdictions, yet even that will not guarantee a uniform application of the law. In a federal civil law system which does not recognise binding precedent such as, for example, the Federal Republic of Germany, which operates a three-tier state and (mostly) appellate-only federal judiciary, this may mean that the lower courts in each state, especially in civil cases, will primarily often follow their own state supreme appellate court because they will be the ones directly reviewing their judgments on appeal – and in some of the larger states there are several state supreme court districts which may differ in turn from each other. The supreme courts of the different states often diverge in their approach to a certain legal question and they may – absent binding precedent – disagree even with the federal supreme court and the federal constitutional court, since the latter’s decisions do not in all cases have the force of an act of Parliament (for exceptions see s. 31 of the Federal Constitutional Court Act). Even in cases where the law would appear to be clear, the courts have managed to be creative by coming to conclusions that portend to be *praeter legem*, i.e., outside the codified system but not in contradiction to it, for example, by claiming the need to close a *lacuna* in the law. Sometimes courts have been even bolder and decided *contra legem*, i.e., they risked directly antagonising the law-maker; however, the constitution provides for a number of pathways to the federal constitutional court in order to ensure a joint-up approach to the most fundamental questions and to keep some of the too creative judges in check. Similar avenues exist in other jurisdictions. The potential for ambiguity is nonetheless striking.

Yet, there is no screaming anarchy in the system because all the judges, prosecutors and lawyers undergo essentially the same lengthy training and most of them use their common sense once they are in practice. In the German system of a career judiciary the institutional socialisation of novice judges is ensured by the fact that they often work in panels presided over by an older and more experienced judge and with another more experienced assessor, or by regular secondments or transfers to the prosecution service, either during the initial probationary period or later as a way of moving up the ladder of promotion. If we re-transpose this picture into the Islamic environment it becomes immediately apparent that such pragmatic streamlining and socialisation functions are provided in Islamic law by the different schools of law and the long periods of training in them,<sup>46</sup> some of which have often been decreed by *fiat* of a ruler or government as the only applicable and valid school in a certain jurisdiction. Customary Shari’ah additionally counters any potentially adverse effect of a too rigid observance of any one school by the principle of *takhāyur*, or freedom of choice between the views of the different schools as best befits the law-seeker in any individual case, or to put it less charitably, it allows jurisprudential cherry-picking. Inversely, the phenomenon of *talfiq*, i.e., amalgamation, allows the diverse schools to bridge differences and come to

<sup>45</sup> See, e.g., *R. v. Turbill and Broadway* [2014] 1 Cr. App. R. 7 at para 12; *Sandeman Coprimar SA v. Transitos y Transportes Integrales SL and Others* [2003] Q.B. 1270 at 1276.

<sup>46</sup> Although some scholars have recently doubted the continued relevance of the schools for matters of worldly rather than religious rule interpretation, see Rohe, *supra* note 2 at 189.

joint opinions.<sup>47</sup> Similarly, the ontologically problematic prevalence of the Sunnah over the Qur'ān is mirrored, for example, albeit to a lesser degree, in the German judges' willingness to create law alongside existing legislation, and in some cases even to tackle the latter head-on if it is deemed necessary, especially when the violation of the so-called 'Radbruch formula' is at stake.<sup>48</sup>

### 3 Building the Future Conversation

Such is the fruit of logic. It also affords acquaintance with the doctrines and opinions of the people of the world. One knows what harm it can do. Therefore the student should beware of its pernicious aspects as much as he can. Whoever studies it should do so only after he is saturated with the religious law and has studied the interpretation of the Qur'ān and jurisprudence. No one who has no knowledge of the Muslim religious sciences should apply himself to it. Without that knowledge, he can hardly remain safe from its pernicious aspects.

Ibn Khaldūn (1332–1406)

*The Muqaddimah – An Introduction to History*<sup>49</sup>

Since we have seen that Islamic and secular scholars do apparently not work that differently once they have been given their building blocks to construct the edifice of law, we should move forward to discussing areas of substance instead of individual questions or matters of ontological provenance, and begin with the guiding principles that are the major arteries of each body of law. One *caveat* may be apposite at this juncture. It is unlikely that Islamic mainstream juridical methodology will anytime soon shed its religious roots in favour of a separated model that distinguishes between the religious obligations of the Muslims as believers and the needs of all inhabitants of a country as its equal citizens and makes the latter the basis for its legal paradigms.<sup>50</sup> Discussions about the value or not of adducing religious revelation and prophetic practice from the 7<sup>th</sup> century as a primary basis for legal rules in the pluralist global environment of the 21<sup>st</sup> century are legitimate and have their place in the theological or philosophical-political debate, yet they will not aid in advancing the discussion that must be had about the similarities and differences of Islamic and secular moral and legal principles that should guide the worldly ruler, since the ontological discussion about the validity of roots is bound to lead to antagonism and frictions – the concern over Muslim parallel societies in secular countries is an example for these. That does, however, not absolve the Muslim side to the conversation from facing up to the realities and undertaking its own efforts at mitigating the nature of their expressions about and effects of their ontological disagreement on the development of the global discourse, unless they want to run the risk of being accused of a continuing stance of moral superiority or a lack of willingness to engage with other views on an equal footing.

<sup>47</sup> See Rohe, *supra* note 2.

<sup>48</sup> The German legal philosopher Gustav Radbruch coined the formula which states that citizens owe obedience to the positive legal order, i.e., the laws and acts of parliament, etc., unless such obedience would result in an unacceptable violation of fundamental tenets of natural justice.

<sup>49</sup> Translated by Franz Rosenthal, 1967; Princeton Classic edn. (Princeton, NJ: Princeton University Press, 2005), 405 pp.

<sup>50</sup> See in this context the brilliant analysis by Abdullahi Ahmed An-Na'im, *Islam and the Secular State. Negotiating the Future of Shari'a* (Cambridge MA, Harvard University Press, 2008).

The debate needs the input of open-minded discussants from both sides. In a previous paper,<sup>51</sup> my Iranian colleague Mohammad Hedayati-Kakhki and I had proposed the creation of a ‘Centre for Global *Ijmāʿ*’, a vision that may have been too optimistic at the time – and probably still is – and whose name may additionally have raised eyebrows among some Muslim colleagues. Interestingly in this context, Siti Faridah Abd Jabbar, has the following to say about the problem of Shari’ah compliance councils within Islamic finance:

The problems of differing Shari’ah pronouncements, the shortage of Shari’ah scholars, payments of exorbitant consultation fees to Shari’ah scholars, and the potential problems of conflict of interest, conflict of duties, breach of confidence, and insider dealing are not, however, issues that cannot be entirely resolved. What may be done to overcome these problems as well as circumventing the potential ones is by establishing a universally accepted central religious authority representing the different schools of thought where Shari’ah scholars the world over are pooled together under the authority’s roof. The religious authority may be set up under the auspices of an international Islamic organisation such as the Organisation of the Islamic Conference or the Islamic Development Bank and may be funded by the levies imposed on the financial institutions that seek the authority’s guidance and approval. The setting up of the central religious authority would bring about the uniformity of Shari’ah pronouncements; give all financial institutions, and not merely the well-established and high-paying ones, access to the services of the most eminent Shari’ah scholars; assist in expediting the approval and introduction of new financial instruments into the Islamic financial industry; and above all, do justice to Islamic finance which is intrinsically good but severely misconceived owing to the failings of mankind.<sup>52</sup>

Nonetheless, outside the Islamic environment, the necessity of a joint-up and sustained open and critical discussion between qualified scholars and practitioners from both sides gains increasing significance, a discussion that goes beyond a perpetual exchange of points of view but which is supported by the earnest desire to understand and learn from each other’s traditions – and to put the lessons learned into practice. The scepticism of Ibn Khaldūn from the 15<sup>th</sup> century that such an effort would be pernicious rather than beneficial should be laid to rest.

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<sup>51</sup> M. Bohlander and Mohammad Hedayati-Kakhki, ‘Criminal Justice under Shari’ah in the 21st century: An Inter-cultural View’, *Arab Law Quarterly* 23 (2009): 417.

<sup>52</sup> “The Shari’ah Supervisory Board: a potential problem in Islamic finance?”, *Company Lawyer* (2008): 31.