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SHARĪʿA AS STATE LAW: AN ANALYSIS OF ʿALLĀL AL-FĀSĪ'S CONCEPT OF THE OBJECTIVES OF ISLAMIC LAW

MUSTAPHA TAJDIN
Assistant Professor, Khalifa University of Science and Technology

ABSTRACT

This article presents and evaluates the legal thought of Muhammad ʿAllāl al-Fāsī (1910–1974) with a focus on his discourse on the objectives of Sharīʿa and the motives behind his reformulation of these objectives within the broader context of his political agenda. Al-Fāsī's concerns were not purely academic. As a political leader who struggled for the independence of his country and as a decision maker within the newly established Moroccan state, his theorization of Islamic law departed from traditional and modern efforts to negotiate the supposed status of Sharīʿa within the institutional structures of post-colonial Muslim states. The questions engaged in this article are to what extent did al-Fāsī's contribution to Maqāṣid go beyond its classical reformulations as represented by the Andalusian Māliki jurist Ibrāhīm Ibn Mūsā Abū Isḥāq al-Shāṭibī (d. AH 790/1388 CE) in his seminal work, Al-Muwāfaqāt fī Uṣūl al-Sharīʿa, and whether al-Fāsī's work represents a turn in the field of Maqāṣid when compared with that of other modern Muslim jurists, among them Muhammad al-Ṭāhir Ibn ʿĀshūr (1886–1970). This article focuses on al-Fāsī's book on Maqāṣid al-Sharīʿa, Maqāṣid al-Sharīʿa al-Islāmiyya wa Makārimuhā, and its contribution to the ongoing efforts to accommodate Islamic law within the corpus of modern secular laws.

KEYWORDS: Islamic law, Maqāṣid, natural law, objectives of Islamic law, reformation, Salafism

INTRODUCTION

A vital scholarly interest in the topic of Maqāṣid al-Sharīʿa, the objectives of Islamic law, has emerged in different periods of the history of Islamic legal theory. This concept of Maqāṣid is by no means new. Since its inception, Islamic legal thought, whether in theory or in practice, has made great intellectual strides, the most remarkable of which is going beyond the letter of the law to tap its sprit. Prior to the Andalusian Māliki jurist Abū Isḥāq al-Shāṭibī (d. AH 790/1388 CE), whose formulation of Maqāṣid is considered to be the most sophisticated in postclassical Islamic jurisprudence, many Muslim scholars were aware of the problems of legal rigidity and the predicament of the obdurate attachment to certain old legal opinions deemed authoritative and, as such, unsurpassable. Indeed, the idea of Maqāṣid can be traced as far back as the end of the AH third century/ninth CE with the effort of Abū ʿAbd Allāh Muhammad ibn ʿAlī, known as al-Ḥakīm al-Tirmidhī (d. probably AH 298/910 CE), the earliest scholar to devote a full

book to the Maqāṣid of ritual prayers[1] and another to the underlying reasons (*ʿilal*) of legal injunctions.[2] Later, Maqāṣid became a central theme in Islamic legal discourse, as *Al-Burhān*[3] of Abū al-Maʿālī al-Juwaynī (d. AH 478/1085 CE) demonstrates. However, it is Abū Ḥāmid al-Ghazālī (d. AH 505/1111 CE) who clearly articulated the five necessary objectives of Islamic law being the embodiment of the essential human interests to be achieved and protected by Sharīʿa.[4] It was a few centuries later that al-Shāṭibī, drawing critically on his predecessors, embarked on the outstanding project in which he laid down a systematic theory of legal interpretation with the higher objectives of law at its core. Not only did he categorize the Maqāṣid into their appropriate sets, but he also devised a whole methodology of legal interpretation rooted in the logic of inductive reasoning and a sociolinguistic approach to sacred texts.[5] In modern times and because of the deplorable situation of Muslim societies, some Muslim luminaries, among them Muhammad ʿAbduh (1849–1905), stumbled across the work of al-Shāṭibī and decided to capitalize on it in their struggle for Islamic revival. ʿAbduh's ardent admiration of al-Shāṭibī led his student ʿAbdullah Drāz to edit *Al-Muwāfaqāt* and write an extensive introduction to it.[6] North African Muslim scholars Muhammad al-Ṭāhir Ibn ʿĀshūr (1886–1970) and Muhammad ʿAllāl al-Fāsī (1910–1974), perhaps under the influence of ʿAbduh and his disciple Rashīd Riḍā (1865–1935), took this project further. Not only did they attempt to reproduce al-Shāṭibī's ideas and make them accessible to modern readership, but they also wrote seminal treatises in which they attempted to expound and surpass what he had outlined in *al-Muwāfaqāt*. Two examples are noteworthy: Ibn ʿĀshūr's *Maqāṣid al-Sharīʿa* (1946) and al-Fāsī's *Maqāṣid al-Sharīʿa al-Islāmiyya wa Makārimuhā* (1963).[7]

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1 For an extensive understanding of al-Tirmithī's efforts, see Ahmed al-Raysuni, *Imām al-Shāṭibī's Theory of the Higher Objectives and Intents of Islamic Law*, trans. Nancy Roberts. (London: International Institute of Islamic Thought, 2005), 5.

2 See Shams al-Dīn Muḥammad ibn Aḥmad al-Dhahabī, *Siyar Aʿlām al-Nubalāʾ* [The lives of noble figures], ed. Hassan ʿAbd al-Mannān (Lebanon: Bayt al-Afkār al-Dawliyya, 2004), 3568–69. The book *Ithbāt alʿIlal* forms one of the bases for his persecution and exile. See al-Ḥakīm al-Tirmithī, *Ithbāt alʿIlal* [The confirmation of the bases and reasons of Islamic law], ed. Khālid Zahrī (Casablanca: Maṭbaʿat al-Najāḥ al-Jadīda, 1998). However, *Ithbāt alʿIlal* contains only orthodox views on the secret wisdom of some rituals, like prayers, fasting, and pilgrimage, and some financial transactions, like usury and land tax. Sufi traditionist and hagiographer Abū ʿAbd al-Raḥmān al-Sulamī (d. AH 412/1021 CE) says that the authorities forced al-Tirmithī to leave his hometown of Tirmidh (Termez) on charges of heresy because of his two books, *Khatm al-Wilāya* [The seal of sainthood] and *ʿIlal al-Sharīʿa* [The confirmation of the bases and reasons of Islamic law], although the latter contains no heretical views. See al-Dhahabī, *Siyar*, 3569. I think that *Khatm al-Wilāya* must have been the reason of his persecution, for some claimed that he preferred therein the state of *Wilāya* (sainthood) over the state of *Nubuwwa* (prophethood).

3 Abū al-Maʿālī al-Juwaynī, *Al-Burhān fī Uṣūl al-Fiqh* [The proof in the principles of Islamic law], ed. ʿAbd al-ʿAẓīm al-Dīb, 2nd ed. (Cairo: Dār al-Anṣār, 1979).

4 Abū Ḥāmid Al-Ghazālī, *Al-Mustaṣfā min ʿIlm al-Uṣūl* [Choice essentials of the methods of jurisprudence], ed. Muhammad Sulaymān al-Ashqar, 2 vols. (Beirut: Muʾssasat al-Risāla, 1997), 1:417.

5 For more information on al-Shāṭibī's legal theory and methodology, see al-Raysuni, *Imām al-Shāṭibī's Theory of the Higher Objectives and Intents of Islamic Law*; Muhammad Khalid Masud, "Shatibi's Philosophy of Islamic Law" (PhD diss., McGill University, 1973). On his hermeneutical method, see Mohamed El-Tahir El-Mesawi, "From al-Shāṭibī's Legal Hermeneutics to Thematic Exegesis of the Qurʾān," *Intellectual Discourse* 20, no. 2 (2012) 189–214; Wael B. Hallaq, "The Primacy of the Qurʾān in Shāṭibī's Legal Theory," in *Islamic Studies Presented to Charles J. Adams*, ed. Wael B. Hallaq and D. P. Little (Leiden: Brill, 1991), 69–90.

6 In the introduction to his edition of *al-Muwāfaqāt*, Drāz explains how ʿAbduh's repeated mention of al-Shāṭibī prompted him to edit the book. Ibrāhīm Ibn Mūsā Abū Isḥāq al-Shāṭibī, *Al-Muwāfaqāt fī Uṣūl al-Sharīʿa* [The reconciliation of the fundamentals of Islamic law], ed. ʿAbdullah Drāz, (Beirut: Dār al-Kutub al-ʿIlmiyya, 2004), 10.

7 Muhammad al-Ṭāhir Ibn ʿĀshūr, *Maqāṣid al-Sharīʿa al-Islāmiyya* [The objectives of Islamic law], ed. Mohamed el-Ṭahir el-Mesawi, 2nd ed. (Amman: Dār al-Nafāʾis, 2001); Muhammad ʿAllāl al-Fāsī, *Maqāṣid al-Sharīʿa*

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What spurred modern Muslim scholars to reemphasize the objectives of Islamic law remains a central question. Al-Shāṭibī states that his intention was to reconcile the legal methods of interpretation used by the Mālikis and those applied by the Ḥanafis.[8] Hence the title *al-Muawāfaqāt* (literally, the reconciliations). Ibn ʿĀshūr's motive was quite similar to that of al-Shāṭibī. He avers that his intention is to minimize legal disagreements and cultivate a sense of critical thinking that allows jurists to justifiably prefer one legal opinion over another.[9] In what follows, my analysis of al-Fāsī's work demonstrates the sociopolitical factors that influenced it and helped situate his book within a somewhat different context, which is the value of the objective approach in al-Fāsī's struggle to modernize Islamic law and include it in the legal structures of the postcolonial Moroccan state.

AL-FĀSĪ AND THE SALAFIYYA DISCOURSE

One of the seldom explored areas of critical cultural studies is the impact of public memory on the intellectual contributions of notable thinkers. Part of the semiotics of ideas is the ways they are remembered. No one has the ability to choose how people should reminisce about him or her after leaving this world. More often than not, the shades of ideas, their ghosts, and impressions are more important than the ideas themselves. This appears to apply perfectly to al-Fāsī, whose career covered a wide range of activities and significant achievements. However, although he was a political activist, an *ʿālim* (a religious scholar), and a social reformer, it is his political career as a leader of the Moroccan independence and resistance against French colonialism, that caught the attention of subsequent generations and has been the focus of modern scholarship about him. Only little consideration has been devoted to his legal ideas.[10] Another area of substantial

al-Islāmiyya wa Makārimuhā [The objectives and noble qualities of the Sharīʿa], ed. Ismāʿīl al-Ḥasanī. 2nd ed. (Cairo: Dār al-Salām, 2013).

8 Al-Shāṭibī, *Al-Muwāfaqāt fi Uṣūl al-Sharīʿa*, 16. A partial translation of *Al-Muwāfaqāt* is available in English: Ibrāhīm Ibn Mūsā Abū Isḥāq al-Shāṭibī, *The Reconciliation of the Fundamentals of Islamic Law*, trans. Imran Nyazee, 2 vols. (Reading: Garnet, 2012, 2015).

9 Muhammad al-Ṭāhir Ibn ʿĀshūr, *Treatise on Maqāṣid al-Sharīʿa*, trans. Mohamed el-Tahir el-Mesawi (London: International Institute of Islamic Thought, 2006), xvi.

10 The scarcity of literature about al-Fāsī's legal thought is acknowledged by many Western writers. See Sara Mogilski, "French Influence on a 20th Century ʿĀlim: ʿAllāl al-Fāsī and His Ideas toward Legal Reform in Morocco" (Master's thesis, McGill University, 2006), 1; Ian Shaw, "The Influence of Islam on the Political, Economic, and Social Thought of ʿAllāl al-Fāsī," (Master's thesis, McGill University, 1984), 1, 7. Shaw notes that Western historians were attracted more to al-Fāsis's political activities than to his ideology and ascribes this imbalance in scholarship to the fact that al-Fāsī wrote in Arabic. Mogilski adds a more reasonable justification to the effect that al-Fāsī's political contribution is much clearer than his ideological contribution (Mogilski, 112). Shaw provides a list of works on al-Fāsī in foreign languages, including the following: Attilio Gaudio, *Allal el Fassi ou l' Histoire de l'Istiqlal* [ʿAllāl al-Fāsī, or the history of independence] (Paris: Éditions Alain Moreau, 1972); Erwin Rosenthal, "ʿAllāl al-Fāsī: A Blend of Islam and Arab Nationalism," in *Islam in The Modern National State* (Cambridge: Cambridge University Press, 1965), 154–78; Amnon Cohen, "ʿAllāl al-Fāsī: His Ideas and His Contribution towards Morocco's Independence," *Asian and African Studies*, no. 3 (1967): 121–64; Mohamed el Alami, *M Allal el Fassi: Patriarche du Nationalisme Marocain* [ʿAllāl al-Fāsī: Patriarch of Morocan nationalism] (Casablanca: Dar el Kitab, 1975). To this list, I add two others: David L. Johnston, "ʿAllāl al-Fāsī: Sharīʿa as a Blueprint for Righteous Citizenship," in *Shariʿa: Islamic Law in the Contemporary Context*, ed. Abbas Amanat and Frank Griffel (Stanford: Stanford University Press, 2007), 83–103; Andrew F. March, "Naturalizing Sharīʿa: Foundationalist Ambiguities in Modern Islamic Apologetics," *Islamic Law and Society* 22, nos. 1/2 (2015): 45–81. Apart from these last two works and Mogilski's, nearly all the literature available to me on al-Fāsī either concentrates on his political career and provides a historical sketch of his life and

significance is the politics of knowledge and how, within a critical discourse analysis framework, ideas are negotiated, refined, modeled, and pruned to respond to immediate personal and social needs. Al-Fāsī's thought and his political program for independence and nation building are so intertwined that understanding one in the absence of the other is doomed to do disservice to his ideas as a whole.

Born in 1910 to a prestigious and traditional family of Andalusian origins, al-Fāsī, like his peers, was admitted to a Qurʾānic school to memorize the Holy Book, the Qurʾān, and learn the basics of standard Arabic. Not only did he excel in absorbing the traditional religious sciences at a very early age, but he also cultivated a critical mindset owing to his exposure to the French culture and his admiration for the Salafiyya movement that emerged in Egypt in the second half of the nineteenth century and started to influence Moroccan intellectuals and *ʿulama* (traditional scholars) since the beginning of the twentieth century. This movement is known to have adopted a critical view to the ways in which Muslim societies, under the yoke of colonial powers, confronted issues of political independence and civilizational awakening.

Jamāl al-Dīn al-Afghānī (1838–1897), Muhammad ʿAbduh, and Rashīd Riḍā appear to have agreed, with some significant variations, that an Islamic renaissance cannot be achieved unless Muslims go back to the original sources of Islam while selecting all historical, doctrinal, and legal aspects of Islamic creativity on which basis a fresh understanding of Sharīʿa is constructed. Under the influence of the Salafiyya movement, the young al-Fāsī grew mindful of two necessities: political independence and Islamic renewal. The former required organized political resistance and a program of action, while the latter called for a systemic cultural strategy for revival with religion at its core. As were Muhammad ʿAbduh, a graduate of al-Azhar University in Egypt, and Ibn ʿĀshūr, a graduate of al-Zaytūna University in Tunisia, al-Fāsī, who graduated from al-Qarawiyyīn University in Morocco, was convinced that restoring the role of the *ʿulama* in public life must start from a revision of the traditional curriculum that introduces modern science and methods of teaching. Because Sharīʿa encapsulates the fragmentary aspects of a Muslim identity under the attack of various modernizing forces, Muslim reformists unanimously came to the conclusion that the edifice of a new Islamic discourse had to be established on a new and firm foundation originating from a twofold strategy: encouraging *ijtihād* (independent legal reasoning) and rejecting *taqlīd* (blind imitation of traditional reasoning). However, they felt that this attempt would be doomed to failure without recalling the glorious past of Islam, on which desired reforms are modeled and communicated. Thus, from their respective countries, ʿAbduh, Ibn ʿĀshūr, and al-Fāsī each found in al-Shāṭibī and his discourse on the objectives of Sharīʿa a genuine precursor whose legal ideas legitimized their call for Islamic renewal. While ʿAbduh was content with encouraging some of his students to edit al-Shāṭibī's seminal treatise on the objectives of Sharīʿa, Ibn ʿĀshūr and al-Fāsī endeavored to digest al-Shāṭibī's ideas and critically surpass them in order to respond to the exigencies of modern society.

AL-FĀSĪ AND MAQĀṢID DISCOURSE

From the early period of Islam to the present, Muslims have wrestled with the issue of how to implement the divine law within the complexities of human reality. Their aim has always been

achievements or deals with his ideas in a more general manner. Through this article, I offer, instead, an exploration of the dynamics of Islamic law and how al-Fāsī avails himself of them to negotiate the incorporation of Islamic law principles within the legal structures of the postcolonial state.

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subject to the interplay of two major forces: the intentions of the lawgiver (God or his messenger) and the exigencies of human contexts. In other words, from its inception as a rudimentary corpus of opinions and practices to its codification as a systemic analysis with various doctrinal approaches, Islamic legal discourse has struggled to bring the perceived will of God to terms with the interests of mankind. Ijtihād (independent legal reasoning) is therefore the effort to discover areas of agreement between what serves human interests while safeguarding the sovereignty of God's will. Ijtihād is forcefully expressed in the domains where divine will appears to go against the changing aspects of human utilities. Consequently, legal theorists have had to articulate a discourse of law that begins with the hermeneutical task of first laying bare the intentions of God and his objectives and then devising general legal rules that transcend the particularities of individual scriptural texts. In short, the aim of Ijtihād is to discover the universal grammar of the divine will running through God's speech and creation.

Maqāṣid al-Sharīʿa, or the objectives of the divine law, is therefore nothing but a human effort to uncover what God wants rather than what he says. The English term *objectives* as a rendering of the Arabic word *maqāṣid* fails to capture the essence of the original term. *Maqāṣid* is derived from the root word qaṣada, which simultaneously refers to three basic core meanings. '*Qṣada ilā*' (to go to or to point to) is a phrase that implies intention, motive, and direction. Hence, Maqāṣid al-Sharīʿa not only means the objectives of law, but it also connotes the ulterior motives behind the law and more significantly its direction, which surpasses both the semantics of speech and the immediate context within which the law was initially articulated.

As mentioned earlier, Islamic legal theory has struggled to accommodate the changing realities of Muslim societies. Three main areas in this theory have been subjected to elaborate revisions in order to provide the jurist (*faqīh*), the judge (*qāḍī*), and the jurisconsult (*muftī*) with sufficient legal tools to achieve this desired accommodation. The first is the concept of unrestricted utilities (*al-maṣāliḥ al-mursala*).[11] The second is the categorization of the Prophet's actions to see whether all are binding and to explore the possibility of acting at variance with them.[12] The third, the core of my analysis, deals with the higher objectives of Sharīʿa (Maqāṣid) and the opportunity they offer to remedy the rigidity of legal precepts. This is, in fact, the aim of al-Fāsī, to which I suggest adding an intent to lay down the theoretical foundations for the codification of Sharīʿa rulings in a modern postcolonial state like Morocco. But before delving into the depths of the issue, I offer some notes on the relevance of al-Fāsī's ideas to Maqāṣid.

In the elaborate introduction to his Arabic edition of Ibn ʿĀshūr's *Maqāṣid al-Sharīʿa al-Islāmiyya*, Mohamed el-Ṭahir el-Mesawi levels warranted and unwarranted critiques at al-Fāsī's book. His implied aim is to establish Ibn ʿĀshūr's precedence and superiority as the main modern scholar who wrote on and developed the topic of Maqāṣid. El-Mesawi maintains that the book of al-Fāsī, despite its title, does not fall within the domain of Maqāṣid proper[13] because al-Fāsī did not go deep into elucidating its meanings, rooting its concepts in Islamic scholastic tradition, developing its methodologies, and extending its reach to practical issues of Ijtihād.[14] This evaluation is rightly dismissed by al-Ḥasanī as hasty,[15] for if it were true, then al-Fāsī's effort in its entirety would have been futile. To say that al-Fāsī did not explain the meanings of Maqāṣid

11 Al-Fāsī, *Maqāṣid al-Sharīʿa al-Islāmiyya wa Makārimuhā*, 256–65.

12 Al-Fāsī, 226–30.

13 Ibn ʿĀshūr, *Maqāṣid al-Sharīʿa al-Islāmiyya*, ed. Mohamed el-Ṭahir el-Mesawi, 2nd ed. (ʿAmmān: Dār al-Nafāʾis, 2001), 142.

14 Ibn ʿĀshūr, 142.

15 Al-Fāsī, *Maqāṣid al-Sharīʿa al-Islāmiyya wa Makārimuhā*, 36.

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and extend its domain to include practical issues ignores the obvious. El-Mesawi is right when he describes al-Fāsī's style as digressive and his approach as polemical. But to conclude, based on this assessment, that al-Fāsī was driven away from the heart of Maqāṣid is, to say the least, arbitrary and unwarranted. El-Mesawi implies that Ibn ʿĀshūr's methodology is the one that represents well the topic of Maqāṣid in its supposedly standard form[16] because it concentrates on issues relevant to the field. By contrast, according to El-Mesawi, al-Fāsī unnecessarily tackles such topics as natural law, Roman law of nations, new Judeo-Christian influences, the narrative art in the Qurʾān, the translation of the meanings of the Qurʾān, and others that fall outside the purview of Maqāṣid.[17] In fact, some topics mentioned by el-Mesawi are not essential, but the concept of natural law that occupies a significant place in al-Fāsī's work is so important that devoting some effort to its concepts is a merit to be acclaimed rather than a shortcoming to be criticized. El-Mesawi fails to appreciate the differences between Ibn ʿĀshūr and al-Fāsī. While the former is an erudite scholastic with reformist inclinations, the latter is a social reformer and a nationalist leader with scholarly merits.[18] The main aim of Ibn ʿĀshūr is to enlarge the scope of the objectives of Sharīʿa so that they include all areas of positive law, especially transactional dealings and judiciary within the changing circumstances of modern Muslim societies, whereas the purpose of al-Fāsī is to convince the secular elites of the progressive nature of Sharīʿa and assure the traditional circles of its indispensability in the process of postcolonial state building. El-Mesawi seems to suggest that there is an ideal method for writing about Maqāṣid, as palpably demonstrated in Ibn ʿĀshūr's treatise. Even al-Shāṭibī, argues Ibn ʿĀshūr, "fell into the trap of *longwinded and confused analysis*. He also omitted some crucial aspects of the Sharīʿa's higher objectives and thus *failed to reach the target that he had set himself*."[19]

16 March makes the same mistake when he describes al-Fāsī's book on Maqāṣid as not being a standard *uṣūl* manual on legal method as if there were an already established standard method to be emulated. See March, "Naturalizing Sharīʿa," 8.

17 Ibnʿ Āshūr, *Maqāṣid al-Sharīʿa al-Islāmiyya*, 142.

18 El-Mesawi in his effort to establish Ibn ʿĀshūr's precedence over al-Fāsī tries quite successfully to prove that al-Fāsī availed of the work of Ibn ʿĀshūr without mentioning him even once. Certainly, this is one of many shortcomings running through al-Fāsī's book. But the question that remains unanswered is why al-Fāsī was systematic in ignoring Ibn ʿĀshūr. El-Mesawi laments this deliberate and unfair oblivion ascribing it to some kind of intellectual rivalry and jealousy, which he calls *ḥijāb al-muʿāṣara*, or the veil of contemporariness. I find this justification untenable given the personal qualities of al-Fāsī's character. I propose a somewhat different answer. Al-Fāsī, like all North African nationalists engaged in the struggle for independence against the French administration, was against the French policy of naturalizing the Tunisians and granting them the French citizenship—a policy designed to accelerate the Frenchification process and get in the way of the nationalist movement. Unfortunately, Ibn ʿĀshūr, who was then an eminent religious figure and the sheikh al-Islam (the nation's highest-ranking religious scholar), issued a fatwa allowing naturalized Tunisians to recant their French citizenship by mere verbal repentance in order to be allowed to buried in Muslim cemeteries. This fatwa was opposed by many nationalist activists as being ambiguous, flexible, and tacitly encouraging Tunisians to hold the French citizenship. Ibn ʿĀshūr and other clerics were attacked and accused of secretly cooperating with the French administration. Al-Fāsī's strong sympathy with the independence movements in the Muslim world and especially in North Africa would very likely lead him to ignore Ibn ʿĀshūr not only in the domain of scholarship but also in the field of political activism, for al-Fāsī never mentioned Ibn ʿĀshūr even when he had the opportunity of disparage him in the concise account he wrote on the French policy of naturalization in Tunisia in his book on movements of independence in the Maghreb. See Muhammad ʿAllāl al-Fāsī, *Al-Ḥarakāt al-Istiqlāliyya fi al-Maghrib al-ʿArabī* [Independence movements in the Arabic Maghreb], 26th ed. (Casablanca: Maṭbaʿat al-Najāḥ al-Jadīda, 2003), 73. For more ideas on Ibn ʿĀshūr's life and career, see Nafi Basheer, "Ṭāhir Ibn ʿĀshūr: The Career and Thought of a Modern Reformist ʿĀlim, with Special Reference to his Work of Tafsīr," *Journal of Qur'anic Studies* 7, no. 1 (2005): 1–32.

19 Ibn ʿĀshūr, *Treatise on Maqāṣid al-Sharīʿa*, xxiii (my emphases).

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Although this criticism leveled at al-Shāṭibī appears to be overstated, it by no means disqualifies his work from falling within the kingdom of Maqāṣid and being the most acclaimed work in the field of Maqāṣid. Likewise, despite al-Fāsī's unsystematic methodology, digressive style, apologetic and polemic mood, and nuanced views, his book remains a keystone in the edifice of Maqāṣid, demonstrating "some of the most elaborate and sophisticated expressions of the core Salafiyya themes of Islamic renewal"[20] and adding to its literature valuable insights, especially those related to the ever-evolving nature of Islamic law[21] and its compatibility with human natural disposition to justice and good. Al-Fāsī should be credited for filling some generally recognized holes in the classical theory on the higher objectives of Islamic law. Many modern Muslim intellectuals have noticed that al-Shāṭibī's theorization of Maqāṣid lacks a crucial dimension—dignity—related to the preservation of human rights against tyranny and oppression and leaves much to be desired as far as ethics are concerned, which, in the premodern model of Maqāṣid proposed by al-Shāṭibī and other scholars before him, were relegated to the status of supplements rather than being viewed as the core of all legal rulings.[22] Dissatisfied with the classical formulation of Maqāṣid, jurist Yūsuf al-Qarḍāwī (b. 1926) "argues, for example, that those legal theorists did not include 'freedom, equality, brotherhood, economic cooperation (*takāful*) and human rights.'"[23] Interestingly enough, what al-Qarḍāwī mentions as lacking in the classical theory of Maqāṣid is exactly what al-Fāsī ventured to explore and propose as the essence of the higher objectives of Sharīʿa. Not only did he devote a whole chapter to human rights and another to the ethical foundations of legal rulings, but he embarked on a very critical issue in modern times, that of peace between nations and civilizations theorizing it as part and parcel of the objectives of Islam and transcending both history and circumstantial phases of conflicts and rivalries between nations and communities. Therefore, this seminal work of al-Fāsī is a book of Maqāṣid par excellence and deserves its place under its multifaceted auspices.

To do justice to al-Fāsī's reformist program requires a deep look into the motives behind writing his book on Maqāṣid. Whether manifestly or tacitly, al-Fāsī was driven by many intentions similar to those that constitute the backdrop of the whole reformist agenda of modern Muslim intellectuals. However, one can set him apart by some significant peculiarities overlooked by many of his critics and admirers. Although all the figures of the twentieth-century Salafiyya movement were concerned with the issue of political independence, only a few of them, like al-Fāsī, were actively engaged in the politics of resistance and liberation. This aspect of his involvement is highly instrumental in discerning the complexities underpinning his discourse on Sharīʿa. He was a political leader, an iconic figure of a nascent nation, and a statesman. He founded a political party with heterogenous ideology cemented by only one aim: political independence. Within his Istiqlāl party,[24]

20 March, "Naturalizing Sharīʿa," 5.

21 Al-Fāsī, *Maqāṣid al-Sharīʿa al-Islāmiyya wa Makārimuhā*, 91.

22 Ibrahim Yasir, "An Examination of the Modern Discourse on *Maqāṣid al-Sharīʿa*," *Journal of the Middle East and Africa* 5, no. 1 (2014): 39–60.

23 Yasir, "An Examination of the Modern Discourse," 53.

24 A Moroccan political party founded in 1943 under the French protectorate. Its main goal was the struggle for independence from which its very name (*istiqlāl* means independence) is derived. The party, alongside the sultan, played a decisive role in the politics of post-independence Morocco. After a short-lived leadership by Ahmed Balafrej, al-Fāsī assumed the undisputed leadership of the party, which gained strong popularity among almost all classes of the Moroccan society. Later, the party lost its momentum after the secession of many of its influential figures, among them Ben Barka, Muhammad al-Basri, and ʿAbdullah Ibrahim. The party subsequently split into three main political organizations—Istiqlāl, Union Nationale des Forces Populaires, and Union Socialiste des Forces Populaires—as a result of the rise of the Moroccan left and the recession of conservative ideas.

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different ideological sensitivities cohabited, from socialists who sympathized with Marxism to liberals who championed capitalism and tradionalists who were faithful to a pure version of Salafism. Al-Fāsī had to navigate his ideas in an ocean of opposing currents and waves of political compromises. He had to be an ideologue rather than an independent thinker. Because of this, his discourse was a repository of divergent orientations. After all, his Titanic had to avoid the iceberg. He had to maneuver rather than theorize. However, his holistic theory can be assembled from scattered pieces by focusing on its core and setting aside circumstantial and accidental views.

As mentioned earlier, al-Fāsī's main aim was to convince the Moroccan elites and the palace-run government of the integration of Sharīʿa in the newly established legal system of the Moroccan state. To fulfil this aim, he had to explain the progressive nature of Islamic law and its adaptability to the new sociopolitical circumstances. Perhaps al-Fāsī felt that his work on Maqāṣid did not achieve the objectives set for it. If so, that may be why he embarked on a more ambitious and less apologetic project, which he published in 1966, *Difāʿ ʿan al-Sharīʿa al-Islāmiyya*.[25] However, although it is a prompt sequel to his book on Maqāṣid, the earlier book remains the mouthpiece for his theory in its abstract and conceptual form.

Al-Fāsī begins his analysis with a critical review of the classical methodology adopted by early Muslim scholars who wrote on the topic of the higher objectives of Islamic law after al-Shāṭibī. According to him, these scholars failed to grasp the core of al-Shāṭibī's views, to go beyond what he had outlined in his treatise, or to avoid relating all areas of positive law to causes while adopting a literalistic approach to the objectives of Islamic law. Despite the fact that al-Fāsī does not identify these scholars by name, one can assert that al-Fāsī's aim was to break away from the casuistic analysis of *furūʿ* (positive laws) and embrace a more holistic, comprehensive, and objective-based approach akin to the one proposed earlier by al-Shāṭibī, an approach that revolves around the universals of Sharīʿa arrived at through textual induction. The fragmented view of al-Fāsī is obvious here, for since he criticized those who associate every legal ordinance with causes, he was expected to agree with Fakhr al-Dīn al-Rāzī (d. 1210 CE), who, al-Fāsī argues, following al-Shāṭibī, "found it problematic to say that God's ordinances as well as his actions are subject to ratiocination (*taʿlīl*)."[26] However, al-Fāsī maintains, against his initial submission, that God does not act except in accordance to cosmic laws he himself, created. Al-Fāsī's argument, as is that of al-Shāṭibī, is predicated on theological rather than on legal premises. What al-Fāsī implies is that divine actions are designed for the well-being of mankind, but they are not necessarily caused by it, as claimed by Muʿtazila doctors of the theological school of the eighth and tenth centuries. Hence, the causation of legal ordinances is not, in its totality, discoverable by human reason but extracted from textual proofs. That said, reason, according to al-Fāsī, constitutes the basis of faith, and therefore it is instrumental in legal knowledge and interpretation. This position exhibits an oscillation between theology and law, but it can be summarized as al-Fāsī's middle view between radical rationalism of Muʿtazila and extreme voluntarism of the Ashʿarites, the school of theology founded by Abū al-Ḥasan al-Ashʿarī (d. 935/936 CE). Hence, while reason can assume a functional responsibility in understanding law, it has no ontological precedence over God's ordinances and actions.

25 Muhammad ʿAllāl al-Fāsī, *Difāʿ ʿan al-Sharīʿa al-Islāmiyya* [Defense of Islamic law] (Cairo: Dār al-Kitāb al-Miṣrī; Beirut: Dār al-Kitāb allubnānī, 2011).

26 Al-Fāsī, *Maqāṣid al-Sharīʿa al-Islāmiyya wa Makārimuhā*, 111. Unless otherwise noted, all translations are mine.

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AL-FĀSĪ'S MAQĀṢID AND COLONIAL MOROCCO

Traditional Muslim societies had adopted two forms of law before they came under the control of foreign Western powers and their ensuing legal systems.[27] These forms are Sharīʿa and customary laws. Sharīʿa refers to the corpus of legal precepts and interpretations drawn from two main sources, the Qurʾān and the Prophetic Sunna. Customary laws designate social practices that, over the passage of time, were endowed with a degree of normative authority and thus elevated to the status of locally binding customs. Customary law in Morocco has two distinct categories. The first, known as ʿUrf (literally, custom), is the body of legal practices dating from the pre-Islamic period. These practices prevailed in the Berber areas.[28] The second is the body of customary practices derived from the praxes of the early Muslim generation of Medina during the formative period of Islam. This category, technically called ʿAmal (practice), is considered within the Māliki School of law a source of legal inference.[29] Under the French protectorate, this dual legal system was subsumed by the French code that presided over civil, commercial, and penal affairs, thus, allowing the French to ensure complete administrative control while restricting the authority of Sharīʿa law to some private matters of family law deemed marginal for the colonizer's hegemony.[30] After the promulgation of the controversial Berber Ẓahīr (decree) in 1933, through which the French administration desired that Berber communities could handle their legal issues according to their own inherited customary practices,[31] Sharīʿa law and its relevance to modern Morocco became not only a revived scholarly topic for debate among Moroccan intelligentsia but also a motif for consolidating a threatened national identity in the face of the colonizer's strategy of divide and rule.[32]

No sooner had Morocco received its political independence in 1956 than the national government embarked on the task of codifying the family law on the basis of Sharīʿa principles. This effort, in which al-Fāsī took a significant part, is, perhaps, the "second most important task after the

27 This dual system of Sharīʿa courts and customary legal practices that prevailed in precolonial and colonial Muslim countries has been analyzed by many scholars. See, for example, Aharon Layish, *Sharīa And Custom in Libyan Tribal Society: An Annotated Translation of Decisions from the Sharia Courts of Adjābiya and Kufra* (Leiden: Brill, 2005), viii; Deniz Kandiyoti, "Islam, Modernity and the Politics of Gender," in *Islam and Modernity: Key Issues and Debates*, ed. Muhammad Khalid Masud, Armando Salvatore, and Martin Van Bruinessen (Edinburgh: Edinburgh University Press, 2009), 91–124; Ebrahim Moosa, "Colonialism and Islamic Law," in Masud, Salvatore, and Van Bruinessen, *Islam and Modernity*, 158–81; Auwalu Hamsxu, "Colonialism and the Transformation of the Substance and Form of Islamic Law in the Northern States of Nigeria," *Journal of Law and Religion* 9, no. 1 (1991): 17–47.

28 Mogilski, *French Influence*, 14. Mogilski refers to the areas populated by Berbers as Bilād al-Sība. This epithet, rendered by many Western anthropologists as "the land of anarchy," included Beber areas located outside the control of the centralized government headed by the sultan and his entourage (the Makhzan). Ernest Gellner rightly prefers a more precise translation than *anarchy* because *anarchy* implies the absence of order and institutions among the Berber communities, and thus, according to him, Bilād al-Sība is better understood as "the land of institutionalised dissidence." Ernest Gellner, *Saints of the Atlas* (London: Weidenfeld & Nicolson, 1969), 1.

29 Al-Fāsī, *Maqāṣid al-Sharīʿa al-Islāmiyya wa Makārimuhā*, 265–72.

30 Wael B. Hallaq, *Sharīʿa Theory, Practice and Modern Transformations* (Edinburgh: Cambridge University Press, 2009), 438–39.

31 William A. Hoisington, "Cities in Revolt: The Berber Dahir (1930) and France's Urban Strategy in Morocco," *Journal of Contemporary History* 13, no. 3 (1978): 433–48.

32 The Moroccan nationalists interpreted this decree as an attempt on the part of the French administration to deepen the cultural differences between Arabs and Berbers. This interpretation proved fruitful for turning the nationalist demands from legal reforms to full independence. See Hallaq, *Sharīʿa Theory, Practice*, 439.

abolition of the Berber customary law."[33] Al-Fāsī's preoccupation with the codification of Sharīʿa as state law was the outcome of his fruitful encounter with the Western legal tradition.[34] Not until the experience of colonization was the Muslim legal mind aware of the role the state could play in the formulation and enforcement of a legal system under the control of the state[35] and how this centralization could remedy the unrestricted diversity of legal opinions, the idle boast of Islamic juristic tradition.[36] Within the postcolonial political arena, the revivalist narrative of Muslim reformists like al-Fāsī faced new peculiar challenges. The implementation of Sharīʿa and its relevance to modern sensitivities were no longer taken for granted. Out of ignorance or outright objection, the Moroccan francophone elite, holding key administrative positions in the newly independent state, was skeptical about the viability of a legal system wholly based on Sharīʿa principles.[37] Consequently, Islamic reformist discourse had to emerge in an apologetic and polemical context. These two aspects indeed colored al-Fāsī's views—not only on Maqāṣid but on Sharīʿa law as a whole.[38]

Within this context, al-Fāsī had to negotiate the return to Sharīʿa law ideals using a discourse rooted in a robust form of utilitarianism.[39] Thus, to ensure the compatibility of Sharīʿa with the modern concepts of law as a tool supervised by state institutions rather than an open field of interpretive exercises by individual jurists or *ʿulama*, al-Fāsī had to focus on the higher objectives of Sharīʿa being the remedy for overcoming the rigid and outdated legal opinions and practices of the sterile past.

THE PHILOSOPHICAL AND THEOLOGICAL FOUNDATIONS OF MAQĀṢID

Unlike traditional Muslim legal theorists, al-Fāsī seems aware of the direct connection between the theoretical framework of legal theories and their broader philosophical and theological backgrounds. Yet, to credit al-Fāsī with the formulation of a full-fledged philosophy of Islamic law

33 Fatima Harrak, "The History and Significance of the New Moroccan Mudawwana," *Institute for the Study of Islamic Thought in Africa*, Working paper no. 09-002 (2009): 1–10, on file with the author. See also Hallaq, *Sharīʿa Theory, Practice*, 439.

34 Erwin I. J. Rosenthal, "ʿAllāl al-Fāsī: A Blend of Islam and Arab Nationalism," in *Islam in the Modern National State* (Cambridge: Cambridge University Press, 1965), 154–78, at 154.

35 Hallaq considers the idea of law as a state jurisdiction to be the most powerful political and legal tradition colonialism has introduced into the colonized territories. Hallaq, *Sharīʿa Theory, Practice*, 439. The underlying theological concepts of legal compliance render the codification of Sharīʿa as state law problematic. Sharīʿa is not merely a body of legal ordinances; it is also a set of moral rules and ethical principles based on which a large area of legal responsibility falls within the person's conscience and her relationship with God and consequently outside state control. Hence, thinking of Sharīʿa law as state-imposed law amounts to an oxymoron. See Muhammad Zubair Abbasi, "Sharīʿa and State Law: Relevance of Islamic Legal History for the Application of Muslim Family Law in the West," *Journal of Law, Religion, and State* 3 no. 2 (2014): 124–38, at 125–26.

36 Hallaq, *Sharīʿa Theory, Practice*, 439; Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb Al-Dīn Al-Qarāfī* (Leiden: Brill, 1996), xiv–xv.

37 The estrangement of Sharīʿa in the context of postcolonial period or more accurately its marginalization has been witnessed across the Muslim world. For more details, see Hallaq, *Sharīʿa Theory, Practice*; Clark B. Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʿa into Egyptian Constitutional Law* (Leiden: Brill, 2006); Iza R. Hussin, *The Politics of Islamic Law: Local Elites, Colonial Authority, and the Making of the Muslim State* (Chicago: University of Chicago Press, 2016).

38 On the apologetic tone of al-Fāsī's views on Maqāṣid, see March, "Naturalizing Sharīʿa."

39 For more details on the rise of utilitarianism in classical and modern Islamic law theories and practices, see Lombardi, *State Law as Islamic Law*.

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would be an exaggeration to say the least. Unfortunately, some modern Muslim scholars have used the term *philosophy* as applied to law quite loosely, to the extent that almost any aspect of legal theory is included in the domain of legal philosophy.[40] In al-Fāsī's discourse on Maqāṣid, one notices a fondness for the history of the idea of law and its origins. The implied logic in al-Fāsī's apologetic program is to establish religion, revealed or otherwise, as a source of all human legal traditions and consequently justify the relevance and suitability of Sharīʿa law within the modern context of state building and legal codification on the premise that all legal traditions, including modern secular ones, could be traced back to the same origin.[41] Central to al-Fāsī's legal philosophy is the concept of natural law and the belief that humans' natural disposition (*fiṭra*) is fundamentally endowed with the capacity to distinguish between right and wrong and consequently craft normative rules for the regulation of human conduct.[42] In fact, Muslim reformists of the nineteenth and twentieth centuries attempted to reconcile Islam with modernity. The main result of this attempt has been the emphasis on the place of reason and utility in the formulation of the basic principles of Islamic law in order to negotiate the common ground between Sharīʿa and Western legal traditions rooted in the concept of natural law.[43] In the following, a discussion of natural

40 See, for example, Ṣubḥī Maḥamaṣānī, *Falsafat al-Tashrīʿ fī al-Islām: Muqaddima fī Dirāsat al-Sharīʿa al-Islāmiyya ʿAlā Ḍawʾ Madhāhibihā al-Mukhtalifa wa Ḍawʾ al-Qawānīn al-Ḥadītha* [Legal philosophy in Islam: An introduction to the study of Islamic Sharīʿa in light of its different schools of law and modern laws] (Beirut: Maṭbaʿat al-Kashshāf, 1946); Muhammad Khalid Masud, *Shāṭibī's Philosophy of Islamic Law* (Kuala Lumpur: Islamic Book Trust, 2005). Masud believes that Shāṭibī's concept of *maṣlaḥa* (benefit) constitutes the basis of his philosophy of Islamic law (Masud, *Shāṭibī's Philosophy of Islamic Law*, vii) despite the fact that Shāṭibī's analysis of public utility cannot be detached from its scriptural foundations, based on which legal rulings are derived and considered, while reason plays only a secondary role in the process of legal inference. For this reason, it is revelation and not reason that constitutes the basis on which *maṣlaha* should be considered (*maṣlaḥa muʿtabara*) or revoked (*maṣlaḥa ghayr muʿtabara*). Jasser Auda claims that a philosophy of Islamic law has indeed emerged during the fifth Islamic century. The epitomes of this intellectual trend, according to him, are al-Juwaynī, al-Ghazālī, ʿIzz al-Dīn b. ʿAbd al-Salām (d. AH 660/1262 CE), Shihāb al-Dīn Aḥmad b. Abī al-ʿAlāʾ al-Qarāfī (d. AH 684/1285 CE), Shams al-Dīn Muḥammad b. Abī Bakr b. al-Qayyim (d. AH 751/1350 CE), and al-Shāṭibī because they focus on the concept of unrestricted benefit (*al-maṣlaḥa al-mursala*). Jasser Auda, *Maqāṣid al-Sharīʿah as Philosophy of Islamic Law: A Systems Approach* (Herndon: International Institute of Islamic Thought, 2008), 16–17. I argue that all their contributions are, to varying degrees, far from formulating a philosophy of Islamic law, for none of them attempted to elaborate on the ontological place of reason and the independent role of *maṣlaḥa* in the construction of the normative rules of law. Instead, they distanced themselves from the Muʿtazila principle of embellishment and repugnance (*al-taḥsīn wa al-taqbīḥ*), which champions a straightforward version of legal rationalism.

41 Al-Fāsī, *Maqāṣid al-Sharīʿa al-Islāmiyya wa Makārimuhā*, 126–35.

42 For more details on natural law as a theme of legal philosophy, see Jeffrey Brand, *Philosophy of Law: Introducing Jurisprudence* (London: Bloomsbury Academic, 2013); Brian Bix, "Natural Law Theory," in *A Companion to Philosophy of Law and Legal Theory*, ed. Dennis Patterson (Malden: Wiley-Blackwell, 2010), 211–27; Mark C. Murphy, "Natural Law Theory," in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, ed. Martin P. Golding and William A. Edmundson (Oxford: Blackwell, 2006), 15–28.

43 Avner M. Emon has devoted remarkable effort to uncovering the seeds of Islamic natural law theories in classical Islamic theology and law. Anver M. Emon, *Islamic Natural Law Theories* (Oxford: Oxford University Press, 2010). He singles out two tendencies within Islamic *kalām* (dialectic theology). One advocates a hard version of natural law according to which human reason, independently of any external authority divine or otherwise, is capable of distinguishing between good and bad and that divine will, by necessity, does only what is conceived of by human reasoning as just and good. The other champions a soft theory of natural law that is predicated on an ontological premise rooted in God's omnipotence and his unlimited will. This latter version is labeled soft because although it acknowledges that God can be unjust by doing what is conceptually construed as bad, God's grace interferes through its hidden ways to comfort and reassure those afflicted by misfortunes destined by God. In the realm of law, the hard theory of natural law presupposes, at least theoretically, the ability of human reason

law as conceived by al-Fāsī and related topics like *fiṭra*, reason and law, and *maṣlaḥa* is essential to uncover the structures of his theory of Maqāṣid and its elasticity, which allows it to be included in a modern state system of governance.

Sharīʿa and Natural Law

Nowhere in al-Fāsī's discussion of natural law is there any attempt at a definition of its basic essence or delineation of its scope. He views it as a human development toward freeing law from the yoke of customs and legal precedents established by judges and priests.[44] The main purpose of natural law is the identification of some higher moral standards, intuitively or rationally assumed as such, against which laws are assessed and based on which commands are obeyed.[45] Al-Fāsī argues that this development is the outcome of two faculties: human reason and conscience and their evolved conception of justice.[46] For a reason that I discuss later, al-Fāsī appears to ignore religion as a source of natural law and claims that it constitutes a step toward a complete separation between law and religion.[47] Al-Fāsī maintains that Western conceptions of natural law changed over time and gave rise to five different expressions: the Greek, the Roman, the Ecclesiastical, the English, and the modern.[48] The Greeks, al-Fāsī explains, understood law as a reflection of fixed and eternal laws of nature and, hence, what constitutes a legal action is already known to those who observe the physical laws of the universe. Yet, al-Fāsī contends, the Greeks held three different interpretations of natural law: the conservatives capitalized on the concept to support and strengthen existing laws on the grounds that they reflect eternal cosmic laws; the Sophists deployed it in order to undermine the authority of some positive laws deemed in conflict with the laws of nature;[49] and the Epicureans emphasized compliance with the law regardless of being in harmony with nature.[50]

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to devise laws and confer on human actions the normative values of being either legal or illegal and on secular legislations the authority to be binding and obeyed. Emon cites Abū Bakr al-Jaṣṣāṣ (d. AH 370/981 CE), al-Qāḍī ʿAbd al-Jabbār b. Ahmad b. ʿAbd al-Jabbār (d. AH 414 or 415/1025 CE), and Abū al-Ḥussein al-Baṣrī (d. AH 436/1044 CE) as the representatives of the hard theory of natural law owing to their theological position about God's actions being inherently good. Emon, *Islamic Natural Law Theories*, 40–88. As far as theology is concerned, Emon is right, but Islamic theological principles have had only meager impact on Islamic legal theories. Abū al-Ḥussein Al-Baṣrī, for example, though he was a rationalist in matters of theology, his formulation of legal principles and inference reflects mainstream ideas of medieval Islamic legal theories. He argues that reason plays only a secondary role in lawfinding not only in relation to the Qur'ān or Sunna, but also to solitary traditions. Abū al-Ḥussein Al-Baṣrī, *Al-Muʿtamad Fī Uṣūl Al-Fiqh* [The reliable source on the principles of Islamic law], ed. Muhammad Hamidullah, Hassan Hanafi, and Muhammad Bakr (Damascus: al-Maʿhad al-ʿIlmī al-Faransī li Addirāsāt al-ʿArabiyya, 1964), 583. Ibn ʿĀshūr accurately concludes that those legal theorists who elevated legal principles to the level of certainty wrongly applied the rules governing the principles of uṣūl al-Dīn (theology) to uṣūl al fiqh (legal theory). Ibn ʿĀshūr, *Treatise on Maqasid Al-Shari'a*, xxi. For more details on the idea of natural law as discussed by some modern Muslim reformists, see Frank Griffel, "The Harmony of Natural Law and Shari'a in Islamist Theology," in Amanat and Griffel, *Shari'a*, 38–61.

44 Al-Fāsī, *Maqāṣid al-Sharīʿa al-Islāmiyya wa Makārimuhā*, 143. Cf. Shirley Robin Letwin, *On the History of the Idea of Law*, ed. Noel B. Reynolds (Cambridge: Cambridge University Press, 2005), 4.

45 Brian Bix, *Natural Law Theory*, 211.

46 Al-Fāsī, *Maqāṣid al-Sharīʿa al-Islāmiyya wa Makārimuhā*, 143.

47 Al-Fāsī, 143.

48 Al-Fāsī, 144–50.

49 Al-Fāsī, 144. Here al-Fāsī does not quite accurately grasp what natural law meant for the Sophists. They downplayed the centrality of cosmic natural laws and emphasized instead the importance of human natural disposition. See Mark H. Waddicor, *Montesquieu and the Philosophy of Natural Law* (The Hague: Martinus Nijhoff, 1970), 2.

50 Al-Fāsī, *Maqāṣid al-Sharīʿa al-Islāmiyya wa Makārimuhā*, 144–45.

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The Romans inherited the concept from the Greeks. The Stoics in particular believed in the existence of unchanging, everlasting, and universal laws.[51] Such a conception allowed the Romans to draft transnational laws (the law of nations) on the ground that law is an expression of the *nomoi* anchored in the physical structures of the universe.[52] With Christianity, al-Fāsī believes, the idea of natural law was given a religious form. Since God is the creator of nature and the laws governing its functioning, man's behavior ought to comply with these divine laws through man's acceptance of revelation and God's eternal commands.[53] In England, the rigidity of customary laws and their inability to attain justice raised public discontent. To remedy this problem, al-Fāsī explains, legal cases were brought before the king, who would adjudicate them based on his own understanding of justice.[54] Hence the English adage, "Justice flows from the conscience of the king."[55] The modern conception of natural law, according to al-Fāsī, is rooted in a general idea about justice as the ultimate purpose of law.[56] However, modern thinkers, al-Fāsī avers, distinguish between the primordial principles of natural law, that is, its eternal and universal set of laws, and the elementary and practical aspects of law that deal with individual cases in light of the above-mentioned principles.[57]

Al-Fāsī's analysis, although fragmentary, unsystematic, and sporadic may be considered the first clearly expressed attempt ever made by a Muslim legal theorist to compare Sharīʿa with natural law and explore areas of conformity between concepts of divine will and natural universal laws embedded in the universal intentions of scripture (as is the case with al-Shāṭibī), and the laws of physical and human nature. Al-Fāsī makes a bold claim with unprecedented significance: God acts according to the cosmic laws that he, himself, created.[58] David L. Johnston convincingly argues that al-Fāsī uses the term *nāmūs* (law or religion) deliberately, but he overinterprets al-Fāsī's purpose as downplaying the Sharīʿa in his political and cultural writings,[59] arguing that "[t]he word *nāmūs* is a deliberate attempt to move the debate away from the traditional perimeters of *fiqh* (applied Islamic jurisprudence) and its methodological theory, *usul al-fiqh*."[60] However, according to al-Fāsī, *nāmūs* is not antithetical to Sharīʿa; rather, it is its natural direction and ultimate purpose. Hence, although upgrading Sharīʿa to meet the horizons of cosmological laws entails going beyond its traditional perimeters, this by no means necessitates its rejection. On the contrary, the principles of Sharīʿa seen from the prism of Maqāṣid are so elastic and adaptable that they are bound to conflate with natural laws to form one single entity. This process of continuous evolution from Sharīʿa to natural law mirrors the progression of mankind from base animality to the heights of human responsibility.[61]

51 Al-Fāsī, 146.
52 Al-Fāsī, 146.
53 Al-Fāsī, 147.
54 Al-Fāsī, 149.
55 Al-Fāsī, 149.
56 Al-Fāsī, 149.
57 Al-Fāsī, 150. This is indeed in line with the definition provided by Frederick Pollock: natural law is "an ultimate principle of fitness with regard to the nature of man as a rational and social being, which is, or ought to be, the justification of every form of positive law." Frederick Pollock, "The History of the Law of Nature: A Preliminary Study," *Journal of the Society of Comparative Legislation*, 2, no. 3 (1900): 481–33, at 418.
58 Al-Fāsī, *Maqāṣid al-Sharīʿa al-Islāmiyya wa Makārimuhā*, 112.
59 Johnston, "Sharīʿa as a Blueprint," 86.
60 Johnston, 86.
61 Al-Fāsī, *Maqāṣid al-Sharīʿa al-Islāmiyya wa Makārimuhā*, 113.

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The originality of al-Fāsī as expressed in his awareness of the commonalities between Islamic law and natural law is, however, not straightforward and requires further discussion and deliberation. In modern Islamic milieus, some scholars have been credited for being fervent advocates of reason and its indispensable authority. However, none went as far as to equate Sharīʿa with natural law.[62] What Muslim scholars did—and al-Fāsī is no exception—is to defend Sharīʿa in the face of secular alternatives not only by stressing its adaptability to modern universal values but by taking the battle, in a swift offensive strategy, to be fought on the secular soil claiming that all non-Islamic ideologies are inadequate for the wellbeing of mankind and that Sharīʿa is superior to them all. However, this supremacy of Sharīʿa over secular legal codes entails its conformity with them with some added value found in Sharīʿa and lacking in its man-made counterparts. Andrew F. March writes,

> For me, the more important reason is that Fāsī himself rejects the comparison to natural law and argues at some length for the superiority of *sharīʿa* to natural law. This is not surprising, and, by itself, is not decisive. Modern thinkers like Fāsī are certainly choosing to stress naturalistic themes in their discussions of *sharīʿa*. But they do not generally advance the *ontological* claim that natural laws or truths causally determine or constrain God's moral laws or *the epistemological* or *hermeneutic* claim that assumptions about the human good or telos provide the primary method of reasoning to moral obligation *independently from revelation*.[63]

The reformation discourse of al-Fāsī, like all the Salafiyya movement architects, was in fact a product of a disturbed Muslim mind that, given the new realities of Western domination and Islamic golden age nostalgia, found itself on the horns of an unprecedented dilemma. The right choice was so difficult that the ensuing discourse of Islamic revival was ambivalent, hesitant, and unsettling. Psychologically, Salafiyya discourse was a result of a collective shock, from which Muslims are still suffering today, for "never before the 19th-century were Muslim religious scholars, authorities and lay intellectuals faced with justifying the *sharīʿa* in public as the right law to be chosen by Muslims for social application in the face of widespread ideological alternatives."[64] Al-Fāsī exhibits well this tension rendering his thoughts on naturalistic themes in Sharīʿa not only ambiguous but tactical, cautious, complex, and open-ended.[65] Wael Hallaq's evaluation of al-Fāsī's discourse is on target when he qualifies it as an emasculated form of utilitarianism rooted in natural law that is paradoxically constrained by the intervention of revealed texts and medieval legal methodologies.[66] This paradox reflects al-Fāsī's vacillation about how far one can take the harmonization between Sharīʿa and natural law. Any attempt at a full reconciliation of the two legal systems brings about two conflicting negative consequences. On the one hand, to concede

62 Emon states that Muhammad ʿAbduh equated Sharīʿa with natural law, but Emon failed to provide any proof to substantiate his claim. Emon, *Islamic Natural Law Theories*, 16. Certainly, ʿAbduh struggled to revive Islamic knowledge in order to catch up with the developed West. Such a revival requires a turn to rationalism as one of the foundations of knowledge. Although ʿAbduh is of the view that justice and virtue can be discovered by reason without the aid of revelation, his idea is discussed within the principles of a moderate theology between extreme voluntarist Ashʿarism and radical rationalism of Muʿtazila. To claim that he formulated a notion of natural law is again an invalid argument predicated on a false analogy between theology and law. See also Griffel, "The Harmony of Natural Law and Shari'a in Islamist Theology."

63 March, "Naturalizing Sharīʿa," 6–7 (March's emphasis).

64 March, 3.

65 March, 5.

66 Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl Al-Fiqh*. (Cambridge: Cambridge University Press, 1997), 224.

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that Islamic law is in total harmony with some legal norms arrived at through reason or consideration of public goods is to infringe on God's authority as the ultimate source and the sole locus of lawmaking. On the other hand, to believe that Sharīʿa does not share the same principles with natural law risks rendering the whole reformist project futile. For al-Fāsī and other Muslim reformists, the way out of this conundrum has been a kind of concocted discourse riddled with contradictions and inconsistencies.[67] While al-Fāsī supports the idea that Islam is the perfect expression of human natural disposition (*fitra*),[68] he avers, "Sharīʿa is a set of legal injunctions (*aḥkām*) that comprise some objectives. It is also a group of objectives that contains legal injunctions. Sharīʿa is not akin to a natural law inherent in God's creation and discovered by man through inspiration, the obscure discovering the obscure. Rather, it is in fact looking at certain general sources by which man guides himself to thoroughly grasp the secrets of the Sharīʿa and its purposes in their generality and specificity through [divine] speech and revealed proofs."[69]

Therefore, even though al-Fāsī exhibits a sharp awareness about naturalistic themes in different legal traditions, he could not depart from the mainstream orthodox and traditional Muslim perspective that places revelation at the center of the general theory of knowledge, a perspective predicated on an Islamic legal doctrine that ties legal inference primarily to the scriptural sources rather than to human independent competencies like reason, natural disposition, and rational conceptions about utility.[70] However, because Islamic law and natural law are not necessarily compatible and given the fact that the former is superior to the latter by virtue of its divine origin, the question that requires attention is whether or not the above-mentioned contradiction in al-Fāsī's discourse is a permanent deficiency, implying the impossibility of integrating Sharīʿa in the corpus of secular laws adopted by modern Muslim majority postcolonial states. March clearly argues that the inconsistencies of al-Fāsī's views are unresolved and remain ubiquitous across the broader spectrum of modern Islamic legal and political thought. He writes, "Fāsī's reflections reveal a set of unresolved ambiguities and conflicting impulses that impose crucial costs on developing a perfectly consistent moral theology, ambiguities that I believe permeate modern Islamic legal and political thought more broadly."[71]

March's assessment, I argue, is hasty and overlooks some important details within al-Fāsī's general purpose to seek a reconciliation between Sharīʿa and modern laws. It is true that al-Fāsī appears to object to any attempt to constrain God's freedom to devise laws and issue commands that are not necessarily in harmony with human reason or inner natural disposition. For this reason, al-Fāsī repeatedly insists that the general objectives of Sharīʿa ought to be dependent on revealed proofs. Hence, Maqāṣid, according to al-Fāsī, are "part of the essential sources of Islamic jurisprudence.

67 Emilio Platti points to this contradiction in the thought of the Indian-Pakistani fundamentalist Abū al-Aʿlā al-Mawdūdī, who recognizes the consistency of Sharīʿa with the laws of nature inherent in man's natural disposition but when he discusses the details of Islamic positive laws, he rejects any congruency between them and the principles of natural law. Emilio G. Platti, "La théologie de Abū l-Aʿlā Mawdūdī," in *Philosophy and Arts in the Islamic World: Proceedings of the Eighteenth Congress of the Union Européenne des Arabisants et Islamisants*, ed. U. Vermeulen and D. De Smet (Leuven: Peeters, 1998), 242–51. See also Griffel, "The Harmony of Natural Law and Shari'a in Islamist Theology," 38.

68 Al-Fāsī, *Maqāṣid al-Sharīʿa al-Islāmiyya wa Makārimuhā*, 180.

69 Al-Fāsī, *Maqāṣid al-Sharīʿa al-Islāmiyya wa Makārimuhā*, 152–53 (my translation, adapted from March, "Naturalizing Sharīʿa," 20).

70 March, "Naturalizing Sharīʿa," 20. Al-Fāsī is highly critical of the idea that the higher objectives of Islamic law could replace its sources. Like all orthodox Muslim legal theorists, he views these objectives as an extension of the meanings of the sources of law through the active agency of interpretation rather than independent concepts in the ontological sense of the term. See al-Fāsī, *Maqāṣid al-Sharīʿa al-Islāmiyya wa Makārimuhā*, 151.

71 March, "Naturalizing Sharīʿa," 7–8.

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The ruling arrived at by way of public interest or legal preference (*istiḥsān*) or by any other way of creative legal reasoning, is considered an Islamic legal ruling; that is a discourse from Allah to those who are legally responsible (*mukallafūn*), for it is the result of the legal discourse made explicit by these objectives viewed as indicants leading to the rulings intended by Allah through His Book and the Sunna of His prophet."[72]

So, while al-Fāsī downplays the ontological basis of the harmony between Islamic law and nature, be it physical or moral, he highlights the critical role textual and paratextual interpretation plays in achieving that desired harmony. For example, al-Fāsī's inclusion of human rights within the domain of legal objectives of Sharīʿa, which is indeed a novelty and a significant addition to the classical theory of Maqāṣid,[73] is supplemented with a new theoretical tool that al-Fāsī calls *amr irshād* (order of advice). He declares that he is the first jurist ever to have mentioned it, and he proposes that this order of advice be included as a source of law with equal weight enjoyed by other known sources.[74] This unprecedented source refers to the direction of a divine command. This direction is supposed to alter the existing command when contextual circumstances are ready to support such alteration.[75] For example, explains al-Fāsī, the Qurʾānic commands on polygyny by restricting the number of legitimate wives to four and the emphasis on fairness on the part of the husband is to abandon this type of marriage and move toward the ultimate adoption of monogamy.[76] The same applies to war. Given all Sharīʿa restrictions on warfare, al-Fāsī concludes, using the order of advice mechanism, that sustainable peace is the ultimate direction of divine commands.[77] Implicitly, the order of advice as a hermeneutical strategy means that the purposes of law being general, normative, and noncontingent override individual, substantive, and contingent laws. The reason why al-Fāsī is hesitant to accept a direct congruency between Sharīʿa and the radical reason-based theory of law is to be uncovered from his attempt to appeal to the masses and the *ʿulama*, who are generally the champions of a traditional version of Islam. For this reason, I partially disagree with Hallaq's evaluation of al-Fāsī's hermeneutics as irredeemably traditional and conventional. Hallaq states,

> It is difficult to make sense of Fāsī's thought in light of his hesitant and selective appropriations from traditional legal theory. He dearly appreciates the necessity to remold legal theory so as to render it responsive to modern exigencies. Yet, he is reluctant to abandon the conventional hermeneutic as expressed in *qiyās*, *istiḥsān* and the literalist approach to legal language. More important, while he hovers over a renewed notion of *istiṣlāḥ*, to justify, if nothing else, the modern reforms in the law, he proves himself unable to embrace a legal philosophy that relegates the texts of revelation to a place subservient to the imperatives of modem social change.[78]

While Hallaq is correct in his description of al-Fāsī's inconsistencies, he fails to take note of this reformist's latent discursive strategies and how he maneuvers to negotiate the modernization of Islamic legal thought. Had Hallaq given even the least of his attention to the order of advice mechanism as expounded by al-Fāsī, he could certainly have mitigated the intensity of the criticisms he hurled at al-Fāsī's legal discourse.

72 Al-Fāsī, *Maqāṣid al-Sharīʿa al-Islāmiyya wa Makārimuhā*, 151.
73 Johnston, "Sharīʿa as a Blueprint," 96.
74 Al-Fāsī, *Maqāṣid al-Sharīʿa al-Islāmiyya wa Makārimuhā*, 348.
75 Al-Fāsī, 348.
76 Al-Fāsī, 349.
77 Al-Fāsī, 349.
78 Hallaq, *History of Islamic Legal Theories*, 225–26.

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Central to al-Fāsī's modernizing program is the elevation of Sharīʿa rulings from the specific and the cultural to the universal and the global. This desire is bound to be challenged by the particularities of Islamic law that govern most of the body of substantive law. To overcome this predicament, al Fāsī sets the whole Sharīʿa on a gradual course of change with the ultimate purpose of embracing humanity as a whole. Just like *qiyās* (analogy), the order of advice serves as a tool of legal inference as well as a source of legislation.[79] According to al-Fāsī, the order of advice method is constructed through an inductive survey of textual legal proofs to be backed up by a host of legal indications like all the universals of Sharīʿa (*Kulliyāt al-Sharīʿa*).[80] He states, "What should hinder us from relying on this source, the order of advice, which is realized through the fulfillment of what the Lawgiver intends in any particular case of law such as the longing for freedom, the desire to establish justice and peace in the family, the realization of world peace and the banning of war, something He intends for every unit of humanity?"[81]

Sharīʿa, Reason, and Fiṭra

Heated debates among Muslim scholars on the place of nonrevelatory criteria in legally assessing acts spanned a period of four hundred years since the eighth century of the Islamic calendar and were subsequently summarized, explained, and taxonomized for another eight hundred years.[82] Al-Fāsī devotes a whole chapter to argue, like all Muslim reformists, that Islam is "the religion of reason and justice."[83] His discussion reflects well the development of the Islamic intellectual tradition as a discourse in which philosophy and theology are integrated.[84] Muslim theologians, argues al-Fāsī, seem to have wasted much time and energy in futile debates as to whether or not God is required to act justly in accordance with human interests, and whether an act is inherently good or bad independently from the divine will.[85] The Sunni Ashʿarites, claims al-Fāsī, emphasized God's omnipotence and the absoluteness of his will, and hence an act is good not because it is essentially good, but because God willed it to be good.[86] Consequently, human reason is incapable of formulating laws with normative authority independently from revelation. Muʿtazila and Māturidīs believed that God's will is inherently good and hence open to human rational evaluation.[87] The absolute will of God as understood by the Ashʿarites by no means implies that God can do evil, but it places the divine acts above human judgment.[88]

However, the problem of evil and how Muslim theologians reacted to it had significant consequences on Muslims' understanding of God's justice. While Muʿtazila argued that God can never do evil, the Ashʿarites agreed with the possibility of God doing evil given His absolute will. The

79 Al-Fāsī, *Maqāṣid al-Sharīʿa al-Islāmiyya wa Makārimuhā*, 348.
80 Al-Fāsī, 348.
81 Al-Fāsī, 349.
82 A. Kevin Reinhart, *Before Revelation: The Boundaries of Muslim Moral Thought* (Albany: State University of New York Press, 1995), 3.
83 Al-Fāsī, *Maqāṣid al-Sharīʿa al-Islāmiyya wa Makārimuhā*, 171.
84 George Hourani points to the fact that theology and philosophy had been considered by Muslim scholars two separate disciplines before they started, at a later stage of the Islamic intellectual tradition, to interact. George Fadlo Hourani, *Reason and Tradition in Islamic Ethics* (Cambridge: Cambridge University Press, 1985), 6. Johnston mentions this integration of philosophy and theology in al-Fasi's discourse. See, Johnston, "Sharīʿa as Blueprint," 98.
85 Al-Fāsī, *Maqāṣid al-Sharīʿa al-Islāmiyya wa Makārimuhā*, 171.
86 Al-Fāsī, 171.
87 Al-Fāsī, 171.
88 Al-Fāsī, 172.

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Māturidīs claimed that some evil acts, such as punishing the obedient, are unjust and therefore God will not perform them. In his search for a solution to this dilemma, al-Fāsī resorts to Muslim philosopher Ibn Rushd (Averroes, d. 1198), who believes that God wills evil only for the good it can accomplish.[89] For this reason, God created in us the ability to choose between good and evil. Such ability guarantees our freedom of choice being the repository of human responsibility. Al-Fāsī's aim is to go beyond the prolixity of theological arguments and seek a middle ground between Muslim theologies. Hence, he capitalizes again on Ibn Rushd's moderate view on human will's being limited by the external laws embedded in the universe.[90] Yet, limited will does not mean the human inability to choose and make independent decisions. According to Johnston, al-Fāsī believes that "Ibn Rushd is correct when he argues that neither is God's power to predestine events in the future (*al-jabr*) all determining, nor is human will absolute."[91] This moderate position adopted by al-Fāsī came at a price. Following Abū Muḥammad ʿAlī ibn Aḥmad ibn Saʿīd Ibn Ḥazm (d. 1064), al-Fāsī seems to agree that reason has no say in some legal matters compared to its importance in general matters of understanding.[92] Therefore, reason has only a subordinate status in the area of law although the general principles of religion do not go against reason in the first place.[93] For al-Fāsī, reason is only one aspect of a larger and more significant human faculty that is *fiṭra* or human innate disposition. It refers to what God has endowed humans with such as reason, the ability to acquire knowledge, the inclination toward sociability, the readiness to obey divine commands, and the thirst to explore the unknown.[94] Al-Fāsī declares that Sharīʿa and *fiṭra* are in total harmony provided that the term *fiṭra* is not understood to specifically refer to human intellect as Ibn Sīnā (Avicenna, d. 1037) and other Muslim philosophers did.[95] Thus, explains al-Fāsī, human *fiṭra* is not limited to the inner human nature; it also covers the realm of actions and behavior.[96] So, *fiṭra* in al-Fāsī's parlance combines two dimensions: epistemic and ethical. Al-Fāsī here continues the same Islamic legacy of orthodox jurists who downplayed the role of reason, allowing it only a secondary role in legal theory, with revelation the primary role. Andrew March rightly observes that al-Fāsī understands Sharīʿa "in much the same way that Muslim theologians and legal theorists have always understood the distinction, namely in the centrality of Divine *command* and the importance of revelation for clarity and determinacy in legal and moral norms."[97] Even the objectives of Sharīʿa as well as its secondary sources "are not a separate source external to revelation but entirely part of it—a ruling extracted with reference to *maṣlaḥa* or *maqāṣid* is considered a *sharʿī* ruling or a divine address, and not a distinct constraint on the law or an independent interpretive lens for extracting the rules."[98]

89 Al-Fāsī, *Maqāṣid al-Sharīʿa al-Islāmiyya wa Makārimuhā*, 172.
90 Al-Fāsī, 173. The idea that human freedom of choice is limited by external natural laws can be ascribed to Aristotle, who argued that human freedom is realized only in matters under human control. See George Hourani, *Reason and Tradition in Islamic Ethics*, 110.
91 Johnston, "Sharīʿa as a Blueprint," 91.
92 Al-Fāsī, *Maqāṣid al-Sharīʿa al-Islāmiyya wa Makārimuhā*, 175.
93 Al-Fāsī, 175.
94 Al-Fāsī, 179.
95 Al-Fāsī, 181.
96 Al-Fāsī, 181.
97 March, "Naturalizing Sharīʿa," 20.
98 March, 20.

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*Islamic Law and the Concept of Utility (*Maṣlaḥa*)*

Legal precepts are continually revised, amended, and even abandoned on the basis of how much justice they can serve and the extent to which they fulfil certain individual and social utilities. Even divine law, as represented by Sharīʿa, is subject to human interpretation deep-seated in the principles of justice and social welfare. However, Muslim jurists seem to unanimously agree that the definition of what is beneficial (*maṣlaḥa*) and what is harmful (*mafsada*) is provided, directly or indirectly, by revealed texts rather than by human reason. Al-Shāfiʿī's final articulation of the sources of Sharīʿa law succeeds in placing the sources of law above any other hermeneutical device, and hence the concept of *maṣlaḥa* has been approached "especially by Shāfiʿī jurists in terms of 'sources.'"[99] In the post-Shāfiʿī period, argues Muhammad Khalid Masud, three main views arose to account for the relationship between revelation and maṣlaḥa. The first position was advocated by some Shāfiʿī jurists and theologians. They claimed that something is considered a legitimate benefit (*maṣlaḥa muʿtabara*) only if it has a textual basis. Therefore, any maṣlaḥa not covered by a revealed text is considered void and invalid (*maṣlaḥa mulghāt*). The second view was largely espoused by the Ḥanafi jurists and some Shāfiʿīs. They argued that even if a *maṣlaḥa* is not textually stated, it still falls under the purview of legitimate benefits as long as it is analogous to some other established benefits. Hence, while the text is regarded as the basis of maṣlaḥa according to the first opinion, already established benefits, according to the second view, become the basis for new ones through the application of analogy. The third opinion ascribed to Mālik b. Anas maintains that unrestricted benefit (*maṣlaḥa mursala*) which has no basis in texts nor is it analogous to other established benefits is considered valid and legitimate. Masud appears to ignore a fourth opinion, attributed to Najm al-Dīn Sulaymān ibn ʿAbd al-Qawī al-Ṭūfī (d. 1316), who radically departed from the orthodox juristic outlook and argued for the precedence of rationally formulated benefits over revealed texts. Al-Ṭūfī proposed a clear-cut theory of legal interpretation ingrained in substantive rationality.[100] He "prefers to place *maṣlaḥah* above all legal sources, including the Qurʾān and the *Ḥadīth* which, according to him, cannot lead people to uniform rulings. He believes that only with this theory can human welfare be secured."[101] I regard this medieval and unique view adopted by al-Ṭūfī as a counterexample against the widely held opinion among modern Islamists that overlooking the Qurʾān and Sunna in modern legal discourse exhibits a complex of inferiority against Western hegemony and a willingness on the part of the conquered to emulate the conqueror. Al-Fāsī's critical analysis of al-Ṭūfī's view resonates well with the mainstream Islamic orthodoxy. He objects to the possibility of having a contradiction between a general text and human interests.[102] For al-Fāsī, this possibility exists only in some specific textual indicants that entail Ijtihād to remove the contradiction by evoking the general import of texts instead of preferring interests to revelation.[103] Ijtihād in al-Fāsī's legal theory refers to the intellectual effort exerted by erudite jurists to adapt Sharīʿa to changing environments. The mujtahid has to depend on three aptitudes in the process of legal inference:[104] (1) acquaintance with textually based sources of law like Qurʾān, Sunna, Consensus, and legal disagreement; (2) firm knowledge of Arabic language namely

99 Masud, *Shatibi's Philosophy of Islamic Law*, 240.

100 Felicitas Opwis, "Islamic Law and Legal Change: The Concept of Maṣlaḥa in Classical and Contemporary Islamic Legal Theory," in Amanat and Griffel, *Shari'a*, 62–82.

101 Nazli Hanum Lubis, "Al-Ṭūfī's Concept of Maṣlaḥa: A Study in Islamic Legal Theory" (Master's thesis, McGill University, 1995), ii.

102 Al-Fāsī, *Maqāṣid al-Sharīʿa al-Islāmiyya wa Makārimuhā*, 265.

103 Al-Fāsī, 265.

104 Al-Fāsī, 279.

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semantics; and (3) the ability to evaluate various evidences in order to select and employ the weightiest. Ijtihād is, therefore, functional rather than creative. Nowhere in al-Fāsī's discourse is there any clear attempt to view legal inference as an inventive effort distinct from the sources of law except for the order of advice tool mentioned earlier. Hence, new legal opinions ought to relate to old ones. Just like the higher objectives of Sharīʿa, Ijtihād has no independent existence from the sources of law. However, al-Fāsī repeatedly attempts to surpass many classical views especially in areas of human rights. To do so, he needed to revisit some principles of Islamic legal theory (*uṣūl*).

ETHICAL ASPECTS OF SHARĪʿA AND LEGAL INFERENCE

Another area of creativity in al-Fāsī's discourse on Maqāṣid is the ethical background for legal rulings. The classical theory of *uṣūl* provided only an atomistic and case-based approach to ethics in legal inference. One might assert that Muslim legal theorists have not discussed ethics as an independent theme of Islamic jurisprudence or as a general framework of legal inference. Rather, they have extensively elaborated ethical issues in the area of substantive law. For example, the Muslim is enjoined to avoid all types of fraudulent practices in transactional dealings, a ubiquitous topic in all Islamic legal compendia. Therefore, no systemic effort has been invested by classical Muslim jurists to approach ethics as part and parcel of the legal theory. Al-Fāsī begins a chapter titled "The High Moral Standards are the Criterion for Each Public Interest and the Basis for Every Legal Objective" by stating that legal objectives are subject to divergent views.[105] Hence, what is considered by a community or ideology as a benefit to be achieved may be regarded by another community or ideology as a harm to be avoided.[106] According to al-Fāsī, this state of affairs has always been behind political conflicts and military clashes.[107] To overcome this calamity, agreed upon universal criteria must be identified to account for globally legitimate objectives that ought to be attained by mankind. Al-Fāsī maintains that ethics is what humanity agrees on as the ultimate purpose for human behavior.[108] Since Islamic ethics are embedded in human beings' natural predisposition to good (*fiṭra*), what remains is that all communities should come together to achieve these moral standards and establish their laws according to them. Al-Fāsī suggests two concepts that constitute the ethical foundations for all legal obligations. The first is *al-ʿafou*, or tolerance,[109] which is an ideal ethical concept with strong legal implications. On the basis of this standard, every legal command is considered legitimate as long as it removes hardship and stresses ease. Yet al-Fāsī fails to explain how a hardship resulting from a particular legal injunction is universally assessed as such. The second is *maʿrūf*, that which is recognized by mankind as good.[110] The antonym is *munkar*, that which is abhorred by mankind as strange to human *fiṭra*. The legal implications of *maʿrūf* are substantial, for what Islam enjoins is supposed to be naturally recognized by any human being regardless of his religious affiliation or nationality.[111] Thus, al-Fāsī, widens the definition of the *mukallaf* (a person who is legally accountable under Islamic law) to include even

105 Al-Fāsī, 301.
106 Al-Fāsī, 301.
107 Al-Fāsī, 301.
108 Al-Fāsī, 302.
109 Al-Fāsī, 307.
110 Al-Fāsī, 309.
111 Al-Fāsī, 310.

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non-Muslims because they are supposed to know what is *maʿrūf* and what is *munkar*.[112] Again, al-Fāsī could not take this reasoning to its logical end. If *maʿrūf* constitutes what is known and approved by human natural disposition, then the particulars of Sharīʿa should be evaluated on the basis of this universal ethical standard. In other words, Sharīʿa laws are supposed to be subservient to what human nature prescribes as legal and ethical and what it proscribes as illegal and unethical. Al-Fāsī seems to reject this conclusion. He understands natural ethics (*al-akhlāq al-fiṭriyya*) within the parameters of what is approved or disapproved in Sharīʿa instead of understanding them in light of a universal natural disposition. Al-Fāsī agrees with Rashīd Riḍā that *maʿrūf* ought to be constrained and limited by revelation[113] and, thus, what Sharīʿa recognizes as an approved practice becomes a universal standard, a one-way material implication.

CONCLUSION

As mentioned earlier, al-Fāsī was preoccupied by issues of state building brought to the foreground in the period following the independence from the French protectorate. He was a strong advocate of a gradual Islamization of the Moroccan constitution—although with a more liberal inclination. Al-Fāsī's Islamic state is essentially distinct from the utopian, idealist, and anti-Western state envisioned by Islamic political activists of the postcolonial period, such as Egyptian Sayyid Quṭb (d. 1966) and Pakistani Abul A'la Mawdūdī (d. 1979). In the section he devotes to political sovereignty in Islam, he makes no reference to either Quṭb or Mawdūdī, whose ideas on *ḥākimiyya* (divine domination over the legislative authority) were supported by the vast majority of Muslims, especially in Egypt and Pakistan. Rather, he relies on Rashīd Riḍā and ʿAbbās Mahmoud al-ʿAqqād (d. 1964). Quṭb or Mawdūdī represent the final formulation of a modernist Islamic outlook with an implicit turn to Salafism, while Rashīd Riḍā and al-ʿAqqād are free Muslim thinkers with no clear ideological agenda. At the theoretical level, al-Fāsī agrees that God is the sole lawgiver. However, in practice, legislative authority is vested in the people who elect their representatives in a way similar to any democratic system. Because Sharīʿa laws are in line with the human *fiṭra*, the legal system and the constitution of the modern Muslim state will be compatible with the globally recognized human rights and the principles of social justice. Hence, not only are human dignity, freedom of conscience, woman's rights, and democracy protected by Sharīʿa, but they are the ultimate objectives of the Islamic state that is, therefore, prepared to cooperate with all other nations for a just global order and peaceful coexistence.

112 Johnston, "Sharīʿa as a Blueprint," 99.

113 Al-Fāsī, *Maqāṣid al-Sharīʿa al-Islāmiyya wa Makārimuhā*, 312.

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