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Islam in the Constitutions of Modern Arab States: the Case of Tunisia

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Cornerstone Series: Implications of Tunisia's new constitution on religious freedom and associated rights, governance, and national and regional stability

This Cornerstone Series invites experts, advocates, and analysts to expound on the implications of Tunisia's new constitution for citizens as well as the stability and security of the country and the region.

This summer, Tunisian president Kais Saied replaced the country's 2014 constitution with one that codifies his moves over the past year to effectively transfer most governmental power to himself.

One aspect of the new constitution in particular has alarmed Saied's critics: Article 5's citation to a core aspect of Islamic legal philosophy, the aims and purposes of the divine law, or *maqasid ash-shariah*. That article provides:

> Tunisia is part of the Islamic nation (*ummah*), and it is the obligation of the state alone to achieve, under a democratic system, the aims and purposes (*maqasid*) of Islam in preserving life, honor, wealth, religion, and freedom.

The reaction to this language was fierce. Human Rights Watch advised that "this clause can be used to justify restricting rights, such as gender discrimination, on the basis of religious teachings." Amnesty International warned of its "dangers":

> This language in writing can allow state leaders, legislators, and courts to cite "the purposes of Islam" as a basis for undermining human rights, especially when reviewing laws on gender equality or individual rights and freedoms, arguing that they are inconsistent with religious principles, [and] it may allow discrimination against other religious groups.

The Brookings Institution likewise opined that "the most surprising change in the constitution" was "the role of Islam." This new constitution, Brookings said, "is decidedly more Islamist" than the 2014 charter, and noted (accurately) that its citation of the *maqasid* "is something the actual Islamist parties in Tunisia never dared to introduce."

One secular Tunisian analyst, Mohamed-Dhia Hammami, worried that "[t]he new constitution sets the foundation of a theocratic Islamic state." He added that he had once studied *maqasid ash-shariah* in high school: "I barely remember the details. I guess it's time for me to take Islamic legal scholarship more seriously."

Some Western Christian organizations have also expressed alarm. "What should concern Tunisia's minorities, including Christians, is that the draft text makes strong references to Islam," said Michael Bosch of Open Doors, a Netherlands-based evangelical missionary and relief organization that supports persecuted Christians. "It also says that 'the state is required to achieve the purposes of Islam in preserving [people's] souls (*sic*), money, religion and liberty,'" Bosch said. "It's not clear what that 'the purposes of Islam' are or what it means and it seems that, in the end, it's up to the president to interpret this."

In partial response to the questions raised by Mssrs. Hammami and Bosch, the purpose of this essay is to explain the *maqasid ash-shariah* concept and its historical function in the context of pre-modern governance in an Islamic polity. More broadly, I will briefly address the question of what role the *maqasid ash-shariah* might play in Saied's governance of Tunisia, and what role Islam in general might play in the context of the modern nation state. I will also discuss, in a more limited fashion, what sort of political ruler Kais Saied might turn out to be, why he thought it important to reference the *maqasid ash-shariah* concept in his new constitution, and what good or harm he might actually do with its inclusion.

The Nature and Development of the Theory of Maqasid ash-Shariah

The theory of *maqasid ash-shariah* constitutes a foundational aspect of Sunni Islamic legal philosophy. It describes the goals or purposes of God, in His capacity as Lawgiver, in promulgating the sacred law for His creation. In this view, every divinely legislated law is understood to have a purpose, a good or goods at which it aims. The purpose of the study of *maqasid ash-shariah* is to articulate those aims, which is to say, to articulate the goods which God intends for his creation.

This is not simply an academic exercise: recourse to the *maqasid* for Islamic jurists provides assistance in deriving rulings on novel issues that are not clearly addressed by revelation, to ensure that those rulings are consonant with God's intent. It also functions as a guide in measuring the suitability of positive law, as well as measuring the degree of justice achieved in the application of revealed law in a given situation.

The *maqasid* theory was first clearly articulated in its widely known form by Abu Hamid al-Ghazali (d. 1111). He wrote:

> As for the public good (*maslaha*), in its origin it is an expression meaning to bring about benefit or repel harm, but we do not mean that (in this general sense): for bringing about benefit and repelling harm are the (general) aims of (all) people, and the rectification of the people (consists in) achieving these purposes.
>
> Rather, by *maslaha* we mean (in the technical sense of) the preservation of the intent of the law. The intentions (*maqasid*) of the law for the people are five: to preserve for them their religion, their lives, their intellects, their progeny, and their wealth, such that everything that encompasses the preservation of these five principles is a *maslaha*, and everything that detracts from these principles is a harm (*mafsada*), and repelling them is therefore a *maslaha*.

These *maqasid* are not, generally speaking, explicitly referenced in the revealed texts; rather, they are identified through inductive reasoning from those texts. The late Tunisian Islamic scholar Muhammad Al-Tahir Ibn Ashur (d. 1973) explained that the primary means of identifying the *maqasid*

> is to conduct an exhaustive examination of the provisions and commands, whose effective causes are known. This study will, in fact, result in an inductive inference of the rationales affirmed by the methods of identification and confirmation of the *ratio legis*. It is by the induction of rationales that we acquire a ready knowledge of *maqasid ash-shariah*. When we conduct an inductive survey of numerous causes, which share the quality of being defining elements for one underlying wisdom (*hikmah*), we can infer from them one specific objective and ascertain that it is an intended purpose of the sacred law, just as we draw one universal concept from the examination of particulars by applying the rules of induction as established in logic.

In the view of classical Islamic jurists, the *maqasid ash-shariah* are an aspect of general, originally unwritten laws that are universally recognized by mankind. Thus, the eminent jurist Izz ibn Abdus-Salaam (d. 1282) wrote:

> Most of the goods of this world and its harms are know by reason, and this constitutes most of the divine law, since it is obvious to the reasonable person, antecedent to the revelation of divine law, that it is praiseworthy and good to secure pure benefit, and to ward off pure harm from the life of mankind…
>
> The wise men (among all of humanity) agreed on that. The same applies to laws on the prohibition of (harming) life, goods, money and honor, and on bringing about ever more virtuous words and deeds. And to the extent that they differed in some of these

> matters, then it is mostly due to disagreement in how (these goods) are to be weighed and balanced…

Islamic legal philosophy therefore regards the *maqasid ash-shariah* not as ordinances but as part of the essence of law itself. Hence, positive law must by definition be an instantiation of the *maqasid*. Positive law that is contrary to the nature of law itself is not in fact not a proper law, in the same way and for the same reason that one who denies that religion, life, intellect, wealth, progeny and wealth are goods worthy of preservation is not a reasonable person.

For Ibn Rushd (d. 1198), known to medieval Christendom as Averroes, the written law, which includes both laws specified by mankind as well as specific commands in revelation, represents the bare minimum of duty required of the individual by the polity, and its purpose in part is to habituate or attune him or her to the unwritten laws. He explained how this higher, unwritten law (which would include the *maqasid*) is to be taken into account by both legislators and judges. As for the former:

> It is not possible for anyone to lay down universal, general laws accounting for all people in all times and in all places, for the change in what is beneficial and what is harmful is limitless. The goal of the astute legislator in laying down laws, then, is to lay down laws that will apply to as many people as possible in as many times and places as possible. The more a legislator strives to lay down a law that is beneficial for a longer period of time and for a larger number of people, the better the law is. And that being the case, then it necessarily follows that positive laws will not be true always and forever, that is, for every person and in every time. This is why addition and subtraction (from those laws) is sometimes necessary.

As for the judiciary, Ibn Rushd explains that judges must harmonize the positive law with unwritten law–which, again, includes the *maqasid*–if they are found to contradict:

> The general law is that by which the judge acts according to the benefit of one person to another and from one time to another. And the judge is in the position of the one who purifies silver from dross: thus it is obligatory for the virtuous judge not to restrict himself to the written law only, but rather to employ the two laws together until the truth is purified for him in the matter, and the specific ruling is confirmed in the case before him in which he is judging. Thus, when he is judging in a matter, and the written law contradicts the unwritten law, or two (written) laws conflict, it is obligatory on the judge to sometimes employ the ancient law, by which I mean the unwritten law, in one place, and to dispense with it in another place, and this is likewise the case with the written law. So in this manner, the apparent contradiction between them falls away, and their combination is rendered sound.

In some cases, notes Ibn Rushd, a judge's literal application of a written law would frustrate the purpose of the law, and of law itself. Hence, he explains, justice consists in forgoing the prescribed Quranic penalty (*hadd*) of amputation of the hand in the case of a man in dire straits who steals food. "Unwritten law demands that an act like this one should be forgiven," he states. Ibn Rushd is likely alluding here to the ruling of Umar ibn al-Khattab, the companion of the Prophet and the second caliph of Islam, that the hand of the thief is not to be cut off during a famine.

Islamic jurists understood the *maqasid* as a legal restraint on the depredations of rulers. Hence, Ibn Khaldun (d. 1406), who was born and lived most of his life in what is now Tunisia, wrote in his celebrated *Muqaddimah* (Introduction to History) that "injustice brings about the ruin of civilization," whereas the *maqasid ash-shariah* preserve it:

> The proven fact is that civilization inevitably suffers losses through injustice and hostile acts…
>
> Injustice should not be understood to imply only the confiscation of money or other property from the owners, without compensation and without cause. It is commonly understood in that way, but it is something more general than that...It is the dynasty that suffers from all these acts, inasmuch as civilization, which is the substance of the dynasty, is ruined when people have lost all incentive.
>
> This is what the Prophet actually had in mind when he forbade injustice. He meant the resulting destruction and ruin of civilization, which ultimately permits the eradication of the human species. This is what the religious law quite generally and wisely aims at in emphasizing five things as necessary: the preservation of religion, life, the intellect, progeny, and wealth.
>
> Since, as we have seen, injustice calls for the eradication of the species by leading to the ruin of civilization, it contains in itself a good reason for being prohibited. Consequently, it is important that it be forbidden.

The Pre-modern Relationship Between Islam and Political Authority

Prior to the modern period, Islam was neither merely a private affair nor a political ideology in the modern sense. Rather, Islam was reality itself. Accordingly, everything in private and public life was affected by it or viewed in some way through its lens. There were of course aspects of life to which Islam was less directly relevant than other aspects, but even answering the call of nature involves certain prophetically-prescribed etiquettes (most ultimately bearing, not coincidentally, on

cleanliness). The Prophet explained that even the mundane act of sexual intercourse with one's wife garners divine reward, because one satisfies one's desires in a lawful rather than unlawful manner.

At the heart of Islam's understanding of the role of "the children of Adam" in this life is stewardship over the earth and its cultivation. It is natural, then, that matters relating to public order and governance would be understood in reference to Islam. Abul Hasan al-Mawardi (d. 1058) wrote in *Ahkam As-Sultaniyyah*, his seminal work of political science and administration, that the ruler–and by extension, the government–is responsible for ten matters:

1. He must guard the religion of Islam as it was established in its original form…
2. He must execute the legal judgements between two contestants and bring to an end any dispute between two litigants so that equity prevails…
3. He must protect the territory of Islam and defend the sanctuaries so that people may earn their sustenance and journey safe from any threat to their persons or belongings;
4. He must establish the divinely-prescribed punishments in order to protect what God, may He be exalted, has made inviolable from being violated and prevent the rights of His slaves (i.e., human beings) from being abused;
5. He must fortify the border posts against attack…
6. He must perform jihad against those who resist Islam after having been called to it until they submit or accept to live as a protected *dhimmi*-community so that God's rights, may He be exalted, "be made uppermost above all [other] religions" (Qur'an 9: 33);
7. He must collect the *fay* and *zakah* taxes from those on whom the *shari'ah* and legal judgment has made it an obligation to pay, and this without fear or oppression;
8. He must apportion the stipends and whatever is due from the treasury without wastefulness or meanness and make payments punctually, neither before their time nor after it;
9. He must ensure the employment of trustworthy persons and the appointment of worthy counselors…
10. He must personally take over the surveillance of affairs and the scrutiny of circumstances such that he may execute the policy of the *ummah* and defend the nation without over-reliance on delegation of authority…

The understanding of the functions of government authorities in the Muslim polity were thus clearly intertwined with the Islamic worldview. Those functions naturally included ensuring Islam's primacy insofar it was the source of order. Note for example point 4, which explains that the ruler must "establish the divinely-prescribed punishments in order to protect what God has made inviolable from being violated," i.e., to preserve the *maqasid ash-shariah*. While the goods represented by the *maqasid* are, as noted, universally accessible to reason and human nature, to the extent that human

beings are imperfect in intellect and perception, revelation is considered to be necessary to specify some rules that secure those goods.

As to point 6, given that premodern Muslims understood Islam to represent God's intended order on the earth, they likewise understood it to be their obligation to establish that order. Truth had to be elevated and falsehood had to be brought low, and thus truth had to be accompanied by strength if it were to be elevated to its proper position in the earthly kingdom. Quranic commentators illustrated this aiding truth with strength with the verse describing God's appointment of Saul as the king of Israel: "Behold, God has exalted him above you, and endowed him abundantly with knowledge (of the Torah) and strength." And they pointed to this verse:

> Indeed, We sent our prophets with evidence of truth; and through them We bestowed revelation from on high, and a balance (by which to weigh right and wrong), so that justice might be established for mankind; and We bestowed from on high iron, in which there is awesome power and benefit for man: so that God might make known those who would stand up for Him and His Prophet…

Some jurists held that it was a standing obligation for the Muslim ruler to wage war to extend the order of truth across the face of the earth to the extent that they could, and this is reflected in Mawardi's statement above. Others held that it was permissible to maintain an indefinite truce with neighboring peoples. This difference of opinion was due to disagreement over how to reconcile two apparently contradictory Quranic verses, one stating:

> Fight against those who have been given the Scripture who believe not in God nor the Last Day, and forbid not that which God has forbidden by His messenger, and follow not the religion of truth, until they pay the tribute readily, being brought low.

and another stating: "But if the enemy incline towards peace, then you too incline towards peace, and trust in God: for He is One that hears and knows (all things)." Those who believed offensive jihad was a standing obligation on Muslims understood the first verse to abrogate the second, and those who held that indefinite truce was an option held that the second verse qualified the first.

Either way, the approach towards Christians and Jews (the People of the Book) under Muslim rule in the classical period was that they were allowed to remain upon their own religion, so long as they paid tribute to the Muslim ruler and were subject to other symbols of the inferiority of their religion with respect to Islam. This second-class status was considered part of the natural order of things, in that truth and its people should naturally be exalted over falsehood and its people. However, the People of the Book were deemed to possess a measure of the truth, which bore relevance to their place in the polity. Ibn Qayyim al-Jawziyya (d. 1350), a jurist of the Hanbali school, said:

> And God the Most High has ordained that the People of the Book abide among us. For verily, along with disbelief, they testify to the origin of prophecy, and monotheism, and the (the reality of) the Day of Judgment, Paradise and the Fire.

Many of the functions of government identified by Mawardi and others were not explicitly religious, insofar as they involved spheres of activity common to the human condition. In this connection, Ibn Khaldun explains that any government must be based on some political norms if it is to succeed in establishing its authority. He categorizes political authority in human societies into three types: natural, rational, and religious. Natural authority is primal and based on sheer power and whim, and tends to injustice. Rational authority is based on reason, and though it may succeed in securing the worldly good of society, it will fail to secure its good in the hereafter. Religious authority, which in the Muslim case is the caliphate (*khilafa*), is based on revelation, and it will secure the good of the people in this life as well as the hereafter: their ultimate destination. In this passage, worth quoting at length, one may also infer how the *maqasid ash-shariah*, that is, the goods God intends for mankind through the revealed law, are related both to happiness in this life (order, justice) as well as to the *telos* of the human being: happiness in the hereafter.

> [T]he purpose of human beings is not only their worldly welfare. This entire world is trifling and futile. It ends in death and annihilation. God says: "Do you think that we created you triflingly?"
>
> The purpose (of human beings) is their religion, which leads them to happiness in the other world, "the path of God to whom belongs that which is in heaven and that which is on earth."
>
> Therefore, religious laws have as their purpose to cause (human beings) to follow such a course in all their dealings with God and their fellow men. This (situation) also applies to royal authority, which is natural in human social organization. (The religious laws) guide it along the path of religion, so that everything will be under the supervision of the religious law. Anything (done by royal authority) that is dictated by force, superiority, or the free play of the power of wrathfulness, is tyranny and injustice and considered reprehensible by (the religious law), as it is also considered reprehensible by the requirements of political wisdom.
>
> Likewise, anything (done by royal authority) that is dictated (merely) by considerations of policy or political decisions without supervision of the religious law is also reprehensible, because it is vision lacking the divine light…
>
> Political laws consider only worldly interests…(On the other hand,) the intention the Lawgiver has concerning mankind is their welfare in the other world. Therefore, it is

> necessary, as required by the religious law, to cause the mass to act in accordance with the religious laws in all their affairs touching both this world and the other world. The authority to do so was possessed by the representatives of the religious law, the prophets. (Later on, it was possessed) by those who took their place, the caliphs…
>
> (Thus, to exercise) the caliphate means to cause the masses to act as required by religious insight into their interests in the other world as well as in this world. (The worldly interests) have bearing upon (the interests in the other world), since according to the Lawgiver, all worldly conditions are to be considered in their relation to their value for the other world. Thus, (the caliphate) in reality substitutes for the Lawgiver (the Prophet), inasmuch as it serves, like him, to protect the religion and to exercise (political) leadership of the world.

However, Ibn Khaldun explains that, while governance must advance and be in accord with Islam, Islamic scholars should not–and by his time, did not–have any substantive role in governance:

> They do not have executive authority to make decisions. If they participate in (the making of decisions), it is just as a matter of form, with no reality behind it. Executive authority in reality belongs to those who have the power to enforce (their decisions). Those who don't have the power (to enforce their decisions) have no executive authority. They are merely used as authorities on religious law, and their legal decisions (fatwa) are accepted…
>
> Some scholars think that this is not right, and that rulers who keep jurists and judges out of (their) councils act wrongly…However, it should be known that it is not as (such scholars) think. Royal and governmental authority is conditioned by the natural requirements of civilization; were such not the case, it would have nothing to do with politics. The nature of civilization does not require that (jurists and scholars) have any share (in authority)...Their advice as derived from their knowledge of the religious laws (is taken into consideration) only insofar as they are consulted for legal decisions (*fatwa*). Advice on political matters is not their province...

Having discussed the classical understanding of the *maqasid ash-shariah* and governance in Islam, we will turn to what significance any of this might have for Tunisia.

Islam in the Legal and Political Order of Modern Tunisia

The reader may have noticed something interesting about Kais Saied's new constitution: it sets forth the *maqasid ash-shariah* as positive law, whereas classically they were considered unwritten, higher law. This reflects the trend towards codification of Islamic law that was part of the Ottoman Empire's

reform efforts, and indeed is a key feature of modernity. The process of codification, and of the transition from the classical period to modernity, proceeded as follows.

At the time that Ibn Khaldun wrote the passages in the previous section, the land of his birth was governed by the Hafsid dynasty. Within a little over a century, it would fall under the varying degrees of suzerainty of the Ottoman Empire.

By the 19th Century, the Ottoman Empire had weakened substantially and Tunisia's nominal rulers, the Beys, came under increasing foreign domination. In 1857, under pressure from foreign governments, the Bey adopted the Pacte Fondamental (Arabic: *'Ahd al-Aman*), a written charter that incorporated the Ottoman Empire's legal reforms and abolished legal pluralism for non-Muslim communities as well as the *jizya*, the poll tax paid by Christians and Jews.

In 1861, these reforms were formalized in a written constitution. The constitution aimed to lay the foundations of a modern nation state by not only doing away with the autonomy of minority religious groups, but also the autonomy of provincial and tribal leaders. This elimination by the state of intermediate levels of hierarchy is a key element of modernity. While an ensuing tribal rebellion against this move led the Bey to suspend the constitution in 1864, the Tunisian nationalist movement had been set in motion.

It is interesting to note the ways in which the 1857 pact and the 1861 constitution differ, because such an analysis sheds light on the transitional phase between pre-modernity and modernity and the path to the nation state. Far more can and should be said about this than space allows. Suffice to say that the pact is an elegant political treatise written in rhyming prose in classical Arabic, and reveals a classical Islamic worldview and epistemology. Virtually every line references God. The principles grounding the treatise do not spring from the will and mind of the Bey, the state, or the people, but rather are eternal, part of God's patterns of creation for mankind, known by reason or revelation. The Bey explicitly seeks to emulate the policies of non-Muslims governments in guaranteeing the security of their people–a good, he observes with dignified humility, he himself has not been able to secure for the people of Tunisia; however, he observes, the good of such policies is known to reason and innate human nature.

The first article (or principle) the pact sets forth is "the guarantee of safety for all of our subjects and residents of our districts of different religions, tongues and colors in their honorable bodies, sacrosanct wealth and inviolable honor." This is, of course, a reference to and partial enumeration of the *maqasid ash-shariah*.

As for the 1861 constitution, its Arabic is technical and bureaucratic. It codified the position of hereditary monarchy, but it also stressed that the monarch could be removed from his position if he failed to obey the law. It provided that the ruler was responsible for maintaining Tunisia's "territorial integrity," a key feature of the nation state, and something qualitatively different from Mawardi's

"fortification of the border posts" and "protecting the territory of Islam." The constitution established a supreme council that had important checks over the monarch. And it provided that non-Muslim citizens of Tunisia would not lose their nationality or be subject to different jurisdictions if they changed their religion, "the creatures of God having to be equal before the law, without distinction, either because of their origin, their religion or their rank." This latter point was aimed at the capitulations, the Ottoman arrangement whereby foreign powers had jurisdiction over Christian and Jewish residents. There are only three mentions of God in the 1861 constitution, once in the passage just cited and twice in the context of oaths.

In 1877, the Ottoman Empire adopted the Majellah (Turkish: *mecella*) as a component of its civil code. This was an attempt to boil down the *sharia* into a European-style code. The Majellah had little immediate influence on legal developments in Tunisia (it would later) but it marks a major shift in the nature of law in the Islamic world. Judge C.A. Hooper, a British legal scholar who translated the Majellah into English in 1936, explained its origins this way:

> Certain of (Turkey's) statesmen had been to France and had conceived a genuine admiration for the products of the French mind. It was therefore inevitable that when the European powers insisted with the Porte upon the necessity for new laws, Turkey, seeking to give what satisfaction she could, should turn to French legislative models. This process of borrowing from France was inaugurated for the first time on a large scale by the promulgation of a Charter of Reform in 1839…In drafting these new laws, the Turkish legislator–there was then no Parliament in Turkey and consequently the Sultan was the supreme legislative power–thought that time and trouble could be saved by borrowing almost en bloc from France the principal legal codes of that country. It was at this time also that she codified the Mohammedan Law relating to obligations into a Civil Code.

While direct French influence was a major factor in the trend towards codification of Islamic law, Arab thinkers such as Rashid Rida and Abd al-Razzaq Al-Sanhuri (themselves heavily influenced by the French legal system) paved the way for further legal reform by advancing theories about how the *shariah* could be reconceived in a modern nation state. In Tunisia, Khayr al-Din al-Tunisi became Prime Minister of Tunisia in 1873 and further advanced modern legal reform.

In 1881, the French seized control of Tunisia, establishing it as a protectorate, although it was still nominally under Ottoman sovereignty, and set about reforming the law. Under the protectorate, *shariah* courts retained jurisdiction over matters of family law but Islam became steadily less relevant in the legal context as French law gained influence, as in 1885 when the Tunisian Code Foncier, based on French and Australian law, was adopted, removing property from the jurisdiction of Islamic courts.

In 1896 the French established the Commission for the Codification of Tunisian Laws and David Santillana, a Tunisian-born Jew of Spanish origin, was chosen to preside over the commission along with four French legal scholars. To produce the code, which was promulgated in 1906, the commission synthesized several sources of law: the French, German, and Italian civil codes, Louisiana's civil code, the law of the Maliki and Hanafi schools of Islamic jurisprudence, and the Ottoman Majellah. Although the commission drew on Islamic sources, particularly its legal axioms, and attempted to render the resulting code harmonious with them when it could, its promulgation nevertheless marked yet another step in the passing away of premodern Islamic order. It remains in effect today.

At this juncture, we may note that civil codes of Libya, Syria, Egypt, and Algeria all state in their first article that that courts may adjudicate matters in accordance with the principles of Islamic law, while Tunisia's code does not.

In 1898 the French administration decreed that vast tracts of land owned by religious trusts (awqaf or habous) had to be handed over annually to the Protectorate. The awqaf properties, which constituted about a third of the land in Tunisia, funded madrasas, an Islamic university, hospitals, and other institutions. This move weakened, but did not destroy, the waqf system.

To compress the timeline of developments further, Tunisia gained independence from France in 1956 under the leadership of nationalist leader Habib Bourguiba. He immediately finished the job begun by the French colonizers and abolished the awqaf system in the name of progress and efficiency, after which he abolished shariah and rabbinical courts along with the hereditary monarchy of the beys. In 1957 he instituted the Code of Personal Status, which outlawed polygamy and made other sweeping reforms to Islamic family law. In 1959 Bourguiba promulgated a constitution. Its opening read:

> We, the representatives of the Tunisian people, meeting as members of the Constituent National Assembly, proclaim the will of our people…To consolidate national unity and remain faithful to the human values that constitute the common heritage of the peoples attached to human dignity, justice and liberty and who are striving for peace, progress and free cooperation among nations; to remain faithful to the teachings of Islam, to the unity of the Great Maghreb, to its membership of the Arab community, and to cooperation with the peoples who struggle to achieve justice and liberty; to establish a democracy founded on the sovereignty of the people…

Article 1 of the 1959 constitution declares that Tunisia's state religion is Islam, and Article 38 declares that the president must be a Muslim. Article 3 states that "sovereignty belongs to the Tunisian People." Also of relevance to our study is Article 5, which provides that Tunisia

> shall be founded upon the principles of the rule of law and pluralism and shall strive to promote human dignity and to develop the human personality. The State and society shall strive to entrench the values of solidarity, mutual assistance and tolerance among individuals, social categories and generations. The Republic of Tunisia shall guarantee the inviolability of the human person and freedom of conscience, and defend the free practice of religious beliefs, provided this does not disturb public order.

During his reign, Bourguiba aggressively promoted secularism, famously giving a "fatwa" that people should not fast during Ramadan because it supposedly held back the nation's progress. Ibn Ashur just as famously declared on state television, "Bourguiba has lied." At this point the reader might wonder what meaning the constitution's pledge to "remain faithful to the teachings of Islam" had.

In 2014, following the Arab Spring and the overthrow of Bourguiba's successor, Tunisia adopted a new constitution. Article 1 again states that Islam is the state religion. Article 2 provides that the state is based on "the will of the people." Article 3 drives this point home with the statement that "the people are sovereign and the source of authority." Article 6 adds that "the state is the guardian of religion" and that it "undertakes to disseminate the values of moderation and tolerance and the protection of the sacred, and the prohibition of all violations thereof."

In 2018, the Tunisian cabinet abolished Islamic inheritance law on the grounds that it was unfair to women. Islamic scholars objected that this violated God's law, but the then-president declared that this move was based on Article 2 of the Tunisian constitution provision that the state is based on the "will of the people."

What one observes, then, is that the process of legal reform in modern Tunisia has involved the steady diminution of Islam's practical relevance to law and governance, while it continues to be mentioned by name in successive constitutions.

Islamic Law in the Modern Nation State

First, it is critical to note that today, and indeed by the 1861 constitution, the idea of law had changed from that reflected in Ibn Khaldun's worldview, or for that matter, from the 1857 pact. In the old order, law was an eternal, divinely revealed reality, and positive law was merely an instantiation of that higher law, a law to which it had to conform if it was to be legitimate. Now, in the logic of the modern nation state, law is what the state (often operating in the name of "the people") said it was. This difference reflected between the 1857 and 1861 constitutions is similar to the difference between the American Declaration of Independence of 1776 and the French Declaration of the Rights of Man of 1789. The former recognizes the source of the law as the Creator God, while the latter proclaims that "the principle of all sovereignty resides essentially in the

nation" and that "law is an expression of the general will." The former specifies and instantiates the higher law; the latter brings the law into existence. With modernity, the state has replaced God as the source of order.

Hence, the declarations of the 1959 and 2014 constitutions that Islam is the state religion of Tunisia do not in fact reflect the political order's orientation toward the divine. In the modern nation state, religion does not reflect reality itself; it does not describe a relationship of love and fear, of duties and rights, between mankind and the Lord of creation, with implications for human order. Rather, religion is one component of national identity, and hence the public function of religion in the modern nation state, particularly in the continental version, is to mark its bearer as a full member (or not a full member) of the nation, and therefore the degree to which they are a citizen of the state. The function of a declaration of a "state religion," then, is to set forth one of the components of nationhood. Hence, the constitutions of militantly secular states such as Ataturk's Turkey or Bourguiba's Tunisia declared Islam to be the state religion, to secular and nationalist effect.

Similarly, the reference in the civil codes of secular states such as Algeria and Egypt to Islam as "the source of legislation" is itself a secular and secularizing development. The *shariah* is now positive law promulgated by the people (or not promulgated, as per its will) through its ostensible representatives, compiled in a civil law-style code, and adjudicated by secular judges completely lacking in the legal scholarship that, in the classical period, was part of the training of Islamic law judges.

Although as we have seen, the civil codes of many modern states in the Muslim world drew on Islamic law, the first modern state to explicitly list Islam as a source of legislation was Egypt when it added this provision to Article 2 of its constitution in 1970. This was as a result of the secular state's attempt to placate Islamists.

The phenomenon of Islamism arose as a corollary to modernity. Heavily influenced by the modernist thought of Rashid Rida, who thought that Islam could be revived through the vehicle of the modern state, Islamism accepted the fundamental premises of the modern political project while seeking to "Islamize" it. Hence:

> The adoption of Western governmental structures by Arab states like Egypt and corresponding acceptance of this development by Egyptian Islamists affected subsequent Islamist political demands, which increasingly came to be couched in "constitutionalist" terms. As majority Muslim states in the Arab world moved to a European-style legal system, they often adopted formal, written constitutional documents. As constitutionalism began to pervade legal thinking in the Muslim world, Islamist groups began to express their demands in Islamic terms. They sought to guarantee a role for Islamic law in the state by demanding that constitutional language

> be adopted which required state law to be consistent with Islamic law. The demand for constitutionalization of Islamic law was particularly powerful in Egypt.

Given Egypt's overwhelmingly secular orientation, and given that the Islamist project of Islamizing modernity is itself contradictory, one might have predicted that the amendment of Article 2 would have little effect, or at least not the effect that Islamists hoped for. As it happens, the Supreme Constitutional Court of Egypt has found many creative ways of ensuring that the provision is not a serious obstacle to the secular, liberal, and often arbitrary, agenda of its ruling party.

The fact is that the Islamist project of using the modern state as a vehicle for reconstituting the Islamic order is doomed. The modern state by its very nature is intractably at odds with the classical Islamic worldview. Moreover, paradoxically, the process of the creation of the modern state, both through colonization or indigenous reforms, largely wiped out the society, culture, and indeed civilization that created the conditions for the existence of a class of people, the *ulema* and *awliyaa*, with the intellectual and spiritual resources to even think about how Islam might rise from the ruins of its civilizational collapse. (Indeed, Ibn Ashur was one of the few Islamic scholars of the contemporary era matching this description.)

Islamists, going back to Rida and his teacher Muhammad Abduh, do deserve credit for at least thinking about what an Islamic revival might look like in the contemporary era. It is probably the case that prudent and democratic (for want of a better word) Islamists, such as Tunisia's Ennahda Party, would do more good than harm, if they actually managed to remain in positions of authority. On the other hand, authoritarian, arbitrary, or foolish Islamists will tend to cause more harm than good. But in the nature of the case, it is evident that little of meaning can come from the Islamist project because, even if they wanted to, they could do little to change the nature of the inherently secular, totalitarian and totalizing nation states of the Islamic world, and particularly of the Arab world. The "Islamic state" is thus a chimera.

Kais Saied and the *Maqasid ash-Shariah*

With this background, we now venture to comment on Kais Saied's new constitution.

First, we may observe that the theory of *maqasid ash-shariah* is not an inherently "Islamist" formula. Rather, it is not only a core aspect of Islamic legal theory, it also describes the reality of law itself; that is to say, the function of law itself is to protect religion, life, property, and so on. Any law which detracts from one or all of these goods fails as a law precisely to the extent that it detracts from them. Indeed, Tunisia's constitutions and civil code have all explicitly or implicitly referenced these goods. And of course they are goods because they are constituents of the universal meaning of law, not because they are referenced in a code or constitution promulgated by human beings.

It is worth mentioning here that the theory of *maqasid ash-shariah* has become widely associated today with the theoretical attempt by liberal Islamists to give authentic effect to the *shariah* while effectively abrogating several aspects of it that do not seem to fit in modernity, such as amputating the hand of the thief. As Ibn Rushd mentioned in the passage quoted above, the purpose of the Lawgiver is undermined when this punishment is applied to a poor person seeking food. On this rationale, Tariq Ramadan has called for a moratorium on the death penalty. Others have called for a moratorium on the punishment of death for apostasy, on the grounds that it undermines the original aim of this provision (protecting the religion) because, in our day, such a penalty actually causes people to leave Islam. Without expressing an opinion on whether this legal reasoning is justifiable, the theory of *maqasid ash-shariah* for liberal Islamists is a means of disallowing the literal application of *shariah* provisions that seem problematic today on the grounds that they violate the spirit of the law under current conditions.

Second, we may observe that whether or not Tunisia's constitution mentions Islam as a state religion, or Islam as the source of legislation, or the *maqasid ash-shariah* as an aim of the state, likely will have zero "Islamizing" effect, or indeed any effect at all, on how Kais Saied governs. That is because, based on the examples of other states, such references do not have the purpose of orienting the polity towards Islam, even if such were possible in the context of the modern state. Rather, they have the secular purpose of placating Islamists, or of symbolizing the characteristics that make up full members of the nation. It is true, as Human Rights Watch alleges, that the *maqasid* language might be used to justify abuses. But it is a trivial observation, since virtually any legal language can serve as a pretext for abuse, as Middle Eastern governments are well aware.

To be sure, one might point to Pakistan, Nigeria, or Indonesia, where Islamists have succeeded in legislating positive laws purporting to codify the *shariah*, and where such laws have often in multifarious ways resulted in direct and indirect harm (though not always without good effects as well). The situations in the Arab world, however, are quite different from those contexts.

In sum, whether Kais Saied turns out to be a just and good ruler of Tunisia certainly has nothing to do with the brief reference in the constitution to the *maqasid ash-shariah*. He probably included it as a means of disarming potential Islamist opponents or coopting their message, and certainly did not include it because he intends it to have any practical effect; and given its excision from its original context and transplantation to inhospitable soil, it is hardly conceivable that it could.

And yet, of course, if Saied actually does govern in a way that does not harm religion, life, property, and so on, then this will be a good thing. Unfortunately, given Saied's behavior towards his political opponents, one can safely assume that he is cast in the mold of the secular Arab strongmen who have plagued the region in recent decades. Having suppressed his political rivals and neutered institutions that might have opposed his will, the new constitution's reference to maqasid ash-shariah will neither meaningfully facilitate nor stand in the way of Saied being whatever sort of ruler

he chooses to be.

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