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A Postcolonial Critique of Modernist Approaches to *Maqāṣid al-Shari`ah*

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Abstract

The Adoption of the Maqāṣid al-Sharī`ah, (Purposive Objective of the Law) a principle orientated approach to Islamic law, is increasing being presented as a panacea to relieve the tension arising from the intersection of classic Islamic law, derived in a historical context of clearly delineated Islam vs ‘other’ socio-political constructs, with contemporary globalization and forced co-existence of Muslims with ‘other’ communities. This dissertation argues that contemporary Maqāṣid reform scholars are steering a course, through the re-construction of the Maqāṣid discourse that is conducive to the agenda of ‘Empire’, an ‘entity’ constitutive of like-minded transnational corporations motivated by the desire for increased excessive capital accumulation, regardless of the consequences. Contemporary Maqāṣid scholars fall victim to ‘Empire’ as demonstrated by this dissertation in their inclination towards satisfying contemporary human rights discourse. Postcolonial analysis uncovers the modus operandi of ‘Empire’, especially with regard to its annexation of human rights. Postcolonial insights moreover sounds a warning to Maqāṣid scholars that they may be perpetrating similar errors which colonialist was guilty of, and on which Orientalism was founded namely a universalist and essentialist perspective. The dissertation warns that Maqāṣid scholars should be wary of hegemony of Muslim cultures through the inadvertent incorporation of hegemonic values via the Maqāṣid discourse, and likewise should not adopt universalist and essentialist perspectives which promotes hegemony towards different cultures.
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Introduction

**A Postcolonial Critique of the *Maqāṣid al-Sharī`ah***

Globalisation and the universalization of the human rights discourse have increased the critical focus on all traditional/customary legal systems including Islamic law. Changes in Islamic law are presented as necessary given that many instances of substantive Islamic law are in tension with the 1948 Universal Declaration of Human Rights (UDHR). These tensions occur especially in areas related to human freedoms such as the freedom of speech, association and beliefs. In this regard the question of apostasy is particularly problematic as Muslims do not have the freedom to convert to another religion yet converts to Islam are readily accepted (Johnston 2004). The question of equality is also one of concern, particularly when foreigners are not being treated as equals in an Islamic state (Alwani 2003). With regard to gender equality, the freedoms of women are often seen to be curtailed by Islamic law (Hashim 1999). The idea of shifting the focus to *Maqāṣid al-Sharī`ah* (objectives of Islamic law/ratio legis) rather than its systemised application in order to reduce or eliminate this tension has been employed by a number of contemporary Muslim reform scholars, the most prominent among them being Hashim Kamali (1944-), Tariq Ramadan (1962-) Jasser Auda (1966-), Muhammad Umer Chapra (1933-), and Gamal Eldin Attia (1928-).

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1 The Universal Declaration of Human Rights is the product of the Paris 1948 United Nations General Assembly after World War 2 and creation of various constitutions and legal systems of the world (178). Its preamble is as follows: The General Assembly proclaims this Universal Declaration of Human rights as a common standard of achievement for all peoples and all nations to the end that every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedom and by progressive measures, national and international to secure their universal and effective recognition and observance, both among the peoples of Members States themselves and among the peoples of territories under their jurisdiction (188). Article 2 provides further insight of the kind of freedom the UDHR aims to achieve for its member states: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of political, jurisdictional or international status of the country or territory to which a person belongs. Whether it be independent, trust, non-self-governing or under any limitation of sovereignty.”

2 *Maqāṣid al-Sharī`ah* (sing. *maqṣad al-sharī`ah*) are principles derived by the early Islamic jurists to discern the objectives of the law. In doing so, they believed that they could then apply this logic to all other legal situations. The following five were initially identified as the key objectives of *Maqāṣid al-Sharī`ah*: 1. The preservation of life (*nafs*); 2. The preservation of religion (*din*); 3. The preservation of intellect (*`aql*); 4. The preservation of property (*māl*); and 5. The preservation of person lineage (*nasl*) (Afridi 2016:283).

3 Bio-notes on these scholars are provided later when their ideas are discussed. In the case of contemporary scholars, I have retained the way in which their names appear in their publications while with the classical scholars and with Arabic terms I have observed the transliteration rules of the *Chicago Manual of Style* (2017).
Maqāṣid is a principle orientated perspective of Islamic law. The latter differs from the initial approach to legislation which followed the letter of the revealed texts, namely the Qur’an and Sunnah (Muḥammad’s behavioural precedent) regarded as the primary sources. The most frequent translation of Maqāṣid al-Sharī`ah used by contemporary scholars is ‘the objectives of Islamic Law’. Hashim Kamali refers to it as ‘the goals and objectives of Sharī`ah’ (2008:515), as does others such as Muhammad Umer Chapra (2008:3) and Jasser Auda (2008:2). Classical scholars such as Abū al-Ma’āli al-Juwaynī (d.1085), Abū Ḥāmid Muḥammad ibn Muḥammad al-Ghazālī (d. 1111) and Abu Ḥṣaq al-Shāṭibī (d.1388) had previously argued there were higher purposes which underlie Islamic law. They identified five such purposes, viz. the preservation of life (nafs), religion (dīn), intellect (‘aql), property (māl) and lineage (nasl). While Maqāṣid is not a new concept, contemporary writers frequently acknowledge the work of these classical scholars. Some of the classical scholars whom Kamali (2008:8) recognizes as more prominent exponents of Maqāṣid are, amongst others, ʿAbd Allah al-Tirmidhī al-Hakīm (d. 932), Imam al-Ḥaramayn al-Juwaynī (d.1085)⁴ Abu Ḥāmid al-Ghazālī (d.1111) and Shāṭibī (d.790).⁵ Kamali and other contemporary scholars such as Gamal Eldin Attia (2007: 5), Ahmad Kazemi-Moussavi⁶ (2011:273), Auda (2008:13), Chapra (2008:4) and Muḥammad al-Ṭāhir ibn Āshūr (2006:30-59) acknowledge their intellectual debt to classical scholars.

⁴ Abū Al-Ma’āli ʿAbd al-Malik ibn ʿAbd Allah al-Juwaynī (1028-1085) was a Shāfiʿi jurist and theologian from Naysābūr in today’s Iran. He served as the Imām al-Ḥaramayn (prayer leader of the sacred cities of Mecca and Medina) and, although a widely respected scholar in his own right, is also famous for being the teacher of Muḥammad al-Ghazzālī (d.1111)

⁵ Abū Ḥṣaq Ibrahim ibn Mūsā ibn Muḥammad al-Lakhmī Abū Ḥṣaq al-Shāṭibī (720-790) was a prominent Malikī legal scholar from Al-Andalūs although not much is not about his early life. Shāṭibī is widely acknowledged as the founder of genre which he expounded in his most famous work, ‘Al-Muwāfaqāt fi Usūl al-Sharia. ‘Al-Muwāfaqāt’ was first published in 1884 and in the contemporary era by Dawlah al-Tunisīa in four volumes and later translated into English by Imran Ahsan Khan Nyazee (1945-) and published by the International Institute for Islamic Studies in Virginia, USA as “The Reconciliation of the Fundamentals of Islamic Law”. Professor Muhammad Khalid Masud in his PhD dissertation was the first contemporary scholar who examined Shāṭibī’s contribution to Islamic scholarship in his Islamic Legal Philosophy: A Study of Abū Ishaq al-Shāṭibī’s Life and Thought at McGill University. Although only published in 1977, the dissertation was completed in 1973. This work was followed by that of Aḥmad al-Raysūnī, a contemporary Moroccan scholar who focussed on Shāṭibī’s approach to the Maqāṣid al-Sharī`ah in his Nazariyyat al-Maqāṣid ‘Ind al-Imām al-Shāṭibī in 1991. Raysūnī’s work was translated by Nancy Roberts in 2005 and published by International Institute for Islamic Training (IIT) as Imam Shāṭibī’s Theory of the Higher Objectives and Intents of Islamic Law

⁶ Ahmad Kazemi Moussavi is an Iranian-born scholar of Islamic Studies, and is currently Professor Emeritus of Political Science and International Relations at the University of Maryland and a former Iranian diplomat (International Institute of Islamic Thought).
According to Taha Jabir al-Alwani (2005:xi) the resort to the Maqāṣid originated as an attempt to bridge a disconnect that earlier Islamic scholars detected between the daily practices of Muslims and the principles of Islam. The Maqāṣid were also formulated as part of an attempt to regulate the extension of Islamic law to novel situations not addressed by the primary sources (Hallaq 1997:200). Such novel questions were often addressed utilising a special concept of public interest (maṣlaḥah) namely the notion of “textually unregulated benefits” (maṣāliḥ mursalah) (Hallaq 1997:112). Many jurists rejected rationally derived laws in the public interest which were unsupported by textual evidence from the Qur’an or Sunnah, the Maliki School of Sunni Jurisprudence being an exception. Al-Ghazālī (c. 1058 –1111) played an important role in the use of Maqāṣid to regulate rulings of maṣāliḥ mursalah. Such derived rulings were to be checked against the Maqāṣid al-Sharī`ah, i.e., the overall purposes of the Sharī`ah. Maṣāliḥ mursalah rulings were accepted if they were within the spirit of Maqāṣid al-Sharī`ah (Nyazee 2006:202).

Rudiments of Maqāṣid in the form of goals or ratio legis behind particular rulings were already utilised by earlier scholars when they employed analogy (qiyyās), the basis (illah) of a particular

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7 Alwani (1935-2016) was an Egyptian Islamic legal theory scholar, was a founding President of the Graduate School of Islamic and Social Sciences, Leesburg, V.A, from 1996-2016 (n.d.) He was also a President, founding member, advisor and founding member of more than twenty institutions across the Muslim and Western world and was one of the prominent Islamic legal scholars in the United States.

8 ‘Maṣlahah’ (pl. maṣāliḥ) literally means ‘benefit or interest’ (Hilal, Qaed & Syaputra 2014: 67) The earlier legal scholars categorized Maṣlahah into the following three categories; a) Maṣlahah Mu’tabarah which is upheld by the Qur’an and Sunnah b) Maṣlahah Mulgha’ which is explicitly or implicitly nullified by the Qur’an or Sunnah through the Sharī’ah and c) Maṣlahah Mursalah, which public interest unregulated and not explicitly validated by the Islamic legal textual authority but does not contradict the Islamic morals and ethics, and can be implicitly proven from the Sharī’ah (Abdul Aziz et al, 2014:67). The term ‘maqāṣid al-sharī`ah’ is also used in the sense of “Maṣlahah, i.e., the means of attaining greater goodness for humanity” (Auda 2007:3).

9 The term “Sunnah” has two definitions independently, the first being the linguistic meaning which is “the way of life and path” (Bazmool, 2013). The second is the Islamic legal meaning: the teachings, commands and actions of Prophet Muhammad (ibid.).

10 Founded by Malik bin Anas (711-795 A.D) this school, one of the four surviving Sunni schools of jurisprudence, was originally referred to as the school of Hejaz or Medina. It is predominantly practised in North Africa as well as several Arab states such as Bahrain, United Arabs Emirates and Kuwait. The Maliki School relies largely on the practice of the Companions of the Prophet in Medina as a source of law.

11 Abū Ḥāmid Muḥammad ibn Muḥammad al-Ghazālī (was born in Khorasan in today’s Iran and is regarded as one of the scholarly and spiritual giants of Sunni Islam. He is widely regarded by Sunnis as a mujaddid, a renewer of the faith and is revered for his contribution to Islamic philosophy, theology, law, and taṣawwuf. His magnum opus was Iḥyā ‘Ulūm al-Dīn (The Revival of the Religious Sciences)

12 Qiyās, loosely translated as “analogy” is an Islamic legal tool used by a jurist to arriving to a conclusion when presented with a scenario that does not have clear precedence in Islamic law.

13 ‘Illah or ‘basis’ refers to the Lawgiver (i.e., God)’s intention and is synonymous with ‘wise purpose’ (hikmah), ‘basis’ (illah), or ‘meaning’ (ma’nā) (al-Raysunī 2013:3). “It primarily refers to the observable, [sic] identifiable condition or situation upon which legal rulings are based, since the ‘wise purpose’ behind a given ruling is usually linked to the observable, [sic] identifiable situation or condition” (ibid.). This correspondence to the notion of ratio legis principles used ordinarily determined by a court to compose an earlier judgment's rationale with the difference that in secular courts the rationale would often be seen to be located in the socio-legal imagination at the time of the
ruling requiring elucidation since common bases were required to legitimate a similar ruling in an
analogous case (Hallaq 1997:83-90). In order to employ analogy, scholars were, therefore,
compelled to seek the objectives of the original ruling embedded in the Qur’an and Sunnah. The
law in Islam, through the Maqāṣid approach, can thus be seen as being formulated to achieve
certain goals. These goals are regarded as the intended purposes of the law i.e., the ratio legis.
The ratio legis of the rulings are principles forming the basis (ʿillah) for legislation. From the corpus
of ratios of specific rulings, the five classical Maqāṣid of preservation of life, religion, intellect,
property and lineage were induced by classical scholars such as Al-Ghazālī (Hallaq 2008:89) and
Abu Ishaq al-Shāṭibī (d.1388) (Raysūnī 2005:108). The Maqāṣid were therefore regarded as a
secondary source of Fiqh14, governing other secondary sources such as ijmāʾ (consensus), qiyyās
(analogy), istiḥsān (juristic preference), qawl al-saḥāba (opinion of a Companion of the Prophet),
maṣlaḥah mursalah (jurisprudential interest), istiṣḥāb al-hāl (presumption of continuity), ṣadd al-
dhari’ah (blocking of unlawful means) and ʿurf (custom), all meant to broaden the scope of the
two primary sources (Nyazee 2006:143 and 202). The Maqāṣid were, therefore, found to be
particularly useful as a guide for secondary sources, since the utilisation of secondary sources
often resulted in conclusions which were indeed rational but not within the spirit of the law (Hallaq
2008:90).

However, when viewed in the light of contemporary society the five classical Maqāṣid does not
parallel the UDHR, and ipso facto Islamic law does not protect certain rights as expounded in
UDHR such as the freedom of religion, women’s rights etc. Contemporary scholars derived or
contrived additional Maqāṣid which are evidently intended to secure greater compatibility between
Islamic law and the UDHR. Amongst these contemporary reform scholars are Yūsuf al-Qaraḍāwi
(1926-)15 who included in his Maqāṣid the principle of ‘calling for a cooperative world’ (Auda

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14 Fiqh, it is Islamic jurisprudence or legal framework primarily derived from the Qur’an and Sunnah. While both play
the roles of primary sources of fiqh, they are also regarded as the final perimeter which ought not to be contradicted
or opposed (Hallaq 1997:1).

15 Yūsuf al-Qaraḍāwi (b. 1926) is an Egyptian-born Sunni Islamist scholar based in Doha, Qatar. He is currently
chairman of the International Union of Muslim scholars and Director of the Sirah and Sunnah Center at Qatar
University, Doha (Halverson, 2017). He is a frequent global commentator on affairs in the Muslim World through
such mediums as his television programme Al-Sharīʿah wa al-Hayāt at Al Jazeera, as well as his website
IslamOnline.net, where he issues fatwāwa (legal edicts) and teachings on a variety of subjects (ibid.). He has long been
involved in the Muslim Brotherhood in Egypt – being jailed several times by the Egyptian state – having moved to
Qatar as a result (Berkley Center for Religion, Peace and World Affairs). He is a prolific write and has published over
120 works on a wide range of topics, including poems, the place of Islam in the modern world and more traditional
Islamic theological treatises (ibid.) Numerous works have been written about his life, such as Bettina Gräf and Jakob
Auda sees the *Maqāṣid* as a mechanism for the fusion of contemporary needs with scripture (2008:11). There are clear attempts to adapt Islamic law to contemporary socio-political conditions. These attempts though, are premised on an uncritical and unqualified acceptance of UDHR as interpreted by Western discourse.

This dissertation proposes to examine the contemporary utilization and invocation of the *Maqāṣid* in the light of postcolonialism. Postcolonialism offers a perspective of current world events which Islamic reformers seem not to have considered. Reform in Islamic law from a postcolonial perspective can be seen either as reformers attempting to introduce change against the hegemony of orthodoxy or, alternatively can be seen as an existing Muslim religious culture or laws being reshaped to uncritically accommodate Western norms and standards. A third perspective is the process of hybridisation. This dissertation focusses a postcolonial lense on to *Maqāṣid*-based reform attempts arguing that the unqualified acceptance of Western legal ethical norms and approaches to human rights may contribute to the entrenchment of Western cultural hegemony based on the commodification of human life and natural resources and the generation of capital.

Postcolonialism questions the universalist assumptions of modernism and deconstructs ‘Empire’ as a neo-colonial trajectory of exploitative capitalism currently thriving on modernist discourse.

Theory remains one of the areas of contemporary knowledge which until recently has been rather reluctant to engage with the experience and knowledge from the Global South (Chandra 2013:491). The Euro-Atlantic bias in the study of politics and theory is imbued with the stereotypes and social theories of the colonizer that seek to control and maintain colonial rule in the colony. After the Second World War and the post-cold war, the hegemony of the US-led empire became a reality and that in turn affected the production of knowledge about the Global South.

According to Uday Chandra, a postcolonial approach to politics can take at least three forms: “1) critiques of existing Eurocentric theories of comparative politics; 2) bottom up ethnographic and historical understandings of politics in particular contexts, 3) re-evaluating key political

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Skovgaard-Petersen’s *Global Mufti: The Phenomenon of Yūsuf al-Qaraḍāwī* (2009), and he is widely regarded as one of the most influential Muslims of contemporary times.

16 Uday Chandra (1984), is an Indian scholar based in Georgetown University who works on the intersection between critical agrarian studies, political anthropology, postcolonial theory, and South Asian studies.
concepts such as the state, democracy, nationalism, and war in the light of different non-Western experiences” (Chandra 2013:489).

The first of these postcolonial approaches aims to examine and deconstruct mainstream political science theories about the postcolonial world by unveiling their overt biases and blind spots (Chandra 2013:490). These biases are not accidental but are extremely connected to the Eurocentric visions of politics and society (ibid.). These Eurocentric visions “implicitly or explicitly privilege Western experience over non-Western experience and recast the postcolonial as backward or underdeveloped” (ibid.). For example, most of the Eurocentric examples of theories on democracy develop a vision by of Europe being the natural home of democracy and projecting non-European societies either backward or blind imitators of the European model (ibid.). Second, to overcome the problems of Eurocentrism in the study of politics, there is an urgent need to provide an alternative vision of political experience from the Global South by inquiring whether the democratic experience of countries such as India, Yemen, Tunisia, and South Africa is part of this approach. The third approach proposes that the urgent task of rethinking the categories employed in the area of political studies is by and large in the tradition of “provincialising Europe” as see in the works of Dipesh Chakrabarty17 (1992). Chakrabarty argued that Europe is no longer a universal experience (ibid.). The reevaluation of key political concepts is the major task in contemporary political theory.

“It is an approach that is in solidarity with other radical intellectual trends within political science that, for example, make the case for interpretative methods, critical studies of race, class, gender and sexuality and constructivist theories of politics and society” (Chandra 2013:491). Decolonizing knowledge within political science, in other words, ought to be seen as part of a wider project of decentering the discipline by undermining what is seen as part of a wider project of decentering the discipline by undermining what is presented and viewed today as dominant or “mainstream” (ibid.). This is not an easy task for us to pursue given the hegemony of the Eurocentrism in contemporary academic setting.

17 Dipesh Chakrabarty (1948) is a Bangladeshi scholar currently teaching at the University of Chicago, He is one of the most eminent scholars in the field of post-colonial theory and Sub-altern Studies and the recipient of the 2014 Toynbee Prize which recognizes social scientists for their academic and public intellectual contributions.
The questions raised by examining Maqāṣid-based Islamic reform through the lens of postcolonialism are an area of research rarely considered by scholars. Most scholars writing about Maqāṣid either completely ignore the question of postcolonialism and the insights that it may bring to the discourse (Ibn ‘Āshūr 2006, Kamali 2008, Attia 2007, Chapra 2008) or provide it scant attention (Auda 2008). Auda briefly mentions the postmodernist approach of some scholars such as Ebrahim Moosa (1955-), Neal Robinson and Ziauddin Sardar (1951-) whom he describes as having a postcolonial sense (Auda 2009:190), their approach aiming to ‘deconstruct western globalising and homogenising forces’. Auda, however, does not address the question of its compatibility with the Maqāṣid approach, of which he is a major proponent, nor does he take cognisance of important issues raised by postcolonialism.

The goal of this dissertation is therefore to explore the attempts at Maqāṣid based reforms in the light of postcolonial discourse. I will show, furthermore, that this uncritical attempt to invoke the Maqāṣid approach without interrogating its philosophical, legal and ethical hinterlands and their intrinsic hegemonic impulses invariably leads to the co-option of Islamic law as a mere appendix to Western cultural and economic imperialism. The objectives of the study are firstly, to demonstrate that Maqāṣid based reform is aimed at aligning Islam with the UDHR as a major symbol of Western philosophical, legal and ethical values, and secondly, that the UDHR in its current framework can be regarded as a tool of ‘Empire’, and therefore Maqāṣid being co-opted into this latter trajectory reflects a larger pattern of Western hegemony being further imposed on ‘Muslim’ culture in its various forms.

An explorative qualitative study will be conducted by analysing contemporary scholars’ work on Maqāṣid and reformation of Islamic law. The qualitative approach takes cognisance of historical context. Burrel and Morgan (1979:4), describe this latter subjective view of the world as being based on the assumption that names, concepts and labels of the social world are human constructed social and historical entities. These latter are then utilised for “describing, making sense of and negotiating the external world” (ibid.). The Maqāṣid will therefore not be examined as an objective reality which has an independent ontological status as is the approach of the positivists, but would be examined qualitatively within a context as described in the postcolonial discourse to see how it has or could be shaped by “a series of social, political, cultural, economic, ethnic and gender factors” (ibid.). Selected writings which this dissertation will concentrate on but
not be confined to would be that of Ramadan\textsuperscript{18}, Ibn `Āshūr, Auda, Attia and Kamali. Trajectories which proposed reformations follow will firstly be identified by analysing the major work of each writer, in conjunction with any subsequently published supplementary writings. The results of these trajectories will be gleaned from their writings where possible. The latter analysis will then be subjected to the lens of postcolonialism and thereby insights will be accrued as regards socio-economic and political futures of Islamic law.

The first chapter will deal mainly with a clarification of postcolonial concepts relevant to this dissertation. It will therefore not be a comprehensive overview of postcolonial discourse, an undertaking beyond the scope of this dissertation. Chapter Two focus on the more prominent proponents of \textit{Maqāṣid} based reform. Scholars such as Ramadan, Auda, Ibn `Āshūr and Attia who ventures into the re-configuration and reconstruction of theoretical concepts pertaining to \textit{Maqāṣid} in order to mould it towards the compatibility for their contemporary reform proposals will be individually discussed. Other writers who voice agreement with various aspects of \textit{Maqāṣid} reform proposals such as equality or freedom, but who generally avoid theoretical concepts are dealt with as a group under ‘miscellaneous writers’. Chapter Three places \textit{Maqāṣid} reform proposals in conversation with postcolonial discourse as explicated in Chapter One. Problematic notions within \textit{Maqāṣid} reform proposals as identified through a postcolonial lens will be emphasised not in a destructive manner, but rather with the desire to re-direct the \textit{Maqāṣid} discourse away from trajectories which postcolonial experience has shown to be destructive in the past. The fourth chapter draws together various problem areas identified which substantiates the formulation of the conclusion that current \textit{Maqāṣid} trajectory needs to be urgently revised.

\textsuperscript{18} Tariq Ramadan (b. 1962) is a Swiss Muslim thinker of Egyptian decent. He is currently Professor of Contemporary Islamic Studies at Oxford University (United Kingdom), visiting Professor at the College of Islamic Studies at Hamad Bin Khalifa University (Qatar), and Director of the Research Centre for Islamic Legislation and Ethics (CILE) (Ramadan, Biography). Ramadan is widely regarded as a leading global reformist Muslim intellectual, and as part of the 20\textsuperscript{th} century Islamic reformist movements emphasizing \textit{tajdid} (renewal or reform). He is the son of Said Ramadan (d. 1995), who was a prominent Muslim Brotherhood party member that was exiled from Egypt by Egyptian President Gamal Abdel-Nasser (d. 1970) (Kechichian). Tariq Ramadan has contributed a number of works to the fields of contemporary Islamic reform - such as his \textit{The Quest for Meaning: Developing a Philosophy of Pluralism} (2010) and \textit{Radical Reform: Islamic Ethics and Liberation} (2009) – as well as scholarship on Muslims in the West – such as \textit{Western Muslims and the Future of Islam} (2005).
Chapter One
Postcolonialism and its Insights

1.1 Introduction
The following chapter will illustrate that postcolonial insights have become an increasing necessity as a prerequisite for understanding contemporary socio-political dynamics. Postcolonialism confers utilitarian value and insight with regard to the identification and highlighting of social injustices, whether at a communal, national or global level. It has indeed become an indispensable tool to be factored in with any model proposed for social reform. The Maqāṣid theory is one such reform model proposed by many Islamic scholars’ (Ramadan, Ibn Āshūr, Auda, etc.) aimed at reforming Islamic Law. However the trajectory formed as a result of the shaping of this Maqāṣid model seems to be aimed at harmonizing Islamic law with UDHR. When viewed through a postcolonial lens, the latter phenomena implies that reformation of Islam from the Maqāṣid perspective seems to be seceding to an ‘Empire’ paradigm of contemporary socio-economic and political conditions, a problematic that will be discussed in the following chapters. Even though a rights based society may be desirable, postcolonial notions raise questions about this enthusiastic attempt at making Islam conform to Western interpretations of UDHR. In addition, the socio-political matrix proposed by Ramadan on to which such human rights could be inscribed is also shown to be flawed when perceived through a postcolonial lens.

It is certainly not misplaced to suggest that much of postcolonial discourse traces its origins from the critique of the use, perhaps, abuse of the modernist discourse of ‘orientalism’ (Said 1977, Ashcroft and Ahluwalia 2009, Young 2004 etc.) and the critique of hegemonic practices (Said 1977, Loomba 1998, Ashcroft and Ahluwalia 2009 etc.). Postcolonial discourse interprets world events in terms of the aftermath of Eurocentric colonialism, and the contemporary neo-colonial economic differentials. A postcolonial perspective casts suspicion on unqualified submission to UDHR, and within the Islamic framework, the ignoring of cultural differences when proposing ‘universal Islamic principles’, inadvertently projecting an image of a homogenous Islam. Postcolonialism is thus well placed to identify the weaknesses and pitfalls in conceding to unjust trends guised as good.

1.2 Global South Positions on Colonialism
There are different positions on how to theorize colonialism from Global South developed in the works of thinkers from Global South.
1. **Provincialize Europe**: Dipesh Chakrabarty (1992) argues that Europe is constructed as the centre of our theoretical knowledge about the colonial and postcolonial worlds. Europe was not merely a geographical entity but a conceptual apparatus of the dominant power in the world (Scott 2005: 24). This knowledge privileges the colonial state, its cultural values, its total influence on all aspects of life, and thus marginalize the resistance from the underside of the Global South (ibid.). By decentering and ignoring Europe one can solve the problem of Eurocentrism. This is the major idea proposed by Chakrabarty who argues for a conceptual repositioning of Europe rather than a rhetorical dismissal of Europe (1992:1-26). This is a strategy to see Europe as one province in the contemporary world; it is a position that does not reject Europe as such but reposition Europe one position among many others.

2. **Forget Europe**: Frantz Fanon (1925-1961) argued for forgetting Europe. He believed it also seeks to invert the relationship between Europe and the universal. Fanon says: “Leave this Europe where they are never done talking about Man, yet murder men everywhere they find them, at the corner of their own street, in all the corners of the globe” (Fanon 1967:251). One can completely abandon Europe to build alternative conversation with Global South.

3. **Exclusionary Discourse of Colonialism**: Ranajit Guha (1923) (1989:210-309) argued that the problem with “colonialism is its attitude towards the colonized and the question of its exclusionary discourse and practice - whether the discourse practice has to do with the exclusion of the colonized from humanity (colonialism's racism) or their exclusion from the institution of the political sovereignty (colonialism's false liberalism)” (cited in Scott 2005:24). When compared to the work of Edward Said who also focused on the exclusion/inclusion discourse of colonialism in knowledge politics, Guha was more concerned with the institutional mechanism of colonial dominance. While Said’s focus was on the textual aspects of colonialism, Guha questioned the colonial claim of good governance by showing the hollow

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19 Frantz Omar Fanon was a psychiatrist, revolutionary and philosophy whose writing are central to postcolonial studies and critical theory. Lewis Gordon, a leading Africa philosopher, said about Fanon’s life and work “that his contributions to the history of ideas are manifold. He is influential not only because of the originality of his thought but also because of the astuteness of his criticisms. He developed a profound social existential analysis of anti-black racism, which led him to identify conditions of skewed rationality and reason in contemporary discourses on the human being” (Gordon, 2015:2)

20 Ranajit Guha, the Austrian-based historian from India is one of the most prominent authorities on Subaltern Studies. With Gayatri Chakravorty Spivak, he edited one of the earliest anthologies on the subject *Selected Subaltern Studies*, New York: Oxford University Press, 1988.
nature of its claim as a way of shifting from the rule of force to rule of law. The liberal principle of colonialism failed to offer equality between the colonizer and the colonized. This strategy argues for decolonizing knowledge and power by critically engaging with European colonial knowledge and power.

4. Colonialist textuality and the issues of representation: Edward Said\(^\text{21}\) (1977) has famously argued that the colonial texts produced a distorted image of the colonized and that further enhanced a false image and language about the colonized. This politics of representation built the condition of the possibility of colonization (ibid.). This is a strategy adopted by Said in his famous work Orientalism. It argued that this was how the colonizer denied the voice, agency and autonomy to the colonized. This position also on the same line of critical engagement with colonial knowledge and power. Said and Guha share a common thread. They belong to a tradition of writing back to the West/ Europe by adopting two strategies. The first is showing the internal contradictions of the colonized discourse and secondly, by showing the resistance to colonization from the side of the colonized (Scott 2005:24). In short “colonialism is a practice of power works to include or exclude the colonized” (ibid.).

5. Political Rationalities of Colonial power: The primary advocate of this position is David Scott who refers to “those historically constituted complexes of knowledge and power that give shape to colonial projects of political sovereignty” (2005:25). Scott is not interested in the 'decentering of Europe' alone. He also wants to develop a “critical interrogation of the practices, modalities, and projects through which the varied forms of insertion into the lives of the colonized were constructed and organized” (Scott 2005:25). This not only a position that wants to provincialize (Chakrabarty), forget (Fanon), and engage (Said & Guha) Europe, but also wants to rethink our own colonized imaginations in the Global South.

The following chapter will firstly address some definitional problems associated with the term “postcolonialism” and its origins. A brief history and discussion of some of these issues will follow.

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\(^{21}\) Edward Wadie Said (1935 –2003) is the father of Postcolonial Studies and one of the most widely cited scholars of the 20th century. A Palestine in exile, Said, was a professor of English literature at Columbia University in New York. His magnum opus, “Orientalism”, first published in 1978, was scathing scholarly critique of the cultural representations of non-Westerners, particularly Arabs and Muslims, was central to arguably the biggest turn in the humanities towards a more sensitive approach to study of the Global South.
An explication of the terms ‘colonialism’, ‘imperialism’ and ‘neo-colonialism’ is included since it is a pre-requisite for gaining insight into the nature of postcolonial discourse, especially the concepts which will be used in this dissertation to critique the Maqāṣid. This is followed by an explication of postcolonial concepts used as lenses to scrutinise the Maqāṣid. It is not the intention of this dissertation to provide comprehensive overview of postcolonial theory. Those aspects relevant to demonstrating the perils, dealt with by postcolonial theory through its encounters with the hegemonic Western culture and expected to be encountered when embarking on a project of the Maqāṣid based transformation of Islamic Law in the face of contemporary Western cultural practices receives my attention. The final section of this chapter will deal with postcolonial analysis of contemporary socio-political conditions, the concept of ‘Empire’ coming to the fore through such an analysis.

1.3.1 The Postcolonial Perspective

The term ‘Postcolonialism’, according to Young (2003:7), ‘describes practices and ideas as varied as those within feminism and socialism’. The heterogeneity of postcolonial discourse is reflective of the diverse influences of colonialism due to the nature of the practices perpetrated by colonialism which Ania Loomba (1998:xiii) refers to as being “heterogeneous”, and the diverse cultures which it affected. There is much difference of opinion within postcolonial discourse, (such as whether hybridity through syncretism is a positive process or not, or whether the Western located postcolonial academic can speak for the subaltern, in the process only strengthening the position of ‘Western academy’ and further ‘othering’ the subaltern (Spivak 1988). These differences notwithstanding, it does provide novel insights as regards current political conditions and cultural influences, which, when aware of, cannot be ignored in any ideology such as Islam, that claims to derive legislation based on justice, and that profoundly affects the socio-economic and political conditions of humans.

Hiddleston (2009:179) argues that: “the need for postcolonial questioning did not disappear with the decolonization movements of the 1950s and 1960s”. The face of exploitation has changed even though the fact of exploitation and oppression has not. The changing face of exploitation is evident in the transformation from binaries such as colonizer/colonized based on exploitation by national sovereignties through physical subjugation of one people over another (Young 2001:15), to imperialism which even though it included direct conquest, also involved the exercise of power through political and economic influences which in essence amounted to similar forms of
domination as direct subjugation (ibid. 27), to neo-colonialism, a continuing form of economic hegemony (ibid. 45), the notion of ‘Empire’ manifesting during this era.

Two important concepts identifiable as central to the process of hegemony is the notion of ‘essentialism’ and ‘universalism’. Essentialist modernist notions of what constitute humans have been the subject of much postcolonial discourse. Descartes\textsuperscript{22} through his proposition “I think therefore I am” asserted the centrality of rationality and the human conscience as the essence of what constitute humanity. This latter concept was appropriated by the colonialists as a hegemonic tool to create the conception that their culture, being based on what has been perceived by them as being the essence of humans viz. rationality, was deemed superior and therefore to justify their colonial projects as ‘civilising missions’. Postcolonialism draws on poststructuralist critics such as Michel Foucault\textsuperscript{23}, Jaques Derrida\textsuperscript{24} and Jacques Lacan\textsuperscript{25} (Ashcroft et al 2000:73) to substantiate the stance that the notion of essentialism is erroneous. Despite the latter stance, postcolonialists are known to have adopted the fruits of essentialists stances in the form of nationalism for strategic reasons in opposing colonialism, as further discussed below under the section ‘hybridity’.

Universalism, the second important notion with regard to hegemony is the belief of the existence of features of human life which are not culturally constituted. Whether all aspects of human life are culturally constituted or only certain aspects may be a contentious issues, but what is not contentious is that there is uncertainty regarding the appellation of any specific aspect as culturally constituted or not. Thus sciences such as mathematics may be seen as possibly culture free but scholars such as Alan Bishop (1990) argue that that it is human construct in that it requires a certain cultural perspective to want to think about certain aspects of mathematics such as the properties of a triangle, which information not necessarily deemed important by another culture. Powell and Frankenstein (1997:17) concur that mathematics cannot exist outside of and

\textsuperscript{22} The founder of modern Western philosophy, French Catholic Theosopher Rene Descartes, lived from 1596 – 1650 CE. His methodology and ideas radically transformed the concept of truth in the concept of certainty. For him, the guarantor of truth was no longer God or the Church but became Western Man’s subjective judgement.

\textsuperscript{23} Michel Foucault (d. 1984) was a French philosopher and social theories who wrote on the relationship between power, knowledge and social institutions. He described himself as a critical historian of modernity. Others though place him within the post-structuralist and post-modernist schools of thought.

\textsuperscript{24} Jaques Derrida (d. 2004) was a French Algerian-born philosopher of phenomenology who developed the academic field of deconstructionism. He is widely regarded as one of the canonical thinkers within postmodern and post-structuralist philosophies.

\textsuperscript{25} Known as the “French Freud”, Jacques Lacan (d. 1981) was a towering French psychoanalyst and psychiatrist in the 20\textsuperscript{th} century. His writings explore the significance of the Freudian conception of the unconscious both in theory and the practice of psychoanalysis itself. Lacan’s ideas have become foundational to continental philosophy, post-structuralism and postmodernism.
unaffected by culture. Bishop\textsuperscript{26} argues that ‘Western mathematics’ was shaped through a particular cultural perspective, namely that of Euclidean conception of space as being atomistic (Bishop 1990:52). Objectism moulded Western mathematics, as the African use of personal idiom moulded the notion of the personal being as knowable whereas the inanimate not, a view opposite to that of Western culture. Thus the inanimate is used as an explanatory tool in Western culture, whereas the person and its relation serve the latter purpose in African culture (Bishop 1990:57).

Similarly, the assumptions underlying many universals can often be demonstrated to be culturally constituted. Content of disciplines are therefore suppressed or amplified in accordance with the needs and pressures of particular cultures, and its content develop as a reflection of such cultural pressures. The latter Bishop (1990) further explicates with regard to ‘Western mathematics’ and its power and control aspects. Firstly he asserts that mathematics was imposed on colonies through the media of trade, administration and education (Bishop 1990:53-54). Western mathematics then conferred certain values typically Western in nature namely rationalism, objectism and its power and control aspects. Thus Bishop (1990:56) asserts that “With its focus on deductive reasoning and logic, it poured scorn on mere trial and error practices, traditional wisdom and witchcraft”. Objectism, claims Bishop (1990:57), decontextualize rather than generalize, which would render meaningless something to someone whose culture understands everything as belonging and existing in relation to something else. The power and control value of mathematics uses mathematical concepts and techniques to control the social and physical environment. Thus, Bishop claims that:

\textit{Mathematically inspired progress through technology and science was clearly one of the reasons why the colonial powers had progressed as far as they had, and that is why mathematics was such a significant tool in the cultural kitbag of the imperialists. (Bishop 1990:58)}

Bishop (1990:59) reiterates that “mathematics is a cultural product - a symbolic technology, developed through engaging in various environmental activities”.

\textsuperscript{26} Alan Bishop has done considerable work on how Western mathematics sustains coloniality. He is particularly known for his work (1990) which looks at how Western concepts of ‘mathematics’ are used against African school-children, “He extends this idea of the educational disciplines as being "culturally loaded" beyond the humanities to suggest that even the study of western mathematics, as a set of principles constructed by humans, has a particular cultural history (Ashcroft, 72). The choice to educate colonized students not in their own languages, and not according to their own cultures' histories and practices of thinking serves to educate them away from those cultures, and towards a belief in the superiority of the culture with whose knowledge and values they are being filled.” (Tiffin and Lawson, 1994: 18)
The process of hegemony strengthened by essentialist and universalist assumptions is of particular importance in this dissertation with regard to the meeting of cultures, in this case that of the meeting of Muslim cultures and Western cultures. The unquestioning acceptance of scientific disciplines as being objective and used uncritically in assisting the development of *maqasid* may yet be another avenue of concern which will be discussed fully in chapter three.

### 1.3.2. Cultural Transformation: Hybridity vs Cultural Restoration

The discussion which follows is of particular significance with regard to the question facing Muslims as to what degree they should allow their culture to be influenced by another culture. The question becomes more urgent if the culture in question is dominated by Empire. Integral to the success of colonial domination is the manipulation and control of the colonized culture. This Ashcroft and Ahluwalia (2009:82) affirms when they state that:

> The role of culture in keeping imperialism intact cannot be overestimated, because it is through culture that the assumption of the ‘divine right’ of imperial powers to rule is vigorously and authoritatively supported.

Edward Said (1994:67) argues that culture is able to confer a type of moral power and ‘ideological pacification’ which enabled the British to rule India with less than 100,000 people and induced identification and admiration in some of the Indian elites in the face of expropriation and exploitation.

Undoubtedly, the intersection of colonizer and colonized cultures has produced a transformation in the colonized culture. The term ‘hybridity’ was used by many postcolonial writers to refer to this transformation process. The recovery of cultural identity has been a source of division amongst postcolonial writers. The opinion that it is possible to return to an original pre-colonial culture implies an immutable origin of identity with an ‘eternally fixed representation of itself’ contrasts with a cultural identity seen as constantly being transformed through the changing conditions of life which implies the impossibility of pointing to an origin (Ashcroft 2001:4).

Nationalism is distinctly an anti-hybrid stance. The idea of a nation empowered and facilitated opposition to colonialism on multiple planes harnessing political, intellectual and emotional energies of the colonized in their struggle against oppression (Loomba 1998:186). However some of the factors around which the notion of national unity was formed marginalised many communities. The consciousness of allegiance encouraged by nationalist movement frequently promotes a consciousness of allegiance to elements such as race, religion, tribal affiliations etc.
which more often than not are only constituent elements of the nation. Fanon (1963:149) points to the fact that the reason for the “process of retrogression, that is so harmful and prejudicial to national effort and national unity” is when “the nation is passed over for the race, and the tribe is preferred to the state”. Young lauds nationalism in the first instance for facilitating an effective opposition to colonialism, but laments it as being a cause for the failure of many postcolonial states after independence (ibid. 62). Young (2003:62) cites the Hindutva movement as an example of oppression occurring resulting from a desire to produce an ethnically pure Hindu nation. He points out that in this instance democracy favours the majoritarian group, marginalizing Muslims, Christians, Dalits (so-called ‘untouchables’) and Adivasis (tribals). Such minority groups have no legitimate political recourse against any democratically agreed upon tyranny and oppression. In the latter situation postcolonial intellectuals will therefore argue for cultural hybridity, rather presenting nation not as an ‘idealized version of what it might be, but with ‘how it is’, emphasising how the nation can be oppressive.

Ashcroft insists that hybridity was in fact a two-way process, that colonialism did not and could not destroy indigenous cultures (2001:2). He believes that indigenous cultures in fact appropriated much of colonial culture and used it against the colonizer (2001:13). He does not regard indigenous populations as passive receptors of imposed colonial cultures but sees them as actively engaging the entire range of cultural production including Western dominance over time and space, language, literature, geography, history etc. These dominant discourses, according

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27 Hindutva (lit. meaning “Hinduness”), is a form of Hindu cultural nationalism which views India as an ancient Hindu homeland. It views the religions of Buddhism, Jainism and Sikhism as authentically Indian religions, while it views those of Islam, Christianity, Judaism and Zoroastrianism as essentially foreign invaders who colonized India throughout the ages (Sharma 2002). Hindutva sees a number of social groups, notably Dalits and Muslims, as their enemies in the struggle to return India to its pure origins (Ibid.). Critiques of Hindutva view it as a form of internal colonialism that has been creating a type of Jim-Crow-like apartheid system in relation to India’s Muslim subjects.

28 The term “Dalit” is a “social construct of the twentieth century. Before the modern Dalit movement, there was probably no collective political consciousness among the so-called untouchables living across the length and breadth of the subcontinent.” (Peacock 2010: 78) A derivative from vernacular form of the Sanskrit (dalita) means “divided, split, broken, scattered” generally refers to a person “not belonging to one of the four Brahminic castes”. (Oxford English Dictionary Online, s.v. “dalit”). The Dalit community in India continues to be subjected to the most vicious forms of social marginalization and oppression.

29 ‘Adivasi’ – in Sanskrit, literally meaning “original inhabitant” – is the name for the indigenous groups of mainland South Asia. The term is primarily used in India and Bangladesh. In India, they are also called “Scheduled Tribes” and make up nearly 10% of India’s population. During the 20th century, they have faced major disruptions to their traditional ways of life due to population growth, industrialization and the development of modern cities.

30 Bill Ashcroft, (1947-) an Australian academic, is one of the most prominent figures in Postcolonial Studies. He has authored or co-authored sixteen books. The website of the University of North South Wales where Ashcroft currently teaches describes him “a founding exponent of post-colonial theory, co-author of The Empire Writes Back, the first text to examine systematically the field of post-colonial studies.” (University of North South Wales)
to Ashcroft, were transformed by the subjugated populations and used against the discourses of the colonizers. He sees this active engagement and transformation as a means employed by the indigenous cultures to resist the cultural dominance and threatened assimilation of the colonizer culture. Ashcroft claims that it is possible to perceive cultural transformation to be a form of resistance by not seeing resistance as a simple oppositionality which would risk the danger of falling into the binary which Europe established to define the other (ibid.). A positive aspect of the latter perspective is that it affirms the colonized as subject with agency, rather than victims of an osmotic process of cultural absorption and assimilation. Thus, the effects of colonization Ashcroft argues, should not necessarily be seen as ‘tragic consequences of cultural subjugation, nor a cultural contamination to be rejected at all costs” (2001:44). Rather, he sees the effect of imperial culture as a neutral form of capital utilised by indigenous culture to negotiate postcolonial transformation which would then be a form of resistance instead of direct opposition.

Homi Bhabha31 (1994:125) expresses similar sentiments with his notion of mimicry, a pro-hybrid concept. He argues that the attempt by the colonizer to reproduce aspects of its culture in the colonized results in an imperfect replication. This occurs because of the differing context in which the replication is attempted. He points to a slippage in meaning occurring between communicating and receiving, similar to the Derridian notion of ‘difference’ - the notion that no sign, especially with respect to language representation, is identical with what it signifies, resulting in a slippage of meaning (Bhabha 2006:209). This slippage results in hybrid and ambivalent representation of colonial authority, opening spaces for colonial subversion (Bhabha 1994:123). The idea of ambivalence is also significant with regard to the contact of Muslims with global culture. The feeling of ambivalence is evoked in the colonized subject through his/her desire of that which is found appealing in the colonizer, and that which is found repulsive. That which is desirable may be mimicked, but the repulsive is that which is mocked. Mockery is a source of resistance for Bhabha, but it is the mimicry which leads to hybridization. Mimicry is that aspect of ambivalence which could be a motivating force for wanting to change (Bhabha 1994:123). Bhabha sees mimicry as a source of resistance to colonial dominance as he sees it leading to mockery and therefore undermining colonial authority.

31 Homi Bhabha is an Indian scholar based at Harvard University, and is known as one of the foundational theorists of Postcolonial Studies. His contributions to such ideas as hybridity and cosmopolitanism through a psychoanalytic and post-structuralist lens have contribute greatly to works on postcoloniality (Huddart 2008).
Fanon (1967), on the other hand, detects in mimicry a source of psychological stress which the colonized experience resulting from the realization that his/her emulation of the colonizer culture is not an exact copy but mere mimicry. Prior to Bhabha’s notion of ambivalence, Fanon had depicted the situation of the black subject under colonial rule as ambivalent. He believes that the black subject under colonial domination sees the white other as representative of all that is desirable. According to Fanon, psychic trauma results when the black subject realizes that she cannot become white and all that which she sees is representative of white including power. Neither can she shed her blackness which she has been taught as representing all that which is negative and despicable. Wearing a white mask allows her to cope, but she undergoes psychic trauma when it is ripped from her face and is reminded of her blackness at the hands of her masters (Fanon 1967:152). In Fanon’s writings, a sense of trepidation is evoked. Mimicry is rather seen as a threat to a healthy psyche and counterproductive to cultural affirmation.

Cornel West\(^32\) (in Ashcroft 2001:49) describes various approaches which the colonized can adopt when encountering an imperial discourse. These are to become pre-occupied with the dominant discourse and its power of legitimation, or to adopt an attitude of ‘arrogant group insularity’. The third approach he mentions is that of extreme rejection of the above options, and the last option is one which Ashcroft identifies as that which facilitates interpolation as the ‘critical organic catalyst’. This latter approach opts for adopting the best of the mainstream yet ‘affirming and enabling sub-cultures of criticism’.

Ashcroft identified strategies adopted by the colonized through which they transformed both their own and the colonial cultures. Even though dominant colonial cultures differed in accordance to their metropole of origin and the fact that indigenous-dominated populations differed, the strategies adopted for transformation Ashcroft found to be global (ibid.:15). These strategies includes interpolation, the process by which the ‘interpellated’ subject i.e. the subject who experienced the hegemonic tactical forces designed to alter her to the specifications of the colonizer, ‘interject’ various ‘counter-discursive tactics’ without the latter being necessarily a unified co-ordinated opposition (ibid.:47). Ashcroft stress the importance of the power relation as being rhizomic which in fact facilitates interpolation (ibid.:50). Said’s conception of ‘the voyage in’ and likewise that of Ramadan’s conception of the West as centre and Muslims as marginal

\(^{32}\) Cornel West (b. 1953) is a renown African-American philosopher of Marxism, Christianity and critical race theory. His works, such as *Race Matters* (1994) and *Democracy Matters: Winning the Fight Against Imperialism* (2005), are part of the canon of Black Studies and the Black Radical Tradition and shed light on the undersides of American democracy and global Western neoliberal imperialism.
travelling towards the centre (chapter two and three) is problematized according to the rhizomic structure of power relations. Ramadan’s and Said’s conception of cultural interaction imply a vertical and hierarchical structural relationship with the hegemonic culture. Ashcroft (ibid.:50) believes that the rhizome, as coined by Delueze and Guanttari, better explains the unorganised interaction which characterises cultural relations. The analogy of a tap root system is used by Ashcroft to illustrate the conventional idea of an imperial power keeping the margins at bay. The rhizome however does not possess a tap root which spreads vertically, but has a root system which spreads horizontally from the trunk. Power in social relations will therefore be seen to be uncoordinated but perpetual, spreading horizontally rather than a binary of central and marginal which Ashcroft believes is a myth of an imperial construction (ibid.:51). The scattered points of interaction between dominant discourse and dominated discourse in the rhizome of social relations is the site of intervention and insurgence of interpolation (ibid.:51).

Language, another strategy Ashcroft mentions, he found to be the key to interpolation and therefore the transformative potential held by indigenous societies. The notion of the acts of reading and writing as being social rather solitary is central to the appropriation of language by indigenous communities and its transformation within their social context (Ashcroft 2001:60). He contends that meaning is not locked in language as implied by the poststructuralists, but is produced by the interface of the subject as agent, and language as a set of codes (ibid.:64). Ashcroft does concede that language as code is itself socially determined as well, but this does not negate the agency of the subject using the language. In this manner, the meaning of language, such as that of the coloniser, is transformed through its use by the colonized as a subject with agency.

Other strategies which Ashcroft discusses - which will not be elaborated upon due to limited relevancy in the context of this dissertation - include historiographic representations of space and time, which are used by hegemonic forces to construct subjectivities and alter self-perceptions and are appropriated by indigenous communities to be re-written. Ashcroft believes the transformation of history to be a very strategic and effective mode of cultural resistance (Ashcroft 2001:83). Allegorical representation of colonial texts is also presented by Ashcroft as a site of

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33 Gilles Deleuze (d. 1995), a French philosopher, and Felix Guattari (1992), a French psychiatrist and political activist, wrote a number of works together, most notably Anti-Oedipus (1972) and A Thousand Plateaus (1980), which form the two volumes of Capitalism and Schizophrenia. Their works deal with such topics as the material psychological effects of capitalism on society and individual desire, and can be classified within the fields of postmodernism and post-structuralism (Roudinesco 2005: 385 and 414).
cultural struggle (ibid.:105), and so is the concept of place (ibid.:125), habitation (ibid.:157) and horizon (ibid.:182), reconceived by the colonised as sites of cultural contestation. All of the above mentioned strategies of Ashcroft have particular relevance when considering the extent to which Muslims should integrate into dominant Western cultures, or whether concentration should be towards preservation of cultures.

Ania Loomba’s (1998:257) comment is distinctly anti-hybrid when he declares that terms such as hybridity and multiculturism are circulated merely to ratify a ‘mish mash’ of cultures dominated by ‘a near unipolar’ Western media machine. The latter position is certainly tenable given that hybridity is usually understood to be a mutual integration of two separate and independent entities, rather than a purposeful imposition of concepts and ideas with the goal of transforming the ‘other’ or with a mission to ‘civilize the barbarians’. Gandhi (1998:136) also affirms the fact that hybridisation is heavily weighted in favour of imperialism indicating that “the West remains the privileged meeting ground for all ostensibly cross-cultural conversations,” and that even though postcolonial theory attempts to show that cultural transformation is a mutual phenomenon between colonizer and colonized, that “celebrations of hybridity generally refer to the destabilizing of colonized culture”. Majid (2000:24) concurs, believing the postcolonial state to be more colonial than indigenous having been “more thoroughly infiltrated by the ideologies and cultural practices of former metropolitan centres”. He (ibid.:35) also agrees that hybridity is the “effect of unequal global relations” and discourages its unthinking propagation less we become “complicitous with the systemic violence inflicted on billions of people worldwide”.

A predominant transformation of colonized culture was clearly the intention of the colonialisist rulers judging from the words of Thomas Babington Macaulay the 19th century English politician who structured English education in India (cited in Loomba 1998:173) who declared that he wished to create Europeanised natives that would be “a class of persons, Indian in blood and colour but English in taste, in opinion, in morals and in intellect”. Loomba (1998:173) sees the underlying intention to have been the creation of a persistent gap between the colonizer and colonized through projecting the notion that Europeanised Indians can only mimic English values and will therefore remain subjected to the English. Fanon’s belief that psychic trauma results when the Europeanised subject realizes that the whiteness which he has been taught to desire is something which has at the same time been made unattainable for him has already been alluded to above. Majid (ibid.:21) is also convinced that the best means of counteracting rampant capitalism and effects of unfettered globalisation is through cultural revival. He (2000:24) believes that the
importance of restoration of an indigenous language, a necessary act of cultural affirmation, is belied by the critics who reduce it to merely an act of nostalgia and sentimental gesturing. Majid (2000:35) believes that promotion of hybridity in cultural encounters will perpetuate a unidirectional hegemonic Western dominance, obliterating non-Western struggles for cultural pluralism “collapsing differences into a capitalist-dictated universalism”. Cultural pluralism can provincialize the West and liberate peoples, furthering the goal of terminating imperialism which can then “give birth to a new human consciousness emanating from an egalitarian and enriching multicultural world” (Majid 2000:35). Consistent with his anti-hybrid stance, Majid (ibid.:36) cautions against valorising the condition of estrangement that befell “Third World intellectuals”, a homelessness which directly resulted from an intentional inducement of a “massive identity crisis” by the colonialists with their “campaign of cultural annihilation” which they effected by imposing their languages causing a disruption of the “continuity between language and memory”, a continuity necessary for the preservation of identity. Hybridity in this context therefore reduces to a particular state of mind of the homeless, a theory resulting from their search for belonging. Majid (ibid.:36) castigates the academic apparatus for lauding this hybridity as an academic achievement rather than an imposed condition with its accompanied pain and anguish. He sees the academic apparatus as shunning its responsibility to remedy this situation through “genuine cultural emancipation” (ibid.:36).

Affirming culture does not necessarily imply bringing back to life an abandoned culture. Fanon (1963:224) sounds a warning against reviving past cultural practices out of synch with the realities of the current practices at that time. He regards the latter as opposing the “current of history” and being in opposition to the people of that tradition. Cultures underwent perpetual change under the coercive forces of colonialism. Older cultural practices may therefore be ‘out of date’ when opposing colonial domination. This stance of Fanon cannot by any means be interpreted as being pro-hybrid. Rather, his stance is that of acceptance of transformation of cultural practices as a necessary response to colonial hegemony, but sees this transformation as oppositional to colonialism, not as a hybridisation with it. The argument for not reviving abandoned cultural practices is also an argument against returning to passive resistance against the colonizer (ibid.). Fanon therefore affirms culture and cultural identity and accepts that culture transforms, but sees this occurring as a binary opposed to colonialism.

The approach adopted in this dissertation is not that of arbitration with regard to these diverse perceptions, rather, it is to discern the applicability of prior postcolonial experiences, analyses and
conclusions which postcolonial discourse has to offer in order to gain a broader perception of national and global trends vis-à-vis maqasid based transformation of Islamic law within a global context. The decades of experiences in analysing hegemonic forces such as globalisation and capitalism accrues to postcolonialism insights which could assist in predicting the consequences of adopting particular courses of reform action in the context of globalisation. Loomba (1998:183) states that a theme such as hybridity should not be pitted against authenticity, rather their “ideological, political and emotional valences” should be evaluated and located, this latter suggestion of Loomba’s facilitating the production of models of approaches to similar contemporary situations such as maqasid reformation in the face of capitalist hegemony. Ashcroft (2001:206) agrees that local experiences and strategies with colonial hegemony can be extrapolated and may “throw light on the relationship between the local and the global in contemporary cultural life”. Postcolonial theory can provide models to better understand the interaction of local communities with global hegemony. The notion of a global entity considered as a hegemonic force threatening assimilation towards a single goal of capital accumulation controlled by a privileged few is a proposition advanced by Micheal Hardt and Antonio Negri which they termed ‘Empire’.34

1.3.3. Defining Postcolonialism.

The Eurocentric perceptions of the colonizer and how it is used to rationalize the process of colonization as described by Edward Said (1977) in ‘Orientalism’, was of the first significant writings which spawned postcolonialism. Postcolonialism can be seen to be a composite of voices from various quarters from those who suffered oppression whether during the height of the colonial era, or whether currently during the neo-colonial period. The disparate voices result from the divergent quarters of origin of such discourses. Ania Loomba (1998:xii) also comments that it is impossible to satisfactorily describe what postcolonial study entail due to the term “postcolonialism” becoming so heterogeneous and diffuse. Leila Gandhi (1998:viii) concurs that

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34 Given the fame of their jointly authored book, “Empire” first published in in the mid-1990’s and which rapidly acquired a canonical status with some describing it as the “Communist Manifesto of the 21st Century”, (Zizek, 2001, 289), their names are invariably co-joined in postcolonial scholarship. Michael Hardt (1960-) is an American Literary theorist who teaches at Duke University, while Antonio Negri (1933-) is an Italian Marxist sociologist. Walter ben micheals summarizes Hardt and Negri’s views as follows: “...according to Hardt and Negri’s Empire, the rise of Empire is the end of national conflict, the "enemy" now, whoever he is, can no longer be ideological or national. The enemy now must be understood as a kind of criminal, as someone who represents a threat not to a political system or a nation but to the law. This is the enemy as a terrorist. In the "new order that envelops the entire space of... civilization", where conflict between nations has been made irrelevant, the "enemy" is simultaneously "banalized" (reduced to an object of routine police repression) and absolutized (as the Enemy) an absolute threat to the ethical order (Hardt and Negri, 2000, 6)” (micheals, 2004, 172)
“postcolonialism itself remains a diffuse and nebulous term”. According to Young (2003:6), postcolonialism therefore cannot be regarded as one coherent theory as possessed by many scientific disciplines which can be applied to a given set of circumstances and a predicted outcome resulting. Gandhi (1998:viii) says that “it seems to lack an originary moment or a coherent methodology”. Postcolonialism would rather therefore seem to be a process of conscientization, with more pragmatic concerns of influencing world events in such a manner that the hegemonic effects of colonialism or neo-colonialism can be neutralised. It seeks to change the way people think, to realise justice and equity between different peoples of the world.

Postcolonialism is therefore a concept not easily defined since it does not seem to have historical limitations as regards its opposition to injustices as described by Young above. Taken in the temporal sense, it could refer to events after the passing of colonialism. Struggles against injustices and oppression have however already occurred prior to and during European colonialism. The nature of struggles against injustices are not temporally confined which then questions the prefix ‘post’ in postcolonial. Given that contemporary postcolonial struggles are not historically unique, the term ‘post’ seems inappropriate since it conveys the contra perception. The use of the term postcolonialism has therefore evoked much debate with regard to the appropriateness between its implied meaning and the theoretical discourse it represents. Anne McClintock (1992:85) believes that the use of the term ‘postcolonialism’ detracts from contemporary conditions which are very much still colonial in nature albeit on the economic and cultural fronts. McClintock’s (1992:85) ambivalence towards the term ‘postcolonialism’ is also evoked as a result of the notion that the term re-orientates towards binary oppositions namely that of colonial/postcolonial, whereas its supposed mission includes challenging such binaries (self/other centre/periphery etc.) produced by ‘Western historicism’. The term fails to reflect multiplicity or the existence of parallel cultures, the awareness of which its theory wishes to promote against the active suppression thereof by Western hegemonic practices. Some scholars such as Gandhi (1998:3) attempt to avoid the latter problems by arguing that it refers to the onset of colonialism rather than its end, preferring to use the unhyphenated form ‘postcolonialism’. Other postcolonial writers such as Ania Loomba (1998), Robert Young (2001), Bill Ashcroft (2001), Ella Shohat (1993) etc. raise debate in a similar vein.

Gandhi’s (1998:4) approach resolves some of the ambivalence expressed by the above-mentioned writers. Gandhi draws an important distinction between the terms “postcolonialism” and “postcoloniality”. The term ‘postcolonialism’ she uses to refer to the theoretical discourse
arising from the decolonisation process. The conditions existent which postcolonialism addresses she refers to as 'postcoloniality' (ibid.). Thus, she avers that postcoloniality may be suffering from ‘political amnesia’ of the colonial encounter. Emerging postcolonial nations/states, she says, are unable to discard the burdens of their colonial past. Postcolonialism as a theoretical approach could be therapeutic in its search ‘not only to make, but also gain theoretical sense out of the past’. Thus, postcoloniality is the description of conditions which may or may not be truly postcolonial as referred to by McClintock and other abovementioned writers whereas postcolonialism would then be a theoretical discourse attempting to provide theoretical sense of the past and present and possibly facilitating an analysis of the feasibility of working towards a global condition that is truly postcolonial in nature i.e., has surpassed all forms of colonialism.

Postcolonialism could then also be a term referring to a theoretical discourse aimed at establishing conditions which has surpassed the deleterious effects of and erased all traces of all forms of colonialism.

There are evidently many contradictory positions taken by postcolonial writers. These ambivalent positions become understandable when postcolonialism is seen as the voice of the voiceless, the subaltern, since the oppressed assume a methodology of resistance in accordance to the type of oppression experienced. Young (2003) collects such oppositions into a mosaic like picture of often contradictory positions. According to Young (2003:4), postcolonialism has two important elements on which much of its discourse is based. These are the fact that there exists a disparity in resource utilization and access between the three non-western continents of Africa, Asia and Latin America, and that of Europe and North America. This resultant subordination is contested by postcolonialism. The second element is cultural identity. Postcolonialism seeks to address the cultural subordination which colonial countries subjected its colonies to. Ashcroft (2001:3) states that what is at the heart of postcolonial studies is in fact the attempt to understand the interaction of colonizer and colonized cultures and how they mutually transformed each other. He ascribes the emergence of postcolonial studies to a methodology developed to examine cultural development in the context of colonialism. Postcolonialism, according to Ashcroft (ibid:7), would thus analyse the strategies employed by colonized states to engage imperial discourse (a similar engagement which Muslim reform scholars are currently embarking on in an attempt to ease difficulties faced by Muslims in the ‘West’) and how these same strategies are shared by other colonized states under different political and cultural circumstances. The subsequent postcolonial cultural discourse resulted in much disparate ideas concerning the role of culture especially its power to transform societies.
Historically, Young (2003:17) identifies the Bandung Conference of 1955 as the ‘origin of postcolonialism as a self-conscious political philosophy’. This was a conference between newly independent African and Asian countries which included Ghana, Egypt, Indonesia and India. They formed a non-aligned movement, refusing to be identified with capitalism or socialism. According to Young (ibid.), the Two-Third (or the Third-World, as it is usually described) was therefore made up of non-aligned independent nations formerly colonies of imperial nations. Even though Young identifies the latter as the first formally structured international co-operation against colonialism and its aftermath, including neo-colonialism, anti-colonial movements had already occurred since the inception of colonialism. With regard to its theoretical background, Gandhi (1998:viii) believes it to have an intellectual history in which a dialectical process between Marxism and poststructuralism/postmodernism features prominently. She identifies poststructuralism as the source of postcolonialism’s critique of Western epistemology and theorization of cultural alterity/difference whereas Marxism forms the major basis for its political aspect (ibid.ix). The first major work which analysed colonialist discourse pertaining to self/other representations was that of Edward Said in his publication of ‘Orientalism’ in 1978. ‘Colonialist discourse theory’ was thereafter further developed by scholars such as Gayatri Spivak and Homi Bhabha (Ashcroft 2001:9).

The difficulty encountered in attempting to isolate the defining features of postcolonialism can therefore be understood since the voice of the voiceless assumes various forms depending on the culture of origin of the voiceless and the historical context of oppression/colonization. A constant feature of postcolonialism, however, is its discourse pertaining to certain issues arising from colonialism and its aftermath. These include the question of hegemony, nationalism, hybridity, globalization, capitalism, neocolonialism etc. which will be discussed below.

Colonialism could be suggested to be the direct conquest and subjugation of another sovereign country (Young 2001:15). Ania Loomba refrains from proposing a ‘water tight’ definition, but suggests that it could be described as the “conquest and control of other people’s lands and goods” (1998:2). He, furthermore, draws a distinction between modern colonialism and pre-capitalist colonialism. Loomba cites Karl Marx as suggesting that the main distinguishing feature of modern colonialism from earlier colonialism (such as that of the Roman Empire or the Ottoman or Chinese Empires etc.) is the fact that modern colonialism was established simultaneously with capitalism. Economies of the subjugated countries were restructured in such a manner that it
ensured reciprocal flow of humans and natural resources between the mother country and the colony, but ensuring that profits always flowed to the mother country. Such restructuring resulted in massive global population shifts (Loomba 1998:4). Loomba firmly asserts that it is, in fact, colonial expansion which assisted in the emergence of European capitalism.

Imperialism is an expanded form of colonialism. Thus, the exercise of power is expanded from direct conquest to include political and economic influences (Young 2001:27). Loomba invokes Lenin and Kautsky (1998:5) to explain these economic controls. Lenin regards imperialism as the highest stage of capitalism and predicted a global system of control through capital. Western countries with their accumulated excess capital could therefore expand into non-industrialised countries to sustain growth. The stage of imperialism, therefore, does not require direct political domination since dependency is created in an economic and social form. Loomba (1998:6) therefore regards the term “neo-colonialism” as being synonymous with “imperialism”, whereas Young draws a distinction between the two terms as explicated below.

Young sees Neo-colonialism as a later development following independence of the colonies from their colonizers. Young (2001:46) believes that the term first originated in 1961, ascribing its further theoretical exposition to the Ghanaian leader, Kwame Nkrumah (d. 1972),35 in his book, Neo-Colonialism: The Last Stage of Imperialism, published in 1965. Neo-colonialism is closer to imperialism than colonialism, this according to definitions of colonialism and imperialism offered by Young (2001:26-27). According to Young, colonialism is defined as the process whereby the colonizer binds the colony to itself to accrue economic advantage, whereas imperialism is the accrual of economic advantage through whatever means deemed necessary such as exploitation, assimilation or partnerships (ibid.). He defines neo-colonialism, therefore, as the independence of the state with the outward trappings of international sovereignty while, in reality, its economic system and, therefore political policy, is dictated by outside forces. It is thus a term which describes the immediate postcolonial epoch. Therefore, even though colonized states had their political sovereignty returned to them, they were still under the effective control of their former colonizers (Young 2001:45). Making a distinction between imperialism and neo-colonialism clears the uncertainty raised by Loomba as regards the ambiguity between the economic and political

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35 Kwame Nkrumah (1909-1972), a pioneer of Pan-Africanist, was Ghana’s first President and arguably Africa’s most prominent anti-Colonialism hero Along with the philosophies of Karl Marx (1818-1883 A.D), Lenin (1870- 1924 A.D) and Mazzini (1805-1872 A.D), Nkrumah was more politically influenced by the philosophy of Marcus Garvey (1887-1940 A.D) (Biney 2011 :18).
connotations of the word "imperial". Loomba raises the concern that if imperialism is defined as a political system of an imperial centre governing peripheral colonies, the independence of the colonies implies the end of imperialism (Loomba 1998:6). This would not, therefore, acknowledge the existence of the remaining economic dominance and control of the former imperial state. Neocolonialism refers to the latter situation, still regarded as imperialism but considered to be the last stage (Young 2001:46). From the foregoing discussion it seems that Young prefers to reserve the term "imperial" for the situation where there still occurs overt political control by the imperial nation, but that its economic dominance is of such a nature that it does not require the political dominance to maintain economic control. Neo-colonialism would therefore be continued economic control despite political independence from the mother imperial nation. Young considers the term “neo-colonialism” as useful in as much as it takes more cognizance of not only the prevalent economic controls but also the related cultural effects, cultural dominance being perpetuated by the continued presence of settlers, their language, westernized education and legal and political institutions originally set up by the colonizers (Young 2001:48). He, however, expresses reservation with regard to its continued use as it may suggest a “powerlessness and passivity” which does not take full cognizance of the achievements of independence movements. He also believes that the stereotype of being helpless is perpetuated by this term. Furthermore, he believes that the assumptions of western hegemony are strengthened, the Third World being regarded erroneously as one homogenous perpetual victim.

1.3.4. Postcolonial Concepts Relevant to a Critique of Contemporary Maqāṣid Discourse

1.3.4.1. Cultural Hegemony
The notion of hegemony as frequently encountered in colonial discourse was first formulated by Antonio Gramsci (Loomba 1998:29). Hegemony is power achieved through both coercion and consent (ibid.). The term hegemony as applied to colonial domination therefore encapsulates in its meaning the combination of coercion used by the colonalist to forcefully subdue the indigent population and the persuasive measures employed to create subjects who are willing to be ruled. Analyses of the persuasive techniques will be favoured with greater attention than the coercive

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36 Antonio Gramsci (1891-1937 A.D) was an Italian Marxist philosopher and politician, born in a socially active family where his father was a civil servant and his elder brother a military officer (Forgas 2000:17). From 1908-11, he completed his studies, became an activist, and was introduced to the works of Karl Marx and later on the year of 1911 he becomes a student at the University of Turin (ibid.). In 1913 he became more politically involved and abandoned his educational career, this was the year that largely shaped his political activism thus fully introducing and exposing him to the Italian Socialist Party (ibid.).
aspects of hegemony in this dissertation due to its greater relevancy to the topic at hand, the understanding of the subtle working of power in contemporary society being necessary to understand the need for caution when globalisation and global culture interact with Maqāṣid based reformation of Islamic law. Ashcroft, Griffin and Tiffin’s (2000:106) description of hegemony also places greater emphasis on its persuasive aspect, the aspect which is subtle but indispensable to domination.

Gramsci (in Loomba 1998:31) identified ideology as the medium through which ideas were not only transmitted, but also accepted as truth and therefore for creating consent. Hegemony according to Gramsci’s understanding is more the incorporation and transformation of ideas and practices by the dominated rather than an imposition of ideas from the dominator (ibid.). Louis Althusser (in Loomba 1998:33), the French communist theorist, argued that in modern capitalist societies, coercion is via repressive apparatuses such as the police and army owned by the state, whereas persuasion is via schools, religious institutions, the family unit, and media which he terms “Ideological state Apparatuses”. The Ideological State apparatuses are used to create subjects that consent and accept willingly the values of the system.

The colonial discourse theory of Edward Said demonstrates how knowledge of the Orient was produced and used as an “ideological accompaniment of colonial power” (Loomba 1998:43) to consolidate colonial power. Orientalism is regarded by Said as a ‘corporate institute for dealing with the Orient’ (Said 1978:3) through its casting of the mould of the Orient through discursive construction so that the Orient can be made known and managed by this constructed knowledge. Said also describes Orientalism as a systematic academic discipline (1978:73) and a style of thought based on an ontological and epistemological distinction between the Orient and the Occident. These three latter interdependent pursuits in addition to the fact that knowledge so produced become truth to that group which has power to impress its version of knowledge on others (Ashcroft and Ahluwalia 1999:56) are what could account for the supremacy of the power of Orientalism. Ashcroft and Ahluwalia (1999:54) confirms the value derived from postcolonial experience for analysing globalization when they declare that the analysis of strategies such as Orientalism used in the past to dominate a culture “has been useful in detecting the specific discursive and cultural operations of imperial culture in various ways”. They (Ashcroft and

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37 Louis Althusser (1918-1990 A.D) was a French Marxist Philosopher who dedicated his life to the working class to overcome its inability to transform the “recurring crisis of capitalism into a successful transition to communism” (Wolff 2007:1).
Ahluwalia), furthermore, assert that Said demonstrated in ‘Orientalism’ the capacity of Orientalism to absorb and adopt positivist, Marxist and Darwinian influences without altering its central tenets (ibid:54), which may be reflective of a similar capability with regard to globalisation and the adoption of some Islamic principles but skewed in favour of promoting ‘Empire’ agendas. Ashcroft and Ahluwalia (1999:15) describes colonial discourse theory as that theory which analyse the discourse of colonialism and the process of colonization thereby demonstrating how colonial discourse obscures the underlying goals of the colonialists, the ambivalence of such discourse, and how it attempts to construct subjectivities to further colonial political and material aims. The modus operandi of the persuasive aspect of hegemony therefore becomes further clarified through colonial discourse theory.

Said argues for the importance of knowledge to power, and therefore the need for the creation of knowledge such as Orientalism to spread and maintain power. Foucauldian discourse on the relationship of knowledge and how it produces power is central to Said’s project to argue that manipulation of knowledge of the Orient was used by Western countries to exert power through a Foucauldian manner over indigenous populations (Ashcroft and Ahluwalia 2009:65). The difference in the understanding of the spread and distribution of power as hegemony and the Foucauldian perspective of a capillary like flow of power is that the Foucauldian (1991) perspective underplays the role of downward pressure of power from the top of the social hierarchy. Jenny Sharpe (1973) and Megan Vaughan (1991:8-10) agree that Foucault predominantly focus on “productive” rather than “repressive power”. Hegemony recognises and brings to attention both aspects of the colonialist methodology namely coercion and persuasion, facilitating praxis in both of these methods. Despite the critique levelled against Foucauldian analysis of power in society, his approach is still useful since covert power has gained importance in contemporary society especially with the advent of globalisation as shall be later described under the section of ‘Empire’. Said’s exposition of the ‘Orient’ as a discursive construction, shows how contemporary Islam could be considered in a similar vein and continuously constructed as the ‘other’ of the West (Ashcroft and Ahluwalia 1999:16).

1.3.4.2. ‘Empire’

The concept of ‘Empire’ is a concept which arose from a period of postcolonial discussion extending from the forties to current. ‘Empire’ is the power manifest from the drive for capital accumulation which, according to Hardt and Negri, is an ahistorical phenomenon (2000:xiv). ‘Empire’ seems also to explain much of postcolonialism’s contradictory discourses. The form of
capital accumulation under the rule of ‘Empire’ has also increasingly taken the form of bio political production i.e., the production of social life itself (Hardt and Negri 2000:xiii) in the economic, political and cultural areas. Thus ‘Empire’ shifts its focus from not only production of commodities but also the production of consumers for these commodities. This becomes apparent when they posit four fundamental characteristics of ‘Empire’ (ibid.). First, ‘Empire’ has no territorial boundaries, i.e., it rules over the entire world. Second, ‘Empire’ “presents itself not as an historical regime originating in conquest” but is an order that suspends history and “fixes the existing state of affairs for eternity” (Hardt & Negri 2000:xiv). Thus Hardt and Negri regard ‘Empire’ not as a temporary occurrence in history, but see it as “a regime with no temporal boundaries and in this sense outside history or at the end of history” (Hardt & Negri 2000: xv). Thirdly ‘Empire’ operates at all echelons of the social order (Hardt & Negri 2000:xv). According to Hardt and Negri ‘Empire’ regulates human interaction and rules human nature, creating the very world in which it exists (ibid.). Thus the globalization of capital production and subsequent decline in political control of economic relations and therefore decline in political sovereignty is lamented by many as the closing of institutional channels which could restrict the free reign of capital production (Hardt & Negri 2000:xi). In the latter sense then, ‘Empire’ seeks to control that which sought to restrict its free reign. Hardt and Negri then hypothesise ‘Empire’ to be a global form of sovereignty “composed of a series of national and supranational organisms under a single logic of rule” (Hardt & Negri 2000:xii.)

Though ‘Empire’ seeks absolute control, Hardt and Negri’s assessment of the contemporary situation is that of a decline in sovereignty of nation states, their political controls, functions and regulatory mechanism continually being challenged by ‘Empire’ agenda (Hardt & Negri 2000:xi). The final characteristic of ‘Empire’ which Hardt and Negri describe is its consistent dedication to peace “a perpetual and universal peace outside history”, despite its practices being “continually bathed in blood” (Hardt & Negri 2000: xv).

Though the idea of ‘Empire’ evolved over a length of time through postcolonial discourse, traces of supranational ideas of oppression for gain of surplus wealth can be gleaned already in the writings of Mohandas Karamchand Gandhi38 who lived in the colonial era (Hiddleston 2009:59).

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38 Mohandas Karamchand Gandhi (d. 1948) was an Indian Hindu activist and leader of the Indian independence movement. He is known for popularizing nonviolent civil disobedience against colonial British authorities, inspiring
He (Gandhi) commented that he did not blame the Englishman for the oppression of the colonized in India, but blamed modern society. Modern society, according to Gandhi, prioritizes bodily welfare. Material priority leads to the neglect of the spiritual aspect of humans. Humans become enslaved in a spiral of material wants and luxuries which money can buy. Gandhi believed therefore that this material dimension of modernity dictates the action of humans. The colonial project is a manifestation of this exploitative drive.

From Gandhi's analysis of the Indian situation, one can conceive of an exploitative capitalist machine which manifest in various forms which he saw as the colonial project of the modernization of India. Nationality (English) was but a screen for its continued function. Gandhi therefore says that India suffers because it is “being ground down not under the English heel, but under that of modern civilization” (Gandhi 1938) The contemporary world order Hardt and Negri see as being dictated by ‘Empire’. Currently nationality still seems to function as a screen for the agenda of ‘Empire’. Hardt and Negri argue that ‘Empire’ now virtually exists as an independent entity even if the US may be playing a leading role in the propagation of ‘Empire’s’ agendas. Other scholars, however, still view the US as an imperialist nation and regard Hardt and Negri, as underplaying the role of the US in contemporary imperialist hegemonies. Balakrishnan (2000:145), for example, believes that the only reason why the contemporary world system can be described as an empire is because political, economic and military power is overwhelmingly concentrated in the hands of the USA. Boron (2005:4) disagrees with Hardt and Negri, arguing that a handful of capitalist nations have steadily increased their capacity to control the world economy while peripheral nations witness their increasing distance from achieving similar economic status is but a continuation of the fundamental parameters of imperialism, and does not regard the latter control as being from an entity termed ‘Empire’. The latter, therefore, rejects the assertion of Hardt and Negri that transnational corporations are at the helm of US imperialism, believing the US and other dominant nations are acting for the preservation of the ‘homeland’. With regard to the latter, reasonable deductions from the stances of both writers would be that Boron’s assertion requires the necessity for believing that transnational corporations may still act in national interest rather than in the interest of the corporation, whereas Hardt and Negri’s assertion implies that corporations are driven by profit and acts only in the interest of the homeland if this coincides with its own, or it may project its own interest as that of the nation. Coleman and Agnew (2007:318)

civil rights movements in other global locations. He was born to a Hindu merchant caste family, and has been critiqued by Dalit movements for not being radical enough in his opposition to the caste system (Oxford Reference).
states the current debate between the two positions as follows: “Those who continue to see state and state interests - and specifically US foreign policy-as geopolitically relevant and those who would see the problem of government in quite a different light as absent any place specific identities or territorial strategies”.

The existence of the latter debate therefore constitutes proof of the poor delineation between what Hardt and Negri term as ‘Empire’ and foreign policies of dominant nations such as the US. The latter debate also supports the assertion that Western culture is dominated by ‘Empire’ and that the two is virtually synonymous.

1.3.4.3. Modus Operandi of ‘Empire’ and the Universalization of Human Rights
The visibility of the impact of the ‘Empire in the world order of today has special significance with regard to the Maqāṣid al-Shari`ah discourse and its purported adaptation of Islam to modern cultural norms and standards. It is important at this stage to emphasise that Hardt and Negri do not promote the notion of a conspiracy theory in the sense that the world order is dictated by “a single centre of rationality transcendent to global forces”, rather it is common interest, which is that of capital accumulation, which results in co-operative ventures giving rise to policies dictating directions of multinational corporations. Hardt and Negri (2000) identify the following means of operation of Empire:

a. The Right to Intervention: The United Nations (UN) is a platform through which ‘Empire’ can achieve its goals. The right of intervention is one of the instruments accorded the United Nations (Hardt and Negri 2000:18). The right to intervene is based on essential values of justice (ibid.). The right to police is legitimated by universal values. ‘Empire’ sets the ground rules for such interventions, the more important method of intervention being moral followed by the military. The news media, religious organizations and NGO’s have become moral instruments of ‘Empire’, forming its persuasive aspect of hegemony. The legitimation of military intervention is therefore articulated by the latter moral instruments. Hardt & Negri (2000:36) regard as more important the moral instruments which are not run by governments such as the NGO's as a means for the legitimation of ‘Empire’s’ coercive arm of hegemony. These moral instruments which strive to identify human rights abuses may have pure intentions, but work within the paradigm of ‘Empire’ without necessarily an awareness of doing so. The latter assertion is substantiated by the fact that the formation of the UN was dominated by European and US nations and therefore their
ideas of human rights will have dominated. Makau Mutau avers that the Human Rights discourse is Eurocentric (2001:204), and therefore so is the UN since Human Rights is its moral compass. It was Hans Kelsen (Hardt and Negri 2000:5) who universalized a notion of right, a supreme ethical idea. The UN, for Kelsen, was an effective mechanism to realise the transcendental schema of right which would govern nations and states. According to Hardt and Negri, supranational subjects are legitimated by consensus, and intervention is justified by an essential value of justice. It is the promise of peace and guarantee of justice which assists in conferring on ‘Empire’ its legitimacy and grants it power to act in terms of ‘just wars’. (Hardt & Negri 2000:10). Domination of representation is through the media machine, controlled by the wealthy. The domination of Habermasian public spaces occurs as a result of advantages accrued during the colonial era commencing as dominance of the economic, political and military, which provide the means for dominating representation through the domination of public spaces via the media and communications industry (Hardt & Negri 2000:33). The wealthy who wishes to accumulate has the wherewithal to promote through such domination of public spaces, policies facilitating greater wealth accumulation under the guise of peace and justice. The wealthy in control will accumulate ever more wealth, and thus continually acquire increasingly efficient means to dictate policies towards the accumulation of further wealth. This is in part how ‘Empire’ is formed, a consensus of like-minded capital seeking individuals/organizations. Thus, Empire is not formed forcefully, but presents force as being in the service of peace and right (ibid. 2000:15). Hardt and Negri expresses the self-legitimation of ‘Empire’ as follows:

The legitimation of the imperial machine is born at least in part in the communications industries...It is a subject that produces its own image of authority. This is a form of legitimation that rests on nothing outside itself and is re-proposed ceaselessly by developing its own language of self-validation. (ibid. 33)

Whoever does not conform to the dominating discourse of peace and right as dictated by ‘Empire’ does not work for peace and right, and if it is an ideology that is a threat to ‘Empire’ will be defined as privation, and recognized as sin (ibid.36), and denounced publicly by NGO’S.

Miranda Joseph writes that the Habermasian public sphere is a domain where the potential for critical discussion and independent debate is engaged by way of publically disseminated information about and/or disseminated by the state (Joseph 2017:213).
b. Production of Needs: The great industrial and financial powers produce subjectivities to become consumers and generators of more capital. Hardt and Negri (2000:32) in this regard claims that they “produce needs, social relations, bodies and minds, which is to say they produce producers”. Hardt and Negri (2000:197) regard various social institutions as factories of subjectivities, individuals passing through them and are formed by them. They see the diminution of the difference between private and public space, or the lack of delimitations between them as significant in the working of ‘Empire’. The latter has unleashed circuits of control throughout what they now term as the ‘intimate public sphere’. The destruction of boundaries promotes the free flow of influences of ‘Empire’. “On the global stage, every biopolitical figure appears dressed in monetary garb. Accumulate, accumulate!” (Hardt and Negri, 2000:32)

This paradigm seems acceptable to NGO’s because it stands for peace and right. What is not noted, however, is that it is a selective right which offers minimal inhibition to capital accumulation. Absent from the paradigm is the right for example of the poor to the wealth of the rich, such as Zakah (obligatory charity) in the Islamic tradition. Absent is the Islamic tradition of the right of parents over children, or the right of women to be supported by men. Such rights do not enhance the process of capital accumulation. Each individual has to create capital. Those qualities which promote capital accumulation are promoted, such as the right and freedom to possess wealth without obligation to anyone, the freedom to dispose of assets as one pleases, the right of everyone to attain equal economic status etc.

Therefore, the contemporary human rights discourse, projects the image of a universal good, but is a selective one. The individual ‘good’ and rights of the human rights discourse cannot be denied or argued against, but the selective process of certain ‘goods’ which promote capital accumulation can be seen as problematic since the selected ‘good’ are the ones which offers least resistance to capital accumulation. NGO’s do not see the absent good and cannot deny that what is presented is good. Add to the latter the Habermasian space occupied by capitalist currently dominated by media which projects the selective good, NGO’s would be at pains to perceive themselves as not doing ‘good’ when they follow the presented human rights paradigm.

c. Presenting Itself as being in the Service of Right and Peace
The concept of just war is pertinent in this regard (Hardt and Negri 2000:12). ‘Empire’ presents its order as permanent, eternal and necessary. Every juridical system is in some way a crystallization of a specific set of values, because ethics is part of the materiality of every juridical foundation, but ‘Empire’ is peculiar in that it pushes the coincidence and universality of the ethical and juridical to the extreme: in ‘Empire’ there is peace, in ‘Empire’ there is guarantee of justice for all peoples. The first step is hegemony over juridical practices involving accepted procedure, prevention and addressing of wrongs. Makau W. Mutua (1958), a Kenyan-American legal scholar40 (2001:202) insights with regards to the dominant forces which operated to control the juridical process throw more light on how such dominance occurred irrespective of intention. Whatever culture dominated the process, would dictate policy, the latter especially in view of the universalizing trends of European culture at the time. The UN is a product of the latter process, the human rights discourse as constructed by the West being its moral voice providing a paradigm within which NGO’s and other organizations operate. What then is accepted as normal will emerge from the hegemonized juridical systems, the latter normativity then being sanctioned, with repression of wrongs accordingly. Hardt and Negri question this notion of essential values of justice and peace when they pose the questions, “Who will decide on the definition of justice and order” and “Who will be able to define peace” over the expanse of global space? (ibid.:19) They then argue further that ‘Empire’, in fact, determines our internal moral disposition by its ethical, political and juridical categories, similar to the Kantian notion of a priori categories of understanding.41 This framework of ‘Empire’ throws our own ideas and practice of justice into question, forcing us to confront a series of aporias, and engaging in reform such as that through Maqāṣid since we are now made to believe that the “external morality of humans are only commensurable in the framework of ‘Empire’” (ibid.:19). No longer are we confronted by “local mediations of the universal,” but ‘Empire’ confronts us with a “concrete universal” (ibid.). Hardt and Negri (ibid. 36) regard many NGO’S as pacific

40 Mutua, a prominent Pan-Africanist thinker, has a controversial and chequered career both in his homeland, Kenya, and in the USA where he was Dean of the University of Buffalo Law School. He currently at SUNY where he serves Distinguished Professor in Law School.

41 The Latin phrases a priori (“from what is before”) and a posteriori (“from what is after”) have been respectively used in philosophy to distinguish between arguments based on causes and arguments based on effects. German philosopher Emmanuel Kant (d. 1804), in his Critique of Pure Reason (1781), held that the distinction between a priori/cause and a posteriori/effect is corollary to the difference between necessary truth and contingent truth. For Kant, a priori judgements are a necessary truth as they are arrived at independently of experience and hold universality. And a posteriori judgements are contingent truths as they are dependent on experience and must deal with the possibility of exceptions (A priori knowledge).
weapons of ‘Empire’ “even if this runs counter to the intentions of the participants”. Likewise, *Maqāṣid* could be used as a pacifier without the intentions of the participants. To achieve these ends, authority is given to conduct just wars when necessary, internally against rebellious, and on the borders with barbarians. The war in Iraq could be seen as such an instance of justified violence. Aime Cesaire (Coetzee et al., 2004:127) alluded to the political misrepresentation of humanitarian principles when he referred with a great deal of irony to the Bantu philosophy of Placid Temples. He did not deride Bantu philosophy but the imperialist attempt at using it to preserve its domination when he stated the colonialist position as follows:

> Bantus are only interested in ontological satisfaction […]. What they want above all is not an improvement in their material or economic situation, but recognition by the white man and respect for their human dignity, for their full human value. (Coetzee et al 2004:127)

Our own moral values are increasing challenged by the new social order thus created. Similar to Kant’s transcendental categories, our internal moral values are increasingly made to fit universal categories of morality as reflected in the human rights discourse as adopted by the UN, a discourse dominated by particular hegemonic cultures. Commensurability of morality of various cultures and individuals is now seemingly only obtainable within the framework as already determined by ‘Empire’.

d. Muslim Reformist Scholarship and Hegemony Coercion rather than Persuasion

‘Empire’ is imperial not in the sense of imperialist, where control is exercised politically or economically over a sovereign state; rather it is of an inclusive nature. It sets aside difference that might cause social conflict and therefore achieves universal inclusion. ‘Empire’ does not fortify its boundaries to push others away, rather it extends a helping hand to all the oppressed. In the same manner in which ‘Empire’ used colonialism or imperialism as a facade to veil its drive for capital accumulation, it present justice (in a universal sense) as prime motivation, veiling its agenda of an all-inclusive drive for capital accumulation from whoever succumbs to its allures. ‘Empire’ gloss over difference establishing a public space of neutrality and therefore legitimate and establish a universal notion of right. Hardt and Negri therefore see ‘Empire’ as establishing "a smooth space across which subjectivities glide without substantial resistance or conflict" (2000:198). ‘Empire’ seeks to construct new territorial and political formations that are functional to its constitution (2000:37).
Michael Foucault’s (1991) historical analysis of the working of power in society lends credence to Hardt and Negri’s conception of ‘Empire’. Foucault presents an historical analysis of how power is filtered through structures of society effecting its influence on human activity. ‘Power’ in Foucault’s understanding of the functioning of society could be likened to ‘Empire’ in Hardt and Negri’s analysis of contemporary global power structures. The ‘Empire’ of Hardt and Negri could be conceptualized as the agglutination of the sources of power, sources which Foucault refer to as the “will” to power. The “will” residing in individuals in society becomes organized under what Hardt and Negri describes as a’ single logic of rule’. The ‘singleness’ of the logic to rule would stem from a common quality that underscores the purpose and advantages of rule namely the desire for power. The desire for accumulation of wealth, a prominent feature of ‘Empire’, could be linked to the power which economic dominance confers.

A pertinent example of societal structures which serves the latter function is that of the academic institutions. Foucault regards them either as “principal elements” or “privileged points of intersection” (Foucault 1991:69). He sees the academic system as a structure which multiplies and reinforces “their power effects as centres in a polymorphous ensemble of intellectuals who virtually all pass through and relate themselves to the academic system”.

Foucault believes that the knowledge at the disposal of the intellectual creates in her a target for political powers since it is the knowledge at her disposal which constitutes a political threat (1991:69). He goes on to explain the relationship between truth and power in the context of the academic who is ostensibly one of the principal elements for the production of truths. “Truth”, he says, “is not an independent entity which lies outside power, neither is it devoid of power”. He claims truth to be a production of this world “by virtue of multiple forms of constraints” (Foucault 1991:72-73). The truth accepted by a particular society is dependent on which discourses are accepted by that society as true and which discourses it makes to function as true (Foucault 1991:73). The role of the academic is therefore seen by Foucault as part of a structure which effect the distribution of power, identifying five important traits (Foucault 1991:73) by which truth can be conceived of as being the servant of power. These are that scientific discourse and the institutes of its production is central to what is accepted as ‘Truth’; Economics and politics constantly
influences the production of ‘Truth’; Truth is spread and consumed in various forms though structure of education and information widely distributed throughout the social body; Truth is produced, transmitted and controlled by dominant political and economic structures; Truth is the object of political and social debate and discourse i.e. the issue of “ideological” struggles (Foucault 1991:73).

The situation of the intellectual or academic and the means by which she may be used as a conduit for the passage of power such as that of ‘Empire’ has particular relevance for the Muslim reformist scholar who is motivated to change Islamic Law by virtue of the difficulties encountered by Muslim minorities in reconciling their way of life to a peacefully co-existence with non-Muslim majorities. Foucault makes reference to the specificity of the role of the academic in generating truths, i.e., a specificity which he sees as being linked to “the general functioning of an apparatus of truth” (Foucault 1991:73). By specificity Foucault means that academies do not expound universal values, but from within her specific position of class, professional scope of activity and the politics of truth of her society in which she functions, her position “can take on a general significance” and can have effects “which are not simply professional or sectoral” (ibid.). These general effects are, in turn, governed by the academic’s specific position. Academics therefore produce power effects and are affected by power. The Muslim reformist scholar, therefore, faces challenge from power in conduits within a society to which she wish to adapt, the distinct possibility existing of becoming assimilated in the power structures of that society and, therefore, becoming a conduit for truths produced by that society. This process is by itself not necessarily undesirable, but can be problematic if that society is dominated by a power structure such as the “Empire”.

The concept of ‘Empire’ by Hardt and Negri and the role of the academic as situated by Foucault as part of a societal structure through which power is distributed is, therefore, particularly relevant to this dissertation. The Muslim academic who wishes to introduce reform as an attempt to harmonize Islamic law with the UDHR, particularly in the context of globalisation, needs especially to be cognizance of the fruits of postcolonial discourses since postcolonial discourse is a sphere of academic studies which had devoted much attention to the methods employed for the acquisition and dispensing of power as evidenced by its discourses on hegemony, Eurocentrism and analyses of power structures arising following the ‘dismantling’ of colonialism. That the Muslim scholar is part of a societal
structure through which power can be filtered is difficult to doubt in the light of the Foucauldian analysis on how power influences and uses societal structures. Furthermore, Hardt and Negri’s conception of ‘Empire’ crystalize that power into a source manifest. That the power of ‘Empire’ can filter through the academic power structure of which the Muslim scholar is affiliated is a conclusion which leave little room for debate.

Concerns may be raised with regard to the credibility of the comments of non-Muslim scholars from the viewpoint of Muslim scholars especially with regard to the structure of Muslim society and the academics which it produces. Is it possible for a Foucauldian analysis of society to be accepted by Muslim scholars and therefore to heed the threat which postcolonial discourse has shown to be facing society in general, and therefore by extension Muslim society in particular? Muslim scholars believe in revelation as an external, independent, objective source of truth (hence the Qur’an as a primary source of law) contra Foucault who believes truth to be a production of this world, and not external to society’s structures as explicated above. In addition Foucault believes societal structures to be formed by multiple constraints as he illustrates with his genealogical approach to his analysis of social institutions, cultural norms and moral standards. The latter approach leads him to the conclusion that “disparity” is at the “historical beginning of things” and not an “inviolable identity of their origin” (Foucault 1977:143). To Foucault, history denies the divine origin of humans (ibid.). Such assertions concerning truth and the origins of humans would certainly be a source of intense ideological debate with Muslims, but if seen in a different perspective, could be viewed as merely a distraction from that which is important in Foucault’s discourse. It is not Foucault’s ideological conclusions which attract this dissertation’s attention, rather it is his uncovering of the modus operandi of power which operate through existing structures including the shaping of such structures which alerts to similar possibilities with regard to the subtle shaping of Islamic law in order to be on par with contemporary globalization trends, notwithstanding the possibility that a similar historical investigation of existing Muslim societal structures may reveal that it may have already been influenced by unfavourable hidden power discourses. If Foucault’s ideological conclusions cause trepidation in the minds of Muslims, the following observations may be a source of assuage, namely, that a distinction should be made between Foucault’s ideological and that of his sociological conclusions. Even though both sets of conclusions draw its premises from his genealogical investigations, Hardt and Negri’s concept of ‘Empire’ is supported by Foucault’s sociological and not his ideological conclusions. The premises and evidence for
sociological conclusions are amenable to empirical investigation and can be accepted or rejected on the basis of tangible historical data contra ideological premises which are not readily amenable or tangible for verification. Finally then, given the trajectory of globalisation trends as projected by postcolonial discourse, and the power of ‘Empire’ as unmasked by Hardt and Negri, can Muslims afford not to be cautious and not take heed of the warning in such discourses? The potential benefits accruable by implementing caution if the latter discourse is a fair reflection of social dynamics should be juxtaposed to the potential for harm accruable in two possible scenarios namely, where caution is exercised and Foucauldian discourse is not a true reflection of societal dynamics, or where caution is not exercised in the face of societal dynamics which reflect Foucauldian analysis.

e. Desacralising the Sacred

For ‘Empire’ with its emphasis on capital accumulation the biopolitical is more important than ideology to achieve its purpose. Hardt and Negri (2000:27) quotes Foucault in support of the latter claim when Foucault asserts that:

The control of society and individuals is not conducted only through consciousness or ideology, but also in the body and with the body. For capitalist society biopolitics is what is most important, the biological, the somatic, the corporeal.

Hardt and Negri (2000:28) turns to Deleuze and Guattari and other Italian authors to further elucidate the ‘who’ and the ‘what’ that drives the system of the “Empire”. Suffice to indicate that the system is materially embedded. Hardt and Negri (ibid:71) also recognise the origins of European modernity as being characterised by "a secularizing process that denied divine and transcendent authority over worldly affairs" but regards the aforementioned as only symptomatic of a more important underlying primary event, namely “the affirmation of the powers of this world, the discovery of the plane of immanence. Omne ens habet aliquod esse proprium - every entity has a singular essence" (ibid.).

Humanity and nature was therefore placed in the position of God (ibid.77). Hardt and Negri (ibid.) then go on to explain how transcendence in the divine was now transferred to a transcendent political apparatus which controlled the field of imminence, free of divine influence, and controlling the creative potential of the multitude. The latter process
contributed to a great extent to the eruption of writings centred round qualities of freedom and equality, necessary prerequisites for autonomy and agency. These latter discourses had as a major focus the tension between the autonomy of the individual and the controlling influence of the state. A plethora of writings are to be found regarding the protection of individual autonomy through the protection of freedom and equality, including the writing of Mills on liberty, toleration and individuality (1991), Nozick (1974) who argues for a minimal state and Waltzer (1983) who argues for a form of communitarian pluralism, defending liberty and equality through a notion of spheres of justice. The importance of the latter discourses lies in the fact that the autonomy of the human needed to be preserved, since autonomy logically cannot exist without the freedom or equality for each human to practice that autonomy. Humans having autonomy could therefore be her own sovereign, instead of God. Such sovereignty could however also invest excessive authority in the state, resulting in loss of autonomy if the power of the state is not curbed. The details of these discourses will not be entered into since it is beyond the scope of this dissertation. Suffice to take cognizance of the fact that the need to defend liberty and equality stems from the need to demonstrate autonomy and sovereignty of the human, which arose because of the desacralization process.

Empire not only inherited the more immanent desacralized perspective of European modernism, but also transformed its transcendent sovereign aspect from a nation state type of sovereignty to a more expansive type of sovereign imperialism. Power is maintained in the hands of the multitude through the constitution of “limits and equilibria, checks and balances” (Hardt and Negri 2000:161) but also constituting a central power. In other words the multitude does not transfer power in a Hobbesian\textsuperscript{42} contract or Lockean type of power transfer as in European modern sovereignty, but is an internal arrangement of the multitude with a network of democratic interaction of powers (ibid.161). The latter attest to the expansive nature of imperial power as seen in ‘Empire’ that absorbs ever more at its margins into its network. This is unlike older forms of imperialism which were exclusive in nature, expanding to the exclusion of that which existed beyond its margins. Pheng Chea, (2006:11) however remarks that this inclusive cosmopolitan consciousness mainly resides

\textsuperscript{42} Thomas Hobbes (d. 1679) was one of the first modern European philosophers to theorize the concept of the social contract. Hobbes viewed human nature as inherently irrational and self-interested, thus, the social contract was a way for individuals to give up some of their individual rights to others. Through a state, which becomes the new sovereign that guides human relations, laws would be created to govern social relations and move humans away from their innate selfishness and inability to generate reciprocal generosity (Hobbes 1985: 223).
with transnational upward class mobility, a class which now mainly benefits from global production of capital. He believes that active exploitation and impoverishment of peripheral majorities is what sustains the beneficiaries of this new cosmopolitanism (ibid.).

The trajectory of contemporary *Maqāṣid* reflects a similar desacralisation dissimilar from classical *Maqāṣid* discourse. The emphasis seems to be on controlling the multitude at a socio-economic level with minimal divine influence. Reformation in this manner may transfer authority in divine transcendence to authority in a transcendent apparatus controlled by the system of ‘Empire’.

Chapter three will demonstrate how the *Maqāṣid* discourse attempts to parallel specific human rights such as freedom and equality, this despite the fact that the source of the aspiration to such values viz. the demonstration of the autonomy of the individual (from God) as is found in the Western discourse, is not vital to the Islamic worldview. Khaled Abou El Fadl (2003) emphasises the difference between Western conceptions of the democratic idea of the autonomy of the people, desacralized, in contradistinction to Islam which maintains divine autonomy over the people. Freedom and equality as a support for autonomy is obviated as a means to legitimate the rule of the people since governance is seen to be in the hands of God. Freedom and equality is, therefore, not essential if God rules, yet these two values are catapulted to essential purposes of the law even though it is not required as a legitimation of the law. The following chapter will demonstrate the latter phenomena appearing in the writings of *Maqāṣid* based reformers, which can only lead to the conclusion that it is a response to coercion to conform to the contemporary human rights discourse rather than an essential element of Islam. It demonstrates a carte blanche acceptance of the human rights discourse with minimal critique of the origins of such discourse.

1.4. Postcolonial Critique of Human Rights

The following critique of human rights relevant to this dissertation are directed at the basis of contemporary human rights discourse i.e., its normative assumptions, whether from a universalist or cultural relativist perspective. Postcolonial critique of human rights reveals inconsistencies within the contemporary human rights corpus that seem to favour hegemonic agendas. Hardt and Negri’s assertion that human rights are currently based on essential and universalist notions has already been mentioned above. Mutua (2001:204) supports this perception of Hardt and Negri, declaring the human rights discourse to be Eurocentric, identifying its authors as being the UN,
Western states, international non-governmental organizations (INGO’s) and senior Western academics. He conceives their construct of human rights to be that of a three dimensional prism constituted of savages, victims and saviours. The savages are the human rights abusers, which according to Mutua (ibid.), are depicted by the authors of human rights to be culturally deviant, thus facilitating the legitimation of cultural hegemony. The victims are projected as helpless recipients of both the abuse of the abusers and succour from the saviours. The saviours currently are the very same authors of human rights namely the UN, INGO’s and Western governments. Therefore, even if well meaning, the human rights discourse suffer from a lack of contribution from those who have experienced abuse and who may have first-hand knowledge of what human rights means for them. The depiction of victims as helpless, Mutua refers to the image depicted of them as “dumb copies of the original (ibid. 205)”, aids in creating the perception that their input may not be forthcoming, or not required since the current discourse on human rights regards contemporary human rights values as universal. It is for the latter reason that Mutua declares the current human rights discourse as Eurocentric, since it captures humanitarian values derived mainly from Western perspectives. This may not in itself be inappropriate for Western culture but becomes problematic when imposed on differing cultures, a process which could then be viewed as hegemonic. Mutua (2001:204) substantiates his view of the Eurocentrism of the human rights corpus by indicating that its historical continuum with the colonial project is the source of its depiction of various role players as either being in subordinate positions or superior positions. He sees the savage-victim-saviour metaphor within the human rights corpus as creating an “othering” process in which the victims’ conditions are ‘elevated’ to resemble that of the saviour. The latter process is reminiscent of colonial hegemonic ‘civilizing’ missions. Gaining cross cultural legitimacy is therefore problematic for the human rights corpus as it requires ‘ascendancy’ to Western values. The projected values of the human rights corpus are presented in apparent neutral and universal language manifesting an outer shell of nobility, but the subtext, which Mutua (ibid.:206) describes as a “grand narrative” to this corpus, of which the authors are mentioned above, dictates actual policy and legislation. He quotes the following excerpt from the U.N. Charter as an example of the latter: “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women, and of nations large and small.” (UDHR)

Despite its noble exterior, the corpus does not provide for all cultures since Westerners have predominantly defined terminology such as “fundamental human rights”. Mutua (ibid.) questions whether consideration has been given as regard the extent to which such terminology may have
been culturally biased. The term “fundamental human rights”, according to Mutua, assumes the existence of a prototypical human being. How did the human rights authors arrive at such an essentialised notion of human rights? He asks whether their prototype is to be found in the deserts of Iraq, or rainforests of Brazil, or slums of Boston? Mutua (ibid.) also point out that despite the fact that the U.N. charter declare equality for “nations large and small” that this is merely a pretence to neutrality and universality since the U.N., being dominated by larger nations such as the US and Europe, gives the latter “the primary power to define and determine wold peace and stability”.

Mutua (ibid:208) calls for a new human rights movement which is multicultural and inclusive and therefore free of Eurocentrism. He (ibid.) also believes it imperative that the unequal power relations described above, should also be addressed. Regarding other cultures as peripheral he sees as problematic as it results in divisiveness stemming from a need to be defensive as a result of being relegated to an inferior peripheral position (Matua 2001:207).

Accepting Eurocentrism and relegating Muslims to the periphery is a significant error which Tariq Ramadan has succumbed to, probably stemming from the lack of input of postcolonial insights as will be discussed in Chapter Three. Pheng Cheah43 (2006:145) also sounds a warning that the perception of the moral universalism of human rights can be used to “justify economic globalization as a form of postcolonial civilizing mission”. The latter argument, he says, is particularly significant in the light of neoliberal arguments promoting the notion that globalization has the power to unify the world into a common humanity. The spread of the interests of global capitalism is thus legitimated through the notion that such globalization brings the rule of law and civil liberties to communities who are perceived as not adhering to the human rights discourse. On the contrary, Renato Constantino (1998) avers that ‘globalization is recolonization’ believing that the promotion of certain policies such as “privatization, trade liberalization, deregulation, export-orientation, openness to foreign investments, phase-out of tariff protection and subsidies for local producers, and the implementation of labor-flexibility schemes”promotes the interests of transnational corporations to exploit countries natural and human resources with the least hindrance possible. He believes that the implementation of such policies results in the loss of control by national governments over corporate activity.

43 Pheng Cheah is Postcolonial theorist who focusses on theories of globalization and transnationalism, cosmopolitanism and nationalism and human rights. He is based at the Department of Rhetoric at the University of California at Berkeley.
Pheng’s (ibid:146) observations regarding cultural relativism and human rights further serves to emphasize the lack of finality regarding the contemporary human rights discourse. He remarks that juxtaposing universalist arguments regarding human rights with cultural relativism detracts from the issues which drives these debates. He refers to Asian governments who points to plurality of cultures as an argument against the current human rights discourse which they claim to be unjustly universalist in nature (Ibid:147). However, these very Asian governments presents a “figured face of statist cultural difference [which] is not identical to the cultural diversity of its people” (ibid:147). He accuses these governments of destroying their own indigenous cultures for the purpose of capital accumulation, citing deforestation and mining projects as examples of the latter process (ibid:148). Both universalist and cultural diversity positions detract from the underlying common purpose of global capital accumulation and therefore from exploring alternative expositions of human rights. Pheng’s (ibid:174) suggested alternative to what is accepted as normative is in fact a continuously changing normativity through “reason’s constitutive inscription within an unstable and shifting field of historical forces that it cannot control or transcend”. It is not in the scope of this dissertation to examine his proposal in detail. However, his proposition is cited to emphasise that debate is still sorely required to critique contemporary human rights discourse. The latter assertion concurs with Mutua’s (2001:209) opinion that “a sober evaluation of the current human rights corpus and its language is not on option - it is required”. Pheng’s (2006:177) work also illustrates that there is, in fact, no finality to this debate and that we not only need to work against global capitalism but are forced to work with it since global capitalism “induces changing forms of human dignity”.

The chapter that follows will illustrate how Maqāṣid al-Sharī`ah reformers focus directly on specific human rights, dedicating scant attention to the latter discussion concerning the normative basis serving as a source for specific human rights of the contemporary human rights discourse. Pheng’s (2006:152) observation that what is accepted as normative, “will influence the specific rights that flow from this universal entitlement” underscores the importance of viewing specific rights with a similar critique. The following chapter will demonstrate the necessity for similar critique by Maqāṣid based reformers of Islamic law. Added insight would be obtained if the latter reformers took cognizance of the observations of Mutua (2001:207) who comments that “if the human rights movement is driven by a totalitarian or totalising impulse, that is, the mission to require that all human societies transform themselves to a particular blueprint, then there is an
acute shortage of deep reflection and a troubling abundance of zealotry in the human rights community”. This vision of the “good society” must be vigorously questioned and contested

The following chapter will also analyse and illustrate that Maqāṣid based reformers have great difficulty in proving that Islam conforms to contemporary (universalist) human rights discourse. There is however a persistence in endeavours to prove specific Islamic human rights which conform to contemporary human rights discourse, often relying on insubstantial and inconsequential evidence.

1.5 Summary

Chapter One has explicated some important concepts which developed within postcolonial discourse. These concepts are essential to the understanding of the dynamics involved with the confluence of dominant cultures with minority cultures. Such concepts can be used to predict, based on past experience, the outcome of such intersections associated with certain given conditions. The concepts discussed such as hegemony with its tools such as universalism, essentialism, marginalization, othering, and ‘Empire’ with its modes of operation are important considerations for Maqāṣid based reformers who wish to develop consonance with another dominant culture viz. the West. The following chapters will illustrate how understanding the postcolonial insights discussed above can assist in directing the trajectory of Maqāṣid away from inadvertent perpetuation of a repeat of past errors and oppressive systems.
Chapter Two

Maqāṣid al-Sharī`ah and Reformation of Islamic Law

2.1 Introduction
This chapter deals with the explication of the opinions of various reform scholars who utilise Maqāṣid as a means to reform Islamic law, with the foremost aim being the integration of Muslims into Western society. The classic conception of Maqāṣid will first be presented. The work of Shāṭibī on Maqāṣid in his book entitled ‘Al-Muwāfaqat fi Ūṣūl Al-Sharī`ah’ as interpreted and presented by Aḥmad Raysūnī has been chosen as representative of the classic period. Discussion of classical Maqāṣid will mainly be for the purpose of demonstrating the fact that even though classic Maqāṣid is seen by reform scholars as a flexible tool with which to reform Islamic law, that classic Maqāṣid unaltered is deficient for the type of reform envisaged by contemporary reform scholars such as ibn-Āshūr and Auda. The discussion of classical Maqāṣid further serves as a historical reference point to illustrate the truncation of the Maqāṣid discourse as an attempt to parallel the human rights discourse reflecting the intended or unintended purposes of contemporary reform scholars of succumbing to the contemporary human rights discourse. The section which follows the classical conception of Maqāṣid present an analysis of theoretical approaches as envisaged by contemporary reform scholars aimed at developing and transforming classical Maqāṣid to improve its ability to effect contemporary reform proposals in Islamic law. The four scholars viz. Muḥammad al-Tahir Ibn Āshūr, Tariq Ramadan, Gamal Eldin Attia and Jasser Auda who offer an extensive theoretical framework to facilitate the usage of Maqāṣid to adapt to modern society will first be presented. The presentation of the work of these four scholars is important at this stage in order to grasp its postcolonial appraisal in chapter four. Other writers such as Taha Jabar al-Alwani, Hashim Kamali and Muhammad Umer Chapra inter alia are also discussed since they support the use of Maqāṣid as a reformation tool, with the foremost concern also being that of the integration of Muslims into Western society, even though their theoretical exposition of Maqāṣid may not be as extensive as the first abovementioned four writers. A discussion with regard to the hierarchy of Maqāṣid al-Sharī`ah has been purposely omitted as it bears little relevance to the theme of the present study.

2.2. The Classical Approach to Maqāṣid
2.2.1 Shāṭibī’s Typology of Maqāṣid
A brief explication of the position of Maqāṣid at the time of Shāṭibī is embarked upon to provide a position of contrast to highlight changes which contemporary scholars propose to introduce. As mentioned above, this dissertation is not an exploration of classic Maqāṣid per se nor of its development. The classic approach to Maqāṣid is discussed as a necessity to provide information as regard its Maqāṣid prior to the emergence of the contemporary human rights discourse. This will facilitate in illustrating the fact that changes in Maqāṣid theory seems to be aimed at an attempt to harmonize it with the contemporary human rights discourse.

Shāṭibī’s theory of Maqāṣid as expounded in his ‘Al-Muwāfaqāt’ is used as representative of the classical Maqāṣid position for the following reasons: a) ‘Al-Muwāfaqāt’ was written prior to the prominence of the Western discourse on human rights of the 18th century; b) Shāṭibī’s work was based on, captures and incorporates much of the work and views on Maqāṣid of his predecessors such as Ghazzālī and Juwaynī (Raysūnī 2005:291-306); c) unlike his predecessors, Shāṭibī dedicated the largest part of his ‘Al-Muwafaqat’ to the discussion of the higher objectives of Islamic law.44 d) the purpose of this dissertation is not to provide an extensive analysis of the development of classical Maqāṣid but to expound the existent position of Maqāṣid prior to the contemporary prominence of human rights discourse.

Classical predecessors incorporated into Shāṭibī’s work that Raysūnī (2005:1-72) mentions includes renowned scholar, Abu al-Ma’āli ‘Abd al-Malik ibn ‘Abd Allah al-Juwaynī (d.1085), who first categorized ratio legis (’ilal) into five categories (ibid. 14) viz. essentials, needs, embellishments, recommended, and a fifth category with no apparent discernible objectives (Raysuni 2005:14). Juwaynī was also the first to refer to the five major essentials (the preservation of religion, human life, reason, progeny and wealth (ibid. 16). Abū Ḥāmid al-Ghazzālī, following his teacher, Juwaynī, categorised his objectives into essentials, necessities and embellishments (ibid:21) retaining also the five essentials differing only in their hierarchical arrangement. Ghazālī also coined the term ‘preservation’ (Al-hifz) when referring to the five essentials, e.g. ‘preservation of life’ (Auda 2008:18). Raysūnī also mentions Fakhr al-Dīn al-Rāzī (d. 1209)45 who included that

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44 His predecessors only referred to the subject, or had isolated phrases which together constituted a few pages on the latter topic (Raysūnī 2005: 311); that many renowned scholars such as Ibn Ḥāshūr (2006: xxiii), Auda (2008: 21) and Ramadan (2009: 66), etc., acknowledge Shāṭibī’s contribution to the development of the theory of Maqāṣid as overshadowing most of his predecessors. Shāṭibī’s work was used as a standard text on Maqāṣid al-Sharī‘ah until the twentieth century (Auda 2008: 21);

45 Fakhr al-Dīn al-Rāzī (1149), was born in the city of Rey in Persia and was an illustrious theologian, muftassir (exegete of the Qur’an) and philosopher who is most renowned for his commentary on the Qur’an initially titled
which had been written by Juwaynī and Ghazzālī in his works. Other scholars whom Raysūnī (2005:21) mentions are *inter alia* Ṣayf al-Dīn al-‘Amidī (d. 1233)46, Al-Baydawī (d. 1286)47, Al-Isnawī (d. 1370) and Ibn al-Subkī (d.1369). The discourse of these latter scholars on *Maqāṣid* were often pre-occupied with the hierarchy of the five essential objectives. A significant assertion which Raysūnī cites from Ibn Taymiyah’s48 writing is that human objectives can be at variance with the objectives of the law and therefore enact that which suite their own purposes. Ibn Taymiyah also locates worldly objectives as being in opposition to the religion of Islam when he states that: “[…] most rulers are under the sway of worldly objectives rather than the objectives of the [Islamic] religion […]” (cited in Raysūnī 2005:36). A prominent feature of their writing therefore seems to be the concern that worldly objectives may supersede ‘religious’ objectives. Ibn Taymiyah’s constant exhortation to God consciousness (Raysūnī 2005:34-35) when dealing with *Maqāṣid* seems to be a means employed by him to counter the effects of worldly objectives, which is in fact the effects of ‘Empire’ as discussed in Chapter One of this dissertation.

Shāṭībī also believes that divine law is not only for preservation of this life but also for the afterlife (Raysūnī 2005:106), a belief which profoundly influenced his exposition and categorization of *Maqāṣid*, especially category type three and four mentioned below (fig. 2.1). The quintessential features of *Maqāṣid* as found in the writings of the above mentioned predecessors of Shāṭībī are virtually unchanged in Shāṭībī’s own writing. Thus a large portion of his theory remains the three categories of 1) essentials, 2) exigencies and 3) embellishments with the essentials constitutive of five, namely preservation of 1) religion (*dīn*), 2) human life (*nafs*), 3) reason (*`aql*), 4) progeny (*nasl*) and 5) material wealth (*māl*) without modification (Raysūnī 2005:291). Shāṭībī however

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46 Ṣayf al-Dīn al-‘Amidī (1156-1233), a Kurdish Ḥanafī jurist, was a pioneer in integrating *Kalam* (scholastic theology) with *Usūl al-Fiqh* (The principles of Islamic Law). He passed away in Damascus.

47 Abd Allah `Umar al-Baydawī (d. 1286), a Persian scholar and jurist, is most famous for his work on *Kalam*, *Fiqh* and *Tafsīr*. His exegetical work *Anwar al-Tanzīl wa Asrar al-Ta’wīl* (The Lights of Revelation and The Secrets of Interpretation) itself has been the subject of many commentaries and is still widely used in traditional theological schools in in Iran and the Indo-Pak-Bangla sub-continent.

48 Taqī al-Dīn Aḥmad ibn Taymiyyah (1263-1328) Born in Harran in today’s Syria, he grew up and taught in Damascus and later in Cairo. One of the most controversial figures in medieval Islam, this Jurist and theologian had a literalist approach to Islam’s foundational texts and campaigned against the veneration of saints and other popular practices that he viewed as heretical innovations without any basis in early Islam. Ibn Taymiyya’s interpretation of Islam serves as the theological basis for much of what is variously described as ‘Wahabism’, ‘Salafism’, and Islamic fundamentalism.
places these three categories in a single type of category (Type 1) of its own which he entitled ‘The Shārī’īs (Lawgiver, i.e., God) higher objectives in establishing the Law’ (figure 2.1). This latter category is the first of four types with the others being 2) ‘The Lawgiver’s higher objectives in establishing the Law for people’s understanding’, 3) ‘The Lawgiver’s higher objectives in establishing the Law as a standard of conduct’, and 4) ‘The Lawgiver’s higher objectives in bringing human beings under the Law’s jurisdiction’. These latter four category types Shāṭibī’s, in turn, places under a broader division entitled ‘Higher objectives of the Lawgiver’, the latter division being one of two broader divisions of which the other is ‘Human Objectives’ (fig. 2.1).

Thus Shāṭibī places those elements commonly used in contemporary Maqāṣid discourse, viz., the discussion concerning the essentials, the exigencies and the embellishments in type one of the four types of categories placed under the broad category of ‘The higher objectives of the Lawgiver’ (Raysūnī 2005: 109). The preservation of the essentials, Shāṭibī believes, is achieved by “legislation that will bring them into being” and, secondly, maintain them by “protecting them from annihilation” (Raysūnī 2005:109). Thus, he argues, the essential of the ‘preservation of religion’ is achieved by bringing it into “existence through its fundamental doctrines, the primary forms of worship such as ritual prayer and zakah, etc. and by preventing its annihilation is achieved through jihād (sacred warfare), punishment for apostates, and the prohibition of innovation” (Raysūnī 2005:109). An order of priority is established between the essentials, the exigencies and the embellishments. The essentials named above - numbering five in Shāṭibī’s schema – are regarded by him as absolutely essential for both the spiritual and material well-being of humans. “The exigencies, or needs based interests are in the service of and complementary to the essentials” (Raysuni 2005:110) and the embellishments are in a similar manner related to the exigenses. Embellishments are less important than exigencies and essentials, and serves to perfect and beautify the more important objectives. Embellishment includes commendable habits and customs (Raysūnī 2005:109). Shāṭibī (Raysūnī 2005:111) declares that “the essentials are the foundation for exigencies and embellishments” and that “disorder in relation to the essentials will lead to complete disorder in the latter two”. Disorder in the exigencies and embellishments “does not necessitate an imbalance in the essentials”. Exigencies and embellishments, Shāṭibī believes, must, however, “be preserved for the sake of the essentials” (Raysūnī 2005:111).

Shāṭibī thus introduces innovative broader categories which are not found in the writings of his predecessors. These are the second, third and fourth types of categories under the broader
division ‘The Higher Objectives of the Lawgiver’. The second category type named ‘The Lawgiver’s Higher Objectives in Establishing the Law for Peoples Understanding’ deals with the objective of the Lawgiver in revealing the Law in Arabic to an unlettered people. Raysūnī interprets this as being pre-conditions set by Shāṭibi for understanding the Law (Raysūnī 2005:112).

Shāṭibi’s third category is entitled ‘The Lawgiver’s Higher Objectives in Establishing the Law as a Standard of Conduct’. This category of Shāṭibi’s could be viewed as an attempt to introduce a greater degree of morality with regard to the objectives of the Law. The five essentials do not prescribe the means for achieving these essentials. Preservation of wealth could lead to hoarding or to capitalist excesses as Hardt and Negri’s analysis of contemporary society seems to indicate. Qualities such as arrogance, envy, worldliness, cowardice, forbearance, patience and courage are mentioned by Shāṭibi (Raysūnī 2005:114). These he mentions in the context of the discussion on the capacity of humans to achieve the Maqāṣid. Shāṭibi in this regard divides objectives for the establishment of a standard of conduct into two; 1) those beyond the capacity of humans to obtain 2) those requiring hardships to obtain. An example of an objective of the first type which is unattainable directly by humans is the objective of attaining love.

This is an objective which humans cannot control voluntarily. With regard to such instances the requirement would then be the fulfilment of conditions, laws and regulations which would facilitate the realization of the prime objective namely love. As regard the second type if the objective only requires a certain degree of hardship, then such objectives are directly realisable by humans and should not be avoided in lieu of the hardship required for its realization. Shāṭibi compares the necessity for hardship in complying with the objectives of the Law to the necessary hardships endured for earning a living. Hardships are not sought for in itself as one of the Maqāṣid, but for the sake of a greater good. Raysūnī feels that al-Shāṭibi’s mentioning of the control of qualities such as worldliness, cowardice, forbearance etc. is peripheral to this category three objective, the discussion concerning the avoidance of imposing hardship onto people he sees as being the core of this category three Maqāṣid (ibid.114). However, if the discussion concerning hardships is taken in conjunction with Shāṭibi’s discussion on standards of conduct regarding worldliness, envy, forbearance etc., then Shāṭibi’s emphasis on the discussion of the intention of hardship is understood as the fact that the inculcation of the abovementioned inward qualities entails a great deal of difficulty and ambiguity as to attaining their optimal standard. Shāṭibi prefers to contextualize the introduction of such qualities in terms of the intention of the Lawmaker (i.e., God) with regard to hardships. The inculcation of these inward qualities could thus be seen as
central under this category three *Maqāsid* (avoiding imposing hardship) and not peripheral as Raysūnī sees it, but tempered and contextualised by Shāṭibī with a discussion on the Lawmakers intention with regard to the hardship that inculcating such qualities may entail.

**Figure 2.1. Schema of Shāṭibī’s approach to and structure of *Maqāsid al-Shari‘ah***
The fourth category is entitled ‘The Lawgiver’s Higher Objectives in Bringing Human Beings Under the Law’s Jurisdiction’. Raysūnī (2005:121) interprets this objective to be aimed at placing humans in subjection to divine law rather than their own desires and fancies citing the following excerpt of Shāṭibī as substantiation.

The rightful objective behind the establishment of the law is to deliver human beings from subjection to their whims and desires in order that they may be servants of God by their own free choice just as they are already His servants by necessity (ibid.121).

Shāṭibī does not view the objectives only as a guide to determine which laws derived conventionally should be included in the corpus of Fiqh laws, but indicates with the discussion of this category that it should be the basis for formulating rules (Raysūnī 2005:121). Therefore with regard to this category Shāṭibī derived the rule “that every action which is based on the mere fulfilment of one’s own desires and without regard for what God has commanded, prohibited or left open to human choice is invalid without exception” (Shāṭibī as cited in Raysūnī 2005:121). A second rule which Shāṭibī derives from this fourth category of objectives is that “living on the basis of one’s desires and whims leads to that which is blameworthy even if it should take the form of that which is praiseworthy” (Raysuni 2005:122). Shāṭibī, therefore, is not only concerned with basic rights, but also how ethically these rights are exercised.

The category of ‘Human Objectives’ is the second of the two broad categories of objectives, the first, namely ‘the Higher Objectives of the Lawgiver’ having been discussed above. Through this second category of objectives, Shāṭibī tries to show that the Lawgiver is not only concerned with the external appearance of an action, but is very much concerned with intentions and motives linked to those actions. Shāṭibī (cited in Raysūnī 2005:129) believes that it is the notion of intention which imparts value to actions. An action is deemed valid if the intention conforms to the Lawgiver’s objectives whereas a legal action is deemed invalid through an intention which contradicts the Lawgiver’s objective. Through this perspective, Shāṭibī is able to declare an outwardly legal action as invalid. He can thus state that:

whoever seeks, through the obligations imposed by the Law, to achieve objectives other than those for which the Law was laid down, has violated the Law, and the action of whoever violates the Law, insofar as it is a violation, is invalid (cited in Raysūnī 2005:130)

Human objectives are seen by Shāṭibī as the prescribed endeavour for humans to make the objective of each one of their actions consonant with the objectives of the Lawgiver (Raysūnī
He, therefore, subscribes to a bilateral notion of validity, both the external action of the Law having to be obeyed and the intent or objective of the Lawgiver. He declares that a person “is engaged in hypocrisy and is manipulating God’s ruling for his own ends” if he “realizes that his actions is in conformity with the objectives of the Lawmaker” but “not in intention”. (Raysuni 2005:131). An example of the latter is the gifting of money to a spouse just prior to zakāt becoming due on the money, the money then being returned, effectively keeping the length of time of possession of the money always less than one year thus avoiding zakāt (Shāṭibī as cited in Raysūnī 2005:134). Similarly human rights are used as a camouflage to fulfil other intentions such as that of capital accumulation as will be discussed in the following chapter.

2.2.2. Shāṭibī’s Methodology for Formulating the Maqāsid

Shāṭibī identifies five means for determining objectives. These are 1) Commands and prohibitions which are explicit in the primary sources; 2) from consideration of the bases of the latter commands and prohibitions; 3) from secondary objectives in the service of primary objects 4) Occasions of silence from the Lawgiver in situations requiring declaration and legislation  and 5) Induction (Raysūnī 2005:135).

1. Commands and prohibitions which are explicit in the primary sources; The first method is clear in that any command which is given for its own sake and not for achieving some other intention is a command which can be considered an objective. These objectives are considered by Shāṭibī as primary ones (Raysūnī 2005:268). The same applies to primary prohibitions. An implicit command or prohibition reflects a secondary intention. Explicit primary commands and prohibitions according to Shāṭibī reflect the Lawgiver’s intentions (ibid.:269).

2. Consideration of the bases of the latter commands and prohibitions; The second method employs the reasons or ʿillah (pl. ʿilal) behind prohibition and commands. An example of the latter would be the prohibition to consume alcohol, the ʿillah being preservation of intellect which now becomes an objective.

3. From secondary objectives in the service of primary objects: The third method is the identification of secondary causes which serves the primary objectives. Whatever supports a primary intention of the Law is considered by Shāṭibī as an intention as well, albeit as a secondary intention (ibid. 274). He, therefore, confines to primary objectives
derived only from explicit commands and prohibitions and only those secondary objectives on which these explicit commands and prohibitions depends for their execution.

4. **Occasions of silence from the Lawgiver in situations requiring declaration and legislation**

   The fourth method is where Shāṭibī understands the silence of the Lawgiver to imply an intention by the Lawgiver to set limits to introducing innovation in matters of worship. The intention of the Lawgiver is that of retaining the existent limits in the laws governing worship as they are (ibid. 278).

5. **Induction.** Shāṭibī’s fifth method is an inductive reading of the sources of Islamic rulings from which he provides both a textual and rational base for derived objectives. He therefore traces the ‘illah of all rulings of Islamic law, and from these ‘ilal he can derive broader objectives (a process termed ‘ta’il’) (ibid. 282).

Shāṭibī’s discourse and those of his predecessors can be thus seen to be firmly grounded in revelation. The themes and the Maqāṣid so derived, however, does not contain values found prominent in the human rights discourse as interpreted in Western discourse. Contemporary scholars therefore venture beyond the protective circle of revelation in order to add Maqāṣid which reflect the contemporary human rights discourse. These attempts create vulnerabilities as will be demonstrated through the assistance of postcolonial insights, which should then engender an appropriate cautionary approach to Maqāṣid derivation and development which would avoid succumbing to ‘Empire’ agendas.

The sub-sections which follow, is an analysis of contemporary approaches to Maqāṣid. The chapter thereafter identifies and discusses the vulnerabilities as seen through a postcolonial lens.

### 2.3. Contemporary Theories of Adapting the Maqāṣid and Reformation of Islam Project

The aforementioned contemporary scholars re-explored the potential flexibility of the Maqāṣid approach to reform Islamic law towards compatibility with the UDHR. A major concern of theirs with the Maqāṣid is the aposteriori methods employed in its derivation. Not only were the Maqāṣid derived aposteriori but so was Uṣūl al-Fiqh.49 According to Ibn ʿĀshūr (2006:xvii), Uṣūl al-Fiqh as

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49 Lit. “Roots of law” The Oxford Islamic Studies Online describes it in the following manner: “The body of principles and investigative methodologies through which practical legal rules are developed from the foundational sources. The primary base of law is the Qur’an. The second source is the Sunnah, reports about the sayings, actions, or tacit
a science was completed only two centuries after *Fiqh* (Islamic Jurisprudence) was codified. Much disagreement existed in *Fiqh* rulings or applied legal rulings prior to the development of *Ūṣūl al-Fiqh*. Because that they were derived from *Fiqh*, universal principles and general rules so derived were largely undisputed (Ibn `Āshūr 2006:xvii). Not only were differences found in applied rulings inherited by *Ūṣūl al-Fiqh*, but also in the cultural specificity wherein those rulings were applied and invoked. Although *Ūṣūl al-Fiqh* did not serve the purpose of expounding the higher purposes of the *Sharī`ah*, it did serve the purpose of eliciting the *ratio legis* of specific rulings in order to employ analogy as an additional tool for deriving legislation for similar cases, this therefore being the rudiments for developing more general objectives of the *Sharī`ah*. Discourses dealing with *ūṣūl* principles contained insights of the higher objectives of the *Sharī`ah*. Ibn `Āshūr (ibid:xix) mentions discussions such as that concerning the notions of suitability (*munāsabah*) and imagination (*ikhālah*) utilised in *Ūṣūl al-Fiqh* to derive *ratio legis* as being insights into *Maqāṣid* based thinking. The further development of maxims (*qawā'id*) by scholars such as `Izz al-Dīn Ibn `Abd al-Salām and Shihāb al-Dīn Ahmad ibn Idrīs Al-Qarāfī (Ibn `Āshūr 2006:xxiii) represents a further development resembling *Maqāṣid* based thinking. Therefore, the problem of incorporating cultural nuances pre-existing in previous discourses is perpetuated and compounded as Islamic law developed through *Fiqh*, *Ūṣūl al-Fiqh*, *Qawā'id* and currently *Maqāṣid*. Auda (2008:4) summarized the concerns of contemporary scholars in four major issues; a) classic approaches to the *Maqāṣid* do not identify which of them (the *Maqāṣid*) are specific to groups of rulings covering a particular chapter in *Fiqh*, b) the classical approaches *Maqāṣid* focus on the individual rather than communities, c) many values considered as basic today such as freedom and justice are not included in traditional *Maqāṣid*, and d) that the classical *Maqāṣid* were derived from the then existing *Fiqh* literature.

Contemporary scholars adopted various strategies to overcome the latter difficulties. Ibn Āshūr (2006:13-20) using three methods - thematic inference, clear Qur'anic textual proof, and contiguously transmitted traditions - derived *Maqāṣid* in addition to the abovementioned five. Auda (2008:248) argues that the traditional *Maqāṣid* can be re-interpreted into contemporary terms, describing how ‘preservation of wealth’ can be understood to mean “economic development”, “flow of money”, and “diminishing difference in economic levels”, or the “preservation of honour” approvals of the Prophet. The third source is the consensus (*ijma‘*) of all Muslim interpretive scholars in a specific age on a legal rule about an issue not covered in the Qur’an or Sunnah”
understood to mean the protection of human rights (ibid. 249). Attia (2007:244) emphasises the link between *Maqāṣid* and *Uṣūl al-Fiqh*, encouraging their development within a single framework, and also includes justice, freedom, equality and human rights amongst his *Maqāṣid*. He, therefore, denounces absolute individual freedom as proposed by enlightenment philosophers, subjecting it to the limits of Islamic Law (ibid. 88). Attention will now be focussed on the ideas of more central figures involved in *Maqāṣid* modification and its implementation as a reform tool for Islamic law.

2.3.1. Muhammad al-Ṭāhir ibn ʿĀshūr

Muḥammad al-Ṭāhir ibn ʿĀshūr (1879–1973) is the most prominent contemporary Tunisian Islamic Studies scholars and one of the great Islamic scholars of the 20th century. A graduate of the Zaytuna University in Tunis, he first served as a *qāḍī* and in 1932 became Tunisia’s *Shaikh al-Islām* in 1932. While his Qur’anic exegesis, *al-Tahrir wa’l-Tanwir* (*The Verification and Enlightenment*) is his magnum opus for which he is best known for, his work on *Maqāṣid al-Sharī`ah* has been described as “a breakthrough in studies on Islamic law in the English language.” (Nafi, 2005:1)

Ibn Āshūr’s (2006:14) method of deriving *Maqāṣid* seems to be a combination of an attempt to retain the consultation of the primary sources directly and to draw from the body of existing *Fiqh* law. The body of *Fiqh* law serves for him as a guide and an existing methodology which contains within itself indications and trajectories pointing to higher purposes of the *Sharī`ah*. Thus, according to Āshūr’s system, there are three basic methods which he accepts as legitimate means for deriving *Maqāṣid*. These are 1) Thematic inference 2) Qur’anic textual proofs 3) Contiguously transmitted traditions.

1. **Thematic inference:** this method has two sub-divisions. The first which Ibn Āshūr regards as the more important one is through induction from rationales of existing rulings. All existing rulings whose *ratio legis* are known are collated. Common themes are induced from the collection of rationales. These themes would then constitute some of the *Maqāṣid*. This method does not use the *ratio legis* itself as a *Maqāṣid*, but rather the greater purpose towards which trajectories of collections of *ratios* indicate. The example cited by Ibn ʿĀshūr is the *maqṣad* of “abolition of ambiguity and substantial risk in transactions” (Ibn Ashur 2006:16). The latter *Maqāṣid* he derived

50 Here, of course, is a potential paradox in that the *Maqāṣid* are used to reform law but restricted by the very law it wishes to reform.
by following the trajectory of the following ratios: i) The prohibition by the Prophet Muḥammad of the buying or selling of something whose number, weight or measure is unknown with something which has been quantified by the latter three means (muzābanah), the ratio legis of which is ignorance of the exact quantity of one of the commodities in the transaction. ii) The prohibition of both the buying or selling of an unknown quantity in exchange for a known quantity of a commodity (bay` al-juzaf bi al-makil). The ratio legis in this instance is also ignorance of the exact quantity of one of the two items in the transaction. iii) The ratio legis for the prohibition of deception in transactions, i.e., to ban cheating.

The second subdivision of the method of thematic inference is by elevating a particular ratio legis to the status of a higher objective (Ibn `Āshūr 2006:16). The latter he achieves by examining the proofs of various existing Fiqh laws and regulations that have common ratio legis. If a ratio legis is supported by laws which have sound textual proofs, then such a ratio legis will be elevated to the status of a higher objective or Maqāṣid.

2). Qur’anic textual proofs: According to Ibn `Āshūr (ibid:17), certainty that the text can be attributed to the Lawgiver through continuous multiple transmissions (mutawātir) is not sufficient for establishing a Maqṣad. The relevant verse should be of such a nature that its connotations are clear and does not allow for ambiguity in its signification (quwwat zann al-dalālah). An example of a verse which he quotes as satisfying his latter stated criteria is: “God wills that you should have ease, and does not will you to suffer hardship”. (Qur’an 2:185)

3). Contiguously Transmitted Traditions (Sunnah Mutawātirah): In this category Ibn `Āshūr distinguishes between two types; the one based on recurrent reports concerning words or actions of the Prophet reflecting the same theme and the other being practices of the Companions based on the Prophet’s words or actions pointing to similar themes. Ibn `Āshūr does, however, admit that the latter methodology is not fool proof when he sounds a caution concerning the disposition of the jurist (ibid. 14). He stresses the need for complete objectivity and justice and warns of the dangers of fanaticism to a prejudgement or past opinions of scholars. The latter concern that he expresses, however, points to a possible weakness of his Maqāṣid. Through this word of caution, Ibn `Āshūr acknowledges that unstated agendas and bias can influence the process of Maqāṣid formulation. The implication of the latter is the notion that cultural milieu in which Fiqh originated may have had a decided influence on the development of the body of Fiqh law. If the latter is true then ipso facto Maqāṣid derived from the existing body of Fiqh law would be culturally biased. It
would also mean that if his methodology was to be pursued then, say patriarchy, if it was a feature of early society, could be reflected in *Fiqh*. This, in turn, could be incorporated into *Maqāṣid*. The concerns with regard to cultural influences will be addressed in the following chapter.

The above three methodologies produce numerous objectives. Ibn `Āshūr now proceeds to set criteria according to which he will separate “true objectives” from “false ones”. According to him, higher objectives must conform to two categories of ideas namely real ideas and conventional ideas. Real ideas he considers as *a priori* truths, or self-evident statements which would be conceived of as true by any ‘sound mind’. Conventional ideas he considers to be notion whose truth has been confirmed by the passage of time. These are notions whose familiarity and acceptance by the general public are unquestionable. Further pre-conditions for the acceptance of these ideas are that they should be certain, evident, regular and constant (Ibn `Āshūr 2006:71).

An example of a higher objective which is certain and evident, Ibn `Āshūr (2006:72) cites as being the objective of the preservation of lineage. The purpose of marriage, he postulates, is the preservation of lineage. However this example illustrates the concern postcolonial discourse reveals with regard to hegemonies of one culture over another. Postulating preservation of lineage to be the higher objective of marriage as a universal applicable to all societies is problematized when viewed from a postcolonial perspective an issue discussed in depth in the following chapter.

His view with regard to his concept of ‘real ideas’, ‘conventional ideas’ and ‘false ideas’, is also influenced by his notion of what he understands ‘*fiṭrah*’ to be. He posits the notions of ‘real ideas’ and ‘conventional ideas’ as being sound criteria for distinguishing *Maqāṣid* based on ‘false ideas’ from ‘true *Maqāṣid*’ which should be based on ‘real and conventional ideas’. He (Ibn `Āshūr 2006:84) believes that what is divinely required from humans in terms of legislative requirements and worship is within their *fiṭrah*, i.e., their natural disposition to perform. By *fiṭrah*, Ibn `Āshūr (2006:83) seems to mean that humans “correspond to the teachings of Islam that God has willed for putting the world to rights and removing disorder from it”. He interprets *fitrah* of humans as their natural disposition “free from all kinds of frivolity and bad habits” (ibid:83). He thus believes that only “real ideas and mentally posited notions in human intellectual perception flow from the *fitrah*” (Ibn Ashur 2006:84). He (ibid) avers that “Illusions and imagination do not constitute part of the *fitrah*, for they do not obtain in the things ingrained in the intellect” and are imbibed from the surroundings. Ibn `Āshūr, therefore, believes that all humans freed from the influences of their environment will display a compulsive *fiṭri* nature. He claims that the religion of Islam is synonymous to that which is in the *fiṭrah* of humans (ibid: 80) and argues against confining Islam
only to its pillars\textsuperscript{51}, believing the body of legal rules and commands revealed to the Prophet has to be included in the meaning of Islam. He claims that the ‘\textit{Shari‘ah} came as a universal law requiring the adherence of all human beings’ (2006:134). From Ibn `Āshūr’s understanding of the nature and purpose of \textit{fitrah}, the inevitable conclusion that emerges is that Islam as interpreted by those who do not allow their \textit{fitri} nature – or natural disposition - to be overshadowed by ‘imagination’ is an Islam that is customized for humans and is, therefore, meant to be followed universally. The concept of \textit{fitrah} as understood by Ibn `Āshūr is thus steeped in essentialist and universalist assumptions. These will be analysed in Chapter Four.

Despite Ibn `Āshūr’s exposition with regard to the requirements for the formulation of a \textit{Maqṣad}, he establishes freedom and equality as \textit{Maqāṣid} with poor adherence to his own criteria. An analysis of his proofs for viewing freedom and equality as \textit{Maqāṣid} will be discussed in the following chapter.

\subsection*{2.3.2. Tariq Ramadan}
Tariq Ramadan also advocates the reformation of Islamic law through the \textit{Maqāṣid}, but with an emphasis on the inclusion of context and the experimental and social sciences (Ramadan 2009:126). The \textit{Maqāṣid} of Ramadan are profoundly influenced by his project, which is that of reconciling minority Muslims with their majority non-Muslim society within which they reside. He believes the five or six classical essential \textit{Maqāṣid} are insufficient for contemporary use as their character is too restrictive. Incorporating knowledge of the universe as reflected in contemporary sciences will expand this list and render it more appropriate for current requirements.

A vital part of his discourse on context which impacts on his conception of \textit{Maqāṣid} is his perception of the contemporary socio-political dynamic and the suitability of Islamic law to meet the challenges of the latter dynamic process. He claims that much of Islamic legislation is foregrounded on an outdated socio-political conception of the world (2010:123). Older concepts such as \textit{dār al-Islām} (the abode of Islam) and \textit{dār al-ḥarb} (the abode of war) were appropriate for its time during the first three centuries of Islam. Ramadan (2010:123) views such divisions as based on geographic divisions, powers conferred through ideological persuasions and alliances

\textsuperscript{51} I.e., the declaration of faith in God and Muḥammad’s prophethood (\textit{shahādah}), prayer (\textit{ṣalāh}), the wealth tax due to the poor (\textit{zakāh}), fasting in the month of Ramadan (\textit{ṣiyām}) and undertaking the pilgrimage to Mecca (\textit{ḥajj}).
by various groupings. It sets up a clear binary between geographic areas demarcated as belonging to Islam in which Muslims live in peace and is governed by *Shar’iah* law, and areas not belonging to Islam which are regarded as abodes of war. He stresses that the concepts of *dār al-Islām* and *dār al-ḥarb* are alien to the primary Islamic sources viz. the Qur’an and *Sunnah* and is no longer appropriate as it sets up similar binaries between minority Muslims and the countries in which they reside in the West. Ramadan (1999:127) does not see in the proposal of Idris al-Shāfi’i (767-820) of a *dār al-`ahd* (lit. an abode of treaty, i.e., territory where a treaty exists with *dār al-Islām*) a solution for contemporary minority Muslims. He provides two reasons for the latter conclusion; First, the notion of *dār al-`ahd* is predicated on the existence of both *dār al-Islām* and *dār al-ḥarb* thereby perpetuating a binary socio-political perception. Second, the term ‘*dār al-`ahd*’ conflate the two differing notions of a treaty between two states and minority Muslims living in Western states. Ramadan (1999:129) summarizes his refutation of the suitability of the old binary model of *dār al-Islām* and *dār al-ḥarb* for contemporary utilization in two pertinent points; 1) colonization, alliances of Muslim leaders with the West, and the influences of Western legal systems have altered relations within Islam. Islam can thus no longer be considered an isolated entity devoid of external relations and influences; 2) global migrations are now a reality resulting in mass population movements with multitudes of Muslims settling in Western countries for economic and political reasons. Many migrants and subsequent generations have been accepted by these countries as citizens with full rights; and lastly 3) that the contemporary reality is therefore of diversity and complexity which simple binary models are unable to capture.

Ramadan suggests an alternative socio-political dynamic to the simplistic oppositional West versus Islam binary model. He proposes that the socio-political area be regarded as a sphere with the West placed at the centre which he believes would be the “heart” and “head” of his system. Muslims and the rest of the world would then be placed at the periphery (Ramadan 1999:148). He is convinced that the latter depiction would imbibe in Muslims an attitude of willingness to contribute to their places of abode in the West rather than promoting a defensive stance which discourages contribution. The term Ramadan coins for referring to Western countries in which Muslims has made their abode is that of ‘*dār al-shahādah*’ or the space of testimony (Ramadan 1999:149). Muslims who live in *dār al-shahādah* are expected by Ramadan to find partners in their place of abode who are willing to co-operate in seeking that which is positive in Western culture and resisting that which is negative (Ramadan 1999:148). What he seems to propose therefore is a type of hybridization between the two cultures. What he regards as paramount for Muslims in *dār al-shahādah* is to bear witness to the bond which they have with God and the duty
they have to live among people, manifesting in their lives the extent of the Islamic message. Ramadan therefore promotes the notion of a sense of belonging and legitimacy of the presence of Muslims in Western countries which implies duty and responsibility to contribute (Ramadan 1999: 150).

Ramadan’s utilization of the *Maqāṣid* is, therefore, foregrounded on his socio-political scenario of *dār al-shahādah*. The latter socio-political dynamic enters into his conceptual schema for the derivation of *Maqāṣid* under the category “context sciences” which, in turn, is derived from what he terms as the “Book of the Universe”52 (2009:129). The “Book of the Universe” together with the “Revealed Books” constitute for Ramadan the two major sources of *Maqāṣid* and Islamic jurisprudence (fig 2.2.). The importance of the concept of a *dār al-shahādah* to *Maqāṣid* i.e., his socio-political conception, can therefore be appreciated. Ramadan places equal importance on the revealed sources and its sciences such as *Fiqh* as he does on the “Book of the Universe” (Ramadan 2009:127). “The Book of the universe” is constitutive of all the natural and social sciences. Ramadan claims that previously, legal rulings were almost exclusively issued on the bases of the revealed books, about situations too complex to be understood without the assistance of the “universal sciences” (Ramadan 2009:126). He sees the derivation of *Maqāṣid* as a co-operative venture between the text scholars (*`ulamā al-nusūs*) and the context scholars (*al-`ulamā al-wāqi*) (Ramadan 2009:130).

Ramadan considers the ‘Book of the Universe’ as a necessary complement to revealed knowledge. The book of the universe contains all ‘objective’ knowledge of the universe as acquired by human endeavour. It provides the context for revealed text. Ramadan is therefore pro-context driven interpretation of revealed texts through the assistance of experts in the field of knowledge of the universe. These include social scientists. The author of this dissertation broadly agrees with such an approach, but wishes to emphasize how the latter approach signals the importance of the postcolonial perspective since postcolonialism demonstrates how even apparently objective sciences can be skewed towards particular agendas. Deriving *Maqāṣid* through context/text approach is fraught with the danger of playing into the hands of colonial, neocolonial or ‘empire’ agendas as is later demonstrated in this dissertation.

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52 Ramadan considers the Book of the Universe as constitutive of laws, scientific techniques, principles and theories derived from the direct study of the visible universe, contra ‘Revealed Book’ which contain knowledge of the unseen, constitutive of revealed knowledge through the Qur’an and Sunnah of the Prophet of Islam (Ramadan 2009:128-129).
Ramadan suggests that through an integrative approach (ibid.:132) the knowledge derived from the Revealed Books and the “Book of the Universe” should be utilised by experts in their particular fields to arrive at *Maqāṣid*. His *Maqāṣid* then becomes far more numerous than the five or six of the classical era since he proposes *Maqāṣid* in various fields such as science, ecology, culture, economics etc. His highest objective is that of recognizing the Creator and our debt (*dayn*) towards Him (ibid. 137). Preservation of *al-dīn* (the recognition of the debt and, therefore, the Creator) is thus regarded by him as the primary purpose of ethical discourse based on the two primary sources, viz. the revealed books and the “book of the universe”. Protection of *al-dīn* as the highest objective is necessary to establish a framework in which to recognize the Creator.
Supplementary to this highest objective is the protection of that which is for the good of humankind (al-
maṣlaḥah).

He proposes three fundamental objectives aimed at realizing the abovementioned two highest objectives of al-dīn and al-
maṣlaḥah. These three objectives are the protection of life, the protection of nature and the preservation of peace. That which follows after these three objectives are those objectives more directly related to human activities on the individual and societal spheres. The latter are the promotion and protection of dignity, welfare, knowledge, creativity, autonomy, development, equality, freedom, justice, fraternity, love, solidarity and diversity (ibid. 139). Following on the latter level, the objectives becomes more narrower and is broadly divided into three groups viz. the inner being, the being or individual, and societies and groups (fig. 2.3).

Problems immediately apparent in Ramadan’s discourse are that the Maqāṣid and, therefore, legislation are determined by the choice of sciences in the books of universe. Furthermore his choice of socio political scenario has a deciding influence on what he considers as maṣlaḥah and exposes Islam to a process of assimilation with Western hegemonic values. An in-depth discussion of the latter issues follows in Chapter Three.
2.3.3. Gamal Eldin Attia

Gamal Eldin Attia (1928), the author of "Towards Realization of the Higher Intents of Islamic Law: Maqāṣid Al-Shariah: A Functional Approach" (translated from Arabic) argues that the Maqāṣid cannot be restricted to five or six, contemporary socio-politico conditions requiring the addition of new Maqāṣid such as justice, freedom and equality (Attia 2007:87). His Maqāṣid, which coincide with the classical Maqāṣid, is well supported by revelatory texts but his foundation for deriving additional Maqāṣid is, however, minimally supported by revelation and depends largely on reason, innate understanding and experience (ibid. 1). Attia accepts Shāṭibī’s method

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53 Attia was an Egyptian scholar who studied at the Universities of Cairo and Geneva. Coming from a Muslim Brotherhood background, he moved between practicing law and banking before his career as an activist scholar at the Cairo for the International Institute of Islamic Thought and later at the Faculty of Sharia, Law and Islamic Studies at Qatar University where he headed its law department. (Ibn Zayd, n.d.)
which relies mostly on revelation as a foundation for arriving at *Maqāsid* (ibid. 11) but also accepts the addition of the latter mentioned supplementary methods in the face of insufficiencies in Shāṭibī’s methods for addressing contemporary requirements (ibid.). He therefore endorse the method of *istidlal* of Shafi’i and Juwaynī, a method that utilized reason to arrive at a ruling in the absence of revealed texts (Qur’an or Sunnah). In addition to the use of reason, he also approves the incorporation of experience (*al-tajribah*) and innate understanding (*al-fitrah*) for the purpose of formulating new *Maqāsid* such as freedom and equality, which are not found in the classical *Maqāsid*. The views of Al-‘Izz ibn Ibn ‘Abd al-Salām (1181–1182)⁵⁴ are extensively cited by Attia in support of incorporating the latter methodology. The latter cited views is based on the argument that it is ingrained by God into the nature of humans to know what is beneficial or what is harmful to them (ibid. 4). However, Ibn ‘Abd al-Salām concedes that even though he believes that this innate understanding can arrive at what is beneficial or what is harmful, that ignorance as to what is inherently advantageous in what is better can lead to an incorrect choice (ibid. 4). The latter is, therefore, an allusion to the argument that a prerequisite for correct choices is that of attaining a condition of being fully informed. To know what is of earthly benefit therefore requires the input of all earthly sciences. A gap in the knowledge of the latter, in accordance with the cited argument of Ibn Ibn ‘Abd al-Salām, can lead to poor choices, as may occur with the lack of postcolonial insights which may lead to lack of awareness as to what aspects of certain systems can lead to oppression rather than benefitting humans. Postcolonial insights can also demonstrate how the unqualified acceptance of reason, innate understanding and experience as a source of *Maqāsid* derivation can lead to the introduction of *Maqāsid* which may favour the Empire’s agenda as will be demonstrated in the following chapter.

Attia suggests a re-structuring of *Maqāsid* in order to facilitate the introduction of additional *Maqāsid*. He proposes four realms of *Maqāsid* namely, the objectives as they pertain to the individual, the family, the community (*ummah*), and lastly as they pertain to all humanity (ibid. 116). This structure expands the *Maqāsid* to a total of twenty four. The five classical *Maqāsid* of preservation of life, religion, intellect, honour and property are grouped under the realm of the individual, whereas the preservation of lineage is relegated to a realm of the *Maqāsid* as they pertain to the family. The inclusion of freedom and equality as additional objectives is achieved in his realm of the *Maqāsid* as they pertain to all of humanity. He includes the following five *Maqāsid*.

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⁵⁴ Ibn ‘Abd al-Salām was an eminent Shafi’i scholar of Usūl al-Fiqh who from Damascus with a formidable streak of independence from the Umayyad dynasty. He also wrote on *Tafsīr* (Qur’anic exegesis) and *Taṣawwuf* (Islamic mysticism) and later rose to fame in Cairo where, in exile, he served as the Chief Qāḍī.
in this realm; 1.) mutual understanding, cooperation and integration; 2.) realizing human vicereignty on earth; 3.) achieving world peace based on justice; 4.) international protection for human rights; 5.) dissemination of the Islamic message. Thus Attia seems to endorse the entire human rights discourse by dedicating one of the *Maqāṣid* to the protection of human rights (2007:146). Attia is, therefore, convinced that *Maqāṣid al-Shari'ah* encompass the contemporary discourse of human rights (Attia 2007:104). Attia discusses his motivation for establishing the latter objectives, opining that the protection of freedom and rights is necessary to prevent tyrannical regimes from obstructing the spread of the message of Islam (ibid. 147). He asserts that tyrannical regimes are violators of human rights which justify “legitimate collective defence in order to bring such regimes down…” (ibid.). Attia does acknowledge that the international sanctioning of the forceful intervention for the protection of human rights requires a disregard for national sovereignty and can be annexed by superpower interests. He, however, expresses satisfaction that, despite the latter, the use of force to protect rights and freedoms has at least been internationally recognized (ibid.). The previous chapter dealt not only with the abuse of the human right discourse, but also demonstrated how such discourse has been infiltrated by capitalist agendas. The danger which a wholesale adoption of such a discourse poses to Islam and Muslim cultures becomes apparent. The following chapter argues that identification of such dangers in *Maqāṣid* discourse is of paramount importance since the subtle effect of ‘Empire’ will gain access to Islamic law through a proposed *Maqāṣid* such as that of Attia’s since it seems to endorse the human right discourse in a completely uncontested manner, merely alluding to its misuse and not to its essentially contaminated nature as discussed in Chapter One. Attia’s discourse is particularly vulnerable to the two synchronous arms of hegemony viz. the persuasive and coercive as discussed in Chapter One. The scholar as an important conduit of power has also been explained in Chapter One. The latter concerns are discussed in the following chapter, including Attia’s endorsement of the use of force to implement his ideological notions (Attia 2007:147). Attia’s approach could set the scene for further hegemony by the “Empire” of the Islamic world.

2.3.4. Jasser Auda

Professor Auda started his academic career with PhD in Systems Analysis – a field that still seems to leave its traces on his approach to the *Maqāṣid al-Shari'ah* from the University of Waterloo, in Canada. A ḥāfiẓ - memorizer - of the Qur’an at a young age, he has also engaged in study of Hadith, Fiqh and Principles at the Al-Azhar University of Cairo. Formerly Director of the Center for the Study of *Maqāṣid al-Shari'ah* *Maqāṣid al-Shari'ah* in Doha, he has taught at a number of
institutions in different parts of the world including Qatar, Canada, Alexandria, Sanjak and Sharja. He lectured about Islam, its legislation and ethics in dozens of universities and other institutions around the world. He has twenty-five books in Arabic and English, some of which have been translated into more than twenty languages. He is widely recognized as one of the world’s leading scholars on the contemporary approaches to the *Maqāṣid al-Sharī’ah*

Auda’s main thrust of his writing seems to be directed at providing additional grounds for confirming *Maqāṣid* as a means to arrive at and formulate Islamic law. All existent systems and methodologies he therefore retains, but casts a different perspective with regard to the approach to Islamic law. He encourages a more holistic view, seeing individual methodologies as part of an overarching system which has a certain purpose or *maqṣad* which it has to fulfil (Auda 2008:245). All laws formulated will therefore not be regarded in a binary either/or perspective, but has multi-dimensionality, the dimension utilized being in accordance to the particular purpose required to be fulfilled (Auda 2008:225).

Auda therefore proposes that the set of fundamentals of Islamic law be seen as a system, similar to contemporary systems theories as set forth by theorists such as Ludwig von Bertalanffy (1901-1972, Daniel Katz 1903-1998 and Robert Khan (1938-) and Charles West Churchman (1913-) (Auda 2008:34-42). Auda accepts the definition of a system to be “a set of interacting units or elements that form an integrated whole intended to perform some function” (ibid. 33). The six features which characterize Auda’s ‘Islamic System’ that he derives from a survey of current theories of systems. These latter feature are: its cognitive nature, wholeness, openness, interrelated hierarchy, multi-dimensionality, and purposefulness. The cognitive nature of Islamic law he sees as necessary to negotiate plurality as a characteristic seen in the different schools of Islamic law (ibid. 46).

Auda regards the *Maqāṣid* as a link between Islamic law and contemporary notions of human rights (2008:1). He expresses the concern that the statistics of the United Nations (UN) indicates that most Muslim majority countries are ranked low on the Human Development Index (HDI) of the United Nations Development Program (UNDP) (ibid. 24). He explains that *Maqāṣid* is ideally constructed to address the concern of the United Nations High Commission for Human Rights (UNHCHR) which is that the Islamic declaration of human rights threatens the intercultural consensus on which the human rights instrument is based (Auda 2008:23) despite the fact that the Islamic declaration contains all the basic rights of the UDHR such as freedom, equality, justice
etc. (I.C.E. 1981). He argues that it is necessary to address the latter concern of the UN, which he suggests may be resolved through contemporarization of *Maqāṣid* terminology which should then be incorporated into juridical reasoning in a more fundamental role (Auda 2008:23). Thus preservation of religion could be contemporized to freedom of faith or freedom of belief, preservation of honour to ‘protection of human rights’, and preservation of offspring to ‘care for the family etc. He further suggests that ‘Human Development’ be adopted or recognized as one of the *Maqāṣid* in its own right.

Auda endorse an open paradigm approach including in his approach to *Maqāṣid* theory aspects of various philosophical theories such as postmodernism, logic and philosophy of law (Auda 2008:xxvi). He declares that his book “*Maqāṣid al-Shari`ah* as Philosophy of Islamic Law”, first published in 2008, to be an argument for a multidisciplinary approach to the fundamentals of Islamic law. He briefly mentions postcolonialism as one of the disciplines which should be incorporated as sources of evidence in the development of the theory of Islamic law (ibid. 191).

Auda proposes a systems approach, yet the goals of the system of Islamic law is gleaned from the very system which Muslims had a hand in formulating. Circularity is detectable in that goals can be influenced by preconceived goals by those who formulated the law initially. Goals may not therefore be representative of pure divine intentions, rather it is influenced by culture and ideology. Auda’s discourse also reveals a strong possibility of being excessively influenced through an ‘interpellation’ process as described in Chapter One. The possibility of the incorporation of ‘Empire’ agendas existent in the contemporary human rights discourse is compounded by his systems approach as will be discussed in the following chapter.

### 2.3.5. Other Authors

Mohammad Hashim Kamali (1944) is an Afghan Islamic scholar and who has lived and taught as a professor of Islamic law at the International Islamic University of Malaysia for most of his scholarly life (1985 - 2019). He is also an ardent advocate of reformulating the *Maqāṣid* since he regards it as striking “a closer note with contemporary human rights discourse” (2011: 246). He sees *Maqāṣid* as subsuming the contemporary human rights discourse, with minor reservations qualifying the latter assertion, reservations upon which he does not elaborate (Kamali 2011:250). Kamali argues that the fundamental rights of modern constitutional law enjoys strong support by the *Shari`ah* (1997:23), irrespective of whether terms such as ‘essential interests’ or ‘*Maqāṣid*’
are employed. He posits that justice, a frequent commandment in the Qur’an, is meaningless without freedom or equality since the moral autonomy of individual is a pre-condition for them to act as they will, i.e., with justice. Similarly justice for Kamali means equal treatment, with equal distribution of ‘advantages and burdens’ (Kamali 2002:ix).

Kamali poses the question: “Where can personal freedom and equality be placed in this classification” i.e., the classic classification of essentials, exigencies and embellishments, a typology of Maqāṣid which he does not find appropriate for the placement of freedom and equality. He then seeks a placement for these two values either in the alternate classification of Maqāṣid as normative and subsidiary Maqāṣid, or to span categories by regarding equality and freedom as both necessary and normative (Kamali 2011:16). He proposes the addition of economic development and strengthening of research and development in technology and science as Maqāṣid, his motivation being that he sees it crucial to the standing of the umma (muslim community) vis-à-vis the world community (2008:12). Kamili’s proposition may be problematic from the point of view of the necessary substantiation of new Maqāṣid. From which authoritative sources does he derive the latter? Even though he discusses in general the principles underlying the derivation of Maqāṣid (2008:12-20), he regrettably does not illustrate how he used these principles to arrive at the latter additional Maqāṣid. From which authoritative sources does he derive the latter? Even though he discusses in general the principles underlying the derivation of Maqāṣid (2008:12-20), he regrettably does not illustrate how he used these principles to arrive at the latter additional Maqāṣid. He, in fact, echoes Ibn’Āshūr’s principles for a methodology for the formulation of Maqāṣid, concurring with the use of clear text, inductive reasoning, and significantly, also condones the use of resorting to the appeal of the innate nature (fiṭrah) of humans for corroborating Maqāṣid (Kamali 2011:259)

Kamali provides numerous other evidences from Qur’an and Ḥadīth in substantiation for his adoption of freedom and equality as the Maqāṣid (Kamali 2002:1-92). With regard to freedom, the first set of proofs from Qur’anic verses and hadith indicate that humans are born in fiṭrah. Fiṭrah he believes, subsumes the meaning of freedom. The second set of proofs deals with the notion that humans cannot be taken into bondage and forced to act against their will. A third set of proofs deals with the fact that humans are held accountable by God for their deeds. He cites a fourth set of proofs providing evidence for the specific freedom of religion. Yet a fifth set of citations refers to proof that oppression must be opposed. Kamali also accepts the Fiqh maxim that all things are in a state of permissibility as proof for individual freedom (2002:28-41). Kamali also believes that the Qur’an promotes absolute human equality (2011b:40), a cosmological outlook which he wishes to be incorporated into all legal rulings of the Sharī`ah, mentioning in particular issues of gender equality, commercial transactions and laws governing crime and punishment.
(2011b:39). He initially affirms that the Qur’an (49:13; 5:2) regards people as being different with regard to their natural abilities (Kamali 2011:256), but then attempts to prove equality by citing the hadith

O people! Your creator is one and you are all descendants of the same ancestor. There is no superiority of an Arab over a non-Arab nor of a black over the red except on the basis of piety.

Despite the numerous citations in support of equality, Kamali admits that the only type of equality for which there is conclusive evidence is that of equality before the law. However, proof of equality relating to the ‘wider fraternity of the human race’ which he believes ‘implies equality of all individuals in basic rights and duties’ he admitted to be ‘somewhat inconclusive’ in earlier writings (Kamali 1992:50). Kamali’s admission of the inconclusive nature of proofs for equality should be sufficient to deter him from positing equality as a Maqāṣid, yet contemporary Maqāṣid scholars seem persuaded of the necessity of doing so, most likely because of the persuasive or coercive nature of the contemporary human rights discourse, a notion further explored in the following chapter.

Muhammad Umer Chapra (1933-)55 is a Pakistani economist based in Saudi Arabic where he served as an Advisor at the Islamic Research and Training Institute of the Islamic Development Bank (IDB), Jeddah. Prior to that, he taught at a number of institution, primarily in economics and including the Central Institute of Islamic Research (Pakistan).

Chapra recognizes the importance of wellbeing linked to values other than material wellbeing alone. He believes human wellbeing to be intimately associated with inter-alia equality (2008:3, 7), personal freedom (ibid. 12), and security of life, honour and property. The latter qualities he regards as basic human rights which he asserts as being dealt with by Islamic literature dealing with Maqāṣid al-Shari‘ah (ibid. 3). Chapra, therefore, supports the notion that the Maqāṣid of the Shari‘ah includes values such as freedom and equality. These qualities receives uncontested

55 Chapra served at the Saudi Arabian Monetary Agency based in Riyadh for more than 33 years and retired as the senior advisor on the same institution (Chapra, 2008). He also lectured at the University of Wisconsin as Associate Professor of Economics, University of Kentucky as Senior Economist and Associate Editor of the Pakistan Development Review at the Pakistan Institute of Development Economics (ibid.) . Currently, he serves on the Islamic Research and Training Institute of the Islamic Development Bank as a Research Advisor (ibid.).
support by him. He deduces that all humans are equal (ibid. 7) because of the viceregency conferred by God on all humans.

Numerous other writers have contributed to the contemporary *Maqāṣid* discourse such as Robert Crane⁵⁶ (2009), Mohammad Monzur-i-Elahi⁵⁷ (2010), Murat Çizakça⁵⁸ (2007), Andrew F March⁵⁹ (2011), Rached al-Ghannouchi⁶⁰ (1998), Osman Bakar⁶¹ (2011), Eric Winkel⁶² (2011), Halim Rane⁶³ (2011) and Ahmad Kazemi-Moussavi (2011), to mention but a few. Most of them are not pivotal in developing *Maqāṣid* theory as part of the contemporary liberal reformist project and have therefore not been discussed at any great length in this dissertation. They are mentioned because, with some nuance here and there, they have adopted and/or advocated its development

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⁵⁶ Robert Crane (b. 1929) is a white American Muslim and politician. He is a trained lawyer, having earned a PhD in Law from Harvard, and has also served in numerous position for the US government and civil society; notably, he was a former Advisor to US President Richard Nixon (d. 1994), and participated in the creation of a number of Washington DC-based foreign policy think tanks. He converted to Islam in 1980 and thereafter participated in several American and International Islamic organizations, such as the International Institute of Islamic Thought (IIIT) (*Kuwaiti Ministry of Awqaf & Islamic Affairs*).

⁵⁷ Mohammad Monzur-i-Elahi is an assistant professor of the Department of Islamic Studies at National University of Bangladesh, Gazipur. He graduated with a PhD from the Islamic University of Medina and specialises in *Usūl al-Fiqh* (*Universal Vision, 2018*).

⁵⁸ Murat Çizakça is a Turkish Muslim thinker specializing in Islamic economics. He is currently a Professor of Comparative Economic History and Islamic finance at the Global University, Kuala Lumpur, Malaysia (*Muslim Heritage 2018*).

⁵⁹ Andrew March is a white American associate Professor of law at Yale Law School and the Department of Political Science at Yale University. His research focuses on issues of liberalism, Islamic law and Western and Islamic political philosophies (*Harvard University Edmond J. Safra Center for Ethics*).

⁶⁰ Rached al-Ghannouchi (1941-) is a Tunisian politician, leading global Sunni Islamist intellectual and co-founder of the Tunisian political party, *Ennahda* (lit. Renaissance). Al-Ghannouchi came from a humble *falāḥī* (peasant) farming family in the rural areas of Tunisia. Azzam Tamimi notes that prior to becoming an Islamist, like many Arab youth of his generation, he ventured through the political philosophies of Arab nationalism and socialism as both activist and thinker, having lived in various places in the *Maghrib*, Sham and even Europe (Tamimi 2001: 3-29). In 1981, he co-founded the Islamic Tendency Movement and for nearly a decade was in conflict with the secular nationalist Tunisian state until he fled the country in 1988. Upon exile, he settled in London and eventually published *Al-Ḥurriyat al-‘Āmmah fi al-Dawlah al-Islāmiyyah* (Public Liberties in the Islamic State) in 1993, becoming an important reference in contemporary Islamic political thought (Tamimi 2013). Al-Ghannouchi has long been a proponent of Islamic democracy and pluralism, and has critiqued both Western supremacy and extremist Islamist movements throughout his writings. He returned to Tunisia after President Ben Ali was ousted during the Arab Spring in January 2011 and continues to head the *Ennahda* Party (*Berkeley Center for Religion, Peace and World Affairs*).

⁶¹ Osman Bakar is a Malaysian scholar whose works, such as *The History and Philosophy of Islamic Sciences* (1999), are widely known and translated throughout the Islamic and Western worlds. He is currently a Distinguished Professor and Director of Islamic Studies at the Universiti Brunei Darussalam (*Universiti Brunei Darussalam*).

⁶² Eric Winkel is a white American Muslim scholar of Ibn Arabi (d. 1240). Winkel has taught at the International Islamic University, Kuala Lumpur, Malaysia, and was Senior Fulbright Scholar in Islamabad, Pakistan. He is currently completing the first complete translation of Ibn `Arabī’s *Futūḥāt al-Makīyāh* (*American Indonesian Exchange Association*).

⁶³ Halim Rane is an Australian associate Professor of Islamic Studies at Griffith University in Australia. He has published works on the topics of Muslims in the West, *Maqāṣid al-Sharī`ah*, and Islamism (*Griffith University*).
and application, usually concurring with the aforementioned central role players. Thus Moussavi (2011:281) agrees that new rational considerations are necessitated in the light of the differing situations arising in Muslim societies. Moussavi concurs with Auda’s notion of traditional legal methodologies needing to be steered by a goal orientated reading of the Sharī`ah, further agreeing with Ibn Āshūr that the Lawgiver’s end goals seems to be directed towards ensuring the well-being of society (2011:281). Moussavi alludes to the concept of human rights when he asserts that the understanding of the higher objectives in the light of public interest is conditioned upon a greater recognition of public practices, institutions and requirements (2011:282). Winkel (2011:308) supports Ibn Āshūr and Kamali’s discourse towards adapting Maqāṣid for contemporary socio-political reform. Crane (2009a: 9) declares Auda’s book “Maqāṣid al-Sharī`ah as Philosophy of Islamic Law: A Systems Approach” as “the most advanced study of Islamic normative law”. Crane sees Maqāṣid as being based on a natural law which is a combination of revelation, reason and the physical laws of the universe (2009 b: 3). He draws a parallel between Maqāṣid as natural law and the fact that the “great American experiment was founded on it” i.e., natural law. He promotes freedom through education. He remarks that Muslims can promote the natural law on which the American constitution is built through applications of Maqāṣid al-Sharī`ah (Crane 2009 b:2-3).

El Hajjami (2009:110) commends Ibn Āshūr for extending Maqāṣid to include freedom and equality, even though she laments the fact that it is not expanded to include many gender issues. March (2011:368) claims the Maqāṣid framework to be a useful means for moving beyond classical rulings with regard to issues of religious freedom and equality. Elahi (2010:328) regards interests of humans as the ultimate goal but justifies any goal on the basis of serving human interest. Facilitating Islamic development is his overriding concern. He similarly incorporates values such as freedom and equality from the contemporary human rights discourse with minimal critique of the human rights discourse and providing scant textual support from the primary sources (Qur’an and Sunnah). He endorses Auda’s proposed use of the UN’s Human Development targets, implicating the use of contemporary human rights discourse as a guide for developing Maqāṣid which would promote human development (Elahi 2010:331). Maqāṣid would then, according to Elahi, be a basis and framework for Islamic intellectual and civilizational development (ibid. 333). The implication is a development parallel to Western values with the ever present threat that Maqāṣid may now be geared for a capitalist society and favoured towards capital accumulation guised as being in the interest of humans. Raschid al-Ghannouchi the
prominent Tunisian activist, statesman and Islamic scholar accepts the āṣūli framework of Shāṭibī and invokes the *Maqāṣid* as justification for Muslims entering into alliances with non-Muslims to form secular states which will “respect human rights, ensuring security and freedom of expression and belief” (Ghannouchi 1998:92). He elucidates the ‘theory of freedom in Islam’, explaining that it rests on the granting of freedom to individuals in all things, provided such freedoms does not oppose the welfare of society (1998:43).

Çizakça, demonstrates that democracy is beneficial for economic development (2007:103). An offshoot of his discussion is the fact that he at the same time demonstrates that for capitalism to flourish, it requires minimal transcendent interference, particularly in the form of the state (Cizakca 2007:107), and therefore by implication the sovereign power of God. He argues that the basic freedoms which are the tenets of advanced countries, (and which are responsible for their economic growth) is not opposed by Islam, and resorts to the *Maqāṣid al-Shariah* to substantiate his stance (ibid.112). With regard to the latter, he relies on the modern interpretation of *Maqāṣid* as expounded by Chapra (ibid. 112). Rane (2011: 354-355) has identified conciliatory trends by the West towards political parties adopting the *Maqāṣid* approach. He argues that human rights and democracy are lesser priorities for the United States, their major concern being their own economic progress. He does not comment on the degree to which the latter concerns may have influenced the human rights discourse, and therefore influencing Muslim political thought that adopts the *Maqāṣid* approach which have suggests uncritical adoption of the contemporary human rights discourse.

2.4 Summary

This chapter has explicated the position of contemporary *Maqāṣid* scholars, in particular those seeking peaceful integration with Western societies. The latter scholars seek to adapt the classical *Maqāṣid* theory, with a view thereby towards transforming Islamic law in order to render it more harmonious with the contemporary human rights discourse. A general trend was the call for expanding classical *Maqāṣid* to more than the traditional five, the majority of *Maqāṣid* writers then including new *Maqāṣid* such as freedom and equality into their discourse. The stated bases for such expansion included derivation of *Maqāṣid* not only from the primary sources and the corpus of *Fiqh* law, but also novel methods such as innate understanding, references to the ‘book of the universe’ and knowledge which unfolds to humans through the passage of time. The
following chapter focus the lens of postcolonialism on the latter discourse and attempts to unveil dangers inherent in such discourses, insights which have been acquired through the accumulated experiences of postcolonial writers.
Chapter Three

Maqāṣid Quo Vadis? A Postcolonial Critique of Maqāṣid

3.1. Introduction

Chapter Three examines the contemporary Maqāṣid discourse through a postcolonial lens. The strengths and weaknesses of the classical discourse on Maqāṣid as espoused by Shāṭibī is initially appraised through the postcolonial lens in order to lend perspective to and highlight the effects of the proposed contemporary Maqāṣid reformist project. A sequential critique of contemporary Maqāṣid scholars and their work progressively adds to the evidence which draw attention to the notion that the suggested modification by Maqāṣid based reform authors seems rather to increase the vulnerability of contemporary Maqāṣid approaches to undesirable influences such as deepening and extending the hegemony of ‘Empire’. Attention will be particularly directed at recurring themes such as the ex facie acceptance of the contemporary human rights discourse with the concomitant attempt to justifying the inclusion of freedom and equality as Maqāṣid, universalist and essentialist assumptions especially evident through the application of the notion of fiṭra, and the desacralization of Maqāṣid.

3.2. A Postcolonial Critique of Shāṭibī’s Classical Maqāṣid Discourse

3.2.1. A Critique of Shāṭibī from a Postcolonial and Contemporary Maqāṣid Perspective

Postcolonial discourse appears to be in consonance with contemporary reformist Maqāṣid scholars with regard to the idea that culture historically influenced traditional Islamic law rendering the law inappropriate for contemporary purposes. Ibn Āshūr agrees that Fiqh laws classically derived may be culturally specific and requires adaptation to contemporary cultures (2006: xvii). Ramadan believes that the concepts of dār al-Islām and dār al-ḥarb to be era specific (1999: 123). Auda holds that the ‘historicity of Fiqh edicts’ (2008: 5) can be overcome by the Maqāṣid approach. Scholars such as Alwani (2003), Kamali (2008: 24), Moussavi (2011) and others concur with the notion of adaptation of Islamic law to new socio-political dynamics. Postcolonial theory and Maqāṣid reformers are therefore in unison in differing from Shāṭibī’s objective regarding revelation in the Arabic language, namely ‘The Lawgiver’s Higher Objectives in Establishing the Law for Peoples Understanding’ which deals with the purpose of the Lawgiver in revealing the Law in Arabic to an unlettered people as discussed in Chapter Two. The abovementioned
objective according to Al-Raysūnī’s (2005: 113) interpretation seems to indicate that the Lawgiver requires proficiency in the Arabic language as a prerequisite for formulating law. A postcolonial perspective would rather see the context of revelation dictating the use of the Arabic language. Such a perspective would neutralize the notion of a holy language, the language used for revelation then being seen as contingent to the exigencies of the situation at hand. Emphasis would be shifted from the overarching significance of the Arabic language on its own to viewing it as a means or tool for understanding the Law within the context of its revelation. Understanding the Law therefore not only involves understanding Arabic, but requires the understanding of the Arabic culture in general, but more specifically, that selected group of a specific era and of a specified locality. In the same manner that the Arabic culture can be understood as not having conferred an added sanctity to the law by the latter process, so, too, is the case with the Arabic language.

Postcolonial discourse regarding hybridity sheds further light on the difficulties expected to be encountered when an attempt is made to replicate one culture from another, a process currently occurring in which laws derived in a particular historical and cultural context are imposed onto a different culture in a different historical time period. As discussed in Chapter One, Homi Bhabha showed how ambivalence results when replication is attempted in the context of one culture dominating over another resulting in both features of attraction and repulsion for the dominant culture, a phenomena which bears the seeds of destruction for the dominant culture, (the Arabic culture being the dominant culture in the latter case). As with colonial discourse that wishes to produce compliant subjects who reproduce the dominant culture’s customs habits and values, which would then be considered as mere mimicry, likewise with regard to the Arab culture, its mere mimicry in the form of reproducing its values and customs, such as its patriarchal nature, would certainly cause ambivalence in the culture so hegemonized. Fanon’s concept of psychic trauma of the individual as previously discussed also gains significance in the latter setting, the copying of Arab culture destined not to be fully achievable. The endeavour of the reformist Maqāṣid scholars to identify occasions where Arabic culture hegemonize Islamic law is thus in agreement with postcolonial cautions of hegemony However these reformist Maqāṣid scholars unfortunately do not adopt the same approach towards human rights and the hegemony of dominating Western cultures as will be discussed later. The latter discussion is significant in the context of this dissertation as it demonstrates a support for reformation utilizing the Maqāṣid approach, but argue for an increased awareness of the dangers inherent in embarking on the trajectory that contemporary reformist Maqāṣid scholars are presently undertaking.
3.2.2. The Problem of Desacralization: Features of Shāṭibī’s Maqāṣid Promoting the Sacred

The identification of the occurrence of desacralization is important in that it forms part of the *modus operandi* of ‘Empire’. Distancing itself ('Empire') from the sacred reduces the emphasis which religions place on charitable acts, the poor tax (*zakāh*), and arousing of the conscience for the moral obligation to care for the poor and the frail. Desacralization therefore minimalizes the inhibitory effect of religious decrees on ‘Empire’ and provides free reign to the expansion of ‘Empire’ since there is minimal restriction on the right to capital accumulation and possession. Capitalism as practiced in the West is very conducive to the flourishing of ‘Empire’ since notions of the entitlement theory of Nozick in a minimal state such as just initial acquisition and opposition to patterned distribution of justice all in the interest of preserving individual liberty and equality, works in the favour of capital accumulation.

A positive postcolonial perspective of the classical discourse on *Maqāṣid* as expounded by Shāṭibī identifies category three and four, (avoiding imposing hardship) and the second division namely human objectives as particularly significant in the light of the ever-expanding hegemony of ‘Empire’. The abovementioned *Maqāṣid* categories seems specifically to target the inward dimension of humans, in particular human intentions. Most contemporary *Maqāṣid* scholars do not include equivalent *Maqāṣid* which could act as counter measures against the excesses of ‘Empire’. Thus, to briefly recap, with regard to the category three *Maqāṣid* as discussed in Chapter Two namely ‘The Lawgivers Higher Objectives in Establishing the Law as a Standard of Conduct’, Shāṭibī explicates that the Lawmaker does not intend difficulty with the inculcation of inward values such as forbearance, control of worldliness, cowardice, envy etc. With the category four of the *Maqāṣid*, i.e., the ‘The Lawgiver’s Higher Objective in Bringing Human Beings Under the Laws Jurisdiction’, Shāṭibī indicates that the intention of the Lawmaker is that humans should be under the sway of divine law and not their whims and fancies. The *Maqāṣid* of division two, i.e., ‘Human Objectives’, of Shāṭibī emphasize that the Lawmaker’s purpose is that the intention of the human being should be consistent with that of the Lawmaker in laying down the legislation. (This was also discussed in Chapter Two.)

In the face of neo-colonial hegemony and the influences of the ‘Empire’, the above three categories should receive much more attention than the cursory encounters it does from contemporary reformist *Maqāṣid* scholars. Bearing in mind the ‘Empire’s’ usurpation and misappropriation of the human rights discourse, and considering the mechanisms for the flow of power of hegemony which we discussed in Chapter One, it is not difficult to conceive the
importance of the power which lies in individuals, or the multitudes to curb the excesses of the ‘Empire’. These mechanism bear recapping here: The Foucauldian manner in which power is spread via conduits such as the academy through society, the coalescence of power via Hardt and Negri’s ‘single logic of rule’, Gramci’s understanding of hegemony as the incorporation and transformation of ideas and practices of the dominated rather than an imposition of ideas from the dominator supported by Said’s exposition of the use of ‘Orientalism’ to dominate, and Koopman’s conception of the ‘Empire within’.

The utility value of the abovementioned categories in limiting ‘Empire’ is manifested in the rules Shāṭibī derives from these categories. The category three *Maqāṣid* firstly establishes the necessity for the development of inward qualities which could resist excesses, even though the difficulty in its achievement is acknowledged. From the discussion of Shāṭibī’s *Maqāṣid* division of ‘Human Objectives’ it is evident that that he subscribes to a bilateral notion of validity of human action, both the external action of the Law having to be obeyed and the intention or objective of the Lawgiver. From the fourth category entitled ‘The Lawgiver’s Higher Objectives in Bringing Human Beings Under the Laws Jurisdiction’ Shāṭibī derives rules which points to a vision broader than the fulfilment of personal wishes and desires. He seems to urge for deeper ethical considerations in the fulfilment of the essential objectives.

Shāṭibī does not consider the fact that it is near-impossible to legislate intentions and thus exert external control over the internal dimension of humans, as an obstacle for including the notion of intention in his theory of *Maqāṣid*. The degree of attention he devotes to the latter aspect of *Maqāṣid* is indicative of the degree of importance he regards this subject matter. Shāṭibī relies on belief in God and the afterlife as leverage for the implementation of *Maqāṣid* related to the inner aspect of human action. Thus, emphatically states that consideration of what is of interest to humans in terms of what is beneficial or harmful to them is based on ‘how this earthly life prepares the way for the life to come’ (cited in Al-Raysūnī. 2005: 225). The six case scenarios he presents in which he discusses the validity of actions depending on whether the action conforms either to the prescribed law of the Lawgiver or to the intention of the Lawgiver or various combinations thereof also bears testimony to the latter (Raysūnī 2005: 131). He furthermore asserts that the Lawgiver wishes to enable human beings to ‘enter fully into adoring submissions to [their] Master’ (Raysūnī 2005: 121). The pragmatic success of his theory of *Maqāṣid* is thus very much depended on the conscience of the individual and her relationship with God. The result may be a community ruled by its inner state of being rather than through external control. Such a community would present a barrier to the free reign of the ‘Empire’. This would be so since, if the origin and
continued existence of the ‘Empire’ is explained and understood through the Foucauldian notion of the distribution of power and knowledge, then it can be seen that Shāṭibī’s inner dimension of the Maqāṣid strikes at the very source of ‘Empire’ power namely the inner desires of Hardt and Negri’s ‘majority’ or ‘proletariat’ which serves as a conduit and eventual manifestation of that knowledge and power in the form of ‘Empire’. Stifling selfish desires, whims and fancies, and attempting to encourage the conformity of the individual intent to the objectives of the Lawgiver would promote the spread of the Lawgivers objectives in a Foucauldian fashion, rather than the desire for capital accumulation, the power of which has already congealed into co-operative ventures in the form of transnational corporations, the backbone of ‘Empire’, which achieved its existence through a mutually beneficial ‘single logic of rule’ activities.

Shāṭibī’s ‘Human Objectives’ and his bilateral notion of validity of human actions has special significance with regard to ‘Empire’s misappropriation of the human rights discourse and the lack of development by theoreticians of this dimensions of Shāṭibī’s Maqāṣid theory. The essential objectives do parallel the human rights discourse in that it also promotes respect for life, religion, intellect, property and lineage (family and society). However, they lack other conditions the development and enactment of the contemporary human rights discourse such as equality and freedom. These are qualities which Maqāṣid reformers are at pains to insert into the classical Maqāṣid discourse to parallel human rights discourse as will be shown below.

Despite subscribing to the human rights discourse, and, in fact, seemingly actively promoting its values, the ‘Empire’ is still growing stronger in the form of transnational corporations. The essential objectives, if made to resemble the human rights discourse, will, therefore, also become vulnerable to the ‘Empire’s influences and misappropriations, especially in the light of the fact that these essential objectives which deal with the outward actions of humans, lacks the inward dimensions as explicated by Shāṭibī’. The conclusion that the human rights discourse cannot keep the ‘Empire’ in check is self-evident as follows from the discussion in Chapter One and, ipso facto, the same lack of control by Maqāṣid in the form of essential objectives over ‘Empire’ is anticipated. Evidence of the consequences of the excesses perpetrated by ‘Empire’ as presented in Chapter One bears testimony to the ‘blameworthy’ character of actions which takes the form of ‘praiseworthy actions’ but done for satisfying the selfish desire of excessive capital accumulation. This could be seen as resulting from the pursuance of human rights for selfish gains such as that of capital accumulation in the absence of ethical standards of conduct as propagated by Shāṭibī’s abovementioned categories of objectives. Classical Maqāṣid discourse offers a means of censoring such excesses particularly as regard the categories three, four and ‘Human Objectives’.
Lack of emphasis on the latter categories of the *Maqāṣid* by contemporary *Maqāṣid* reformers reduces the ability of *Maqāṣid* to counter the excesses of hegemony and capital accumulation and facilitates the ‘Empire’s’ free reign.

3.3. Ibn Āshūr

3.3.1. Critique of Ibn ʿĀshūr’s Essentialism and Universalism

The postcolonial concept of cultural difference (Bhabha 2006) sheds further light and provides deeper insight with regard to Ibn ʿĀshūr’s attempt at providing an ‘objective approach’ to *Maqāṣid* derivation. Ibn ʿĀshūr demonstrates an unfortunate heedlessness to cultural difference on four occasions. These are his assumption that Muslim jurists could be culturally unbiased, his concept of ‘real ideas’, his notion of ‘conventional ideas’ and lastly his understanding of the meaning of the term ‘*fiṭrah*’.

First, Ibn ʿĀshūr cautions that *Maqāṣid* could be inaccurate if the jurist is not unbiased and objective, and should not be influenced by past scholars, irrespective of their eminence. This is an approach challenged by postcoloniality which denies that objectivity can at all be possible. Culturally specific laws were being perpetuated via the classical *Maqāṣid* approach as explicated in Chapter Two, having its sources for its derivation in the classic body of *Fiqh* as interpreted by a particular culture. Accepting the inevitability of cultural bias will acknowledge the fact that what was done in the past and any future activity will be culturally influenced, including the contemporary *Maqāṣid*-based reformation. Rather than striving for some unachievable transcendental universal condition, acknowledging cultural difference will promote dialogue other than that of a universalist approach which holds the values, experiences and expectations of a specific culture as being true for all humanity (Ashcroft, et al 2000: 216).

Second, Ibn ʿĀshūr’s concept of ‘real ideas’ which he uses as a criterion to distinguish between true and false objectives is also blind to differing cultures in that he does not acknowledge the cultural bias that could affect such a notion. The idea that there is a ‘sound mind’ which recognize universal ‘truths’ is also an aberration of the colonialist who used their self-image thus created as a hegemonic tool as explicated in Chapter Two. Nevertheless, if, for the sake of exploring Ibn ʿĀshūr’s notion of true and false ideas, it is assumed and conceded that revelation confers on us certain universal truths and also that revelation is not culturally attuned for the sake of the community to which revelation has directly occurred, then cultural bias can still occur at the level of the interpretation of that revelation. The interpretation of revelation is reflected in the body of knowledge which is now known as *Fiqh* law contra the *Sharī`ah*, which is the divine law as
intended by the Lawmaker, resembling a Kantian type of noumena not apprehendable as understood by scholars such as, *inter alia*, Mir-Hosseini (2006: 25), Nyazee\(^{64}\) (2006: 24) and Auda (2008: 59). In the latter hermeneutical context, the seemingly specific self-evident truths may appear self-evident only in the context in which that truth is perceived. Imposing values from an ancient society onto a modern society is a form of universalization, the dangers of which has been extensively covered in postcolonial discourse. An example is the postulate by Ibn Ṭūsī that the one of the *Maqāṣid* for the institution of marriage is for the preservation of lineage. In this case, marriage would then be rendered obsolete in a modern society since lineage can be traced using DNA techniques or futile if one of two in the relationship are incapable of child-bearing. If the preservation of lineage were to be a higher objective then this can be achieved without the need for marriage in contemporary society. Either extra-marital sex must thus now be allowed in societies where DNA mapping is easily available or, if prohibition of extra-marital sex is an absolute, then preservation of lineage may not be the underlying goal. Irrespective of what the underlying wisdom may be, this shows how differing circumstances alters the clarity with which certain apparently ‘true facts’ may be viewed. A further example would be the apparent self-evident truth in the context of a patriarchal society, where men inherit more than women given that they bear the obligation of maintaining women. Such a notion becomes contested in a non-patriarchal society and no longer seems self-evidently true.

Third, Ibn Ṭūsī’s second criterion for identifying objective truths viz. his notion of ‘conventional ideas’ i.e., that the truth of a particular idea has been confirmed through the passage of time, also becomes unsustainable when viewed from a postcolonial perspective. Because postcolonialism recognizes cultural difference (2006), a corollary is that what is accepted as normal practice differs from culture to culture. Foucault’s conception of knowledge being constituted of that which is agreed upon in a particular society as discussed in Chapter One is also of particular significance with regard to Ibn Ṭūsī’s ‘conventional ideas’. Attempting to impose what has through the passage of time been accepted by one culture on to another constitutes a form of cultural hegemony in which the culture of a particular historical and geographic setting is perpetuated and imposed, the dual methodology of hegemony manifesting in coercion through law which has to

\(^{64}\) Imran Ahsan Khan Nyazee is a Pakistani legal scholar. He has taught at International Islamic University Islamabad (IIUI) for over 20 years. His theories of Islamic Law has been described as laying the foundations for a 'new (Islamic) jurisprudence'.
be adhered to in order to attain access to heaven, and consent through persuasion that the law is appropriate and, therefore, acceptable if you wish to be recognized as following the Islamic ideology. Gramsci’s identification of ideology as the means through which consent is created is particularly pertinent albeit the process less consciously performed as compared to colonialism. The current ambivalence experienced by contemporary Muslims appears in the tension they experience between their love for Islam, and the precepts which they have to adhere to which may not be historically or culturally appropriate. An example of the latter is the classic *Maqāṣid* of the preservation of religion, which in the context of war between Muslims and non-Muslims, requires the killing of a Muslim who became non-Muslim since it is tantamount to treason. Applied in the contemporary globalized world wherein it is difficult to describe countries accurately through religious identity, one country at war with another may be difficult to be construed as one religion at war with another. Furthermore, mass population movement has inevitably resulted in many Muslims acquiring full citizenship in most non-Muslim majority countries across the globe. Conversion to a religion other than Islam can hardly therefore be construed as treason in the modern context, and imposition of a death sentence would be affected with a great deal of difficulty, resulting in the peaceful co-existence of society being threatened. Ramadan grapples with the latter issue when he suggests that the *dār al-ḥarb* and *dār al-Islām* binary vision of modern socio-political structure is outdated and inappropriate, possibly leading to hostilities since the *maqṣad* of preservation of religion would in such a binary vision encourage and promote the setting up of hostilities between Muslims and non-Muslims. Ramadan suggests a *dār al-shahādah* (abode of witness-bearing) as an alternative but lapse into the error of utilizing a tool of hegemonic cultures to realize the latter as will be discussed below.

Fourth, Ibn `Āshūr regards *fitrah* as an inborn disposition inclining human towards the laws of Islam as discussed in Chapter Two. His corollary is that the discursive use of human *fitrah* will, therefore, produce Islamic law consonant with divine intentions i.e., it gives rise to his ‘real ideas’ and ‘universal conventional ideas’, the bases for formulating his *Maqāṣid al-Shari`ah* (Ibn `Āshūr 2006, 71). He, therefore, claims that the fundamentals of Islam originate in humans’ natural disposition or *fitrah*. He considers any notion which deviates from *fitrah* as false resulting from “age long bad habits perpetrated by wrong-headed people” (ibid. 83). He, therefore, maintains ideas which are essentialist and universalist i.e., all humans have a basic essential nature reducible to what is termed their *fitrah*, and universalist i.e., that because Islamic law so derived

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65 Presumably an abode where Muslims are free to give witness to their faith by freely living it out as well as the freedom to call towards their faith.
is compatible with human nature, i.e., their fitrah, it should therefore be universally applicable (ibid. 78-86). The inescapable conclusion is that Islam is suited to humans’ essential characteristics, namely their fitrah, and is the only means of attaining order in the world. Any other system or ideology is, therefore, being unacceptable since it originates from “age long bad habits perpetrated by wrong-headed people”. The status of other ideologies of beliefs is, thus not only questioned, but regarded as ‘unnatural’ and inappropriate for humans. These essentialist notions of humans must lead to hegemonic universalist assumptions akin to that characteristic of imperialist and colonial discourse. The imposition of universalist assumptions is counterproductive to inter-religious co-operation as demonstrated by orientalism and its sequelae. Similar problems may arise as that which were experienced in the colonial era and could be counterproductive to the peaceful coexistence of Muslims with other ideologies. Furthermore, the emergence of ‘Empire’ contradicts such notions of fitrah as described by Ibn `Āshūr giving rise to questions resulting from obvious contradictions with empirical evidence, such as; if humans were naturally inclined to Islamic law, why the origination of ‘Empire’? Why not the natural inclination towards the emergence of that which is a natural tendency in humans viz. Islamic law? Why the need for constant exhortation to follow the law? Why the need for revelation containing such exhortations? Ibn `Āshūr’s concept of fitrah acquires a different meaning in the light of the above postcolonial critique. The term may possibly not refer to what humans are naturally inclined towards. Rather, it could refer to the divine conception of what God wants humans to become, humans being created with the inert potential and ability to develop into that which was divinely conceptualized. Fitrah would then be regarded as the potential within humans to fulfill a divine plan, similar to the potential in a seed to become a tree. Suffice to suggest at this stage that Ibn `Āshūr’s conception of fitrah is not the only credible interpretation of this term. It is beyond the scope of this dissertation to offer a comprehensive reworking of the meaning of the term in the light of postcolonial understandings, other than to have pointed out the difficulties with the current interpretation of the meaning of fitrah.

3.3.2. Desacralization Evident in Ibn `Āshūr’s Maqāṣid.

I will argue that, Ibn `Āshūr’s construct of Maqāṣid seems to be perpetuating, knowingly or unknowingly, the desacralisation process discussed in Chapter One. These desacralization tendencies manifest in three ways; his separation of matters of worship and matters pertaining to external human conduct, his omission of Shāṭibī’s maqṣad pertaining to ethical standards of conduct and his tendency to copy the contemporary human rights discourse. The latter could
certainly be regarded as ominous signs of the hegemonic effects of ‘Empire’, hegemony in its persuasive rather than coercive aspect.

Evidence for Ibn Ḥāshūr’s deviation from the sacred and towards a more imminent perspective of Islam can firstly be found in his proposal regarding the separation of commands and rules pertaining to the devotional acts of worship (‘ibādat) from those pertaining to the regulation of external human conduct, (muʿāmalāt) a position in consonance with the majority of jurists in Islamic law (2006: xxiii). The difficulty which arises is that Islamic Jurisprudence operates clearly in the area of civil transaction (muʿāmalāt) and usually confines its scope to the latter. Can the Maqāṣid be confined in a similar manner? Can true objectives of the Lawgiver be obtained without factoring in aspects of worship? Will the Maqāṣid devoid of spiritual dimensions not favour an ‘Empire’ agenda? Did the Lawgiver intend devotional matters to be separate from civil matters i.e. secular vs religions matters? Did the Lawgiver intend by the creation of civil Society that there should be a just society with no further end in sight? Are there possibly other goals intended thereby, goals which may incorporate the spiritual dimensions as well? Stated differently, is this earthly realm merely a means towards ends which the Lawgiver envisages? Is it possible for humans to attain glimpses of those goals which the Lawgiver truly intends as the ultimate destiny for humans? To cite an example, consider the possibility of the intention of the Lawgiver as being to develop certain qualities in humans which would only emerge under conditions of inequality, such as kindness. An ideal Marxist state would not produce conditions conducive to the development of the human quality of kindness since equality would prevail. Surely then the Lawgiver’s intentions would be thwarted since kindness cannot be developed under perfectly just conditions? A just society may not be in the teleology of the Lawgiver, rather, the process of attempting to establish a just society may be an important process in achieving goals not immediately apparent. Taking cognizance of spiritual aspects of humans may alter the Maqāṣid derived from separating civil transactions and acts of worship or spiritual aspects. Shāṭībī certainly confirms his belief that spiritual matters are an essential perspective needed for Maqāṣid through his extensive integration of Maqāṣid with spiritual development. As related in Chapter Two, all his Maqāṣid refers to and appeals to the spiritual nature of man, the only exception being his first Maqāṣid of the second division namely ‘The Lawgiver’s Higher Objective in Establishing the Law’ which contains the Maqāṣid which resembles the human rights discourse.

The second indication of Ibn Ḥāshūr’s departure from the sacred is his omission of all Shāṭībī’s Maqāṣid other than the one resembling the human rights discourse. Thus, Shāṭībī’s mention of
spiritual matters which appeals to individual conscience such as aligning the intention of the human with the divine intention, or not being dictated in activity by personal desires but instead by the will of God etc. are omitted. This inability to integrate the life in the hereafter with this world in contemporary Maqāṣid discourse frees the conscience of the individual from obligations conditional for the attainment of success in the afterlife.

The third indication of Ibn `Āshūr’s departure from the sacred is the fact that he seems to also follow a trend copied by contemporary scholastic works on Maqāṣid which attempt to accommodate contemporary human rights discourse. Although the publication of Ibn `Āshūr’s book on Maqāṣid was prior to the 1948 Universal Declaration of Human Rights (UDHR), the human rights discourse in the West prior to 1948 seems to have had a decided influence on his ideas. The Maqāṣid of classical scholars such as Al-Ghazzāli and Shāṭibī showed very little emphasis on individual human rights. Thus, the term ‘preservation’ (ḥifẓ) is frequently used adverbially in relation to stated higher objectives such as ‘The preservation of life’. The mode of presentation is also impersonal. In the latter mode as regards the preservation of religion the concern is not expressed for the individual right to freely follow a religion of her choice, but rather the impersonal concern that religion, specifically Islam, should not be corrupted. In Shāṭibī’s conception of the preservation of religion, the existence of religion, he says, is preserved through its fundamental doctrines such as the ṣalāh, ḥaj and zakāt etc., whereas its annihilation is prevented by jihād, the punishing of those converting from Islam to another religion, and prohibition of innovation in matters of religion (Raysūnī 2006: 109). Preservation of religion is clearly not seen as a mechanism to protect the freedom to choose how and what religion to follow. The same applies to the preservation of life where concern is expressed for protecting life in general as a duty rather than as a possession or a right to which an individual has a claim. Shāṭibī (Raysūnī 2006: 138) cites the following Qur’anic verse for substantiating the acceptance of the protection of life as a higher objective: “…and do not take any human being’s life-[the life] which God has declared to be sacred” (Qur’an: 81: 8-9). Contrasted with the human rights declaration which conceives the right to life from a subjective perspective i.e., each human being has the right to life, the difference between conceiving the right to life as a duty to preserve life as framed by Shāṭibī and perceiving it as an individual right where an individual has a claim or vested interest in a more self-interested sense becomes evident. Shāṭibī is, in fact, often quite clearly uncompromising in his opposition to vested self-interest. Raysūnī cites him as follows with regard to the latter stance:
The subtle shift in orientation in approaches to the principles of preservation of life, religion, intellect, property and lineage observed in Ibn ʿĀshūr’s work seems to assume the form of the human rights discourse of his time. Thus Ibn ʿĀshūr, in contrast to Shāṭibī, refers to rights and freedoms rather than duties. In the process he causes or creates a clearer separation between matters of worship and worldly concerns, unlike Shāṭibī who clearly states that the objectives of the law is for serving human interests in both this life and the hereafter (Raysūnī 2006: 170). One of Shāṭibī’s Maqāṣid related principles states:

The objective underlying the establishment of the law is to deliver human beings from enslavement to their selfish whims and desires in order that they might be God’s servants by choice just as they are His servants out of necessity (Raysūnī 2005: 319)

Ibn ʿĀshūr, however, remarks that the all-purpose principle (al-maqṣad al-ʿām) of the Sharīʿah is for the maintenance of order in this world (2006: 116). He views ‘correct’ belief as a pre-condition to sound management and correct legislation in matters of this world, rather than seeing the process of ordering the world as a necessary mechanism for developing a higher spiritual being (ibid: 94). The impression gained from Ibn ʿĀshūr’s writing is that he regards the ultimate goal of legislation to be an ordered world, not addressing the question of the teleology of an ordered world i.e., what is the underlying purpose of an ordered world? The latter trend demonstrates how this shift in emphasis result in an inadvertent truncation of Maqāṣid to an ‘Empire’ agenda at the hand of Ibn ʿĀshūr (and other contemporary scholars as shown below). The shift in emphasis is well suited for the working of ‘Empire’ since the individual pursuit to possess is promoted by the manner in which human rights discourse is framed by the West.

3.3.3. Maqāṣid Moulded for the Contemporary Human Rights Discourse
The UDHR seems to have a decided influence on Ibn ʿĀshūr’s ideas despite his efforts at exhorting scholars to remain ‘objective’ and not to allow affiliation to previous scholars to influence the derivation of Maqāṣid. Thus, with regard to specific rights as expounded in the UDHR, Ibn ʿĀshūr’s work reveals a keenness to demonstrate that Islam follows similar principles. Two of the prime examples of the attempt by Ibn ʿĀshūr to conform to the contemporary human rights discourse is the inclusion of freedom and equality as two additional Maqāṣid to the classical Maqāṣid discourse. The latter is a recurring theme evident in the writings of other contemporary
Maqāṣid reformers as will elaborated upon later in this chapter. The evidence produced by Ibn `Āshūr, and other writers that Islam promotes freedom or equality as primary purposes of its creed is meagre and unpersuasive. Prior to embarking on a critique of Ibn `Āshūr's, and later other author's approaches to the latter aspect of human rights, it is perhaps appropriate to reiterate a point made in the introduction; the concern of this paper is directed at the ex facie incorporation of contemporary human rights discourse into the Maqāṣid theory and not against the rights of humans as such. Chapter One has highlighted some of the aberrations in the contemporary human rights discourse which requires attention by Maqāṣid reformers prior to following the human rights discourse.

Focusing on the incorporation of equality and freedom among the Maqāṣid, Ibn `Āshūr is confident of his evidence offers that Islam promotes equality, to the extent that he deems it sufficient to declare equality as one of the objectives of the Sharī`ah (Ibn `Āshūr 2006: 154). Of the three methods accepted by Ibn `Āshūr to formulate Maqāṣid as described in Chapter Two, he offers the second method, that of Qur'anic contextual proof as conclusive evidence that equality is indeed a maqṣad. None of the evidence presented however unequivocally states the equality of all humans. The notion of status of equality amongst all humans is either arrived at through what Ibn `Āshūr believes the text implies, or by inaccurate translation resulting in hermeneutical errors. Thus, the Qur'anic verse “all believers are brethren” (Q. 49: 10) is seen by Ibn `Āshūr to imply equality since brotherhood is seen by him as implying “universal equality” (Ibn `Āshūr 2006: 146). His interpretation of the Q. 4: 135: “O ye who believe! Stand out firmly for justice” as being that of commanding equality also contains some hermeneutical leaps which allowed for his understanding of equality to adopted. His translation of the term ‘bi al-qiṣṭ’ does not take into account the difference in meaning between the terms ‘equity’ and ‘equality’. He first of all prefer to use ‘equity’ as a translation for ‘bi al-qiṣṭ’, unlike most commentators who use the translation ‘justice’, as cited above from Yusuf Ali’s translation. Even though the term equity is consistent in meaning with the term ‘bi al-qiṣṭ’, it does set the scene for an easy transition to an erroneous understanding that it is synonymous with “equality”. The verse “stand out firmly for justice” is now read “Be ever steadfast in upholding equity” and interpreted as referring to the establishment of equality.

Inasmuch as the evidence presented by Ibn `Āshūr may to some extent point to equality, more persuasive evidence, not acknowledged by Ibn `Āshūr, can be derived from the Qur’an which seems rather to emphasize difference and inequality, suggesting social stratification as a divine
pre-ordained norm, contra the idea of equality as a prime objective. Referring to what can be construed as a pre-ordained economic superiority limited to the earthly realm, the Qur'an states: “God has bestowed His gift of sustenance more freely on some of you than on others”, (Q 16:71). The verse: “He enlarges and restricts the sustenance to whom he will” (Q 42: 12) seems to indicate a divine intention not to equalize wealth amongst humans, but the continued creation of an intentional disparity in possession of wealth. According to the Qur'an, social stratification can also be seen as a divine intention when the Qur'an declares:

it is We who portion out between them their livelihood in the life of this world: and We raise some of them above others in ranks, so that some may command work from others” (Q 43: 32).

The use by the Qur'an of the metaphor “are the blind equal to those who see?” (Q 13: 16) indicates a recognition that physical sight confers a physiological superiority over physical blindness similar to metaphorical insight being superior to not possessing such insight. The Qur'anic verse: “the blind and the seeing are not alike” (Q 35: 19) supports the latter notion. The Qur'anic statement: “Men are protectors and maintainers of women, because God has given one more than the other, and because they support them from their means (Q. 4: 34) appears to contradict a maqṣad which may strive for gender equality. The Qur'an further describes a rank which it regards as the highest in the following verses: “Verily, the most honoured of you in the sight of God is the most righteous of you” (Q. 49: 13), and: “A slave woman who believes is better than an unbelieving woman” (Q. 2: 221).

In the light of the Qur'anic prescribed social stratification, the following hadith by the Prophet of Islam can only be interpreted as being a specification of qualities which does not confer any inherent superiority to its owner, representing exceptions to that which the Qur'an describes:

No Arab is superior over non-Arab etc. All mankind is from Adam and Eve, an Arab has no superiority over a non-Arab nor a non-Arab has any superiority over an Arab; a white has no superiority over black nor a black has any superiority over white except by piety (taqwā) and good action (Al-Bukhārī, Hadīth 1623, 1626, 6361).

Thus, the possession of greater wealth confers a superiority limited to economic status but declaring superiority in 'blackness' or 'Arabness' is meaningless. In the same manner that being black does not convey superiority in any other social or spiritual matter, so also does economic superiority not confer superiority in any other quality besides the quantity of wealth possessed.
The evidence is therefore overwhelming that equality is not considered by the Qur'an as a *maqṣad*, and that it rather acknowledges difference. The argument presented above demonstrate that equality posited as a *maqṣad* is a contestable proposition from the perspective of the primary sources of Islam. The evidence presented may not necessarily prove inequality to be a *maqṣad* of the *Sharī`ah*, neither is it intended to do so. It merely serves to illustrate that reformers, in their zeal to prove that Islam endorse human rights as interpreted by the West, fail to adequately examine the evidence which either support or reject claims of such an endorsement. The positing of equality as a *maqṣad* in this instance could be said to, therefore, be more indicative of a process through which an attempt is made to conform Islam to certain predetermined goals such as that of human rights, rather than examining the evidence without presupposition. It lends credence to the assertion of this dissertation that reformers selectively invoked texts as pre-texts accommodate Western notions of human rights and inadvertently locating their reformation project firmly on the side of the the “Empire”.

Ibn `Āshūr is profoundly influenced by the concept of freedom to the extent that he believes that it too should be a *maqṣad* of the *Sharī`ah*, and then sets about to find evidence in substantiation of his claim. His discourse seem to be shaped by the dominance of the contemporary human rights discourse regarding freedom, rather than clear evidence from Islamic primary sources, the requirement of which he had clarified but does not seem to adhere to. The first proof Ibn `Āshūr offers in support of positing freedom as a *maqṣad* is premised on the fact that he was convinced that he had proven equality to be an objective of the *Sharī`ah*. He argues that the existence of equality necessitates the positing of freedom as a *maqṣad* in order that community members can freely conduct their personal affairs (Ibn `Āshūr 2008: 154). The second proof is a narration from the caliph `Umar ibn Al-Khaṭṭāb *maqṣad* who reportedly asked: “On what grounds do you enslave people whose mothers have born them free?” He deduced from this statement that freedom “is inherent to man’s inborn nature” (Ibid: 155). The third proof is a thematic inference. Ibn `Āshūr refer to a maxim in Islamic Jurisprudence which states that: “The Lawgiver aspires for freedom” (Ibid.). He also explains the context of the latter maxim as being freedom from slavery. He believes that the *maqṣad* of freedom is not confined to this latter meaning of freedom. Freedom also includes the ability “to act freely”. The latter, according to him, implies that one can handle one’s affairs “as one likes without opposition from anyone” (ibid: 155).
The proofs Ibn ʿĀshūr offers do not seem to qualify as evidence substantial enough to posit freedom as a maqṣad in accordance with his own criteria which he formulated for determining the Maqāṣid. With regard to his first proof namely that of freedom being a natural consequence of the establishment of equality, his criteria to formulate a maqṣad is not satisfied since it is not based on Qur’an, mutawātir hādith or thematic inference. It is instead an argument based on the predetermined premise of equality as a maqṣad, for which his proof has shown above to be inconclusive. As demonstrated in the foregoing section, equality is not an unequivocal notion in the Qur’an and can, in fact, be contested by alternative verses of the Qur’an. An argument based on unproven assumptions cannot therefore be used to formulate a maqṣad. The second proof can similarly be regarded as inconclusive since it is based on the saying of a Companion, a method inconsistent with Ibn ʿĀshūr’s criteria for deriving Maqāṣid. Of the three proofs which he offers, only the third resembles one of his criteria, namely thematic inference. Ibn ʿĀshūr explains that there are two meanings for freedom; the first he describes as being the opposite of slavery (ibid. 154) while the second as the freedom to “handle one’s affairs as one likes, without opposition from anyone” (ibid. 155). He clearly states that the main objective of the Jurisprudence maxim that ‘the Lawgiver aspires for freedom’, was “to abolish slavery and promote freedom for all” (Ibid 2008: 155). He contextualized the latter maxim providing details why the Lawgiver chose to establish freedom as a delayed goal rather than freeing the slaves all at once (ibid. 156). The theme which led jurists to derive the latter maxim therefore centred round the practice of slavery. Ibn ʿĀshūr does not provide evidence to demonstrate that jurors could have had in mind modern ideas of human rights and freedom, but merely extends the first meaning to encompass the second. The latter methodology is therefore not sufficiently persuasive and sound enough to be declared as being in conformity with Ibn ʿĀshūr’s own stipulated criteria for Maqāṣid derivation. Other specific freedoms such as freedom of religion, freedom of expression and freedom of action are all subsumed by Ibn ʿĀshūr under the maqṣad of freedom even though they are not consistent with the theme underlying the formulation of this maqṣad namely freedom from slavery. Contemporary conditions, where slavery as an institution is relatively absent, obviate the need to declare freedom as a goal of the Shari‘ah, yet Ibn ʿĀshūr, and later contemporary Maqāṣid scholars are at pains to introduce it as a maqṣad.

It is the Empire as discussed above in Chapter One which emphasizes freedom, de-linking it from any transcendental manifestations. The latter is a process which commenced with modernity’s obsession with freedom as an imminent component of humankind’s self-determination and newfound autonomy from divine influences as described in Chapter One. Positing freedom as a
*maqṣad* dilutes the notion of humans as the servants of God as described in the Qur’an (47: 38). The emphasis on autonomy and the imminent aspect of sovereignty as propounded by modernity and promoted by ‘Empire’ sets the stage for reinforcing the ego, individuals now regarding themselves as central. The fight against ‘Empire’ could be seen as the fight against the ego since the argument can be made that the self-interest of the ego leads to the development of ‘Empire’ through the greed for capital accumulation. Sarah Koopman (2008: 299) concurs with the latter assertion when she states that those within the core of ‘Empire’ wishing to oppose it may see ‘Empire’ as being imposed on others but fail to see how it affect themselves as well. She believes that to effectively fight the ‘Empire’ we have to “see the ‘Empire’ we carry within” (ibid.).

The assertion could be made that the counter arguments presented to demonstrate that the primary sources of Islam do not necessarily promote equality or freedom do not disprove that these concepts have a place in Islam. However, the counter-arguments do, at the very least, render these concepts ‘essentially contestable’. Such contestable notions cannot according to Ibn ´Āshūr’s criteria therefore be posited as *Maqāṣid*. The fact that incorporating freedom and equality as *Maqāṣid* therefore seems ‘forced’ leading to the conclusion that the UDHR is serving as a coercive or persuasive force decidedly influencing Ibn ´Āshūr’s *Maqāṣid* discourse. The latter could result in the infiltration of discrepancies present in the human rights discourse, into the *Maqāṣid* discourse which will then influence the shaping of Islamic law. This paves the way for entrenching the hegemony of ‘Empire’ and the untrammeled accumulation of capital. The inescapable conclusion is therefore that Ibn ´Āshūr’s acceptance of the human rights discourse as true and his desire to comply with the latter discourse by shaping *Maqāṣid* to correspond to contemporary human rights values creates a potential for the ‘Empire’ to co-opt.

### 3.4. Tariq Ramadan

The following section deliberates Ramadan’s approach towards modifying *Maqāṣid* theory with regard to three aspects. a) A critique his *Maqāṣid* modification as elaborated upon through his concept of the “book of the universe” as discussed in Chapter Two above. b) Interrogating Ramadan’s understanding of the socio-political global dynamic of the West as central and ‘others’ such as Islam, as peripheral and how the latter impacts on the understanding of ‘Maṣlaḥah’ are also analysed from a postcolonial perspective. c) A critique of his lack of support from the primary

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66 See Peter Coates’ *Ibn ´Arabi and Modern Thought: The History of Taking Metaphysics Seriously* (2002, Anqa) for a more in-depth discussion of his notion of ‘essentially contestable’ concepts
sources of Islam for the inclusion of freedom and equality as *Maqāṣid*, shows a similar predilection to assume that Muslim must move into the direction of adopting and following contemporary human rights discourse. Substantiation of freedom and equality as *Maqāṣid*, it is argued, are to a considerable degree dependent on his concept of ‘the book of the universe’, thus perpetuating the thread of problematic notions highlighted concerning his ‘book of the universe’ and his perspective on socio-political global dynamics.

3.4.1 Critique of ‘Book of the Universe’

The first and more important postcolonial critique of Ramadan’s approach to *Maqāṣid* is his concept of the “Book of the Universe”; this as the weakest aspect of Ramadan’s *Maqāṣid* framework. In this work Ramadan argues that the sciences are impartial and objective. He declares that:

> The methods, techniques and scientific methodologies established to understand and analyze an object of study and realize how it functions [...] must meet the requirements of the indicated object of study and they must therefore remain free and autonomous about the rational frameworks and techniques chosen by scientist to comprehend their field of investigation (Ramadan 2009: 128).

This suggests that scientists could be objective about their choice of framework and techniques or even their objectives and hypotheses which they wish to prove. The putatively pure material sciences are, however, not free of the influence of social conventions; the post-structuralist, Thomas Khun, (1970) demonstrated that scientists work in communities with agreed upon paradigms as disciplinary matrices. Khun does not dispute scientific facts but argues that the theories and paradigms built around these facts are through consensus of the scientific community, which, in turn, affects their agreed upon standards, methodologies and meaning of terms, which is then the means by which their social activity affects science. The human sciences such as sociology and anthropology are of the sciences which postcolonialism which initially Edward Said, and later joined by many others, have demonstrated is deeply interwoven socio-economic and political conditions. Said’s discourse concerning the discursive construction of the Orient, as discussed in Chapter One, implicates the use of both sociology and anthropology in the construction of knowledge and therefore the creation of corresponding attitudes and legitimization of colonial government policies towards the “Orient”. Postcolonial analysis, therefore, sounds a warning against perceiving science to be completely impartial and objective. Using the sciences as one of the primary sources for deriving the *Maqāṣid* can lead to the uncritical adoption of alternate agendas such as that of the “Empire” into the body of Islamic law.
This is reminiscent of colonial agendas which infiltrated societal values through the scientific route and, other than wars of invasion and occupation was largely responsible for the hegemony of colonial powers. The latter has direct consequences for Ramadan’s consideration as to what should be regarded as being in the best interest of Muslims (*maṣlaḥah*) since he relies on various sciences such as sociology, political science, etc., to determine the condition of the people and, therefore, what is in their best interest in accordance with those pre-determined conditions. This is evident from his framework for deriving *Maqāṣid* (fig 2.3) which is entirely governed by an equal partnership between his two primary sources viz. “The Revealed Books” and the “Books of the Universe” (fig 2.2). *Al-Maṣlaḥah* can thus be seen to be one of two highest objectives from which all other objectives are derived. The assistance of science in deriving *Maqāṣid* is not discounted by this argument, rather it seeks to advise against the uncritical acceptance of knowledge from scientific sources as uncontaminated facts, and to utilize as comprehensive measures as possible to assess the cultural suitability of scientific “facts”, measures which includes discourses such as postcolonialism.

3.4.2. Ramadan’s Central vs Peripheral’ Worldview – a New Binary

The second area of concern is Ramadan’s socio-political conception of central versus peripheral. His alternative socio-political construction of the West as central and the rest of the world - including Islam - as peripheral presumably also has its source from his notion of the “Book of the Universe” since Ramadan does not provide evidence from revelation to support this latter framework (2010: 123-148). Ramadan’s conception in this instance seems to be the West as the focus of the source of the westernization “apparatus” and is therefore central. He believes that this approach “from the outside” (2010: 150) allows Muslims to see themselves as having a responsibility to contribute to European society rather than protecting themselves from it. Regarding themselves as peripheral will, therefore, be in the *maṣlaḥah* of the Muslims according to Ramadan’s worldview, and because *al-maṣlaḥah* is a major objective from which all of his other objectives are derived, it will truncate all the other *Maqāṣid* to realize the central vs. peripheral worldview. If Ramadan adheres to his central vs. peripheral conception then he will simply be replacing an old binary with a new one which is, however, a split image of old colonial superior-inferior binaries, one culture dominating another as discussed in Chapter One. Based on the effects of the old colonial conception, the fear is that the peripheral may once again experience hegemony which in this instance may be from the “Empire” which is currently dominating Western culture.
This approach is therefore retrogressive from a postcolonial perspective. Dipesh Chakrabarty’s work “Provincialising Europe” devotes much attention to deconstructing the conception of Europe as central, this in order to be able to perceive the world as heterogeneous (2000: 46). If one bears in mind Edward Said’s exposition on the development of Orientalism as an academic discourse in Europe and how it was used by the colonialist to entrench the notion of their centrality, universality and therefore superiority of culture which is expected to be accordingly adopted by the peripheral or marginal cultures as discussed in Chapter One, then the need for Chakrabarty to deconstruct such notions of centrality can be seen as an imperative to remove “that which resists and escapes the best human effort at translation across cultural and other semiotic systems” (Chakrabarty 2000: 45-46). The re-introduction of central versus periphery only perpetuates unbalanced binaries and poses the danger of assimilation of Muslim cultures into the dominant central West.

Majid (2000: 10) believes that at present Muslims seem to “transcend the real but contingent pressures of imperialism and neo-colonialism” which is the cause of the West’s ‘problem’ with Muslims. A key feature of Muslim cultures is its Islamic identity with Islamic law pivotal in characterizing them Islamic. This identity is acquired by its adherence or attempt to such of a system of Islamic law which has remained intact for over twelve centuries (Hallaq 1997: 209). Such Muslim cultures can further be characterized as a legal culture in view of the successful development and preservation of Islamic law and it’s supporting legal structure. The fairly protected environment afforded to Muslims by Islamic law may therefore come under threat by ‘Empire’ since the integrity of each Muslim culture is weakened by ‘Empire’ and its secondary goal of destroying barriers as discussed in Chapter One. The need to transform Islamic law therefore creates vulnerability and an opening for Muslim culture to be manipulated. *Maqāṣid* is an attempt to further manipulate and change the law. Manipulating the law could therefore significantly affect many Muslim cultures.

The contemporary socio-political reality, however, is that Muslims are faced with aporias regarding approaches to globalization. The argument for the need for reform seems to justify the efforts of reform scholars in this direction but, in the light of postcolonial discourse, Muslim scholars would do well to re-examine the agendas being served with regard to the identification of areas which need reform in Islamic Law, and the current trajectory of reformation. Majid (2000: 19) alludes to the latter deficiency when he proclaims that the absence of postcolonial critique especially as regards “cold globalization and intense retribalization” (ibid.) in Islamic works make them “Ideologically and theoretically problematic” (ibid.). It is not only the absence of postcolonial
critique in Islamic works that Majid laments, but also the fact that postcolonial theory is “inattentive to the question of Islam in the global economy” (ibid.). Majid indicates that the West’s response to the Rushdie Affair\(^{67}\) is indicative of its universalist stance as being the civilized culture par excellence and that “Islam and Islamists are yet to be civilized”. He cites Ferdinand Mount who reportedly said:

> Clearly, fundamentalists are nowhere near asserting the vital Western principles of the rule of law, religious tolerance, and freedom of speech and enquiry [...] [Pressure must be increased] to serve the lifting of the fatwa… to persuade Islamic fundamentalism that it will remain outcast until it comes to terms with Western standards of civility (cited n Majid 2000: 37)

Thus, Tariq Ramadan’s strategy of Muslim coming to the centre to affect the centre is deeply flawed since *Maqāṣid* may become more focused on altering Islam to suit the ‘centre’. Muslim scholars need to be certain that reformation is not a response to coercive pressures of hegemonic capitalist agendas. The Muslim scholar is also alerted to the danger of becoming marginalized from her culture to a hybrid category lauded by academic apparatus.

### 3.4.3. Freedom and Equality as *Maqāṣid*?

The third disconcerting of Ramadan’s perspective on *Maqāṣid*-based reform is that his evidentiary support from the revealed books for some proposed *Maqāṣid* especially at his level three (fig 2.3) is rather sparse, in particular the *Maqāṣid* that coincide with central concepts of the human rights discourse. Bearing in mind that he initially proposes an equal weight to both of his sources namely his ‘revealed books’ and his ‘books of the universe’, relying mostly on his ‘books of the universe’ seems to contradict his stated position. An example of the latter assertion is that he provides no support for the inclusion of freedom as a *maqṣad*. Equality he substantiates with the verse “God commands justice” which may substantiate his inclusion of justice as a *maqṣad* but cannot be conflated with equality as discussed previously. The latter assertion receives further confirmation by the observation that his extensive ethical discussion on freedom and equality in his publication, “The Quest for Meaning”, is confined to a rational and philosophical discourse lacking substantiation from the “Revealed Books” (Ramadan 2010, 51-81). If evidence from the revealed books is lacking, then according to his framework, his derivation must necessarily be from the

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\(^{67}\) The “Rushdie Affair”, also known as “The Satanic Verses Controversy”, was the negative global reaction of Muslims to the publication of British Indian novelist Salman Rushdie’s *The Satanic Verses*, published in the UK in 1988. Many Muslims took offense to and accused Rushdie of blasphemy for his allegorical depiction of the prophet Mohammed in *The Satanic Verses*, with then Iranian Supreme Leader, Ayatollah Khomeini issuing a *fatwa*, or legal edict, ordering Muslims to kill Rushdie (Jacobson 1998: 34).
book of the Universe. Contemporary human rights discourse is derived from sociological and political consideration which are sciences of the books of the universe. Freedom and equality are dominant within the human rights discourse. Consultation of the books of the universe through the human rights discourse is most likely the means by which Ramadan arrived at the idea of freedom and equality being *maṣāliḥ* and, hence, his inclusion thereof as one of the *Maqāṣid*. The human rights discourse is however problematic as discussed in Chapter One, as it is punctuated by ‘Empire’ agendas.

### 3.5. Gamal Eldin Attia

A postcolonial critique of Attia’s work reveals concerns in three areas; a) his understanding of *fitrah* as being the natural inclination of humans and his consequent acceptance of *fitrah* as a source of *Maqāṣid*. b) The incorporation of freedom and equality as *Maqāṣid*, revealing once again the influence of the coercive pressure of the contemporary human rights discourse and c) the dedication of a *maqṣad* for the protection of human rights including the endorsement of international intervention in the context of contemporary human rights discourse - both latter inclinations indicating an uncritical acceptance of the contemporary human rights discourse.

#### 3.5.1. *Fitrah* – Attia’s Universalist and Essentialists Understanding

With regard to Attia’s innate understanding and notion of *fitrah*, its essentialist and universalist implications have been discussed above with reference to Ibn `Āshūr’s use of the term. The postructuralists have demonstrated the difficulty associated with placing reliance on the centrality of the subject to attain to objective knowledge of the world. Postcolonialism especially with regard to Said’s work as discussed in Chapter One points to compelling affirmation that any knowledge produced from a human perspective will be nuanced in accordance to the cultural milieu always influencing human perspectives. Edward Said’s ‘Orientalism’ has demonstrated how Europeans have been deluded by their logocentric perceptions, many missionaries acting with sincere intentions to civilize other cultures in accordance to ‘objective criteria’ derived from the rational self. Postcolonialism would therefore argue that *fitrah* and innate understanding which arises from *fitrah* will be culturally nuanced. Imposing understandings derived in the latter manner may be culturally inappropriate and could be compared to the Christian missionaries who sincerely sought to civilize other cultures believing their approaches to be objective and universal. The latter approach would be tantamount to a repeat of cultural hegemony as practiced by the Western colonial nations. Motivating for world peace while maintaining universalist assumptions in the light of postcolonialism is oxymoronic. Maintaining universalist assumptions can only result in nations.
and followers wishing to impose such ‘true’ assumptions on others, rather than seeing truths as culturally nuanced, a position explicated by Foucault as presented in Chapter One.

3.5.2. Freedom and Equality as Maqāṣid?

Significant once again is the continual emergence, under postcolonial scrutiny, of evidence indicating Maqāṣid discourse scholars being swayed by the contemporary human rights discourse. Notable in Attia’s motivation for acknowledging freedom and human rights as Maqāṣid is once again the lack of substantiation from the primary sources of Islam namely Qur’an and Sunnah. Nor does Attia utilize his independent reasoning from ‘innate understanding’ to demonstrate the logical necessity for including equality and freedom as Maqāṣid. Attia’s attempt at affirming the achievement of equality as a teleological endpoint in Islamic law results in a numerous list of exceptions to equality rather than conclusive proof that Islamic law should regard equality as a maqṣad. These latter exceptions which Attia mentions include differences in degrees of knowledge among humans, a divinely purposeful different degree in possession of wealth, differences in ability, differences in power etc. (Attia 2007: 89). The enumeration of so many exceptions to equality are instead clearer proof of Attia’s attempt at reconciling his stance with Qur’anic texts which clearly does not promote equality. Attia deals with the concept of freedom in a similar manner emphasizing the notion that Islam does indeed endorse freedom, but not in an absolute sense (2007: 88). The adoption of freedom and equality by Attia is an indication of the effects of the persuasive arm of ‘Empire’ hegemony. As previously shown, the latter two values have little substantiation from the Islamic sources of law for its incorporation as Maqāṣid.

3.5.3. Human Rights as a Category of Maqāṣid?

Attia propose dedicating an entire maqṣad purely for the protection of human rights. This may have been commendable in the absence of the effects of ‘Empire’, but the infiltration of ‘Empire’ into the human rights discourse renders the uncritical incorporation of the latter values suspect. The latter strategy may only be promoting good conducive to ‘Empire’, a selective process as discussed in Chapter One which may then also steer the formation of Islamic law in a similar direction of ‘Empire’, or in the very least, remove the obstacles to the progress of Empire’ within the Islamic milieu. Despite Attia’s acknowledgement that the international sanctioning for the forceful intervention of the protection of human rights requires a disregard for national sovereignty and can be annexed by superpower interests, he nevertheless sanctions the use of force to protect rights and freedoms, a method which he believes has been internationally recognized (2007: 147). The latter interventional policy has been shown in Chapter One to have been
annexed and is already a *modus operandi* of the ‘Empire’. That chapter also described how news media, religious organizations and NGO’s have become moral instruments of ‘Empire’, forming its persuasive aspect of hegemony. The contemporary *Maqāṣid* discourse could thus be seen as a response to aporias faced by Islam coming into contact with ‘Empire’, and therefore attempting commensurability within the framework of ‘Empire’.

3.6. Jasser Auda

Much like Ibn Ashūr, Ramadan and Attia, Auda also embraces the contemporary human rights discourse *ex facie*. His systems approach is particularly ominous for advancing the interest of the ‘Empire’ among Muslims.

Auda’s *ex facie* acceptance of the contemporary human rights discourse as expounded by the global north becomes evident when he suggests that the *Maqāṣid* be used to realise human development in accordance to targets set by the United Nations. His *Maqāṣid* seems to be more driven by the concern that Muslim countries seem to be low on the human rights index as determined by the UN. He further suggests that an empirical measure of the actualization of the latter human development should be the “UN human development targets according to current scientific standards” (2008: 25). He then further argues although human development and human rights require further research from a *Maqāṣid* perspective, that human development as a *maqṣad* would provide a firm base for human development targets in the Islamic world, *contra* its presentation as mere “tools of Western domination” (ibid.). Auda errs in submitting to the coercive hegemonic forces of ‘Empire’ by attempting to align *Maqāṣid* with the contemporary human rights discourse.

Auda’s systems approach inadvertently provides an effective means for ‘Empire’ to control Islamic legislative processes. His belief that the effectiveness of a system is measured by fulfilling its purpose (2008: 55) leads to his conclusion that the effectiveness of the system of Islamic law is measured on the bases of the fulfilment of its *Maqāṣid* (ibid.). While Auda’s proposal for adopting *Maqāṣid* as an approach to reform Islamic law may be acceptable, the methodology for the primary formulation of *Maqāṣid* is not dealt with adequately. He offers little in the way of a mechanism by which *Maqāṣid* truly in the interest of the people can be secured. His project seems more directed towards an attempt to make Islamic law more flexible and to keep the door of *ijtihad* open, rather than ensuring the legitimacy of the formulation of *Maqāṣid* which reflects *Maṣlaḥah* (interest of the people). The malleability of Islamic law could be considered necessary to ensure
the rights of humans but at the same time measures have to be employed to ensure that ‘Empire’ or its influences does not gain access through the open door and shape Islamic law to its purposes. Addressing the latter question is paramount since whatever infiltrates as Maqāṣid will therefore have at its disposable the entire legislative machinery of Islamic law to realise that Maqāṣid. A system driven by an incorrect target could end up being a destructive weapon. All system features will be engaged in realising that Maqāṣid in accordance to the systems approach as described by Auda in which the purpose of the system is achievable whether the environment changes or not, or whether the same or different means are utilized (Auda 2008: 52). Islamic law would then be truncated, via the systems approach, towards fulfilling the goals of ‘Empire’. Because all units of the system are now orientated towards achieving a particular purpose, it becomes crucial that the purpose or Maqāṣid derived be a purpose which is truly a benefit (maṣlaḥah) to society, and not a purpose which promotes an the Empire’s agenda. The latter concern assumes significant proportions in the light of the fact that Auda, like the other abovementioned Maqāṣid scholars, seems also to adopt an uncritical approach to the acceptance of the human rights discourse as a guide for Islamic reform as mentioned above.

From a postcolonial perspective, the Auda’s proposal to formulate Maqāṣid for human development is not problematic in itself, but becomes so if it is motivated by a desire to satisfy human rights discourse ex facie. With Islamic law as an open system as proposed by Auda, one cannot afford the error of assuming the appropriateness of any contemporary discourse, be it human rights or the current method of critique offered by this dissertation, viz. postcolonialism, since the potential to manipulate Muslims is increased through the introduction of alternate agendas such as that of the ‘Empire’. It seems imminently advisable that any discourse should have a multi-dimensional scrutiny from various discourses i.e., an open paradigm approach to cross check for any applications which may not be in the interest of humans.

3.7. Other Scholars

With regard to the writings of other scholars, no new concerns can be discerned via a postcolonial lens. Their writings reflect approval of the abovementioned scholars’ discourses but does not provide additional evidence in support of positions adopted by the key scholars discussed above. Chapter Two discusses many of the other writers’ expositions which are relevant to the postcolonial critique levelled at the key Maqāṣid scholars. The latter includes notions such as the drive to include human rights and its contemporary values as Maqāṣid, Al-Wani’s tacit support of
Ramadan’s ‘book of the universe’ through his suggestion that revealed texts should be interpreted in conjunction with knowledge which unfolds to humans with the passage of time, and Çizakça’s implicit conclusion that minimal transcendent influence promotes economic growth which supports the notion of desacralization, etc. and need not be repeated at this point. Kamali does seem to provide additional substantial evidence as proof for the need to include freedom and equality as *Maqāṣid*, and will thus be the only writer to be discussed to any extent.

Despite Kamali’s numerous citations from the primary sources attempting to prove freedom as an end goal of the *shariah* (Chapter Two), similar numerous counter citations can be offered which confer doubt on the latter supposition. On countless occasions, for example, the Qur’an orders obedience to God and his Prophet (Q. 3: 132, 4: 64, 66, 80, 8: 20, 24: 52, 56 etc.)\(^{68}\). The verse: “O you who believe, obey God and obey the Messenger, and those charged with authority among you (Q. 4: 59)” not only commands obedience to God, and his Prophet, but also orders obedience to ordinary humans placed in charge of the affairs of humans. The argument can therefore be made that in the interest of the well-being of humans that ‘obedience’ gains priority as a *maqṣad* for establishing a well-ordered society instead of freedom which could result in anarchy. Yet other verses indicate that we may not be as free from divine destiny as Kamali seems to believe. Q. 10: 100 states: “No soul can believe, except by the will of God”, and Q. 57: 22 which reads: “No misfortune can happen on earth or in your souls but is recorded in a decree before We bring it into existence”. Similarly, Q. 76: 29-31 and Q 81: 29\(^{69}\), indicates limited freedom of will granted to humans. Other verses refer to the Prophet and humans as the servant of God, emphasizing servitude rather than freedom or equality e.g., Q. 54: 9, Q. 50: 11, Q. 50: 29, Q 47: 38.\(^{70}\) Furthermore, the Qur’an does not declare slavery as practiced at the time of the Prophet as forbidden. The Qur’an seems to rather seek to regulate the institution of slavery as a necessary reality of society as reflected in the above cited verse namely Q. 2: 221 with regard to the marriage to slaves. The argument that the trajectory of the Qur’an is to abolish slavery is weakened by the latter command by the Qur’an at its regulation, and the fact that even modern society still requires

\(^{68}\) Q. 3: 132: “Obey God and the Messenger”; Q. 4: 64: “We sent not a Messenger but to be obeyed”. Q. 4: 66: “All who obey God and the Messenger are in the company of those on whom is the grace of God”; Q. 4: 80: “He who obeys the Messenger, obeys God”; Q. 8: 20: “O you who believe obey God and His Messenger”; Q. 24: 52: “It is such as obey God and His Messenger, and fear God and do right, that will win”; Q. 24: 56 “[…] and obey the Messenger; that ye may receive mercy”

\(^{69}\) Q. 76: 29-31: “This is an admonition: Whosoever will, let him take a path to his Lord. But ye will not except as God wills: For God is full of knowledge and wisdom. He will admit to His mercy whom He will […]”; Q. 81: 29: “But ye shall not will except as God wills.”

\(^{70}\) Q. 54: 9: “They rejected our servant […]”; Q 50: 11: “[…] as sustenance for Our servants […]” Q. 50: 29: “and I do not the least injustice to my servants.”; Q 47: 38: “But God is free of all wants, and it is ye that are needy.”
regulation with regard to humans whose freedom (used in the sense of freedom from slavery) have been removed as they pose a danger to the order of society. Such individuals either remain incarcerated and becomes a financial burden to society, or are compelled by court rulings to do compulsory community service, both scenarios representing regulated limitations on individuals in society and could therefore be regarded as similar to regulated slavery.

3.8 Summary

Chapter three has highlighted concerns from a postcolonial perspective regarding the four central Maqāṣid writers namely Ibn `Āshūr, Ramadan, Attia and Auda who attempt to modify Maqāṣid discourse to suite contemporary requirements. These concerns included ex facie acceptance of contemporary human rights discourse exemplified by; semantic changes to appease the human rights discourse; insisting on including freedom and equality as Maqāṣid despite overwhelming evidence to the contrary; the proposal of new Maqāṣid endorsing contemporary expressions and modes of applications of contemporary human rights discourse; and the absence of a systematic critique of contemporary human rights discourse. Universalist and essentialist assumptions through notions such as fitrah, ‘objective approaches’, ‘real ideas’ and ‘conventional ideas’ and the notion of Islam as marginal to the central West were also discussed as being problematic. Desacralization was shown to be evident in contemporary Maqāṣid through the fact that; the Maqāṣid which encourages the development of human conscience with regard to pure motives for actions are generally lacking; there is a separation of Maqāṣid concerning the conduct of human affairs from matters concerning worship which as-Shāṭibī had integrated; there is an insistence on freedom in the vein of contemporary human rights discourse overshadowing the notion of humans as the servants of God. The opening of the door of Muslim legislative processes to the influence of ‘Empire’ was also seen to be evident in Auda’s systems approach because of his ex facie acceptance of contemporary human rights. Kamali was the only other writer who adds any additional substantial evidence to support the abovementioned core writer’s assertions for including freedom and equality as Maqāṣid. His arguments were refuted mainly with contrary citations from the Qur’an, demonstrating that freedom and equality cannot unequivocally be allocated as Maqāṣid.
Chapter 4.

4.1. CONCLUSION

Chapter one commenced with a discussion of postcolonial discourse with the purpose of scrutinizing the contemporary Maqāṣid discourse through insights gained from postcolonial experience. The historical development of postcolonial discourse was demonstrated to have placed postcolonialism as an ideal critique to identify social injustice, especially in the contemporary neocolonial era. Important concepts conferring the latter ability to postcolonialism included analyses of the notions of cultural hegemony, universalism and essentialism, hybridity versus integration of cultures, multiculturalism and the notion of ‘Empire’ as a transnational corporate co-operative promoting the accumulation of capital as primary goal. ‘Empire’s’ five modes of operation were also identified namely desacralization, claiming to act in the name of good, claiming the right to international intervention, production of needs, and hegemony. An important assertion in Chapter One is that the contemporary human rights discourse is imbedded in the Empire’s agenda for the global South. The latter assertion is based on the following findings namely: That the origin of the normative assumptions of human rights are Eurocentric based on universalist and essentialist assumptions, a historical continuum of the colonial project; The victims of oppression have contributed minimally – if at all - historically to the development of human rights; The contemporary human rights discourse creates an ‘othering’ process creating an inferior vs superior binary; The underlying grand narrative of human rights dominated by one culture, namely Europe and US, presented as universal, dictates policy and legislation via the UN; The US and European cultures can virtually be regarded at present as synonymous to the culture of ‘Empire’; ‘Postcolonial civilizing missions’ legitimized by universal perceptions of human rights could be the justification for economic globalization and capital accumulation.

Chapter two identified the foremost scholars in the contemporary Maqāṣid discourse. Numerous scholars dealt with Maqāṣid, but four scholars namely Ibn Ibn `Āshūr, Ramadan, Attia and Auda were found to be more prominent in that they innovate changes to the classical Maqāṣid discourse. The latter scholars draw evidence for their stance from three sources namely, the primary sources of Islam, from knowledge accumulated through human experience, and from what is arrived at by human intellect which originates from the fiṭrah of humans. Other writers that are discussed merely supports the latter four scholar’s position, Kamali being the only other writer who contributes significantly towards providing additional evidence from the three sources as mentioned above. Shāṭibi’s discourse on Maqāṣid was found to be representative of the classical
Maqāṣid discourse and was presented as a means of reference to highlight contemporary innovation. The inclusion of new Maqāṣid was found to be the major innovative process but also the omission of certain Maqāṣid which had previously emphasized the sacred was disclosed.

The discussion in Chapter Three scrutinized the Maqāṣid discourse from a postcolonial perspective highlighted areas found to be conducive to the introduction of social injustices. The foremost concern was the *ex facie* acceptance by Maqāṣid scholars of the contemporary human rights discourse. A manifestation of an inclination to conform to human rights discourse was the change of the phraseology used when referring to the Maqāṣid. Ibn ‘Āshūr altered the classical phrase ‘preservation of life or religion’ to ‘right to life or freedom of religion’. This trend is then followed by all other Maqāṣid scholars including Ramadan (2009, 268-271), Attia (2007, 147), Kamali (2010, 16-24), and Auda (2008, 21) who entitles one of his paragraphs ‘From Protection and Preservation to Development and Rights’. A second indication of the inclination to wish to conform to contemporary human rights discourse is that, despite the fact that clear incontrovertible evidence is not available that Islamic law encourage as a goal the achievement of freedom and equality, that Maqāṣid scholars without exception, nevertheless includes these latter two values as important end goals and purposes of the Shari‘ah. Shāṭī‘ib, representative of the classic Maqāṣid discourse has never in his scrutiny of Islamic law found, and therefore never included, freedom and equality as Maqāṣid. A third indication of an uncritical adoption of contemporary human rights discourse is the formulation of new Maqāṣid which openly supports contemporary expressions and applications of human right values. Thus, Attia entitles one of his Maqāṣid‘International Protection of Human Rights’ and endorses violent international intervention on the basis of human rights violations by the target countries, such an endorsement occurring with minimal critique of the human rights discourse on which such violent strategies are based. Auda suggests ‘human development’ as a Maqāṣid in its own right but uses UN policy as guides to human rights approaches. He suggests using the UN development targets as a guide to the success of Maqāṣid derived human development programmes, the latter proposal being prompted by his concern that many Muslim countries scores low on the human rights index. The final indication of the willing embracement of contemporary human rights discourse is an absence of a systematic critique of contemporary human rights similar to that offered by postcolonial writers such as Mutua, Hardt and Negri, Cheah and others.

Other areas of concern highlighted in Chapter Three included the fact that a desacralizing process was detectable in the contemporary Maqāṣid discourse which inadvertently promotes an ‘Empire’ agenda. Desacralization was manifest in the fact that contemporary Maqāṣid discourse
demonstrated a lack of emphasis on the inner dimension of humans and therefore a lack of appeal to their conscience. Chapter two mentioned how Shāṭibī used the sacred as leverage to inculcate internal values of virtue, dedicating three categories of *Maqāṣid* towards establishing the development of such internal virtues. A lack of conscience governing actions of humans, Shāṭibī has indicated, results in an outward action deemed good but motivated by internal motives not in consonance with the expressed virtue. Chapter three mentions the three categories of *Maqāṣid* omitted from most contemporary *Maqāṣid* scholars’ writings which are ‘The Lawgivers Higher Objectives in Establishing the Law as a Standard of Conduct’, ‘The Lawgiver’s Higher Objective in Bringing Human Beings Under the Laws Jurisdiction’ and ‘Human Objectives’ as indications of the desacralizing process. As-Shāṭibī urges frequently with regard to the importance of this earthly life, and therefore of the essential objectives, as being only a means of achieving the afterlife, an approach minimally present in contemporary *Maqāṣid* theory. Furthermore Ibn ʿĀshūr proposes in the development of *Maqāṣid*, the separation of commands dealing with devotional acts of worship and those dealing with human conduct, whereas Shāṭibī integrated the latter two divisions to emphasize the governing of human conduct by conscience through awareness of God. The insistence of freedom as a *maqṣad*, present in all *Maqāṣid* writers as dealt with in Chapter Two, dilutes the notion of humans as slaves to God’s will as was discussed in Chapter Three.

The fact that such a desacralizing process is conducive to ‘Empire’ is confirmed in Chapter One by the fact that one of ‘Empire’s’ modus operandi is to desacralize. ‘Empire’ would also flourish through the fact that double standards are not countermanded in the contemporary *Maqāṣid* discourse because of the omission of Shāṭibī’s emphasis on the conscience governing human action. Double standards are referred to by Hardt and Negri when they mentioned the working of ‘Empire’ striving for good but bathed in blood in Chapter One. Also discussed in Chapter One is the use by ‘Empire’ of the human rights discourse to promote its own agenda of capital accumulation. An example of the latter is Cheah’s mentioning of Asian governments’ opposition to contemporary human rights discourse on the basis of unique cultural differences, claiming privilege to actions on the basis of its unique culture but causes oppression to its own people in the interest of capital accumulation as also mentioned in Chapter One.

Chapter three identified another important perception which promotes hegemony of ‘Empire’ against Muslims, namely that of perceiving Muslims as the ‘other’. The effects of the ‘othering’ process is felt to the extent that *Maqāṣid* scholars feels the necessity to change towards conformity with the human rights discourse. The submission to being ‘othered’ is most explicitly projected by Ramadan who conceives of the West as central and all else as peripheral. The
perception of being marginalized is further evident by the fact that they include poorly substantiated *Maqāṣid* such as freedom and equality as previously mentioned, in an effort to appear to comply with the contemporary human right discourse. Such perceptions has been shown in Chapter Three to increase the vulnerability of Muslims to the influences of ‘Empire’.

A cause for Muslims becoming isolated would be the universalist and essentialist assumptions of *Maqāṣid* scholars compounded by their notion of *fiṭrah* also discussed in Chapter Three. Ibn ‘Āshūr’s notion of an ‘objective approach’, ‘real ideas’, ‘conventional ideas’ and ‘*fiṭrah*’ promotes similar universalist and essentialist notions. Attia also subscribed to similar notions of *fiṭrah* as Ibn ‘Āshūr. Ramadan also accepted contemporary sciences as being ‘objective’, and therefore free of ‘Empire’ or ‘Islamic’ influences, an error which promotes incorporation of ‘Empire’ agendas via these sciences developed predominantly by the West.

The premises outlined above lead me to conclude that contemporary *Maqāṣid* discourse is increasing the vulnerability of Islam to the hegemony of the ‘Empire’ because of its uncritical alignment with the contemporary human rights discourse, its desacralization tendencies, and its perception of being the marginalized peripheral ‘other’. Simultaneously essentialist and universalist assumptions are promoting a perspective of Islam as being hegemonic. Allowing the access of the influences of ‘Empire’ opens a means for the misappropriation of Islamic law, in the same manner in which the human rights discourse has been annexed. Accentuation of that which is considered permissible in Islam, but which serves the purpose of ‘Empire’ may then occur similar to the misappropriation of the good envisaged in the human rights discourse disguising oppressive agendas. At the same time Muslims need to guard against adopting similar essentialist and universalist approaches as that adopted by the orientalists, thus avoiding similar hegemonic oppressions as revealed by postcolonial discourses. This dissertation also concludes that all available knowledge irrespective of its source must be considered when dealing with *Maqāṣid* since *Maqāṣid* may become fundamental to Islam if accepted as a guide to sources of law. Ramadan’s appeal to ‘the book of the universe’ therefore gains credence in accordance with this study, but at the same time highlights the skewed result when all sources of knowledge, such as postcolonialism is not included in deliberations. A precondition for pursuing *Maqāṣid* as a guide to legislation therefore is the necessity for a multi-paradigm approach, including specialist in each paradigm of knowledge as suggested by Ramadan. The contribution of postcolonialism, especially in matters related to the state of the world, abuses of existing paradigms of knowledge and experience related to the effects of the meeting of cultures, especially with regard to Muslims
integration within existing cultures, is therefore essential in the *Maqāṣid* discourse and for the future of Islam.

4.2. General Recommendations Derived from this Dissertation

4.2.1. The Adoption of a Critical Approach to Human Rights and all other Human Sciences

*Maqāṣid* theory has much potential to offer in terms of transformation of Islamic law. The most pertinent concern with contemporary *Maqāṣid* theory is the lack of assurance that an affirmed *maqṣad* conforms to the divine will. This is because *Maqāṣid* has the potential to steer Islamic law towards directions which may be fulfilling other human agendas rather than divinely sanctioned *Maqāṣid*. As has been demonstrated by this dissertation, *Maqāṣid* can be formulated accommodating (or succumbing to) coercion from contemporary hegemonic discourses. The values promoted through the contemporary human rights discourse have been demonstrated by this dissertation to be influenced by a hegemonic culture resulting in promotion of goals favourable to that culture under the guise of values which cannot be denied as good when viewed in isolation. Aspects of postcolonial discourses have revealed ‘Empire’ biases in the contemporary human rights discourse, the adoption of which should be avoided by contemporary *Maqāṣid* discourse. The actual driving force behind promoting particular perspectives of human rights therefore needs to be examined rather than an *ex facie* adoption of the human rights discourse. However, many of the *Maqāṣid* reform proposals indicate a blindness to hegemony dominating the human rights discourse. The discussion in Chapter Three has illustrated that the current infiltration of contemporary human rights through the *Maqāṣid* discourse seems to lack an engagement with the primary texts of Islam, and likewise lacks a thorough scrutiny of the implications of asserting such rights. If *Maqāṣid* are to be utilized as a means of aligning Muslim lives in accordance to what is divinely required, then much more care and scrutiny is required in the formulation of *Maqāṣid* than is currently exercised.

4.2.2. The Inclusion of *Maqāṣid* Categories Encouraging the Development of Higher Spiritual Values

Shāṭibī’s higher objectives in category three, four and human adjectives could potentially counteract the influences of ‘Empire’ in that its requisites deals with standards of conduct which would be regarded as acceptable, and not excessive. Thus its pertinence in dealing with qualities such as envy, greed, worldliness etc. (Raysūnī 2005: 114) qualities which left unchecked, are all conducive to the flourishing of ‘Empire’. The development of the inward characteristics as
encouraged by the abovementioned three categories of *Maqāṣid* will inhibit the coagulation of like-minded capital seeking individuals into a single logic of rule as occurs with ‘Empire’. Instead the inculcation of inward virtues could spread in a Foucauldian manner through society thereby eroding ‘Empire’ from within. Unfortunately, *Maqāṣid* reformers emphasize category one namely the essentials, necessities and embellishments, *Maqāṣid* which can easily be influenced by various agendas in the same manner in which the human rights discourse has been influenced as discussed in Chapter Three. Lack of development of the categories of higher objectives of Shāṭibī related to standards of conduct may therefore constitute a serious shortcoming in *Maqāṣid* discourse.

4.2.3. Preservation of Muslim Integrity

The contemporary reality is that Muslims and their cultures have to relate to the dominant culture of globalization which is unanimously identified by postcolonial discourse as a threat which frequently and relentlessly devastate the economies of smaller communities (Ashcroft 2001; Loomba 1998; Majid 2000; Gandhi 1998; Hardt and Negri 2000; Young 2003; etc.). Even though Ashcroft notes positivity in the formation of hybrid communities, Majid, among others, sees preservation of cultures as a viable approach to opposing rampant ‘Empire’. In view of the argument presented in Chapter Three in the critique of Ramadan’s work, the recommendation would be to preserve cultures, as Majid suggests, in order to oppose ‘Empire’ rather than attempting to integrate into contemporary Western society as Ramadan suggests, with the resultant ever present fear of being assimilated into ‘Empire’ agendas.

4.2.4. Revision of the Use of *Fiṭrah* as a Source of Law

A revision of the meaning of the term *fiṭrah* or innate understanding may be necessary and has been alluded to above. Unanswered questions which arises from Attia’s understanding of the notion of *fiṭrah* includes the following: Can *fiṭrah* be maintained to be a natural tendency conferring an inherent ability to identify what is right or wrong, in the face of postcolonial critique of universalist and essentialist perceptions? Is Islamic law meant to be synchronous with what is natural in us and conform “to our natural tendencies”, or does the law wish to change our nature to that which is *fiṭrah*? Is it perhaps the case therefore that we have to attain the state of *fiṭrah* through the guidance of divinely based laws and ethics contra the natural inclination for survival and other acquisitions driven by Maslow’s hierarchy of needs? Undoubtedly this area requires further analysis and exploration. If it is accepted that knowledge from the “book of the universe” can assist with development of *Maqāṣid* as Ramadan explicitly assert, and which is implicit in the
writings of the other mentioned *Maqāṣid* scholars, then the interpretation of the term *fiṭrah* in the Qur’an cannot be denied a similar benefit from the ‘book of the universe’. Experience gained from ‘knowledge of the universal book’ as Ramadan refers to the various disciplines of knowledge, seem to suggest a different understanding of *fiṭrah* to that of a universal nature from which a reliable set of laws can be derived. The disciplines of postcolonialism and poststructuralism have, for example, demonstrated difficulties associated with the understanding of *fiṭrah* as being an essential nature towards which humans are naturally inclined, since if an essential human nature does exist, then the latter two disciplines demonstrates its unattainability due to cultural influences. Hoping that such a natural tendency would provide guidance is unrealistic as demonstrated by Said who exposed the orientalist discourse as being hegemonic and originating from an erroneous conception of an essentially unbiased intellect which could arrive at truths, resulting in a hegemonic tool for colonialism as discussed in Chapter One. Reliance on *fiṭrah* may, therefore, only be a reliance on the cumulative experiences of a particular culture rather than a pure essence which produce unbiased conclusions. It is therefore doubtful whether the need for further reliable sources for legislation can be fulfilled by *fiṭrah* and innate understanding as closed paradigms. Some postcolonial scholars such as Loomba (1998: 253) and Prakash (1992: 184) suggest a multi paradigm approach for postcolonial research in order to avoid the marginalization of minority groups as had occurred with colonialism. Reliance on *fiṭrah* exposes Islam to bias and possible ethnocentrism from individuals or cultural groups which may lead to hegemonic discourses. Rather than attempting to demonstrate the universality of law derived by humans, the pragmatic option would be to acknowledge that in the process of establishing a ‘God bias’ in Muslim law, that there would be the inevitable presence of cultural bias as elucidated by postcolonial discourse. Finding ‘God bias’ in *fiṭrah* seems highly unlikely since humans will judge what has been thought to have arrived at by *fiṭrah* with what they have culturally been equipped with to judge. Even if they have achieved a ‘God bias’ through their discursive thought, it can never be known to be such since we can only know with what we have been culturally equipped.

### 4.2.5. Adoption of a Multi-paradigm Approach

The suggestion by the abovementioned postcolonial writers of an open paradigm approach can be utilized by Islamic scholars to disperse the effects of bias in sources of law. Islamic scholars may draw not only on the physical sciences such as medicine or the social sciences such as sociology, but also on all other academic discourses such as postcolonialism, postmodernism.
decoloniality, social theory or political science etc. Attia concedes that humans cannot hope to formulate the correct system as divinely intended and leaves the door open for a number of possible conceptions (2007: 105). An open paradigm approach may minimize hegemony through the acquiring of insights from various paradigms. Currently it seems that instead of formulating legislation to preserve Islam in the contemporary milieu of hybridization of cultures, legislation is being redirected towards accommodating the human rights discourse. Majid’s elaboration on the importance of maintaining the integrity of cultures in opposing rampant capitalism, and similarly Hardt and Negri’s belief that the multitude as a concept in contrast to a unified like-minded majority is important in controlling the hegemonic spread of the “Empire”, have been discussed in Chapter One. The multitude was shown to be a conceptualization of people with full recognition of difference, unlike the concept of majority which is a group of likeminded individuals. If the notion of equality is juxtaposed to that of the multitude, a difference in teleology becomes evident. For equality, the eventual teleology is that of a society with no individual difference. The proverbial comparison of apples with oranges is an apt simile for the attempt at showing individuals to be equal. The perpetuation of universalist notions is an inevitability in the drive towards monoclonal individuals who can then be referred to as equal. Contra equality, the multitude is a concept which recognize difference with a teleology of this recognition being the co-existence of difference. Clearly then a postcolonial critique of the proposed contemporarization of Maqāṣid would argue in favour of that which is more appropriate in the light of the awareness of the “Empire” and rampant capitalism, and would therefore more likely encourage integrity rather than hybridity of cultures or religions to promote a methodology as proposed by Hardt and Negri whereby the multitude is recognized and can serve to oppose the free reign of the “Empire”. The term “Preservation of Religion” would most likely be retained, but rather than regarding different religions or cultures as the “other” with its accompanying antagonism, would instead preserve itself as one of the multitude, and therefore part of a community which would oppose rampant capitalism in the form of the “Empire”. Legislation would therefore be developed according to Maqāṣid contextualized more appropriately for contemporary society. The latter may be more harmonious with the Qur’anic inclinations towards difference rather than equality as discussed in Chapter Three.

4.3. Suggestions for Future Research

The most urgent need at present is to explore the notion of a maqṣad for the Maqāṣid discourse. This dissertation has illustrated that it is possible to discern a trajectory in contemporary Maqāṣid discourse, namely that of satisfying the human rights discourse. The uncovering therefore of the
fact that it is possible to pre-determine a goal for *Maqāṣid* and modify them to satisfy that goal has therefore been demonstrated. If *Maqāṣid* claims to be that which the *Sharī`ah* intended, the urgency to undertake research to discover the ultimate goal for which the *Sharī`ah* was divinely intended becomes manifest. Establishing what the ultimate divine intention is for creating humankind would most likely reveal the *maqṣad* of *Maqāṣid*. Is it possible for humans to acquire such insight into the ‘mind of God?’ Would lack of such insight mean that humans may never know whether *Maqāṣid* are ever directed at a divinely intended goal? A beginning towards the acquisition of such insight would be to scrutinize all revelation, including those sent to previous prophets, for hints suggesting at an ultimate purpose, such as the Qur'an verse (51: 56) ‘I have only created jinns and men that they may serve me’. Exploring nature and ecosystems may be another source of such knowledge.

A second suggested area of research would be the need for an examination to be undertaken to explore the effects of the meeting of two cultures such as that of the heterogeneous Muslim culture and the heterogeneous western culture. Given that this study has established that the agendas of ‘Empire’ dominates western cultures and is, therefore, materially inclined, should Muslim legislative processes be directed at retention of integrity of each Muslim group’s culture, or should integration be aimed for as Ramadan suggested? If integration is opted for, to what extent will hybridization take place? How relevant is the latter concern in terms of divine requirements? Each Muslim culture will have to be examined individually to determine the projected effects on each Muslim culture, with customization of its legislative processes in accordance to what has been determined as a desired course of progressive by that particular Muslim culture. Most likely the first recommendation viz. a *maqṣad* for *Maqāṣid* would be a major determining factor.

An undertaking to review the contemporary human rights discourse needs to be embarked on by Muslim scholars. What would be the status of concepts such as freedom and equality be in a revised human rights discourse? Is it possible in the light of postcolonial discourse on difference, to devise a human rights discourse respecting such differences, but simultaneously guarded against misappropriation by selfish interests?

Postcolonial theory would concur with *Maqāṣid* scholars that *Fiqh*, like any other human endeavor, is culturally biased towards the culture which predominantly formulated *Fiqh* laws. *Maqāṣid* scholars do not acknowledge that their reformulation would also be culturally specific. This dissertation has demonstrated the possibility of the *Maqāṣid* discourse itself becoming
biased, as exemplified by its inclinations towards the contemporary human rights discourse. An interesting study would be to embark upon a project to identify various cultures which had significant influences on Islamic law through the historical progression of time. To what extent has `urf (custom) influenced Islamic law, and does the resultant differing laws have identifiable common outcomes on differing communities? How does differing communities’ Maqāṣid detectable in their laws differ from one community to another? To what extent does it differ from classical Fiqh? Or does a sense of ‘universalism’ emerge?
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