



PROJECT MISHKAT

WHICH WAY MUST LAW PROCEED?¹

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Mishkat Paper Series

Serial No: MPS-003/2025

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I.

The life and its time

Time is transformative. The less we realise it's quickness, the more it changes our perception of the reality. While Newton could measure the mechanics of the physical world through his calculus, humanity has been unable to invent any calculus to help understand how time is tied to our lives. Can we predict the reality of persons, places or events against time? Certainly not!

Allah (swt)[†] underscores how time is tied to our lives:

By time,

Indeed, mankind is in loss,

Except for those who have believed and done righteous deeds and advised each other to truth and advised each other to patience.

(Al-Qur'an, Ch. 103, V. 1-3) (Trans: Saheeh International)

While the predictive nature of our lives is minimal, the only option all of us have is to live through the reality – face it and make every effort to live through it, hoping always to gain the favour of the Lord Almighty. Every one of us is helpless in this context – theists, atheists and the agnostics. We accept it or not, we are all subservient to the laws of nature created by the Almighty.

Allah (swt) highlights the limits of our human capacity (in both deeds and knowledge):

O company of jinn and mankind, if you are able to pass beyond the regions of the heavens and the earth, then pass. You will not pass except by authority [from Allāh]

(Al-Qur'an, Ch. 55, V. 33)

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[†] SWT stands for *Subhanahu wa ta'ala* which in Arabic means "glorious and exalted is He".

Contemporaneity and the chaos

The unpredictable nature of our lives is additionally troubled by the fact of contemporaneousness. It springs from what we have come to define as the ‘globalization’ – where every person, place and event loses the attachment with locality. When everything becomes globalized, geography becomes immaterial – nothing remains particular, everything becomes universal; and, therefore, amenable to uneven tinkering at the hands of the Market or the State. Otherwise, how do we account for what Walter Mignolo calls as ‘global designs’[‡]? Or else, what could David Kennedy mean when he accounts for ‘a world of struggle’[§]?

We live in chaotic times. Our differing identities are subverted to champion some constructed ‘universal’. The Kantian state of being has captured our imagination to the extent that every human action is understood against the plane of universality. All of us must make sense to everyone, everywhere and at all times. If that does not happen, a forensic study of our lives and its forms is undertaken. This time again, to comprehend things in their universal terms. The continuing debate on *Hijab* in the country is a glaring example of this fact.

Of universal and particulars

Belief in universality is not *per se* sufficient to guide the society in its affairs. We need criteria to both differentiate and to relate with the world we live in. We may create methods to achieve ‘uniformity’ of knowledge by employing the scientific method. However, that does not mean that this uniformity must necessarily yield to universal ‘knowledge forms’ as well. An overemphasis on universality only ends up killing the appreciation of the world and its phenomenon in their myriad forms.

In order to make sense of who we are and what we do, we are constantly in need of criteria to identify ourselves morally, socially, politically, economically and individually. The Qur’an is instructive about this fundamental character of the world we reside in.

Allah (swt) says:

O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another.

(Al-Qur’an, Ch. 49, V. 13)

[‡] Walter D. Mignolo, *Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking* (Princeton University Press 2012)

[§] David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016)

On identity and identification

This sense of identification tied to the emotion of being ‘particular’ is instructive in itself. It remains central to both our understanding of the world and the understanding of our own selves.

Iqbal writes:

*The individual is firm by nation's coherence, otherwise nothing;
The wave is only in the ocean, and outside it is nothing.*

In instances where our identification of ourselves, or our identity for the sake of others, gets diluted, it becomes difficult to comprehend both ourselves, and the fate of the world we live in. We end up losing our universal features once we have lost this particularity. The life, in nutshell, becomes chaotic.

The world as it is

Our contemporary imagination is structured as follows – the world is populated by States constituted on the template of a social contract where individuals come together to decide their fate as a community; the State gets power to govern the community of individuals while the individuals retain their rights against the State; every justification of a right or a duty is based either in its politics in the public space or else in the language of the positive law; the public space is secular, which also means that it is neutral; the only morality that permeates our togetherness is the constitutional morality since it is the constitution that sets the benchmark for every aspect of our lives, including how we consummate our marriages; justice is the sole function of positive law and the judiciary; the politics of the State is justified through representative democracy where people elect their representatives on a non-permanent basis; the lives of individuals and the community is political, for legal justification of every right is fundamentally linked to the politics of its performance in the public space.

Our contemporary imagination, however, ignores the following – the world belongs to communities which have a longstanding tradition of constituting themselves – religious communities, cultural communities, ethnic and linguistic communities etc.; the justification of a right or a duty is often based in the membership of the community which has constituted itself, and in the language it prescribes for itself; the public identity of individuals and the communities is neither neutral nor pre-prescribed, rather it is a function of them performing themselves in the public spaces; there are multiple moralities that are at play, and which might or might not find their translation in the constitutional language; justice is not a mere function of law but also a condition of the human psyche, which often stems from the non-justiciable methods rooted in community lives of the people; the politics of the State is justified through the multiple stories of association and dissociation which

individuals and communities enjoy as against the authority of the State; the life of both individuals and communities is self-oriented and self-decisive, and that, it may or may not coincide with the mandate of the State.

Our imagination of ourselves must keep pace with the changing face of the world around us. It is important, therefore, that we continue making efforts to understand how the context is shaping the text; or else, how the reality is changing the 'myth' of the ideal.

The function of legality

The transformation of how law relates to individual is assuming unprecedented proportions. Our definitions of categories like marriage, family, religious freedom, citizenship etc. is witnessing fundamental changes. It is here that a deeper understanding of the legal function is required.

Is law a mere repository of the emotional corpus of the society, or else it also rationalizes the expectations of the people? To what extent it can remain independent of its social, political and economic proclivities? Does it also carry the burden to shape the fate of our social, political and economic lives? What criteria does it embody to achieve that? Is the text of the Constitution the sole criterion to determine the legality of our national identities? What could be the limits to extra-textual renderings of the 'legal'?

Answers to these questions are extremely important. We often come across situations which require us to go beyond the realms of legality to find solutions. However, while we do that, we are automatically also tethered to the limits of our freedom in doing so. What must then the legal thinking and the legal process entail becomes fundamental.

The work of law

The job of law is not adventure but meaning-seeking. It must remain conscious of the boundaries which each definition creates, and for the reality it embodies. The law must be a vehicle to preserve this tradition of respect – respect towards definitions, categories and the social causes for which human beings have been living their lives. While doing so, the law must also remain conscious of its duty to regulate the lives of these same people, whose 'traditions of sociality' it must respect. This is a slippery path. But then who decides to deliver justice must necessarily also tread its path.

The path to justice is arduous; and, so must law proceed!