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The Poetics and Politics of Law After Empire: Reading Women's Rights in the Contestations of Law

Ebrahim Moros
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Ebrahim Moosa*

I. INTRODUCTION

Contemporary Muslim thought is suspended between two narratives: the
narrative of origins, a glorious past that is nostalgically recalled as evidence
of the historical truth of this faith-movement, and the narrative of an unful-
filled present that is wavering in the flux of history. It is this historical mo-
ment, with its continuous momentum of change, which challenges the
narrative of origins and its apparent stability. Everything from law, theology,
ethics, culture and politics is challenged by the present. In the arena of
rights, especially women's rights and human rights, the seeming stability of
the pre-modern intellectual discourse is unusually tested, once theorists and
practitioners have cut through the triumphalist rhetoric of revivalists, funda-
mentalists and apologists alike. This rhetoric normally begins and ends with
the assertion that "Islam" is superior to any competitive ideology, without
advancing any compelling arguments in support of this claim.

This essay attempts to engage talk about women's rights and issues in
Islamic law as interrelated discourses. When theorizing women's rights in
Islamic thought, one necessarily encounters issues in Islamic legal theory or
jurisprudence (usul al-fiqh), even though there is not always a conscious
awareness of such implications. Before addressing some issues in legal the-
ory, especially the theory of public interest (maslaha) and how reformists
employ it, I shall try to present some of the theoretical challenges that thor-
ough reform, any kind of reform, but especially reform to women's rights,
poses to legal theory. Thus far, debates in Islamic feminism have made tre-
mendous efforts to re-read the intellectual tradition as well as to recover, re-
discover or simply invent the place of women in contemporary Islamic

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thought. However, these debates have made few attempts to engage issues of jurisprudence. Not only would such encounters provide opportunities for new discussions, but they will also challenge the science of jurisprudence to re-think and re-invent itself in light of new questions. In a bid to arrive at new questions and answers in jurisprudence, it may be helpful to follow the Aristotelian definition of art (sina'a) as a "state of rational creation."

New questions require us to treat jurisprudence as an art or poiesis. According to Aristotle, art is one of the five means by which reason arrives at the truth and intellectual virtue.1 Jurisprudence, like architecture, is a form of art and has to do with creation. Its practitioners must consider the possibilities as they create. The jurist, like the architect who creates a work of art, creates a set of ideas. One should recall, though, that in both the architect and the jurist, the original cause of creativity lies not in the building or the legal idea, but rather in the creator. The goal of poiesis (sina'a) must be creation, not action. Every creative instant, be it interpretive or active, involves a discourse of power, in other words, a "politics." It would thus be worthwhile to pay additional attention to the politics of creativity in Islamic thought, especially in legal thought. In order to explore a proposed revolution in interpretation, I shall revisit those "politics," "poetics," and "hermeneutics" narratives that have been reduced to the margins of juridical discourse over the past several centuries. The purpose for resurrecting such marginal discourses is to recall a memory of creativity.

Rights do not precede history, but exist within history. The source of rights may be natural, Divine, secular or any hybrid of these sources. Irrespective of whether rights are unique in origin or viewed as a symbolic means of exchange, one thing we do know with some amount of certainty is that rights are not exclusively metaphysical constructs, but are a product of history. The most visible aspect of its historicity is that we find that rights are embodied in practices and are constituted in our linguistic consciousness. Uncritical adherents of a religious tradition do not always acknowledge the challenges posed by history and the constructed nature of the tradition. A closer scrutiny, however, would show that history, embodiment, linguistics, time and space are all alluded to in the sources of Islamic law and ethics, namely the canonical texts — the Qur’an and prophetic traditions (hadith). In modern times the historical and linguistic elements of the canonical texts

are reluctantly admitted, and frequently denied.2 It goes without saying that the culture, history and reality in which the sources were grounded differ radically from the conditions that contemporary Muslims experience. Nevertheless, the manifold ways in which tradition is invoked seeks to impose the past onto the present.

The modern discourse about human rights and women's rights, however, presents more than a defining moment for modern Muslims as they constructively engage the inherited legacy of Muslim thought. In fact, the discourse of rights — human rights and women's rights — goes beyond the debates of modernity or post-modernity. In much of the twentieth century, Muslim thought was centered on culture, secularism, politics and the nation-state. By contrast, however, the gender debate compels thinkers to scrutinize closely the panoply of inherited interpretive strategies and methods that are used to interpret the canonical texts. In order to deal with the canonical texts with integrity, given the radically different lives of contemporary Muslims compared to the environment in which these hermeneutical methods were originally devised, a foundational re-thinking of interpretive strategies has become unavoidable.

The absence of such new strategies is palpable in the discourse of law and legal theory. Complaining about the current state of legal scholarship, the Syrian legal scholar, Muhammad Fathi al-Darini, justifiably purports that there has been no inductive or logical study of the philosophy and purposes of Sunni Muslim jurisprudence, and in particular, no study of political jurisprudence and its general purposes.3 Echoing the views of the pioneering Andalusi jurist of the Maliki school, Abu Ishaq al-Shatibi (d. 790/1388), Darini argues that new circumstances, conditions and contexts generate new ethical and moral warrants, which in turn require a dynamic approach to the understanding of Islamic jurisprudence.4 Darini discusses what he calls the "principle-based methodology" or "principled approach" (al-manhaj al-usuli) to jurisprudence. Darini’s comment on the present state and future hopes for Islamic jurisprudence deserves careful attention:

2 The modern Lebanese writer Subhi Salih, author of Ma’alim al-Shari‘ah al-Islamiyya (1975) [hereinafter Ma’alim], is one of the few Muslim scholars of law who addresses the issue of language, history and interpretation and how pertinent these considerations impact the study and practice of law, even though his conclusions are very Arabocentric; others are Adil Fakhrur, Ilm al-Dilala inda ‘l-‘Arab (1985).
3 Muhammad Fathi al-Darini, Khilas ‘is al-Tahiri al-Islami fi ‘l-Siyasa wa ‘l-Hikma 6 (1407/1987) [hereinafter Khilas’s].
4 Id. at 7; Also see 4 Abu Ishaq al-Shatibi, al-Muwafaqat fi Usul al-Shari‘ah 104 (Abd Allah Daraz ed., n.d.). In Shi‘i jurisprudence the issue of ‘ijtihad is less contentious than in the Sunni juridical tradition.
The legislative approach to independent reasoning (al-iḥyāʾ al-
ashrī) assumes that sufficient consideration and weight be given to
changing conditions and their concomitants in the search for legal
solutions. Especially the conditions of this age in which we live, in particular
its complexity, requires diverse scientific specialties in accordance with
the nature of the circumstances, in order to generate new analyses and
explanations. For [these circumstances] provide new indexes of moral
obligation (adilla taklifiyah) that require new rules of legal reasoning and
activity (ahkam iḥyāʾiyyah). Hence, jurisprudence must relate to reality,
with its changing circumstances and accompanying phenomena. [Juris-
prudence] should be contemplated in such a manner that it affirms its own
existence, and also avoids the causes of its weakening, incoherence and
collapse.5

The need to generate creative solutions in Islamic jurisprudence has also
spawned a fury of interpretive activity, notably around the canonical texts
and some secondary texts.6 Most of the critical and contentious debates in
contemporary Islam boil down to the canonical texts, particularly with regard
to the Qur'an and the authoritative statements issued by the Prophet Muham-
mad, known as the hadith.7 Controversies over the interpretation of these
texts are plentiful in modern Muslim thought and, moreover, result in a pleth-
or of heresy trials, excommunications and even violence resulting in
fatalities.

Canonical texts, as is well known, are ubiquitous and open to multiple
uses. They can become the pretext for the denial and repression of rights and
at the same time can be employed in discourses of emancipation. There are
few religious traditions where this duelling between repression and emancipation
plays out as dramatically as in the debate over women's rights in modern
Muslim thought. A cursory survey of the literature produced in the last two
decades of the twentieth century would bear out such an assertion.

What becomes evident from all these debates is that the notion of "gen-
der," as we understand the term today, is radically different from the one
inherited by way of tradition, no matter how elastic one's understanding of
tradition may be. To cope with the contemporary understanding of gender,
especially our changed perceptions of men and women and their respective
roles in society, requires nothing short of a revolution in thinking. This

5 DARINI, supra note 3, at 6.
6 See the work of the Syrian scholar Muhammad Shahrur, al-Qur'an wa l-Kitab al-
Karim (1992); NASS HAMED ABU ZAYD, MAHMUD AL-NASS: DIRASA FI ULUM AL-QUR'AN
7 SALIH, supra note 2, deals almost entirely with issues of interpretation as it relates to the
primary authoritative texts and juristic opinions under the rubric of several important social
and legal themes and subjects.

changed understanding affects Islam at several levels of its self-definition as
we pass through this critical and historical moment at the beginning of the
twenty-first century. Those men and women who pursue an agenda of eman-
cipation generally employ two weapons: the ability to mobilize opinion
through power (politics) in a variety of forms, and through creative interpre-
tation (a combination of poetics and hermeneutics). Changes that arise from
these two strategies invariably present themselves as crises, until the new
discourses are accepted and become normative. Such innovation is not a new
phenomenon in the history of Islamic thought. When one examines the rec-
cord of Muslim juridical thought, one is pleasantly surprised to see the im-
pressive amount of intellectual innovation and creativity that has occurred
throughout history.

Contemporary Islam, whether in the Muslim heartlands or the periph-
eries of Islam, is challenged by the feminist revolution. The focus on wo-
men, their rights and their status and repression in a predominantly male
world, have become major ethical issues. There is an established consensus
among women of all denominations that subjugation and subordination to
male chauvinism is no longer tolerable. Large sections of the world's male
population increasingly acknowledge that women have, over the centuries,
been denied their humanity. What this means may not yet be apparent to
many men and women, and above all not to the leadership cadres of the
world's religions. Jean-Paul Charnay observed:

Due consideration we must... insist, should be given to the fact that
the emergence of a woman's world will in the long run considerably mod-
ify human life and society. Women's high potential for action and
thought, which for thousands of years has been unable to find expression,
will inevitably affect social relations and organisation.8

Charnay's prediction about the future of women is now an observable reality
in several regions of the globe. It has not left the Muslim world unaffected,
posing challenges to traditional and inherited worldviews.

The response from certain revivalist and traditional Muslim quarters to
increased arguments for women's rights has been a flood of apologetic litera-
ture notable for its triumphalist tenor, claiming that Islam recognized wo-
men's rights long before any other religion. But the women's movement in
the Muslim world, far from being cowed by male opposition, has in fact
made tangible gains. Women's mobilization and activism have transformed
even conservative Islamic revivalist organizations, despite the intentions of
the male leadership to resist such influences for fear they would change wo-
men's public and private roles. Not only has the broad women's movement

made gains in challenging cultural and political authority, but where it has not already begun to employ strategies of resistance to combat the epistemological authority of androcentrism in Muslim thought, this is the anticipated next level of struggle. This change will dramatically alter our notions of individual, community, gender, person, family, society, state and even our perception of the Divine, in very foundational ways. Some of the outcomes may be that being a woman would cease to be a reason for discrimination, denial and inferiority.

Thinking and deliberating about women’s rights and human rights in Islam requires some reflection on at least two levels. The first is a careful analysis of some of the more complex and foundational presumptions in Muslim legal and ethical philosophy. The second, related to the first, is an awareness of post-Empire Islam, where Muslims have (at least in practice) abandoned the idea of a universal political empire but have not yet made the necessary epistemological shift. Much of the material that forms the node to which the new rights discourse is grafted presumes the making and perpetuation of empire.

While centuries of intellectual labor in Islamic law, theology, mysticism, philosophy and aesthetics are often glossed as a seamless tradition, chiefly by “insiders” (but also by “outsiders”), the truth is that multiple traditions exist because each were shaped by very different kinds of ideas, motivations, consciousness and origins. Thus, re-thinking the notions of woman and man today against the backdrop of inherited traditions that make very different assumptions about these categories of persons must by necessity produce a crisis in thought. One should also admit, in the face of critics, that the knowledge employed to construct a definition of the crisis can also be viewed as part of the crisis. Thus, the crisis becomes even larger. It becomes a crisis of knowledge.

According to the legal and social anthropologist, de Sousa Santos, the relationship that the exterior “face” of knowledge has to the conditions that it analyzes is but a provisional one. He believes it is momentarily suspended between two moments: one that is located on the interior of knowledge, namely beyond the surface level, and the other at the level of abstraction. These two moments are, firstly, a past or pre-reflexive interiority, and secondly, a future or post-reflexive interiority. For this reason, knowledge, particularly critical knowledge, moves between ontology (the reading of crisis) and epistemology (the crisis of reading). In the end, knowledge itself will

not know which of the two — ontology or epistemology — will prevail and for how long. Then, what should thrive in periods of crisis is not epistemology itself, but rather the critical hermeneutics of rival epistemologies. Piaget reminded us that epistemology thrives during periods of crisis. During crisis and revolutionary upsurge, all discourses, including the discourse of religious traditions, are subjected to rigorous interrogation in order to establish their relevance to the moral compass of society. This scrutiny is not only a feature of materialist histories, but of religious histories as well. Prophets and religious reformers also question the validity of the social and economic practices of their own societies. The prophetic or reformist voice retains some practices and forcefully rejects others. More often certain values and mores are supplanted by others, not for reasons of expediency, but because the older values lack any ontological utility.

II. ISSUES OF JURISPRUDENCE: TIME AND INTERPRETATION

Most serious students of the canonical sources of Islam, namely the Qur’an and hadith/Sunna, will readily admit that there is no single canon of interpretation. Indeed, the rise of legal schools of interpretation (madhhab) during the formative and pre-classical period is eloquent testimony to the variety of interpretive canons. Methodological and epistemological concerns, as well as ideological nuances, constitute a range of issues in most of the canonical schools of interpretation of law. In the study of law, multiple Muslim religious sciences coalesce to construct another variegated but supremely crucial discipline known as usul al-fiqh, the science of jurisprudence. Literally, this phrase means “the roots of discernment or understanding,” but refers to the science of jurisprudence and legal theory. Classical Muslim legal theory was an amalgam of moral philosophy, epistemology and hermeneutics. It was the primary discipline and site for the exploration of history and linguistics. Here we observe how science, broadly defined, influences Muslim legal and ethical practices.

Among the variety of disciplines that not only existed independently, but were also incorporated into the themes of legal theory, were Qur’an exegesis and the verification and interpretation of prophetic reports. Especially

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9 See Rahma Burqiyaa (Bourqin), al-Nisaa wa l-Sulta, 10 DIRASAT ARA'IBYa, 63, 72 (July-Aug. 1995).
10 BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE 7 (1995).
11 See I SHAH Wali ALLAH al-DIHLAWI, Hujja’t l-Allah al-Baligha 343 (Muhammad Ahsan Nanoti et al. eds., n.d.).
12 See I MARSHALL, G.S. HODGSON, THE VENTURE OF ISLAM: THE CLASSICAL AGE OF ISLAM 315-58 (1974) (who stresses that Muslims were colored and moved by what he calls the Shari’s spirit; they also varied tremendously among themselves in trying to approximate that spirit and vision).
in the study of exegesis, attention was given to issues of context, such as the locations where revelation occurred (whether in Mecca, Medina or elsewhere), as well as the special circumstances surrounding a revelatory event. This genre of literature, called the “occasions of revelation” (asbab al-nuzul), sheds light on the social context that may have generated the revelatory moment or served as the pretext for the revelation. Abrogation, supercession and the repeal of earlier revealed verses by later verses (al-nasikh wa l-manasukh) are critical aspects of a genre of literature that discloses how subsequent material in the text replaced earlier material. Exploring this material sheds light on how a verse or a particular set of verses can particularize, augment or detract from the meaning and authority of an earlier revelation. What this discloses is that early Muslim jurists admitted with great candor that issues of language theory, rhetoric and hermeneutics were implicated in the understanding of revelation.

Perhaps more than their modern counterparts, scholars of Muslim antiquity developed a critical apparatus in order to understand God’s seemingly categorical injunctions. They showed an extraordinary awareness for the fact that during the Prophet’s time, as well as in subsequent eras, there was a politics of interpretation at work. Most juristic interpretive treatises are brimful with explanations as to how the Prophet’s context was governed by certain conditions and circumstances, while they nevertheless saw his authority as a model authority. From these we can conclude that Muslim thinkers were critically aware of the need to interpret the canonical sources within their own social contexts, without being shackled to the history and culture of the original founding moment. Historically speaking, the general purpose of legal theory was not so much to generate new laws as it was to provide a post-hoc rationalization and justification for the legal practices that were already in circulation in the post-prophetic period. In other words, legal theory provided coherence for the moral and epistemological framework of Muslim legal and ethical thought. Thus, as an outline of the ideal moral theory through which Muslim thinkers viewed the world, the science of jurisprudence finely sutured and refined its logic of coherence. This coherence successfully managed to mask the link between the canonical texts on the one hand, and the social and historical context, in short chronometric time, on the other. All of this was done by means of a professional and idealized discourse of power regulated by the clerico-legal discourse of the ulama.

In an important contribution to our understanding of the elements of time and history in Muslim legal discourse, Aziz al-Azmeh has made an argument that would in many respects contradict what I have claimed. Azmeh describes the source texts of canonical status as being “archetypes” that function within the parameters of a providential discourse, or what he describes as “chronophagous discourses,” that appropriate time by reducing “certain moments [in] history to a privileged assimilation to an eternity. . .”15 He builds an impressive case in his reading of the jurisprudential texts, stating that despite the very manifest employment of the discourses of linguistics, logic, history and terms such as “ratio legis” (illa) in legal discourse, the use of these disciplines and terms is nominal, merely indexical and rhetorical.16 In short, he argues that the legal discourse effectively denatures the historical discourse, if there was any of it in the first place. It further ejects the historical discourse “from the realm of the lexical to that of the technical legal sense, with the rhythm of the law taking over from the steady flow of the chronometer.”17 Azmeh repeatedly shows that the legal discourse not only oscillates between indeterminacy and determinacy, openness and the possibility of closure, the co-existence of providential time and chronometric time, but between discursivity and generic history and mythology as well. He also shows that there are several techniques at work, trying to negotiate these multiple disparities and antinomies.

Yet, without any compelling argument, he rejects that very complex discursivity that he painstakingly outlined with an almost essentialist reading of the function of the clerico-legal institution. He believes that, by virtue of their authority, the ulama are akin to sorcerers, and according to Azmeh, are the only individuals capable of “turning sequence in consequence, the virtual into the actual, and of making practical reason out of canonical discourse.”18

14 Contemporary Muslim scholars are obviously conflicted about the role of history in the Qur’anic exegesis and the limits of its application. Salih praises the classical commentators and exegetes for not neglecting the time-factor in their appreciation of history and for apprehending the notion of time in the exegetical genre of “occasions of revelation” (asbab al-nuzul) as well as showing an aesthetic sensibility in interpreting the Qur’an. Salmi, supra note 2, at 277. In fact he cites Zarkashi (d.794/1391) who says: “Surely time is a precondition in determining the [material] cause of revelation (asbab al-nuzul) but time is not stipulated in the determination of the appropriate placement of a verse (manasabat).” Id. A few pages later, Salih raises serious doubt about the reliability of historical sources in determining the causes of revelation since he finds them to be flawed in various respects. Salmi, supra note 2, at 289-90. Thus there is very little hope, given the nature of the historical sources, that traditional methods of inquiry will be able to shed more light on the impact of the elements of time and space upon our understanding and interpretation of texts of canonical status.

16 Id. at 181-182.
17 Id. at 183.
18 Id. at 194.
According to Azmeh's theory, the pretense of discursivity is replaced by magic. Aside from the extraordinary element of essentialism on the part of Azmeh, his study is highly eclectic and lacks differentiation between diverse historical periods and the various actors in the legal discourse. Furthermore, his reading is primarily that of the high metaphysics of law, while ignoring the intricate articulations between juridical discourse and metaphysics as well as those instances where metaphysical propositions are suspended in the legal discourse. However, Azmeh's essay cannot be dismissed in its entirety. It is valuable because it raises many important points and questions about the tensions between the archetypal discourse and the nomological, the discursive and the mythological, serial time and providential time, as well as inquiring into the role of history, politics and power in the study of the law. For those grappling with the legacy of Islamic jurisprudence in contemporary times, this cluster of questions and tensions are far from being resolved.

Hermeneutics was one of the ways in which the jurists of the past appropriated the world through legal principles, which were formulated and later canonized. It became the stock-in-trade of jurists once the emphasis shifted to canonical texts as the primary sources of tradition. This was a departure from the formative period when communal practices determined what was normative. After al-Shafi'i's intervention in the interpretation of Islamic law, the growth and importance of canonical texts boosted the importance of juridical exegesis in search of norms (nomocentrism). These norms were meant to direct and regulate individual and societal practices. Norms are, of course, partially related to some mythical or metaphysical narrative that provides an anchor for epistemological foundations, and makes the flux of history and time stand relatively still. Yet the need to stabilize was itself antithetical to the narrative of the present, namely, the notion of history-in-the-making. This is where the jurist is imbricated between an established and stable past and the instant of the decision-making (i.e., the present).

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19 The encyclopedist Tash Kubra Zadah (d. 968/1560) for instance discusses the categories of interpretation (adwil) of nomothetically sound (muwafaqa li 'i-shar) versus unsound interpretation, when it is inconsistent with the nomothetic discourse. However, despite such rigid categorization he is reluctant to exercise judgement against those interpretations of Sadr al-Din al-Qanawi (d. 673/1275) that are not consistent with the exoteric dimension of revelatory discourse (zahir al-shar). Qanawi apparently argued that his interpretive claims were reinforced by sound mystical unveilings, to which Kubra Zadah can only add: "this master (shaykh), may his secret be hallowed, had produced several innovative interpretations in which the heart and mind delights." TASH KUBRA ZADAH, MAW'SU'A MUSTALAHAT MIFTAH AL-S'AADA WA MIBAH AL-SIYADA FI MAWD'AT AL-ULUM 276 (Rafiq al-Ajam & Ali Dahraj eds., 1998).

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20 It must be pointed out that all legal systems have their archetypes and metaphysics and that the oracular nature of legal discourse is not the exclusive domain of legal systems based on religion like Islam and Judaism, but also applies to secular legal discourse. See Peter Goodrich, LANGUAGES OF LAW: FROM LOGICS OF MEMORY TO NOMADIC MASKS (1990).

21 2 SHATIMI, supra note 4, at 283.
prophetic authority. But jurists engaged in interpretative limitation, or the specification and delimitation of authoritative religious texts, as part of an ongoing hermeneutic practice. To understand this form of interpretive limitation as a legitimate form of abrogation, however, was always an idea fiercely contested, even though in effect it amounted to an abrogation of sorts.

III. Maslaha: Social Expediency and Revelation

During the life of the Prophet, the Qur'an was primarily an oral text. After the battle of Yamama, many of those who had memorized the Qur'an and were its most knowledgeable scholars (qu'raa) were killed. Umar realized that it was time to undertake an editorial process of "collecting the Qur'an" (Jam al-Qur'an). In other words, Umar wanted to collect the fragments and to verify exactly what constituted the Qur'an in order to establish some written source. This innovation of a written and authorized source was unprecedented in the experience of the first community. There was also an understandable reluctance to deviate from the tradition (Sunna) of the Prophet, who left behind a revealed text that existed in the memory of his followers, rather than a written text. In trying to persuade the reluctant caliph Abu Bakr, who agonized about acceding to this suggestion, Umar countered by saying: "It is, by God, a good [thing]" (huwa wallahi khayr). In the first decades of Islam in Arabia, clients were not insured against loss or destruction if they left their goods in the care of craftsmen for repairs or manufacture. Ali, the fourth caliph, ruled that craftsmen were to guarantee the wares of clients against loss, saying: "Nothing benefits people, except this [guarantee]" (la yasulhu li 'in-nas illa dhakha). From these instances the lexicon of public interest jurisprudence was associated with terms such as khayr, meaning "good," and maslaha (from yasulhu), meaning "beneficial."

When political authorities and master-jurists (mujahidun) realized the need for ongoing interpretation in the post-prophetic period, the practices of the early community, driven by public benefit (maslaha) considerations, became instructive. The second caliph, Umar, was famous for several of his rulings in which he demonstrated innovation and independent legal reasoning. For example, he decided that he would not distribute inmoveable property, such as the conquered lands of Iraq, to the soldiers who participated in the war. Nor did he permit the soldiers to take the original inhabitants as slaves, as part of their booty-reward (ghanima) for participating in the wars, a customary practice of his predecessor. The injunction in favor of distributing a part of the booty to those who participated in the wars of conquest was clearly stipulated in the Qur'an (59:7), and was a practice personally ratified by the Prophet. After a great deal of debate and controversy, Umar insisted that his new and innovative reasoning was in the interest of the greater good (naf) and benefit (maslaha) of society.

Umar reasoned that if he distributed the conquered lands to the warriors, it would instantly make them excessively rich and would unjustly deprive the original inhabitants of their properties. He then proceeded to effectively rewrite the laws of post-conquest property distribution. He decided that he would henceforth formalize a stipend from the treasury for the fighters, while simultaneously imposing a tax on the new non-Muslim subjects of the Islamic Empire. Umar emphasized his contention that the very verse of the Qur'an (59:7) that sanctioned the distribution of spoils had a caveat to it. It stated that wealth should not become an exclusive commodity that circulated among a few people. Not only did Umar's interpretive innovation put a completely different and unique weight on the caveat portion of the verse, he also had to engage in a great deal of political strategizing and campaigning in order to turn public opinion in Medina to his side.

The main underlying cause for Umar's re-interpretation of the verses was the new reality of lands far away from Arabia. Geography and new social contexts made it impractical to literally invoke rules and operate under the assumption that booty would be movable, as was the prevailing custom among tribes and sedentary groups in Arabia. The new conquests of urban areas under Umar's rule meant that a massive increase of fixed property and large numbers of urbanized subjects came within the domain of the Muslim state. If this change in context were not accounted for in his reasoning, it would have had far-reaching moral, economic and fiscal consequences for both the conquerors and the conquered. Under these new conditions, Umar had to re-configure the purpose and intent of the verses that originally dealt with movable wealth, despite the fact that most of his contemporaries made no distinction between movable and fixed property. Furthermore, these contemporaries expected to enslave defeated urban communities the way they did local tribes in Arabia.


23 See 2 id. at 284 (Shatibi says that "abrogation after the death of the Prophet, on whom be peace and blessings, is void").
In another telling incident of legal innovation, Umar limited the scope of the canonical text on grounds of public expediency. The Qur'an permitted a portion of the obligatory tax, zakat, to be spent on non-Muslims. Economic advancement would serve as an incentive for conversion. This would numerically increase the nascent faith-community. Again, Umar effectively suspended or abrogated that practice, arguing that in his day, Islam was numerically strong and thus, there was no need to recruit adherents by means of financial incentives. This he did, despite the fact that the Qur'an explicitly stipulated such disbursement of funds in the recommended zakat expenditure categories. Similarly, the practice of selling female slaves who bore their master's children was permissible during the time of the Prophet and the caliphate of Abu Bakr. It was Umar who outlawed this practice on grounds of compassion and humanity. A concern might have been that the mass circulation of female slaves in trade would result in unwitting instances of incest if the offspring did not know who their parents were as a result of the excessive circulation of human slave cargo. Employing these early examples as models of juristic reasoning, later Muslim jurists would contemplate the gap between the text and reality, readily filling those gaps with interpretive imagination that responded to the demands of social reality.

A. Reason, Canonical Text and History

Thus far we have observed how reason and history played roles in determining values, those revealed as well as those that were non-revealed. The early medieval debates affecting interpretation of revelation were no doubt also shrouded in the language and sectarian polemics of theology. One of these controversies centered on the metaphysical nature of the Qur'an that is recalled by the oddly phrased emblem of the "createdness of the Qur'an" (khalq al-Qur'an). The other debate was whether human reason could determine whether acts were good or detestable independently of revelation. These debates have complex pedigrees in the history of early Islam and it would be a mistake to make quantum leaps and invoke these antique debates as being similar to modern debates regarding theology and ethics. However, modern Muslim interpreters are often inclined to do just that and revive the memory of the ninth century Mu'tazila, the early Muslim rationalist-competitiest schism that advocated the created nature of the Qur'an and a rational ethics and exhibited them as proposing a philosophy compatible with Enlightenment rationality. While this is both a simplistic and flawed compar-

son, the analogy is invoked in order to demonstrate that historical Muslim thought is compatible with modernity.

Tracing a line of reformist reasoning that goes back to the Egyptian thinker Muhammad Abduh (d. 1905), a contemporary Egyptian scholar, Nasr Hamid Abu Zayd, lauds the Mu'taziliite rationality that characterizes revelation as a "historical event."27 Abu Zayd asserts that this discourse kept alive the God-human dualism, in which the human was the "subject" of revelation. In this view, revelation was placed within the domain of language and reason in order to realize human interests (masalih) on earth. Revelation, the world and the human being were on the same epistemological plane.

In the opposing Ash'ari view, God was the subject of revelation. God provided values in His omnipotence. Humans were dependent on His will. At its best moments, Ash'arism advances a radical voluntarism. Everything that happens in the world occurs on a contingent basis. Even laws of nature and causation can be altered by the absolute will of God. Paradoxically, it is in the voluntarist hermeneutic that the subversion of rationalist ethics and authority can take place. If an Ash'ari hermeneutic is finely attuned to the full implications of its theology, then a living God calls on humans to act within history at every instant of renewal. If humans are called by God to act at every instant, then such a theology would also necessarily require that humans understand and interpret at every new and contingent instant. For this reason the emphasis in Ash'arism is on human acts, not on things. Consistent with Divine voluntarism, it is acts that are deemed good or detestable, not the essence of things themselves. Thus, the radical implications of Ash'arism is that an act can be gauged as good from a certain perspective and detestable from another, and both analyses would be in accordance with the sovereign will of God.

A legal theory driven by the theological considerations of Ash'arism may have unintended consequences on the legal discipline and on positive law. In the past, theology did influence legal philosophy, but only in a limited and selective manner. In the end it was the textual-cum-scriptural approach that prevailed. One of the prime movers behind the textual approach was the jurist Muhammad b. Idris al-Shaf'i (d. 204/820). He introduced a new hermeneutical paradigm to deal with the foundational sources. His efforts resulted in the "textualization" of the sources of law and authority. By textualization, I mean not so much Shaf'i's desire to break with the methodology of his predecessors, but his desire to offer a rational framework for the interpretation of the sources, especially the Sunna. He was clearly uncomfortable with the notion of Sunna as the living tradition of the community as


27 Nasr Hamid Abu Zayd, supra note 6, at 277.
understood by the Maliki school based in Medina.\(^{28}\) At least in the Hijaz, the Sunna of the Prophet was understood by the Medinese to be equivalent to the organic and embodied practices of successive generations of Muslims. Shafi'i's rationalism and sense of coherence found the practice-based notion of the Sunna unpalatable. He was dissatisfied with the multiplicity of localized versions of norms attributed to the Prophet. Therefore, he initiated a process that would to his mind establish the universality of prophetic authority and norms. Thus, we owe him for at least providing a coherent, interpretive framework that harmonized a good body of legal materials related to the Qur'an and the Sunna, even if this was at the cost of disrupting the organic continuity of the legal tradition.\(^{29}\)

Not only do the sources of the law rely heavily on revealed texts, but Shafi'i also insisted that the methodology of interpretation was based on incontrovertible textual authority. The Qur'an provided "conspicious elucidation" (bayan), he said, as a hermeneutic model to help the reader discern what was clear and self-evident revealed text (nass). This method of reasoning, which assumes that language is a series of exterior signs representing a pre-existing string of internal thoughts, forms the backbone of Shafi'i's interpretive method. It is the absolute union of signifier, "clear text" (nass), and signified, "elucidation" (bayan), that coalesces and transparently constitutes the articulated truth of God as embodied in the eternal language of the Qur'an. Shafi'i is perhaps the best exponent of logocentrism in law, where all arguments are interminably shaped by a logic that is derived from the grammar of the Arabic language with its implicit logical premises. And logic, together with authority, leads the letter, while the clarity of a transparent elucidation dispatches rhetoric and ambiguity to a predetermined linguistic order. His method is designed to reduce legal disputes and uncertainty, and limit the free play of interpretation by ostensibly stabilizing language.

Shafi'i's intellectual rigor was to "fix" the flux of embodied practices, historical emphasis and the ambiguity of language. He did not like the interference of pragmatic juridical preference (istihsan) that he deemed as too open-ended and that advanced a form of juridical reasoning that could justify previously unsanctioned or unthinkable practices and then deem these per-

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\(^{28}\) FAZLUR RAHMAN, ISLAMIC METHODOLOGY IN HISTORY 21-22 (Islamic Research Institute 2d reprint 1984).

\(^{29}\) Id. at 24. Here the author observes that "al-Shafi'i's genius provided a mechanism that gave stability to our medieval socio-religious fabric but at the cost, in the long run, of creativity and originality. There is no doubt that even in later times Islam did assimilate new currents of spiritual and intellectual life, for a living society can never stand quite still, but this Islam did not so much act as an active force — as master of itself — but rather as a passive entity with whom these currents of life played."

missible under the rubric of public benefit (maslaha). In some sense, Shafi'i had an obsession with logic, coherence and order like that of a Greek thinker. He always tried to fix the law to a being, an event, a name, a time and a place. In Shafi'i's case, it was to link the law to an already-fixed present that would make it coterminus with the logic of the Prophet. He was primarily motivated by a nostalgia to recover what he thought was a primitive, or ur, meaning of the first Islamic impulse. Although he was not driven by a desire to create a new instant in history, at least not consciously, his hermeneutic laid the foundation for metaphysics that subjected the law to a rational teleology. Within his own framework, Shafi'i was also keen to develop a native rationality closely linked to primitive Arabicity since the revelation itself sanctified the Arabic language.

Logocentrism by its very nature presents a double bind: we cannot think or do without it in order to make sense, and yet all efforts to suppress meaning and limit it were necessarily finite and could not be contained. Within time, the very same sources of authority that Shafi'i claimed to have stabilized became open to re-interpretation. This was largely due to the subversive nature of writing. Through writing, the symbolism and the effects of "iterability," the code of repeatability, made it impossible to fix, contain, predict or program the traces of meaning. This is exactly what several jurists after Shafi'i did. But there are few authors who could rival the sophisticated writings of the Andalusian Maliki jurist Shati', who made two major contributions: 1) he advanced the case of purposive interpretation, arguing that the purposes (maqasid) of the revealed law (Shari'ah) can be established by way of juristic induction; and 2) he labored to prove that the legislative purpose was inscribed and sutured into the very texture of life, provided that the juristic vision was sufficiently honed to read it correctly from "the book of life."

There was now, with the advent of Shati', an alternative to the rigidity imposed by the Shafi'ite legacy. One of the unforeseen outcomes of purposive interpretation was that it accentuated a Qur'anic interpretability where the interpretive process itself was guided by the primary values of the Qur'an, derived inductively.\(^{30}\) What added luster to Shati's theory was the fact that he linked purposive interpretation to the doctrine of public interests (masalih) in a creative and coherent manner, following to some extent the taxonomy of

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\(^{30}\) For instance, contrary to the widely held popular maxim that claims that ijihad (independent juridical reasoning and interpretive activity) of a clear premise or a unicursal statement (nass) is impermissible, la ijihad ma 'l-nass, "no ijihad in the presence of a clear statement," Shati' would insist that the very act of trying to decipher a legal rule from the interwoven elements of a statement, known as tahqiq al-manat, is itself an act of ijihad, see 4 SHATIBI, supra note 4, at 103.
public interest as advanced by the polymath jurist-theologian Ghazali, to whom we now turn.

B. Ghazali and the Public Interest

In the eleventh century, the legendary Abu Hamid al-Ghazali (d. 505/1111) took a cautious approach to the doctrine of maslaha or public benefits. He surely did not count it among the sources of law, and seemingly tried to downplay its status in his taxonomy and hierarchy when he almost disparagingly described it as one of the "fanciful sources" (al-usul al-mawhumah) of the law.31 There is some inexplicable dissonance in Ghazali's taxonomy. On the one hand, he distanced himself from maslaha in his thematic organization of legal theory. On the other, he formulated some of the most insightful discussions in legal theory while discussing the very same topic. It is these very reflections of Ghazali that have become a trace and nodal point on which later jurists have built and expanded their complicated and sophisticated legal theories. To be absolutely clear, Ghazali stated that public benefit (maslaha), in his view, was not about "procuring benefits and repelling harm."32 His reasoning for rejecting this definition of public benefit was that he believed it led to subjectivity in the law. This is when he believed human beings design the desirable nonmectic goals. What met with his approval were instances where the maslaha doctrine "secures the purpose of revelation" (muḥafāṣa ala maqṣūd al-shar).33

With this classification, Ghazali very effectively establishes two definitions of public benefit: humanist and theistic. The humanist type is disapproved, while the definition that reinforces theistic interests is approved. From this division that he made, it becomes clear why scholars of Shari'ah differentiate between valid and invalid forms of maslaha. Ghazali also created a third category of maslaha to which the law is indifferent. Maslaha is only operational in those areas of human existence where the revealed law (Shari'ah) is indifferent or silent, says Ghazali. In terms of "its own essential strength" (bi 'ītar quwwatiha fi dhatiha) vis-à-vis human existence, maslaha can either be in actions that are indispensable (darurat), necessary (ḥajat) or advance improvements/luxuries (tahsinat/tayzinat).34

If one were to take the "indispensable" category, for example, then it becomes clear that the imperatives of maslaha require that the five intentions or purposes (maqasid) of the Shari'ah be protected. Thus, all legal pronouncements and practices must of necessity secure and protect one or more of the five purposes, namely: religion, reason or intellect, life, property and paternity or honor.35 Public benefit, Ghazali reiterated, was about securing the five purposes that were derived from the uncontested textual and authoritative sources, namely, the Qur'an, Sunna and consensus:

And thus, for each public benefit (maslaha) that can be traced to secure a revealed purpose, it can then be vouched that [such maslaha] was intended by the Book, Sunna and consensus and therefore can not be deemed to be outside the [jurisdiction] of these [agreed] sources.36

Although he explicitly denied that maslaha considerations could constitute the fifth source of law, after the Qur'an, Sunna, consensus (ijma) and analogy (qiyas), it is difficult not to conclude that Ghazali endorsed it as the meta-purpose of the revealed law. If one examines the primary sources — the Qur'an and Sunna — carefully, he said, one will find that maslaha is indeed implicitly and explicitly evident as the purpose of the law. Ghazali thus endorsed maslaha stealthily, progressing from disparaging it as "fanciful" at first, to viewing it later as the grounds of all the legal pronouncements to be found in the canonical sources.

Unable to make such weighty and unconventional claims in a forthright manner (for to overstate his case on maslaha could render him an outcast in terms of the Shafi’i school to which he belonged), Ghazali hedged his statements in order to avoid controversy. However, once he had made the argument that the statutory laws that were stipulated in the canonical sources were themselves ultimately based on the implicit and explicit doctrine of public benefit, he could proceed to make a stronger argument advancing his case that public benefit considerations per se are part of the law. One of the more interesting insights that modern jurists derive from Ghazali’s work, in an age where Islamic jurisprudence has turned in favor of the literal and nominal, is the fact that neither the doctrine of public benefit nor the theory of the purposes and intentions of the law are expressly stated in any revealed statement or prophetic dictum.

Ghazali sutured the five purposes of the law to the doctrine of public benefit with great skill and persuasiveness. This extrapolation can be seen as an attempt to view the law as the dynamic unfolding of existential values. If so, then theoretically it is possible to expand this list of purposes to include newer ones, although little has been done in this direction. Furthermore, there can be very little doubt that in order to arrive at such a list of general

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32 Id. at 174.
33 Id.
34 Id.
35 Id.
36 Id. at 179.
values, the interpretation of the sources must be approached with extraneous reference points. In his discussion of maslaha, it becomes apparent that Ghazali is not concerned with establishing epistemic coherence (although Shatibi would be). All he intended to do was extend the existential values derived from the sources of the law to those domains of life that were not covered by revealed texts. In other words, Ghazali expands the normative frontiers of the Shari‘ah without being inhibited by the strictures of analogical reasoning (qiyas).

In order to avoid arbitrariness, Ghazali insists that the application of maslaha must comply with a three-point test. In order for an act to qualify as being a public benefit it must prove to be: 1) indispensable (daruri), 2) practically conclusive (qari‘i), and 3) universal (kulli). At this point, a flourish of rhetoric enters the discussion. Instead of mounting an argument about epistemology, Ghazali prefers to employ the rhetoric of the force of public benefit. So one finds him arguing that the "strength" (qawiy, quwwa, qawa) or the "force" of the public benefit or the intent of the Shari‘ah will no doubt persuade one to recognize that maslaha reasoning ought to be applied. The rhetoric of "force" deflects attention from the issue of subjectivity, an issue that had concerned him. He appears to fall back on an intuitive subjectivity. True to his concerns, Ghazali was honest to admit that, when making a choice in favor of the "stronger" of two competing benefits or rival purposes of the law, a subjective dimension was invariably involved. It is precisely the aspect of subjectivity that made maslaha suspect in the eyes of critics. However, in the hands of the best of Muslim jurists, there is both a concern about subjectivity as well as an admission that even issues of law are not without an unavoidable amount of subjectivity.

C. Tufi and the ‘Turn’ to Public Interest in Legal Interpretation

Two hundred years after Ghazali, the Hanbali jurist Najm al-Din Suyayman al-Tufi (d. 716/1316) freed the doctrine of maslaha from the ambivalent position Ghazali had given it. For Tufi, maslaha was the essence of Islamic law and was the doctrine that effectively regulated all the other established sources. No one in the annals of Islamic law had made as explicit and radical a claim in favor of maslaha as did Tufi. If Ghazali was hesitant to give maslaha a universal and humanist status in the law, Tufi had no such qualms. From a theological point of view, he argued that considering benefits or public interests (masalith) was part of Divine grace (tafaddul) towards humanity. Although God, sovereign as He was, was under no compulsion to bestow His grace, wherever His grace was evident, the consideration of public benefit was not only automatic but also obligatory. Whatever Tufi’s theological inclinations (as it is fiercely disputed whether he was a Hanbal or a Shafi‘i), there is little doubt that a current of Divine voluntarism was prominent in his legal theory.

Tufi derived his insight from a report (hadith) of the Prophet that says: "Do not inflict injury, nor repay one injury with another." The implication of this report, he argued, was that the Shari‘ah intended to avoid all kinds of harm and sought to maximize the acquisition of all public good. But Tufi dared to venture into areas others may have merely contemplated. In the event of an interpretive conflict arising between a clear text (nass) of the Qur’an and the consideration of a public interest, Tufi had no doubt: preference should be given to the public interest (maslaha) over the clear meaning of the text. Tufi had a cogent response to charges that his method could result in contravening a pre-existing juridical consensus (ijma) or ignoring a clear textual premise and text (nass). Maslaha, he explained, was stronger than either a textual ordinance or a ruling based on the force of consensus. He could state this without hesitating due to the fact that, in his mind, the core objective of both a clear textual ordinance and consensus was the same: to avoid harm and promote public benefits. In other words, in terms of function and philosophy, the "sources of the law" were actually representations of public interest. Furthermore, in the event of an apparent conflict between the consideration of maslaha and any other source, the former superseded by way of particularization (takhsis) and by means of a thorough hermeneutical elucidation (bayan). In fact, Tufi believed that the acts of Divine legislation, especially in matters of social transactions (mu’amalat), were designated to serve the public interest ab initio.

Whereas Ghazali cautiously linked public benefit with revealed intentions, Tufi went further, making a resounding and controversial claim that even the rules of the Qur’an were legislated with the concerns of maslaha foremost in God’s mind. In summary, Tufi placed a major emphasis on the epistemic value of the sources of the law and the degree of practical conclusiveness (qari‘ya) that they provided in terms of evidentiary value. In his reconstruction of the hierarchy of sources in which maslaha was the golden

37 Id. at 176.
38 See W.P. Heinrichs, Tufi, in 2 ENCYCLOPEDIA OF ISLAM, for an excellent overview on this figure.
40 Id. at 206, "la darar wa la diraz," a report of Abu Sa‘id Sa‘id b. Malik b. Sinan al-Khudāri and reported in the collections of Ibn Maja and al-Darqutni.
41 Id. at 209.
thread of all the sources of the law, Tufi stressed the ethical values and the
priority of the sociological purposes of the law over epistemology, in the
same manner that Ghazali privileged the ethical values of the law in his later
life. Here we note that epistemic conclusiveness was replaced by the search
for a source that would forcefully generate a coherence of the law in line
with the meta-purpose of law.

In his bid to avoid the anachronistic use of the text and the pitfalls of
atomistic interpretation, Tufi carefully interrogated the purpose and objec-
tives of the law. In doing so, he offered new readings of the textual sources
and reviewed the value of juridical consensus. The method of his predeces-
sors had been to adopt a hermeneutic of reconciliation between disparate
sources. This method involved interpretation, exegesis, and when it was
necessary, to particularize or limit (sakhsis) the scope of the application of
one text with the use of another. In the final instance, Tufi’s hermeneutic of
universal benefit subordinated the text to the divination of the universal
intentions and purposes of the Sharī‘ah. For him, history, contingency and
context were as much part of the text as the literality of the text was the
"knowing" text and the unique object of knowledge. Tufi wished to cut
through the epistemological pre-occupation with procedure, method and
formalism. He wanted to focus on ethics, and so with almost telegraphic brevity
tells us that law is not about what was or is, but it is about becoming.

A glance at the history of Muslim legal theory cannot conceal the fact
that, in many ways, Ghazali forestructured Tufi’s radical hermeneutics. To
put it differently, Ghazali serves as model or a "trace" for Tufi. The
doctrine of public interest, which Ghazali so carefully crafted from textual
sources and pre-conditions, was liberated from the text by Tufi using the
rhetorical trope of metalepsis. The rhetorical figure of metalepsis is the trope
that reverses cause and effect through a shuffling of priorities. Prior to Tufi,
the clear text (nass) was the cause, while public benefit was the effect. He

43 Also the Maliki jurist of Egypt, Izz al-Din Ibn Abul Salam al-Sulami (d. 1262) empha-
sized the centrality of public interest that culminated in the extensive work of Abu Ishaq al-
Shatibi (d. 1388) on this topic.
44 Muhammad Iqbal (d. 1938), the thinker of the pre-partition India, intimated his theory of
movement represented by the twin concepts of ijtihād (independent juridical reasoning) and
tuqādat (renewal) largely from the doctrine of maslahah as enunciated by the classical and medi-
eval juridical legacy. See MUHAMMAD IQBAL, RECONSTRUCTION OF RELIGIOUS THOUGHT IN
ISLAM (1965).
45 Al-Tufi wrote a gloss called Sharh Mukhtasar al-Rawda, a commentary on Rawdat al-
Nazir wa Junna’t l-Munir of Muwaffaq al-Din Ibn Qudama al-Maqdisi (d. 620/1223). It is
well known that Ibn Qudama’s book is an abridgment of al-Ghazali’s text, al-Mustasfa, see
ZAYI, supra note 39, at 100.

reversed this by asserting the opposite, that public benefit was the cause of
the clear text. He added that maslahah was a sign of God’s benevolence
and grace. In other words, the text was the effect of a pre-existing mythical
or metaphysical cause, namely maslahah. Failing to see the public interest that
served as the historical motive for a canonical text, says Tufi, was an errone-
ous reading of the text. By way of metalepsis, the existential conditions of
Tufi’s world — history, motives and conditions yet unknown to us — were
legitimized by the doctrine of maslahah. Legal history evolved in the gap that
resulted from the tension between a metaphysical legal code or nomothetic
discourse (Sharī‘ah) and its application in law (fiqh). In the space between
the grammar of the legal code and the rhetoric of the legal enactments of law,
a new history emerges which is then attributed to the original text, as Tufi
aptly demonstrated.

In order for Muslim jurists to take maslahah seriously, history had to
become the history of meaning, and politics (power) had to mirror the text.
Everything turns on the ability to enter the flux of history. Legal theory as a
type of philosophy requires a preparedness to encounter the anxiety of
history, the uncertainty of becoming and the actuality of life. In law, this occurs
in the encounter of textual authority with changing social realities. The
Arabic word for an unequivocal expression is nass. Nass has several
meanings, from "becoming visible," to "being expressive," or even "a place
of appearance." Drawing on these iterations of the text, each philosophical
and psychological moment of meaning and juridical reasoning is in effect the
disclosure of a new "appearance," a new "visibility" and "expression." By
means of reasoning and interpretation, a new unequivocal statement (nass) is
carved out of the primordial nass revealed by God. Rather than seeking a
way around the text through linguistic stratagems and legal fictions, Tufi
insists that he prefers to swim with the text in the sea of life.

Nevertheless, politics and history cannot be reduced to a single rhetorical
figure: metalepsis; nor can it be reduced to the fixed content of a canoni-
cal tradition or the interpretations of authorized jurists. A more complex
analysis of the politics of interpretation will tell the story more effectively
and perhaps differently. The unconscious, Freud taught, thinks in images.
Politics thrives on images. The politics of religion, represented by the
discourse of theological polemics, is rich with such images. Tufi’s attempt to

45 An Arab saying goes: nassa-t al-talabīya, "the gazelle lifted her head" when she exposed it.
A chair on which a bride sits is called a munassa or "place or location of appearance." The
Prophet is described as: "kana al-rasul salallahu alayhi wa sallam idhā wajada furajat
nassa," "When the Prophet (peace be upon him) experienced delight, he expressed it," see AL-
GHAZALI, supra note 31, at 196.
find the subject of the law — the human — the recipient of Divine grace, through a revolt in textual interpretation, made him a dangerous man. He was an undesirable stranger whose ideas were foreign to the "body" of the law and thus, according to some, he merited expulsion. Some contemporary writers on Islamic law would pass negative judgment upon Tufi’s intellectual project, either depreciating his intellectual contribution or outrightly rejecting his work. One prominent scholar stated that by the standards of his predecessors, Tufi’s “theory was, epistemologically, inferior to the average theoretical discourse.”\(^\text{46}\) Tufi’s iconoclasm may well have elicited such a comment, but to ignore his project is to ignore a complex jurisprudence and deprive us of insights to ponder upon the enterprise of jurisprudence at large.

According to traditional legal scholarship the “subject” of the law is “knowledge.”\(^\text{47}\) The purpose is to gain knowledge (ma’rifat/ilm/fiqh) of the “judgment or assessment of Allah” (hukm al-Lah) from the sources, especially of the way this knowledge relates to the acts of the legal subjects. Muslim legal discourse describes a legal subject as one who is morally and legally responsible (mukallafun). In other words, human beings (jurists) acquire knowledge in order to conduct the acts of fellow humans. Thus the law aims to empower the human being, by projecting as key players in legal discourse a “knowing or learned human being” (alim) or “a discerning being” (faqih), that are also two significant terms in jurisprudence. It is primarily the act of knowing and its product, viz. “knowledge,” that reign supreme. In order to attain learning and knowledge, the jurists in the pre-modern examples of Ghazali and Tufi were not unwilling to “engage” the canonical texts. While I cannot dwell on this point at any greater length here, it will be sufficient to note that in modern times this willingness to engage the canonical texts has changed a great deal. A cursory glance at modern Muslim legal interpretation and reasoning will reveal that not only is there a reluctance to “engage” the text, but there is an even greater pre-occupation to "save" and preserve the clear text (nass) from the alleged corruption and distortion by courageous interpreters. The desperate struggle that contemporary Muslim intelligentsia encounter in the face of authoritarian discourse is evident in different parts of the Muslim world. In my understanding of the pre-modern juridical legacy, the "knowing human being" (who was both the "subject" and "mediator" of the law) was the subject of the law rather than the "all-

\(^{46}\) WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNI UZUL FIQH 153 (1997).


knowing text.” For contemporary Muslims — for whom uncritical modernist and traditionalist thinking is almost identical — the canonical text “knows” everything and has the answers to all the complex problems of human existence. Human beings and their travail on earth are ignored as the real “subjects” of Islamic law. The dialogical relationship between canonical text and social text has been severely repressed in modern Islam.

The value of Tufi’s recuperation and reinterpretation of the text is to make us understand the written reason (ratio scripta) of the legal tradition. He wants to draw the attention of the student of jurisprudence to a living text, a speaking or animated law. If one follows the play of the Arabic word nass, which means to be "expressive," "visible" and constantly "appearing," then the text of the law by nature animates life and addresses the realities of one’s context. For many of Tufi’s medieval and modern critics, the canonical text is a design for social life and it establishes the "legal subject" as a child of the text. In other words the text enjoys priority to the legal subject. In other words for most of the jurists the unconscious of the law is a "jurist," its "spirit" is a body of interpreted and canonized law. This is not how Tufi imagines the relationship between the law and the legal subject. For him it is the reverse: the “canonical text” is the child of the legal subject. In short, the legal subject is prior to the text. The recovery of the precise meaning of the text that Tufi points to, the interior space or gap of that repression, lies not only in the tension between the deep grammar of the legal code, the Shari’ah as a locus of potential meanings, and its unfolding in time in the form of ethical and moral practices. It is also a biographical enterprise and a matter of social and subjective genealogy. Thus, it will be accurate to say that Tufi’s rule of interpretation recovers the inscribed subjectivity of the law and the legal institution. This recovery suggests that, in engaging the canonical text through more creative forms of hermeneutical elucidation (bayan), one can discover a greater love and passion for the text while also recovering the spirit of the legal institution. It also brings the text into conversation with its original cause: Divine grace.

Islamic law has yet to come to terms with the role of the individual jurist in the shaping of jurisprudence. Many contemporary and modern readers of the medieval legal texts assume that the personalities who studied, practiced and wrote the texts were heroes who conformed to the most sacred conventions of the day and were infallible paragons of virtue. This is more than mere exaggeration. It attempts to place such figures outside history in an attempt to isolate them from critique. We know that the tradition of law also included people who “dabbled” in controversial speculative theology and the Greek sciences; those who studied literature; many who became mystics and oracles, refusing to submit to the dogma of the authority of texts and
their reiteration. In the eyes of some of the "sovereign" jurists, such personalities were suspect; Tufi was one of them. Fully aware of the tensions and hostilities within Muslim ethical and theological thought, Tufi was quite prepared to exploit these divisions and fissures between the legal subject and text in order to create a new space for himself as another "subject" of the law.

Some of the theological tensions that were evident in his day were the anthropomorphism of the Hanbalis, the political extremism of the Rafidis (a generic name for Shi'a political schismatics), as well as the literalism of the Zahiri school and the sovereign dogmatism of the Ash'aris. In a dramatic moment of self-satire, Tufi says: "[I am a] Hanbali, Rafidi, Zahiri, Ash'ari; these are one of the noteworthy lessons."48 Even for some of his modern admirers such as the Egyptian scholar Mustafa Zayd, this statement was profoundly embarrassing, one which only a "madman" would utter.49 The only persuasive explanation for this phrase is that Tufi may have employed satire and self-stigmatization as a weapon to silence his vocal critics. In fact, he poked fun at his critics and their decrees of heresy. He implied that life was much more complicated than the clear-cut straight lines that dogma and ideologies impose in order to police certain ways of thinking. It is as if he was saying: "As a jurist, I am a living example that all antinomies can co-exist at the same time. Variety is the spice of life!" The genre of satire can also be the most dramatic and exemplary critique of law. One cannot help but speculate that perhaps Tufi was trying to enhance the role of the "subject" in the law that he derived from some of Ghazali's imprints and comments on the law. In addition to criticizing vehemently the jurists of his day for their ignorance of the ethics of law, Ghazali also argued that the true understanding of the law is the "understanding and knowledge of the self" (fikih al-nafs). In his view, every true jurist ought to be a "discerner of the self" — fāqih al-nafs.50 Tufi would wholeheartedly endorse it.

Tufi's unconventional and radical views on public interest can be found in a commentary he wrote about the selection of forty hadith compiled by the notable Damascene Shafi'i jurist and traditionist, Yahya b. Sharaf b. Muri al-Nawawi (d. 676/1277). In the introduction to Tufi's writings:

I advise you dear reader of this book — while you weave your gaze through the folds and pleats of its arguments — that you do not rush to deny what appears to be contrary to what you have become accustomed to and what your knowledge had enclosed. But apply yourself earnestly and renew your opinion; think it over and then continue it [your thinking]; for only then will you be worthy of reaching the goal.51

With this critical and creative mindset, Tufi, a one-time student of Ibn Taymiyya, reached Cairo in 705/1305. There he studied for some time with several scholars, including the Hanbali chief qadi, Sa'd al-Din al-Harithi (d.711/1312), and established his credentials at the two famous law colleges: al-Mansuriyya and al-Nasiriyya. Given his eclectic intellectual temperament, it was not surprising that very soon his relations, notably with Harithi, deteriorated over a dispute between them. That incident signaled the beginning of his troubles and was followed by his imprisonment in Egypt. Tufi was charged with being a Shi'i, and accused of being a Rafidi, "schismatic rebel" (rafidi), one who denies the legitimacy of the Sunni order of succession after the Prophet Muhammad. For this, he was punished and publicly humiliated, banished from Damascus, and chose exile in Qus in upper Egypt.

Tufi's relevance in modern times increases because his own career and personality highlight issues related to the politics of interpretation. The Egyptian scholar Mustafa Zayd recovered Tufi's work from the archives by editing and then publishing his essay on maslahah. In a foreword to Zayd's book, the Egyptian jurist Shaykh Muhammad Abu Zahra (d.1974), a well known al-Azhari scholar and writer on the law, was mildly critical of Zayd's attempt to rehabilitate Tufi but nevertheless endorsed the worth and work of the fourteenth century scholar. Abu Zahra observed that Zayd tried too hard to prove that Tufi was not a Shi'i. Writing in 1954, Abu Zahra stated that he had doubts as to whether Zayd succeeded in his attempt to vindicate Tufi of certain charges, since every piece of evidence he had marshaled in support of Tufi for not being a Shi'i could also be used to incriminate him for being a Shi'i. Then, dismissing narrow sectarianism, Abu Zahra said:

It does not reduce the stature of Tufi if he is a Shi'i, neither does it enhance his knowledge if he was Sunni. In both instances he is a scholar of depth and a student that dives into the Islamic sciences, displaying a knowledge of its methods; he is a swimmer who swims above the crests of the waves and is also a diver who can find the pearls. . . .52

By 1961 Abu Zahra had changed his mind about Tufi, of whom he had once spoken in glowing terms. He now viewed him to be an incorrigible subversive. On the occasion of an anniversary conference in honor of Ghazali held in Damascus, Abu Zahra presented a paper in which he harshly singled out Tufi for criticism. Using Tufi as a scapegoat, he went on to condemn a number of unnamed modern scholars who took this 14th century figure to be

48 ZAYD, supra note 39, at 109.
49 Id.
51 ZAYD, supra note 39, at 71-72.
52 See ZAYD, supra note 39, at 9.
a paradigm for legal reform. He cited the chronicler Ibn Rajab (d. 796/1393) who condemned Tufi as "a deviant Shi'i in his beliefs about the Sunna." Abu Zahra added that Tufi's views were not only invalid, but also added no value to the history of Islamic law, "except in the eyes of those who invent idiosyncratic views in order to circulate their idiosyncratic opinions and deviance in heresy (takfir). . ." The moment that Tufi became a resource for new and reformist interpretations, the traditionalists like Abu Zahra who view themselves as the guardians of the paternity of the law, felt compelled to discredit Tufi.

D. Haddad of Tunisia: A Lonely Warrior

In modern times Tufi's radical hermeneutics resonated widely through the movement for religious renewal in the Muslim world, especially in Egypt and Syria. The Tunisian thinker Shaykh al-Tahir al-Haddad (1901-1935) was clearly influenced by Tufi's way of legal reasoning. In a brief life of barely 34 years, Haddad made some of the most bold and far-reaching intellectual commentaries on Islamic law, notably with respect to the status of women. He was first educated in the traditional Islamic sciences at the Zaytuna University. Later, he also completed a professional law degree. His first job was as a newspaper essayist, followed by a brief role as an activist for the old Tunisian Drust party. His free-spirited nature soon became the cause of disagreements in political circles with his less liberated colleagues, and so he turned his attention to trade union activities. As one of the founders of the trade union movement, he advanced the cause of Tunisian workers under French colonization. During that period he realized that much of the energy of the trade union activity was directed at men, while as much as half of the population, namely women, were being ignored.

His reflections on the subject of women resulted in his book, Our Woman: Between the Shari'ah and Society. This book caused a mighty outcry, resulting in several physical attacks on Haddad and his supporters. In addition, he was stripped of all his university degrees and effectively defrocked by the Tunisian Islamic clerico-legal establishment. Four years after the publication of this book, Haddad died. His deteriorating health had only been aggravated by the psychological trauma he had endured at the hands of his fellow countrymen in his pursuit of the ideals of intellectual freedom. A mere 100 people attended Haddad's funeral. One should recognize that, for his time, both Haddad's ideas and his courage were revolutionary. Reading Haddad's book at the beginning of a new century in which feminism made major strides, one cannot fail to admire his revolutionary zeal and the humanity in which it was grounded. He saw that the advancement and emancipation of women involved an interpersonal and psychological dynamic between the sexes. "If we humiliate woman and we do not care about her abasement and decline, then it is a portrait of us [males] humiliating ourselves." He further noted that "we need to cooperate with each other in order to rescue our own (male lives) by establishing comprehensive principles to advance women which will also be tantamount to our own advancement." Haddad argued that the prejudice against women in Muslim society, with particular reference to Tunisia, was deep-seated in the psyche and history of his community:

Any discussion about her as an intelligent human being (insan rashid) only provoked those ancient prejudices. We have no other weapon with which to combat the issues of women, except religion. However, in our practices we have effectively diverged from religion in its essence and meaning, exploiting it in our lives and deeds, while our prejudices and habits make us biased towards the created form of religion. This is what had induced me to talk about Islam, that golden treasure that the sands of forgetfulness had covered, and have replaced with that which resembles our subjective desires and inclinations, instead of Islam. In fact the two, [Islam and our subjectivities] are complete contradictions.

From this sociological reading of Muslim society, he argued that Islam accorded equal civil rights to men and women. When women were denied civil rights in certain instances recorded by the religious texts, such occurrences should be attributed to some contingency or contextual consideration, and should not be understood as an eternal principle and norm. "There is no textual evidence or proof," he stated boldly, "that suggests that what had gradually been achieved in the life of the Prophet, is the final goal after which there is no further purpose; as long as those matters that are connected with gradualism continue to present difficulties then it is appropriate to elimi-

54 Id. at 552.
55 AL-ISLAMI B. AL-HAJ YAHYA & MUHAMMAD AL-MARZUQI, AL-TAHIR AL-HADDAD: Hayatuhu, Turathuhu 30 (n.d.).
56 AL-TAHR AL-HADDAD, IMRA'ATUNA FI 'L SHARI'AH WA 'L-MUSTAMA 40 (2nd ed. 1972).
57 If one compares this turnout to the paltry four mourners who attended the funeral of the famous mystic and scholar Harith al-Muhassib (d. 243/862-3), who was harassed in medieval Baghdad by Hanbali inspired violence, then Haddad should consider himself lucky.
58 AL-TAHR AL-HADDAD, supra note 56, at 13.
59 Id. at 16.
nate such hardship." Change would continue indefinitely in several areas of religious life, he argued, according to changing circumstances.

Gradual changes occurred in the customs of Arabian society, particularly with those involving inheritance in the early legal history of Islam. The smaller fraction of inheritance shares allocated to daughters as heirs, half the share of sons, was not a principle of religion, he said. Haddad's proof was that in some instances of Sunni inheritance rules, males and females inherited in equal shares. The smaller share for daughters was the result of the policy of gradualism, which involved inducing Arabian society to first recognize the inheritance principles of women as a matter of principle, a notion contrary to the pre-Islamic treatment of women as akin to moveable property. There was therefore no reason, in his view, why sons and daughters could not inherit in equal shares from an estate when societies changed and gender equality was affirmed. Women, he argued, had a right to choose their spouses, and monogamy was the rule in marriage. In fact, he described polygyny to be a crime against women.

He also severely condemned the practice of extra-judicial divorce, called talaq (repudiation), as well as the pronouncement of the triple repudiation, (which, if uttered in a single sitting, irrevocably dissolved the marriage contract in the view of the majority of classical jurists). In order to bring marriage and divorce practices in line with the purposes and intentions of the Shari'ah, Haddad proposed the establishment of specialized family courts that would regulate, among other things, divorce, which had hitherto been an informal practice and resulted in a great deal of harm to women. He was especially critical of the interpretations and rulings issued by some religious authorities of his day on the subject of women's rights. The persecution and venomous campaign against him may have been fueled by the fury of the ulama upon discovering that Haddad had refuted their opinions on the subject of women in his book.

The responses to Haddad's book and ideas were especially severe, not only from traditionalist religious sectors, but the secular quarters as well. The latter were probably trying to settle personal scores, retaliating because Haddad had become critical of the leadership of the nationalist political movement that he had helped to establish. Among the ulama, al-Shaykh Muhammad al-Salih al-Nayfar accused Haddad of being an apostate (muhdid) in an essay titled: 'How Far Will the Deceit of the Apostates Go?' In turn, Haddad lamented the fact that none of his opponents responded to his intellectual arguments upon which he posited a new interpretation of the status of women in Islam:

In the end I am satisfied, secure in the veracity of my faith in Islam, that it is the eternal religion of humanity, unlike the opponents' understanding or pretension, but [an understanding] according to the needs of the time (hajja-i 'isr) and the benefit of the community (maslaha-i 'umma) at large.

IV. Women's Rights in the Language of Jurisprudence

History and power, in addition to questions of jurisprudence, interface with the rights debate. To state the problem, it is my view that the rights debate is about jurisprudence, history and power. It raises further questions about the nature of Islam as a tradition with both revelatory and historical components. These two dimensions occur simultaneously and are equally important to believers, although the various shades of emphasis may shift the balance in favor of one aspect over the other and thus generate interpretive diversity. The worldview of the interpreter is consciously and unconsciously shaped by a variety of factors, which the observer does not always perceive. If there is one central issue at the center of Islam's unfolding as a religious-political tradition, then it is surely the question of interpretation. More specifically, it is about who has the right to interpret. This question raises further issues such as the legitimacy of interpretation as well as the politics of interpretation. Since there is no ecclesia in Islam, this issue of power and politics are publicly contested with its attendant ideological tensions. In the remainder of this essay, I will provide examples of how some late twentieth century thinkers tried to address certain issues related to women's rights followed by a critique of particular aspects of Muslim modernist legal interpretation.

A. Modern Interpretations

Discussing the plight of women after the Algerian war of liberation (Nov 1, 1954- July 5, 1962), Mohammed Arkoun dwells on the issue of Muslim Personal Law and women. These matters affect marriage, divorce, inheritance and custody of children:

The most controversial aspect of this body of law [says Arkoun] is that of the status of women — namely, how to deal, in a modern state, with such issues as polygamy, inheritance laws, repudiation, divorce and women's freedom to choose their future husbands. The Shari'ah (Divine law) has

61 AL-TAHIR AL-HADDAD, supra note 56, at 40.
specific rules regarding these issues, but many women in Algeria who took part in the war of liberation feel that they have earned the right to full equality with men. During a hard and long discussion the fundamentalist "true" Muslims stood in opposition to the "modernists." The result was the adoption of a rather conservative family code published on June 9, 1986, with Algerian women once again losing the battle... [It is said dogmatically that the status of women is fixed by God in the Revelation and rightly interpreted centuries ago by the authorized doctors of the law. Women, actually, are treated just like the beard and the moustache. They are no more than signals used to separate the "true believers" from the "infidels." 64

Rules related to women and practical social exigencies are categorized as social transactions (mu'amalat) and distinct from devotional rules (ibadat) in Islamic law. In the second half of the twentieth century, the Pakistani scholar Fazlur Rahman (1919-1988) argued in his analysis of Islamic law that when the Qur'an made pronouncements on social transactions, such rules had an implicit goal or telos. Arguing a viewpoint similar to that of Haddad, he stated that the reforms proposed by the Qur'an and the Prophet were meant to bring about change gradually. "To be effective," Fazlur Rahman said, "a realistic reformer, however, cannot go beyond a certain limit in his legal reform and can only lay down certain moral guidelines according to which he hopes his society will evolve once it accepts his legal reforms." 65 A Prophet interacts with his society at two levels: the legal and moral levels. Many of the reforms proposed by the Prophet Muhammad were of a moral nature. While some of his legal reforms concretely restructured the situation in seventh-century Arabia, part of it also indicated a moral direction and vision for that society. Laws are thus the repositories of morality. Therefore the form of the law must constantly be adjusted and manipulated in order to realize the best moral order.

Each legal ordinance addressed the actuality of life and its complex problems. This is why the revelatory imperatives did not appear in a vacuum:

The Qur'an usually also gives [said Fazlur Rahman] explicitly or implicitly, the reasons for a pronouncement containing moral or legal judgments or principles. An understanding of these reasons is essential for an understanding of the legal and quasi-legal pronouncements of the Qur'an.

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67 Id.
this matter of two women's testimony being equal to that of one male. In gynecological cases as well as matters deemed to be related to the sexual privacy of females, the evidence of one female was viewed sufficient as testimony. For instance, if one female nurse or physician testified as to having delivered an infant, then her single testimony would be sufficient. This obviously goes against the claim that female testimony is inherently deficient. The Qur'an clearly points to a different view that supports the efficiency and trustworthiness of female testimony.

If anything, the verse is in fact a description of the patriarchal reality, the Qur'an reflecting a given socio-historic situation where males essentially operated society. Under these circumstances women were poorly educated in matters of trade and were generally restricted from participation in public life. Another reading could be that the Qur'an implicitly attempts to break the restrictions on female socialization by way of affirmative action, assuring the participation of women in commercial practices. This was done under pretext, such as when the Qur'an stated that "if the one [of the two females] should forget, then the other might remind her." This is clearly a reading that promotes an emancipatory understanding of the verse. Later Muslim practice has gone against the Qur'anic directive and, instead of insisting on two witnesses, began deciding cases on the basis of one witness and an oath. Fazlur Rahman adds:

We must understand that social situations do not remain the same but continue to change. Thus, the law must be interpreted not only in the light of the moral objectives and principles of the Qur'an, but also in terms of the change in the social situations. What cannot be given up or modified are the Qur'anic objectives and principles themselves. These, in fact, must exercise control upon and direct the present social change, for otherwise, some social changes will not be healthy.

Qur'an 4:3 deals with marriage and polygyny in the form of a command: "...then marry from among other women such as are lawful to you, two, three or four..." Most traditional jurists consider this verse to be directive but do not make marriage or polygyny compelling, even though it occurs in the form of an imperative. Every linguistic imperative, jurists tell us, does not necessarily translate into a legal obligation. A modern interpreter must take into account the contextual character of the rhetoric of the Qur'an to determine whether an imperative was really intended. The verse on polygyny functions against a background of presumptions of a medieval world where such practice was a matter of choice. However, it is not clear whether the Qur'an compels Muslims to adopt polygyny. At 4:129 the Qur'an states: "And it will not be within your power to treat your wives with equal fairness, however much you may desire it..." Traditional jurists consider this verse to be directory, largely as an advisory directive and argue that it imposes no limitations on Qur'an 4:3 that permits polygyny. To Muslim traditionalists, both the verses that legitimate polygyny and the verse that restricts it are treated as non-compelling.

On the other hand modern Muslims view Qur'an 4:129 to be peremptory. According to this view, the verse requires full compliance. Since the verse explicitly states that fairness among a plurality of wives is impossible, it provides authority to outlaw polygyny and thus confirms monogamy. This verse has an implicit and proleptic life. It is read as an argumentative figure of speech that anticipates the rational question: Can you do justice to a plurality of wives? Proleptically, the answer is: no, not even if you try to be just among your wives! Clearly, the conventions and communal understanding of marriage — what it meant to be a husband, wife, child and family in seventh-century Arabia — could be reconciled with notions of polygyny. Polygyny may even be functional in certain societies today depending on history and circumstance. Similarly the polysemity of the text as well as the location of the interpreter could permit a modernist interpretation of reading monogamy as the norm and polygyny as an exception.

The example of slavery is possibly the best example in the armoury of the Muslim modernist in order to demonstrate that law is primarily based on considerations of public interest (maslahah), Post-prophetic Qur'anic exegesis and legal practice gradually repealed certain aspects of the institution of slavery in several phases. Legally, the Qur'an accepted the institution of slavery as permissible. Even though the Prophet Muhammad personally disapproved of slavery, he did not outlaw it. For one, it would have been difficult, if not impossible, to legislate it out of existence in one stroke in seventh-century Arabia. A major factor was the economic structure of the society and its dependence upon slave labor, among other socio-economic needs. Restrictions were gradually placed on the selling of slaves by caliphal decree. Umar I prohibited the sale of slave women who bore the children of their masters. One door, at least, was closed to the perpetuation of slavery. Over time,

68 Qur'an, 2:282.
69 Fazlur Rahman, ISLAMIC METHODOLOGY IN HISTORY 190 (1965).
71 There was a concern that the sale of female slaves who left behind offspring could result in certain unintended circumstances leading to incest. There was no way in which one could alert a child born of a slave mother that his purchase of another female slave 20 years later would not be his mother or blood sister or brother.
Muslim sensibility found slavery abominable and hardly anyone, save for some extremists, would insist on instituting slavery again.

V. PRELIMINARY QUESTIONS: RETHINKING THE EMPIRE’S LAW IN (POST) MODERNITY

From the above it becomes obvious that the legal tradition of Islam is central to any attempt to legitimate new ideas and practices. In a religious tradition such as Islam, where revelation is the ipseisima verba of God, the question of interpretation poses particular challenges to its readers and listeners of revelation. To state the problem succinctly: is the revelation open to new interpretations and alternative readings, different than those posited by the first community of listeners? One response from Muslim scholars would be “yes,” followed by a “but...” accompanied by a number of qualifications to demonstrate the limits of interpretation. This caveat is emblematic of an ongoing debate on interpretation within Muslim intellectual circles.

The question about interpretation masks a larger question: are the culturally specific norms provided by revelation subject to change? The more problematic question within a religiously inspired ethical and moral system would be along these lines. Is normativity a given as an a priori in a time past, or is it constructed and continuously discovered in history? In other words, are the Qur’anic and prophetic formulations on the status of women which reflect the patriarchal and androcentric discourse of a particular society fixed, or are they subject to change as the context changes? Some of the philosophical and jurisprudential issues were partly addressed in the discussions of public interest as derived from the intellectual tradition of Ghazali and Tufi, to moderns like Haddad and Fazlur Rahman. In modern times, Muslim traditionalists legitimate most of their decisions by placing them under the rubric of public interest or the doctrine of necessity in order to accommodate change. However, they also augment their views with a specific social and historical reading of the revealed text. Since the modernist and neo-traditionalist view-

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72 See Ibrahim Omoa, Languages of Change in Islamic Law: Redefining Death in Modernity, 38 ISLAMIC STUD. 305 (1999).

73 By neo-traditionalists I have in mind those traditional scholars who have purchased into the revivalist Islamic discourse, bringing them closer to fundamentalist positions. For further discussion, see Fazlur Rahman, Roots of Islamic Neo-Fundamentalism, in CHANGING THE MUSLIM WORLD 23 (Philip H. Stoddard, David C. Cuttell, & Margaret W. Sullivan eds., 1981), and also by the same author, Islamic Modernism: Its Scope, Method and Alternatives, 1 INTL J. OF MIDDLE E. STUD. 217 (1970).

74 The penalties in criminal law for males and females differed just as it was different for slaves and free persons, as well as for Muslims and non-Muslims.
When contemporary Muslim scholars, especially the traditionalists among them, invoke the medieval texts as authority, they rarely address the assumptions these texts make with regard to critical issues such as truth, personhood and gender. For surely these notions of a bygone era can hardly be instructive in informing the present, except by way of anachronism. For example, some Muslim modernists like the Indian thinker Muhammad Iqbal thought that the collapse of the Ottoman empire in 1924 was a highly desirable goal, hoping that it would bring to an abrupt halt the dissemination of pre-modern and medieval religious, cultural and political practices. However, these modernists repeatedly failed to irradiate the presumptions of empire from the texts they invoked. So for example, while Muslim modernists adopt the nation-state as a model for governance Islam, they continue to equate the doctrine of parliamentary sovereignty or constitutional sovereignty to be analogous with the principles of the prophetic consultative (shura) model of statecraft. Not only are these very different models of governance, but parliamentary systems also assume a legislative authority of a binding nature, whereas the shura-model does not claim any sovereignty of governance and therefore does not legislate new law but only applies prescribed laws. It is therefore not surprising to find Muslim militants and fundamentalists harshly rejecting the modernist model of state for being secular and un-Islamic, largely because they see no continuity between these new models and those that are assumed to be normative models in the classical heritage of Muslim constitutional jurisprudence. One can say the same about the nation-state. There has not been any effort to theorize the nation-state within the framework of a modern interpretation of Islamic law. What has been produced over the years in this respect can at best be described as creative ad-hocery, to borrow one of Charles Taylor’s neologisms.

The political model of the empire continues to flourish in the imagination of contemporary Muslims by several means. Religious education, whether traditionalist or of a revivalist brand, continues to reinforce the desideratum of empire. And beyond that, the continued and uncritical invocation of the pre-modern legal texts as authority by way of fatwa, pl. fatawa, (juristic responsa) that direct the practices of communities also perpetuate the goals of empire albeit in distorted and inconsistent ways. There is certainly nothing harmful in reading medieval texts and treatises in modern and post-modern contexts in different parts of the Muslim world, provided of course that they are read as sources of information and not necessarily as binding authority in all matters. But what seems to appeal to modern readers of these texts is that they subliminally recall the fiction of authenticity and perfection of the past vis-a-vis the decline, degradation, loss of empire, defeat, and humiliation that Muslims experience in the present era of late (post) modernity. However, many of these texts give little attention to history and these texts were constructed. A closer scrutiny would reveal that these "authentic" and "pure" texts are actually hybrid constructions of ideas and practices that emanate from multiple origins in their medieval and pre-modern contexts. Nevertheless, Islamism or Islamic revival movements that circulate a limited number of these texts as binding and authentic sources of authority have unleashed new discursive particularities on Muslim societies and only exacerbated the Babel Tower syndrome in distressing ways. The result is that the modern and the pre-modern co-exist in new formations and leave their imprints on political and cultural practices in novel ways.

In short, the uncritical un-historicized employment of medieval treatises only serves to advance the fiction of "empire" that finds its fulcrum implicit in the discursivities and pragmatics of Islamic law. Much of what passes as Islamic law today, whether in Islamic Iran, Sudan and Afghanistan or in the formal and informal legal tribunals elsewhere in the Muslim world, continues to advance consciously or unconsciously the political philosophy of empire. The most visible manifestation of this is the establishment of the Islamic state, and especially the undue haste with which such states apply unreformed versions of Islamic law. Women are the first targets of these laws that are applied to them with undisguised brutality. In other words, the Islamization of women's bodies appears to be, by means of the discursivities of law, one of the marks of the empire of law. At other levels it is a moralistic empire with supremacist and self-righteous overtones, only to be matched by the supremacist and triumphalist discourses of Euro-American global liberal capitalism. Islamism that espouses the vision of empire is of course a crude attempt to discipline the body of society, by invoking blueprints and models made in a world very different from the one that Muslims inhabit today. In this guise of Islamism, women are viewed as the index of society's moral and ethical well being in discourses that are deeply offensive to the integrity and humanity of women.

The second problem is one relating to the issue of context. The classical models of Muslim legal hermeneutics do have a semblance of coherence and

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73 See Brinkley Messick, Genealogies of Reading and the Scholarly Cultures of Islam, in CULTURES OF SCHOLARSHIP 387 (Sally C. Humphreys ed., 1997); See also EMANUEL SIVAM, RADICAL ISLAM: MEDIEVAL THEOLOGY AND MODERN POLITICS (1985).
appear to be contextually appropriate to their times. But it would be incorrect to assume that these past contexts were not hybrids of various experiences and influences. In fact, one of the difficulties in trying to explain the Islamic past to Muslims is to disbelieve them of the misconception that the past was perfect and untainted and therefore a model worthy of imitation. Such an idealized notion of the past is a reflex in order to deem the present as bad, unworthy of appreciation and lacking in authority. Absent in the imagination of contemporary Muslims is, firstly, an admission that the past is a hybrid one; and secondly, that the modern experience has fundamentally changed our notions of self and society from the role and meaning of these concepts in pre-modern society. There is of course either little understanding or resistance to the understanding that modernity is an attitude of questioning. It questions and endlessly interrogates whatever is meaningful in human existence. 76 This critical aspect of modernity has an uneasy reception among certain Muslim thinkers. Even if one concedes to the notion of cultural modernity that resists the hegemonic societal modernity of the West, there is no escape from the fact that it has spawned its own varieties of questioning and generated new practices. Thus it is conceded in some circles that modernity is somewhat of an inscrutable phenomenon. Thus in both Western and non-Western settings, the condition makes us question our inherited notions of reason, truth, self, nature, God as well as our understanding of self-evident truth and meaning; the concept of a text and writer; and, our vision of history and progress.

In the past, reason was seen as universal, held by all to articulate a set of rational truths in order to distinguish reason from tradition and emotion, among other things. 77 Now, reason is a contested terrain, no longer universally and uniformly accepted as self-evident. We recognize that reason is socially constructed and that it exists and is embodied in practices and discourses. In the past one understood the self to be exclusively unique and transcendent. In fact the postmodern critique of the self suggests that it too is a product of language and discourse. The correspondence between language and reality once exerted a strong influence on our thinking and imagination of the truth. In fact it was a hallmark of early notions of modernity. Today there is a healthy skepticism of what passes for the truth. Now we admit that truth is related to the practices of power and the deployment of knowledge and that the truth is often viewed to be the result of an agreement. Neither do


against the patriarchal grain of society are deployed as apologia and an attempt to show that Islam is "modern" and egalitarian.

Fazlur Rahman urged us to re-examine the moral vision of the Qur’an by elevating certain passages to become the nodal points or "controlling" texts for the general hermeneutic or interpretative framework of the Qur’an.78 Leila Ahmed argued that there are pragmatic and expedient rulings in the Qur’an regarding women, but that these are framed by an egalitarian and ethical vision. She advocates that the ethical and egalitarian vision be taken seriously and be applied to society.79 But a quick look at such a pragmatic approach soon shows that everything in the Qur’an — from polygyny, seclusion of women, the male unilateral right to repudiate a wife, the male control of females in marital relations and the male duty to provide economically for the wife — is in conflict with the ethical vision. To advance the case of an ethical vision of the Qur’an, does offer "politically correct" rhetoric. But it is uncertain whether such rhetoric can make a credible intellectual argument in the face of both the text and the history of the text in explaining why practices that seemingly go contrary to the ethical vision are deemed as normative and are still deemed to be normative till today by many Muslims. Successive generations of Muslim modernists and neo-traditionalists have managed to produce a reasonable amount of literature to prove that Islam does have an emancipatory ethos: that it offers equality between men and women and promotes peace and co-existence on the grounds of equality between Muslims and non-Muslims. However, these arguments are fraught with problems. I will briefly identify these in closing.

Part of the problem of the modernist/neo-traditionalist apologetic approach is that it perpetuates the idea that one needs a founding and originary text (or some construction or re-construction of an originary text) in order to validate a new claim or to fulfill the warrant of liberation or egalitarianism. In doing so, it only reinforces text-fundamentalism and a desire to "find" the norms hidden, buried and inscribed within the body of the text(s)! The truth of the matter is that the text promises, but never delivers, new norms: the new norms are "read" into the text, an uncomfortable fact that many confessional and even not so confessing Muslims have difficulty in admitting. On this point of text-fundamentalism, the modernist and the radical Islamists find common cause in that both seek solutions through the absoluteness and sovereignty of the text.


The implication of the previous point is grim. It suggests that the text is the exclusive source of norms in Muslim thought; that norms are prescribed by texts. Furthermore, it presumes that norms are "already there," that they pre-exist historical realities and social contingencies. This kind of approach and assumption surely limits, if not forecloses, human agency in having a role in the making of norms. It denies the historicist elements of norm-construction within a long and established tradition of jurisprudence and juridical discursivities. The prevailing assumption of many Muslim jurists and thinkers is that the norms have merely to be discovered in an almost oracular encounter with the text. There is a stubborn rejection of an explanation that suggests that norms are created in the present through a discursive process involving text, history and interpreter. The prevalent reasoning is that since the Divine is imagined to be the supreme and transcendent norm-giver, it then follows that norms are "given," that they come from an external source and are thus not constructed. This kind of reasoning also makes certain theological and metaphysical assumptions about the Divine as a "Legislator." The modernist/neo-traditionalist discourse does not give any substantial weight to the "event" of revelation. If one were to take the "event" of revelation seriously, then it provides for the opening and unfolding of the endless possibilities of insights and intuitions. Of course it also requires that one acknowledge the need to be located in the flux of history in order to pursue self-mastery. This approach differs significantly from the one in which norms are given and the Divine is imagined as the sole "Legislator." It would be fair to say that the medieval Muslim jurists developed many means whereby the "worldliness" of the revealed text was given a great deal more credibility and authority, than what their contemporary modernists, traditionalists and neo-traditionalists counterparts are prepared to concede in this regard.

In order to prove that their definition of normativity is the "true" one, Muslim modernists/neo-traditionalists have to privilege their version of the truth, while de-legitimating previous narratives of truth as distorted and false. This is a weighty judgment on history that carries with it the implication that generations of humanity were simply wrong in their understanding of Islam. Indeed the "real" truth on a whole number of issues has only recently been discovered in the modern era! Besides the intellectual hubris that such a claim contains, it also erodes the credibility of Islam as a living tradition. It suggests that a tradition has the capacity to be perpetually "mis"-read and to remain distorted for centuries. To use debates in Islamic feminism and women's rights as an example, one is fully cognizant and supportive of more humane discourses that are generated by the energetic intellectual work by female and male scholars. However, I am rather skeptical about an explana-
tion that implies that women’s oppression took place at the behest of a text and that their liberation will also take place through a text exclusively. A new reading of a text may have persuasive value, but that cannot be the end of the interpretive project, since there is a politics of interpretation to factor in as well. So, in the case of women’s rights, the implication of modernist thinking is that for centuries the Qur'an had been misread, and the egalitarian message of Islam had been suppressed by a massive conspiracy. There is a failure to recognize that egalitarianism and equality, the way we understand them today, are unique to our time and conditions. Under different conditions there would be another kind of egalitarianism and justice with an entirely different scope of questions. The struggles of women in previous epochs against male authority and patriarchy needs to be told, in their own voices and within their specific contexts, so that the shades of similarities and differences can become apparent and so that the historicity of the text and tradition can become manifest. However, to reduce the stories to a reductive narrative of patriarchy and androcentrism does not tell us how this patriarchy played out in practice.

VI. CONCLUSION

The selective narratives discussed above were intended to highlight two points: that all interpretation involves a politics, a discourse of power and a poetics, and a creative deployment of arguments that may not be easily distinguishable from each other. The act of interpretation is an act of power (politics) in itself; just as every act of power legitimates itself in narratives of explanation and interpretation. In modern Islam, interpretation stands at the center of all reformist, revisionist, progressive or reconstructionist projects. As our reflections on the history of legal interpretation deepen, the possibility of more complex and varied hermeneutics of both the past and present may become evident.

I have tried to argue that a concept of *maslaha* may have had an important place in Ghazali’s jurisprudence, one that later became the centerpiece of Tufi’s jurisprudence. Both *maslaha* and Tufi have existed at the margins of mainstream jurisprudence, always alerting, warning and reminding practitioners of the submerged power of interpretation itself. Haddad, Fazlur Rahman and others have advanced the emancipatory discourses for Muslim women on the grounds of public interest. Muslim modernists and even neo-traditionalists have embraced the doctrine of *maslaha* with a passion, legitimating virtually every conceivable innovation under this very broad rubric of validating practices under the doctrine of necessity (*durura*). While these measures do alleviate hardships in Muslim society, offering some emancipation (notably in the case of women’s rights) from stifling orthodoxy via new interpretations inspired by this line of reasoning, it is not an end in itself. Exclusive reliance on the doctrines of public benefit and necessity signals the end of theorizing in Islamic law, and has produced a confusing mass of rulings that can be best described as a jurisprudence of expediency. For example, there is hardly any refinement and contextualization of how the public good is defined within specific historical and political contexts. Any serious jurisprudence must situate the public good within a political economy and politics that can identify whose good and interests the law will advance. Thus, in rethinking Islamic jurisprudence in a globalized post-Islamic empire context that has nation-states, the new imperatives generated by the needs of different Muslim societies deserve serious attention.

The canonical text has to be historicized. Of course, the canonical text presents or simulates the Absolute to the subject of the law, namely the human. Discernment (*fiqh*) and insight present themselves as the discourse, which can understand, interpret, mediate or speak to that unknowable space of authority, as well as to the mundane, worldly and secular instance of the law. Indeed, the act of interpretation is related to the passion for the canonical text while the paternity of the law is derived from the existence of the canonical text (*nass*). While the canonical text mediates the Absolute, it does not mean that it should deny the temporality of the law. The earliest denial of a temporal dimension of the law was embodied in the early credo and slogan popularized in the first century of Islam and re-circulated in the discourses of Islamists in later modernity, *la hukm illa lillah*,” there is no ruling/verdict/judgment except that of God.” The object of desire mediated by the text is always an impossible and elusive one.

From the limited examples explored in this essay, it becomes clear that, in the past, the letter of the text was never self-sufficient. The bearers of the medieval tradition took great pains to demonstrate that legal commentary and interpretation depended upon a complex rhetorical and extrinsic evaluation of the text. They produced a glossatorial tradition of Islam, the writing of pithy and dense primary texts (*mutaf*) and secondary commentaries and super-commentaries. This in itself was an early experiment of inter-linear meaning, a spiritual and analogic sense of what the words harbored and veiled. In the standard protocol of medieval legal reading, it was not so much the letter but the incarnate spirit of the letter that determined the meaning of the law. The caliph Ali, and for some the imam Ali, when confronted by opponents who wished to impose on him a literalist rendition of the Qur'an, immediately retorted by saying: “the Qur'an is between the covers of the book and does not speak, it is humans that make it speak.” Here, there is a realization that a canonical text is flexible to our desires and goals. In other words, the meaning of the
law is internal to the living body of its subject; the human being, the jurist or judge, and ultimately, society.