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# THE ISLAMIC STATE AND THE QUESTION OF CHANGE IN SHARIA

MAHMOUD PARGOO\*

*This paper is a response to An-Na'im's thesis opposing the notion of the Islamic state. It begins by critiquing the premises of his arguments and goes on to propose the thesis of underdetermination of Sharia rulings by their textual sources. My main criticism of An-Na'im is that he overlooks the potential for change in Islamic law and considers it unable to accommodate new concepts of democracy, human rights, and gender equality. I argue, in contrast, that Sharia has the potential to diverge from what is considered the literal meaning of its textual sources and accommodate new theories, concepts, and values. My argument is based on a detailed exploration of the three-step exegetical procedure through which religious rulings are shaped. Throughout this procedure, there is extensive room for any jurist to insert their own personal preferences. Based on this, I conclude that sacred texts proper do not determine Islamic legal rulings and that extra-textual factors play a more important role than the text itself in determining the content of final rulings.*

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## I INTRODUCTION

In this piece, I argue against an externally imposed Western secular state for regulating the relationship between the state and religion in Muslim-majority countries as might be an implication of — at least — some statements of An-Na‘im as I would explain. Theories promoting a secular state for Muslim-majority countries generally suffer from two intertwined and mutually corroborating critical problems. First, they downplay the potential for change in Islamic law and thus consider it unable to cope with the requirements of the modern age and values like human rights and gender equality. Second, they consider secularity a context-free, ahistorical, and culturally neutral phenomenon which can be applied with minimal adjustments to non-Western societies. If horizons of change in Islamic law and in the more general realm of Islamic *Weltanschauung* are considered to be so narrow and limited as to not allow for the incorporation of modern values, then one is likely to look for alternative options which are external to the traditional Islamic framework. On the other hand, if one holds that the secular state is so neutral and universal that it can be applied to any society, European or not, then one is more likely to look for external solutions for regulating the relationship between the state and religion. I criticise the theory of separation in its first pillar by showing how Sharia has systematically devised dynamisms of change over its long evolution. This means that the traditional framework has the capacity to

incorporate modern values. I will propose a theory of underdetermination of religious rulings by sacred texts, by which I mean that the text in itself is not sufficient for a jurist to derive a Sharia ruling, and that there are many other factors involved in the process which are irrelevant to the literal meaning of the text. The second pillar has been discussed in detail by others and I will not touch upon it in this paper.<sup>1</sup>

I will begin by investigating An-Na'im's theory of the secular state, as elaborated in his *Islam and the Secular State*.<sup>2</sup> I argue that An-Na'im downplays the potential for change in Sharia and explain how jurists have coped with change in a systematic way through a three-stage conceptual apparatus within traditional legal theory. The general conclusion is that since the Law is capacious and has flexible methodological tools, and because imposing an external value framework is not viable in Islamic countries, it is theoretically more consistent and pragmatically more viable to implement an internally developed theory of the state which is responsive to modern values as well as fundamental Islamic values.

## II AN-NA'IM'S THEORY OF THE SECULAR STATE

An-Na'im argues for the secular state and against the Islamic state and the implementation of Sharia as a positive law of the state. His principal argument is that Sharia is, in essence, a voluntary individual task of all Muslims which should be practised as a religious obligation and that this is not compatible with its implementation by the state: 'By its nature and purpose, Sharia can only be freely observed by believers; its principles lose their religious authority and value when enforced by the state'.<sup>3</sup> He also states that since the knowledge and implementation of Sharia is possible only through human agency, it cannot be regarded as God's rule.<sup>4</sup> Furthermore, if we accept the implementation of Sharia, there would emerge such unsolvable problems as the *dhimma* religious tax and gender equality, which are neither acceptable nor implementable within the current nation-state political structure. These problematic areas within

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<sup>1</sup> See, eg, Talal Asad, *Formations of the secular: Christianity, Islam, modernity* (Stanford University Press, 2003); José Casanova, *Public religions in the modern world* (University of Chicago Press, 2011); Saba Mahmood, *Religion Difference in a Secular Age: A Minority Report* (Princeton University Press, 2016) 212.

<sup>2</sup> Abdullahi Ahmed An-Na'im, *Islam and the secular state: Negotiating the future of Sharia* (Harvard University Press, 2009).

<sup>3</sup> Ibid 4.

<sup>4</sup> Ibid 20.

Sharia are so strongly supported through many of its passages that changing them is almost impossible within the traditional legal framework.

An-Na'im alludes to the difference between the traditional minimal state and the centralised, bureaucratic, and powerful modern state and explains why Muslims should not expect Sharia to be implemented in the modern state as it was in the imperial states in the past. However, he passes without further elaboration over this significant point.<sup>5</sup> He then proceeds to show that religious and state authorities have always been separate over the history of Islam and the example of the Prophet should not be extended to others. '[R]eligious leaders achieve recognition among believers because of their piety and their knowledge, which can be determined only by the private judgment of individual persons, who need to get to know potential religious leaders through daily interactions.'<sup>6</sup> While the political leaders have always derived their authority from their political or military skills, which were at times immoral, as the very practice of politics tends towards immorality and corruption. This is An-Na'im's objection to the model of complete conflation of political and religious authorities, derived from his examination of the Mamluk and Fatimid dynasties as evidence for his argument.

An-Na'im, however, admits that "the religious neutrality of the state" should not be interpreted as the separation between Islam and politics. The call for a secular state is not equal to the call for the secularisation of the society. Islam can remain within the spheres of public policy and legislation, but advocates of this should debate in the public sphere with civic reasoning instead of religious reasoning because '[w]hen the policy or

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<sup>5</sup> Ibid 46, 86–7, 125, 285. In my view, the main reason behind all of the problems with the implementation of Sharia and the zeal of the Islamic state is this changing role of the state. The traditional state was only a military unit at best without any cultural, judiciary, or religious policy making-powers, in which much of society's educational functions were delivered by religious institutions. The judiciary was fully provided by the religious institutes, and though heads of states had remarkable political influence on the judiciary, this did not mean that different schools of law were imposed upon people when the religious affiliation of the king and the people were different. Even in cases like the Shiite Fatimid kings who held majority rule in Sunni Egypt, the judiciary kept its doctrinal independence from the rulers and the Law was implemented according to the people's dominant legal school, as is attested at 72. Likewise, trade and business was regulated by people themselves according to their beliefs. There was no state intervention, regulation, or policy making. The state functioned more like a big security farm with minimum intervention in other aspects of life. The modern state, in contrast, intervenes in and regulates almost all facets of private and public life including education, healthcare, family, and many other areas. The surge of Islamism in the 20th century, I suggest, should be seen as a form of resistance to this sweeping intervention of the state, which has never been religiously neutral but rather essentially Western in even the most Islamic states implemented. Detailed consideration of this, however, falls outside the scope of this essay.

<sup>6</sup> Ibid 51.

law is presented as mandated by the “divine will of God,” it is difficult for the general population to oppose or resist it.<sup>7</sup> But, An-Na‘im affirms that the very principles and institutions of constitutionalism and equal human rights for all citizens have to be justified and internalised for all people using religious reasoning, since the lack of such internal validity may result in resistance to the whole system.

The main problem with An-Na‘im’s *Islam and the Secular State* is the ambiguity of its core concepts, such as the secular state, Islamic state, and Sharia. Sometimes, he hails the secular state since it helps one to be a ‘Muslim by conviction and free choice,’<sup>8</sup> though sometimes he denounces the *coercive* implementation of Sharia as an argument against it.<sup>9</sup> He allocates almost an entire chapter of the book to proving that there once was a separation between the religious authority and the state authority (the so-called men of faith and men of administration) in the Umayyad, Abbasid, Mamluk, and Fatimid dynasties. This distinction is then used as an argument for secularism, but one needs to notice the fact that all advocates of the implementation of Sharia do not believe in the full conflation of the state and religion. There are diverse models of an Islamic state put forward by different scholars which do not require the full conflation of the state and religion. For example, the model of Ayatollah Khomeini in Iran is very different from the Islamic state as is conceived by Saudi muftis in which there is no need for conflation.

As An-Na‘im has not precisely demarcated the core concepts of his theory, it is difficult to distinguish exactly what he defends and what he objects to. The Islamic state is often equated with any state in which Sharia (no matter how loosely and partially) is implemented,<sup>10</sup> and sometimes as a state in which there is total conflation of religion and the state, exemplified in the teachings of the Prophet Muhammad.<sup>11</sup> Therefore, An-Na‘im’s primary goal of defending the secular state turns out to be a full-fledged opposition against the enforcement of Sharia, which he considers coercive. When it comes to Sharia in An-Na‘im’s book, we are faced with an essentialist, solid set of unchangeable religious rulings throughout the entire Islamic world. Considering An-Na‘im’s objections, one may reconstruct his understanding of Islamic state as a fierce

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<sup>7</sup> Ibid 29.

<sup>8</sup> Ibid 1–4, 268.

<sup>9</sup> Ibid 4, 278.

<sup>10</sup> Ibid 7.

<sup>11</sup> Ibid 52–53.



and coercive implementation of a Salafi — a narrow-minded and immutable reading of Sharia by a despot ruler-jurist. This is how a typical extremist group like ISIS may portray the true Islamic state. But criticising this weak, indefensible, and maximalist version of the Islamic state does not rule out other intelligible, minimalist, and conventional theories of the Islamic state.

Some of An-Na‘im’s objections to the notion of the Islamic state or the implementation of Sharia seem to be objections or challenges to all other theories of the state as well. For example, An-Na‘im claims that since Sharia is so diverse and each group of people believes in a different Sharia legal school,<sup>12</sup> choosing one school over many others would be a problem because whichever school is selected, it would not be representative of the adherents of the other schools. To demonstrate how this argument is a drawback for all political systems and not specifically for the Islamic state, I quote An-Na‘im in sentence 1 below, and then substitute “Islamic” with “democratic” to produce sentence 2. One can realise that substituting “Islam” with “democracy” does not change the validity of the sentence.

Sentence 1 (An-Na‘im’s sentence):

- ‘Given the realities of inevitable individual variations in the comprehension and realization of *Islamic* values, why should some of them constitute the *Islamic* basis of the state to the exclusion of others?’<sup>13</sup>

Sentence 2 (“Islamic” substituted with “democratic”):

- Given the realities of inevitable individual variations in the comprehension and realization of *democratic* values, why should some of them constitute the *democratic* basis of the state to the exclusion of others?

A similar comparison can be made using An-Na‘im’s argument in sentence 3:

- ‘When the policy or law is presented as mandated by the “*divine will of God*,” it is difficult for the general population to oppose or resist it’.<sup>14</sup>

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<sup>12</sup> There are four major Sunni schools of law as well as some other schools with minor followers. Shi’ites also have different schools including the majority Ja‘farī school, predominant in Iran, Iraq, and Lebanon and some other schools with less followers than the latter.

<sup>13</sup> An-Na‘im above n 2, 52-53.

New sentence produced by substituting *divine will of God* with *divine will of the people*:

- ❖ When the policy or law is presented as mandated by the “*divine will of the people*,” it is difficult for the general population to oppose or resist it.

This shows that those arguments, even if valid or sound, are a problem for all political systems, not merely for the Islamic state.<sup>15</sup> In a secular democracy too, people who are not able to create a political party are not represented in government, and those who are against the very framework of democracy are not represented within the political system at all. So, these could be in all systems and are not exclusively a problem for Islamic state.

In another case, An-Na‘im argues that since political groups often promote their interests in the name of implementing Sharia,<sup>16</sup> Sharia should therefore be abandoned. But again, this is a general problem with all political systems in which some people claim a monopoly on generally accepted values like freedom, liberty, and justice while accusing others of lacking in them. This does not mean that those values should be abandoned. The fact of violation of basic human rights (consider the Guantanamo torture scandal) by the very countries that consider human rights as the cornerstone of their legitimacy does not justify repudiation of the notion of human rights. Sharia, human rights, and other notions should be evaluated on their own terms rather than by looking at those who misuse them.

### III MU‘AMALAT AND ‘IBADAT

An-Na‘im’s key objection to the Islamic state and the implementation of Sharia is that being a ‘Muslim by conviction and free choice’ requires a secular state because if Sharia is enforced by the state then its practice is not voluntary and hence not Islamic.<sup>17</sup> Because all practices of Sharia should be voluntary, ‘claiming to enforce Sharia principles as state law is a logical contradiction’.<sup>18</sup> This argument is repeated several times in the book and is considered the canonical argument of the book: ‘Religious compliance must

<sup>14</sup> Ibid 29.

<sup>15</sup> See Ibid 284–285 for similar arguments.

<sup>16</sup> Ibid 26, 34, 79.

<sup>17</sup> Ibid 1.

<sup>18</sup> Ibid 2.

be completely voluntary according to personal pious intention (*niyah*), which is necessarily invalidated by coercive enforcement of those obligations'.<sup>19</sup>

But this argument is based on a very simple yet plainly false presupposition: that *all* Sharia practices should be voluntary and performed only for the sake of God, as An-Na'im has clearly asserted:

The essentially religious nature of Sharia and its focus on regulating the relationship between God and human believers mean that believers can neither abdicate nor delegate their responsibility. No human institution can be religious in this sense, even when it claims to apply or enforce principles of Sharia. In other words, the state and all its institutions are by definition secular and not religious, regardless of claims to the contrary.<sup>20</sup>

This is simply not the case. Sharia rulings fall into two parts: firstly, the personal and private part for regulating the relationship between the individual and God (worship, ritual acts or *'ibadat*), such as rules governing daily prayers, fasting and other rituals. Secondly, the other part for regulating the relationships between people, state, groups and so on, including profane activity, social acts, practical matters or *mu'amalat*.<sup>21</sup> In the traditional books of Sharia, four differences are mentioned between *'ibadat* and *mu'amalat*. First, the ultimate goal of *'ibadat* is approximation to God, fulfilling his orders and guaranteeing compensation in paradise, while the ultimate goal of *mu'amalat* is the realisation of a worldly end or the regulation of relationships between individuals or groups. Second, the specific reasons or ends behind *'ibadat* are unknown for humans. They are as they are and humans should practice them according to the Law. Nobody knows why the Dawn Prayer is performed in this or that specific form or why one has to go on their pilgrimage to Mecca only at a specified time of the year. In *mu'amalat*, however, generally the *ratio legis* behind a ruling is known to our reason. Third, *'ibadat* is to be accomplished for the sake of God (intentionality), while in *mu'amalat*, the accomplishment of the practice is not predicated on intending it for the sake of God; what is important is to observe the Law. Imagine the difference between a prayer and

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<sup>19</sup> Ibid 4.

<sup>20</sup> Ibid 15.

<sup>21</sup> A Kevin Reinhart, 'Ritual Action and Practical Action: The Incomprehensibility of Muslim Devotional Action' in A Kevin Reinhart and Robert Gleave (eds), *Islamic Law in Theory: Studies on Jurisprudence in Honor of Bernard Weiss* (Brill, 2014) 37, 55.

some business contract: with the latter there is no requirement to perform the practice for the sake of God, while the former is acceptable only if performed for the sake of God. The fourth difference, according to some schools, is that the default in *mu'amalat* is lawfulness, unless one can find a relevant ruling within Sharia.<sup>22</sup> Summing up, intentionality (performing an act for the sake of God) is not a precondition for *mu'amalat*. This means An-Na'im's argument against the Islamic state is not relevant here. Sharia is not mainly about belief or disbelief; at least parts of Sharia are positive law, just like other laws.<sup>23</sup>

#### IV AN-NA'IM'S SALAFI UNDERSTANDING OF ISLAMIC LAW

As mentioned earlier, one reason behind proposing alternative, external frameworks of reform could originate in a failure to acknowledge the mechanisms of change in the Law. This, in turn, could be the result of subscribing to a specific school of Law which renders all other unorthodox legal interpretations illegitimate. In other words, according to some legal views, the legitimate boundaries of legal variations are so narrow and limited that any interpretation outside the demarcated area is conceived heretic. Thus, the more firmly one subscribes to a Salafist understanding of Sharia (which allows for very limited possibilities for change), the more inflexible would be one's conception of Sharia, and hence, the more one would be inclined to offer external solutions for the Islamic state dilemma. Thus, it is of utmost importance to make it clear at the outset which jurisprudential school or theory one chooses as one's basis in the legal theory. What makes An-Na'im different from scholars who insist on the possibility of an Islamic state while being able to incorporate notions like human rights and women's equality is their understanding of the capabilities of Islamic law and legal theory. Therefore, disagreements should be negotiated at a more fundamental level (i.e. within legal

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<sup>22</sup> See, eg, Tabet Koraytem, 'Two Surprising Aspects of Islamic Saudi Liberalism in Public and Private Law' (2013) 27(1) *Arab Law Quarterly* 87. Koraytem explores how adoption by Saudi Arabia of the principle of the distinction between *mu'amalat* and *'ibadat* and the primary principle of the lawfulness of the former is changing Saudi laws and introduces more liberal elements into it. The distinction is traced back to the second century of Islam and is considered among hadith scholars to be well established, when the word *Shari'a* primarily meant ritual parts of the religion (see 55–104 for more important notions of irrationality about the rituals as against *mu'amalat*).

<sup>23</sup> Shalakany criticises the Western scholarship of the Islamic law because it limits the law to Sharia while it has constituted only a small portion of the laws being executed in many Muslim territories. So, other laws including customary ('c whil laws and administrative laws (*siyāsa*) of the states are put outside of the historical researches in the West (see Amr A Shalakany, 'Islamic legal histories' (2008) 1 *Berkeley Journal of Middle Eastern & Islamic Law* 1).

theory). Logically, if one chooses Western values as one's fundamental rational framework and, in addition, one believes that the capacities of the Law for change are limited, then one inevitably would suggest an external framework. It is worth noting, however, that this does not mean that An-Na'im is Salafi but rather that the arguments he puts forward run against a Salafist reading of Sharia.

The fact that An-Na'im views Sharia from a highly Salafist point of view can be vindicated by his attempt to illustrate how human agency is involved in the process of jurisprudence. He is, in fact, responding to an entirely Salafist objection which is not shared by the majority of classical or modern jurists. In contrast, the involvement of human agency in the process of the Law is acknowledged in the body of classical jurisprudence wherein can be found an interesting controversy which basically relates to the humane nature of the practice of *ijtihad*. It runs like this: if jurisprudence is a humane activity and thus is exposed to error and mistake, a jurist might be correct in his endeavour and discover the true ruling of God or he might make a mistake and issue an incorrect *fatwa* (legal opinion). The majority of jurists admitted that the very act of *ijtihad* carried out by a qualified scholar (*mujtahid*) for discovering the sacred ruling is sufficient for the performance of religious duty and whatever ruling is reached should be applied. There is not a separate true ruling of God distinct from that the *mujtahid* has obtained.<sup>24</sup> The minority position, however, is that there is always a true ruling of God and the jurist may or may not reach this ruling. The majority of Muslim jurists believed that God's ruling is the same ruling as the one the jurist derives from the sources using a sound methodology.<sup>25</sup> Viewed from a different perspective, this means that laws in themselves do not carry essential good or evil properties; what is important is that humans do *ijtihad* for the sake of God and using its due methodology.<sup>26</sup> But what is important here is that the very existence of this debate within Islamic law demonstrates that jurists were fully aware of and acknowledged the role of human agency in the process of making laws. This is against An-Na'im's emphasis that implementation of Sharia contradicts human agency as the prerequisite of Sharia.

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<sup>24</sup> This position was called *taswib* as against *takhtae*.

<sup>25</sup> For more details, see Joseph Lowry, 'Is There Something Postmodern about Uṣūl Al-Fiqh? Ijmā', Constraint, and Interpretive Communities' in A Kevin Reinhart and Robert Gleave (eds), *Islamic Law in Theory* (Brill, 2014) 37, 283 (Lowry discusses the similarities between the pre-modern Islamic legal theory and the postmodern philosophy of law).

<sup>26</sup> The majority of Asharites believe in *taswib* in the Islamic law, as opposed to the consensus among Imamites and Mu'tazilites, who believe in the *takhtae*.

As mentioned earlier, part of what leads An-Na'im to such views about Islamic law is his view of it as fixed and essentialist. Because An-Na'im considers that Islamic law is unable to cope with the requirements of change and is fully pessimistic about its capacities, he believes there is a need to go around it and initiate political reform from scratch. He mentions several times that many reforms like women's rights, human rights, and non-Muslim rights cannot be solved from within the traditional apparatus of Islamic law. Even such measures as the *maslaha* (public benefit) and *maqasid* (higher objectives) apparatus,<sup>27</sup> he suggests, are not enough to establish a completely indigenous Islamic but democratic framework for politics.<sup>28</sup> Once again, one can see how downplaying the potential for change within the traditional framework can result in proposing alternative, non-indigenous frameworks.

I argue against this, proposing that reform within the traditional jurisprudential methodology is possible. I begin with one of the most difficult cases in terms of Sharia being considered immutable, fixed and unchangeable, the case of *nass* (text), showing how it once was subject to constant change. I outline a systematic procedure contained within legal methodology, which is designed to facilitate modifications in interpretations of text.

Ambiguities continue to be widespread in the concepts of religious neutrality of secularism and related concepts in An-Na'im's theory. One cannot understand, based on An-Na'im's book, why civic reasoning is vested with great value while faith-based reasoning is relegated outside of public debate. Why is secularism seen as a context-free, ahistorical, and neutral notion that is applicable to all human societies? There is still less

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<sup>27</sup> An-Na'im, above n 2.

<sup>28</sup> Ibid 109. For example, he asserts that:

verse 4:34 of the Qur'an has been taken to establish a general principle of men's guardianship (*qawama*) of women, thereby denying women the right to hold any public office involving the exercise of authority over men (Ali 2000, 256–263). While jurists differ on a range of relevant issues, none of them would grant women equality with men in this regard. This general principle is applied in interpreting, and is reinforced by, various specific verses that apparently grant women unequal rights compared to those of men regarding marriage, divorce, inheritance, and related matters.

We may also consider his view on inapplicability of *maqasid*: 'But the problem with this view is that the so-called basic objectives of Shari'a are expressed at such a high level of abstraction that they are neither distinctly Islamic nor sufficiently specific for the purposes of public policy and legislation' (35). Several exegetical works by Islamic feminists indicates the capacity of these apparatus as regards the verse in question above. See, eg, Amina Wadud, *Qur'an and woman: Rereading the sacred text from a woman's perspective* (Oxford University Press, 1999); Aysha A Hidayatullah, *Feminist Edges of the Qur'an* (Oxford University Press, 2014).

said about how — and under which conditions — an imagined difference between an Islamic society and its Western counterpart would be regarded as legitimate and thus allowed to exist and be implemented. What are the criteria used to highlight the problematic parts of Sharia, and thus explain it away in favour of a relevant Western law? Or, to ask frankly: what is Islamic at all if every substantive difference with the West is going to be interpreted away in favour of the latter?

I suppose An-Na'im's call for democracy, human rights, and constitutionalism to be a reactionary call to homogenisation and assimilation out of the pragmatic inevitability and domination of the West rather than a genuine endeavour (Islamic in its origin and its ends) to solve an Islamic dilemma. To put it more clearly, his primary framework of value is a Western one and he tries to incorporate Islam into that Western frame. This is different from a Muslim who tries to tackle the issue of Western values; and here arises the problem of fundamental commitment: what are one's basic fundamental values or beliefs for which one is willing to sacrifice all other ones? This makes a discourse a genuine Islamic or a pure Western one. This fundamental question remains untapped throughout the book.

Any theory trying to solve the problem of friction between Western and Islamic values should answer this fundamental question: where and under which conditions should a Western value be rejected? In what situation exactly may one say *no*? What exactly distinguishes you from the West if you are going to assimilate everything Western?

To understand this, it may serve to explore more deeply the example of banking interest (usury or *riba*) highlighted in An-Na'im's book.<sup>29</sup> Usury, according to some verses of the Qur'an, is prohibited. Many Islamic scholars have tried to contextualise this issue historically and uncover the rationale behind this ruling. One view is that usury is illegal, according to Sharia, in order to prevent class differences. Instead, there are other business contracts allowed under Sharia, which allow the possibility of financial investment while prohibiting it whenever it becomes a unilateral moneymaking machine. For example, in the contract of *mudharaba*, one party provides capital and the other brings in labour, expertise, and entrepreneurship with the profit or loss shared as agreed. The difference is that with usury, whatever the outcome of the business, the

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<sup>29</sup> An-Na'im, above n 2.

party providing the labour has to pay the interest; while with *mudharaba*, if the business is successful, both parties benefit from it, and if not, the labour party is not forced to pay anything to the capital owner. Thus, the prohibition of usury was primarily about social justice and avoiding the imbalanced accumulation of wealth in the hands of a minority of rich people.<sup>30</sup>

One may wonder why An-Na'im so easily accepts usury as a universally rational practice which should be adopted by the state as a basis for its financial and monetary structure, while other forms of financial settings should go private. What makes the current Western banking system so appealing other than its hegemony and domination?

One may go deep into Sharia, find the reasons and goals behind such prohibitions and defend them based on those rationales, and thus resist the mainstream financial world order. On the other hand, one may merely accept and assimilate the current dominant institutions. These are two different approaches at two extremes: resistance vs assimilation.

All cultures, ideologies, and belief systems (including Islam) need to go back to their traditions and return with something critically innovative rather than surrendering to Western hegemony and giving up all their points of difference. The world is in need of novel ideas and insights from different traditions and the capacity to resist this terrible capitalist world order rather than succumb to compromise and assimilation. There may be a contradiction between an Islamic insight and "premises of modernity", but in fact, that is what "genuine cosmopolitanism" does mean; as Mehta has suggested: 'any genuine cosmopolitanism will have to allow the serious possibility of complicating, if not outright questioning, the premises of modernity itself. If these premises are not allowed to be questioned, then the demand for reflection becomes a trap. It obligates one to conform to what are, in effect, particular views of the world'.<sup>31</sup>

One problem with An-Na'im's proposed secularity is that it makes personal integrity almost impossible for a believing Muslim individual by making multiple commitments for him: a secular commitment in the public sphere and an individual commitment for

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<sup>30</sup> Mallat, in a similar approach on usury in Islamic law, explores the subject in depth from a Shi'ite perspective (Chibli Mallat, *The Renewal of Islamic Law: Muhammad Baqer as-Sadr, Najaf and the Shi'i International* (Cambridge University Press, 2003) 29, 158).

<sup>31</sup> Pratap Bhanu Mehta, 'Cosmopolitanism and the Circle of Reason' (2000) 28(5) *Political Theory* 619, 634.



his private belief. This is not tenable. An-Na'im imposes a law from outside people's normative system and even if such a secular system becomes established, people will not hold on to it because of the internal inconsistencies.

#### V UNDERDETERMINATION THEORY

As mentioned earlier, the failure to acknowledge the dynamisms of change in legal theory results in denying the possibility of such change in the future; thus, suggesting alternative ways of reform rather than an internal, genuine, indigenous one.

The view that Islamic law has been resistant to change and impotent to comply with conventional rationality is limited, incomprehensive, and idiosyncratic. Islamic law has changed on a par with the dominant rationality of the time. An-Na'im claims that *ijtihad* is allowed only if it is exercised 'in matters that are not governed by the categorical texts (*nass qatt'i*) of the Qur'an and Sunna'.<sup>32</sup> It entails that radical change is impossible because *ijtihad* is not allowed in regards to certain key problems which are supported by categorical texts. Investigation of the history of Islamic law points to the contrary. Abundant cases of extreme divergences from the literal, conventional, and apparent meanings of holy texts vindicate this reality. Jurists, like all other people, hold a repertoire of beliefs, only a small part of which is the literal meaning of the texts. So, when any conflict arises between a literal meaning of a text and the other beliefs of a jurist, it is not necessarily the latter which gets left behind; in many cases the former is given up. When a new belief enters into one's web of beliefs, it may result in inconsistencies, which require a response from the agent to resolve the tensions in a way that does the minimum possible harm to the other beliefs. All beliefs do not have the same epistemological weight, and thus it is important in such epistemic operations of conflict resolution to be attentive to the weight of each belief. The literal meaning of the text has been only one of many beliefs held by the traditional jurist. Though this belief was significant and central, it was not unalterable when a set of other important beliefs was at stake. Consider the example of early theological debates about the material transcendence of God. In spite of numerous instances of references to a personal and material God in the Qur'an, a majority of theologians did not take those verses at their face value but rather interpreted them away using this or that hermeneutical ploy. When

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<sup>32</sup> An-Na'im, above n 2, 13

the very intelligibility of the system is at stake, interpreting away a few verses of the Qur'an is not catastrophic. This has happened a myriad of times throughout history. To cope with such situations, jurists have devised a very sophisticated hermeneutical apparatus to enable them to rule out problematic elements in a legitimate way. The process of *ijtihad* (derivation of a ruling from different sources of the Law) is in itself a kind of theory of reconciliation between religious texts and many other beliefs held by a jurist. Texts in themselves do not dictate this or that specific ruling; rather, there are many other social, cultural, and philosophical backgrounds that fix or determine the ruling.

Inspired by a similar discussion in philosophy of science, I am proposing underdetermination of jurisprudential rulings by their textual sources — that textual sources are insufficient to determine what rulings a jurist should derive out of them. Quine writes in the same spirit with his *two dogmas*:

The totality of our so-called knowledge or beliefs, from the most casual matters of geography and history to the profoundest laws of atomic physics or even of pure mathematics and logic, is a man-made fabric which impinges on experience only along the edges. Or, to change the figure, total science is like a field of force whose boundary conditions are experience. A conflict with experience at the periphery occasions readjustments in the interior of the field. ... But the total field is so underdetermined by its boundary conditions, experience, that there is much latitude of choice as to what statements to re-evaluate in the light of any single contrary experience. No particular experiences are linked with any particular statements in the interior of the field, except indirectly through considerations of equilibrium affecting the field as a whole.<sup>33</sup>

Similarly, the exploration of Islamic legal theory shows that no particular text determines any particular ruling in isolation from other background knowledge. Viewed with this holistic approach, a single mismatch between a verse and a ruling is not enough to rule it out as illegitimate: it is only one of the factors against which we are evaluating our legal rulings.

If one realises that there is an inconsistency between one's belief about gender equality and one's belief about the validity of a hadith or verse in the Qur'an denoting the

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<sup>33</sup> Willard V Quine, 'Main trends in recent philosophy: Two dogmas of empiricism' (1951) *The philosophical review* 20, 39–40.

contrary, one can revise the former to resolve the conflict; however, if that belief is so central that dismissing it may put the very framework of rationality at stake, then there is an option of dismissing the validity of the hadith. Interestingly enough, disqualifying a hadith will not render you a heretic or apostate; rather, it will be considered only an intra-legal view. Thus, what is important is to make the web of beliefs consistent.

As I shall elaborate, if ever such an inconsistency occurs in the web of beliefs of a jurist, the methodological apparatus to get rid of problematic elements (be it an authentic text, a consensus on a ruling or whatever else) is abundant. To put it very simply, any problematic pieces of the scripture can be neglected or overlooked in the process of *ijtihad* in three different stages. First, its very authenticity may be questioned by casting doubt on its chains of transmission and narration or (in the case of the Qur'an) by resorting to the theory of abrogation. Second, if any text passes the first stage and qualifies as a source of Law, then there is a chance of word-level semantic analysis and pragmatics to find alternative meanings for it or interpret away its literal, apparent, and conventional meaning. And third, if the text is still strong enough to pass through and reach the next stage, there are other options available: to explain away the text at the expense of the spirit of the law or its ultimate goals.

#### VI THREE-STAGE CONFLICT RESOLUTION APPARATUS

As I will discuss, unlike the belief held by An-Na'im, *ijtihad* has been a holistic hermeneutical practice in which literal meaning is only one element among others. It could have been explained away if preserving it would have cost the system more expenses than more gains. Of course, the weight of literal meaning varies from one scholar to the other, but in general, text is not the only governing rule in *ijtihad*.

The divergence from literal meaning was justified with different explanations: sometimes a specific verse was deemed to be against a self-evident rational principle; at other times a literal reading of the Qur'an was resisted since it was perceived to contradict certain "definite" theological principles; and sometimes it was not accepted because its practice was considered to be too demanding and beyond the capacity of ordinary believers. Whatever the reason, there have always been strategies to explain away the literal meaning of a text in favour of what seemed more consistent with the

web of belief of the community at the time.<sup>34</sup> There are several other Islamic disciplines in which one can trace these strategies of holistic conflict resolution against literal meaning, but the core idea of this research is to explore it merely within Islamic legal theory (*usul al-fiqh*) according to mainstream Sunni legal jurisprudence.

## VII THE EVOLUTION OF THE TEXT IN ANCIENT ARABIA

The view that a text itself, isolated from the context of its utterance, has a clear, uncontested, and objective meaning is controversial.<sup>35</sup> In many of the cases, there exist various layers of meaning for a certain word or phrase and different people from different geographical locations have different understandings of the same passage. To have a better view of this, in the context of Islamic law, a brief exposition of the early evolution of the Islamic law should prove helpful.

Before Islam, the Bedouin and sedentary tribes of the Arabian Peninsula were governed by customary law, which although scant in written form, comprised complex procedures and nuances;<sup>36</sup> but, lacked any specific administrative body to establish laws or enforce it.<sup>37</sup> Later on, with Medinans embracing Muhammad as the Prophet and arbitrator (as was the role of soothsayers in ancient Arabia) of the disputes they had before, the Qur'an replaced customary tribal laws as the governing legislating source.<sup>38</sup> The worldly arbitrator became a divine lawgiver, whose rulings were to be abided by religious duty. Thus, the Prophet and the governor became united in a single man and it became difficult to separate out two different deeds of the man; those that stemmed from him as a prophet in a divine role and those as mundane everyday statesmanship. It can be argued that had the Prophet not migrated to Medina as a head of state and stayed in

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<sup>34</sup> I use the term *web of belief* in its precise Quinian context. See Willard Van Orman Quine and Joseph Silbert Ullian, *The web of belief* (Random House New York, 1978) 2. For example, Shi'ites got the Q 9:28 (truly, the idolaters are unclean) for its face value thus adopted the view of ritual impurity of the non-believers while Sunnis explained away this verse by several interpretational ploys and adopted the absolute purity of the human kind. See Ze'ev Maghen, 'Strangers and Brothers: The Ritual Status of Unbelievers in Islamic Jurisprudence' (2006) 12(2) *Medieval Encounters* 173; A Kevin Reinhart, 'Impurity/no danger' (1990) 30(1) *History of Religions* 1; Marion Holmes Katz, *Body of text: the emergence of the Sunni law of ritual purity* (SUNY Press, 2012). There are a huge number of other occasions in which what appears as the categorical meaning of the text at question is explained away and another meaning is adopted.

<sup>35</sup> See Robert Gleave, *Islam and literalism: literal meaning and interpretation in Islamic legal theory* (Oxford University Press, 2012) for a brief discussion of the philosophical debates about literal meaning.

<sup>36</sup> Joseph Schacht, *An introduction to Islamic law* (Clarendon Press Oxford, 1964).

<sup>37</sup> Noel James Coulson, *A history of Islamic law* (AldineTransaction, 2011).

<sup>38</sup> *Ibid* 11.

Mecca as merely a spiritual leader, the course of events would have been entirely different; maybe there would be no divine law as it exists today. The Sharia is a result of the coincidence of prophethood and statesmanship in one man. The scant distribution of legal verses in the Qur'an (80 verses as compared to 6000 with 500 of them dealing with rituals like prayers, fasting, and pilgrimage), as well as Sharia's ad hoc approach to them rather than dealing with them in a comprehensive systematic manner shows how this has been the case.<sup>39</sup> This gave the Qur'an a unique status as the source of the Law. On the issues where the Qur'an was silent, however, the customary laws were considered valid as far as they were not expressly changed by the Prophet.<sup>40</sup> However, the whole conceptual turn was of utmost significance; that the law should be decreed by God. Customary pre-Islamic law, however, continued to exist decades after the Prophet and into the conquest period.<sup>41</sup> With the coming to centre of the Qur'an as the primary source of the law, attention was paid to its collection. While it was originally oral and memorised by its reciters, by the time of third caliph Uthman (23-35 AH), the Qur'an was collected and codified, although there are several other variants available which are considered valid and canonical as well.<sup>42</sup> And so, a text formed which was deemed to be the ultimate source of the law.

The tensions between textualists and their opponents may be traced back to the Senior and Junior (*Kibar* and *Siqar*) Companions and later on between the pros and cons of Qur'anic interpretation. The Senior Companions believed that the Qur'an, by itself, is evident enough and there is no need for exegesis, while the Junior Companions considered exegesis as necessary to understand the text. Beginning with the rule of the third caliph, two groups of Muslims, the reciters of the Qur'an and the interpreters of the Qur'an, stood in opposition to one another, and each associated with different geographical, tribal and political tendencies.<sup>43</sup> This shows how deep and longstanding the split between the textualists and the rationalists has been. As Pakatchi has demonstrated, these tendencies were more a result of political, economic, and tribal

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<sup>39</sup> Ibid 13; Wael B Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh* (Cambridge University Press, 1999).

<sup>40</sup> Coulson, above n 37; Hallaq, above n 39.

<sup>41</sup> Hallaq, above n 39.

<sup>42</sup> Fred M Donner, 'The historical context' in Jane Dammen McAuliffe (ed), *The Cambridge Companion to the Qur'an* (Cambridge University Press, 2007) 23.

<sup>43</sup> Ahmad Pakatchi, *tarikhe tafsire Qur'ane karim* [The History of the Qur'an Exegesis] (Imam Sadiq University Press, 2011).

rivalries than pure theological or theoretical disputes.<sup>44</sup> The *Kharijites* started their rebellion and schism in the same period.

With the Muslim conquests and the incorporation of people with very diverse cultural and religious backgrounds into the Islamic empire, new legal problems faced ruling, which were not expressly addressed in the Qur'an or in Arabian customary laws. The first four caliphs considered themselves the legitimate interpreters of the Qur'an and the holders of the powers of positive legislation,<sup>45</sup> although, others known for piety had the right to have a say in disputes. At times, caliphs even sought their advice on legal issues as well.<sup>46</sup> By the demise of the caliphs and the start of the Umayyad dynasty, the need for a more authentic source of Law emerged and the Sunna of the Prophet started to gain attention and orally transmitted reports written down. The first Sunna reports date back to the first century of Islam,<sup>47</sup> although there are scholars like Schacht who believe it to be a few decades later than that.<sup>48</sup> The text solidified and became more canonised, replacing the *ra'y*, which was more rational legal activity. This was opposed to textual legal reasoning as a response to Umar II's emphasis on Prophetic traditions in legislation rather than *ra'y*.<sup>49</sup> Decades later, Al-Shafi'i (d. 820) in his *Risalah*, theorised the Sunna as the source of the Law; much the same as the Qur'an and regulated its conditions of validity and scope of applicability. His aim was reconciliation between extreme rationalists under the influence of *Mu'tazilites* and textualists who emphasised the hadith. Al-Shafi'i accomplished this by regulating two different realms: Sunna as the traditionalist textualist source and *ijtihad* or *qiyas* as the rationalist source of the Law.<sup>50</sup> So from the beginning there was awareness of the balance between the blind text and human agency, understanding it through independent rational procedures. Al-Shafi'i established formal legal theory and inserted a few presuppositions into it that remained unquestioned for the centuries to come: 'law must be exclusively derived from revealed scripture.'<sup>51</sup> This leaves no room for independent reasoning while harnessing it to the scripture as in *qiyas*. He consolidated the rule of the Sunna as the second most important

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<sup>44</sup> Ibid 72–60.

<sup>45</sup> Coulson, above n 37.

<sup>46</sup> Ibid 25.

<sup>47</sup> Hallaq, above n 39.

<sup>48</sup> Schacht, above n 36.

<sup>49</sup> Hallaq, above n 39.

<sup>50</sup> Ibid 18.

<sup>51</sup> Ibid 30.

source of the Law and justified this using evidence from the Qur'an. He believed that legal theory itself should be supported and even deduced from the Qur'an. This gave his theories a more religious colouring. This was the beginning of a full-fledged theory of text.<sup>52</sup>

In ancient Arabia, with the absence of any standard language, any written grammar, spelling or pronunciation, or worse, any standardised codification rules, the problem was even deeper. There were linguistic differences between the southern and northern parts of Arabia as well as between the northern tribes themselves. The abundance of reports from the first century of people asking for the meanings of Qur'anic phrases confirm that "text" — as we understand it today — could not have had the same function in first century Arabia.<sup>53</sup> Thus, *literal meaning*, as distinct from *figurative meaning*, was indistinguishable then. However, the closer proximity to the time of the Prophet assisted understanding the context, and by extension, the meaning of the texts. It was only later linguistic contemplations that made clear, outstanding, and literal meaning distinct from ambiguous and/or figurative meaning. Later on, when the text of the Qur'an became solidified as a legal text, disputes among scholars over certain phrases of the Qur'an gave rise to rudimentary semantic and syntactic theories, which were later elaborated and developed into a full division of legal theory called *usul al-fiqh*. The rudimentary theories of semantics developed in the Islamic law were the result of purely practical needs which, later on and under the influence of translated books of Greek logic and philosophy, developed into an abstract legal theory. One of the primary distinctions within those rudimentary semantics was that of *ambiguous* as opposed to *clear* words; that is, words whose meaning is disputed, versus words whose meaning is agreed upon. The latter were called *nass*: '[words] their meaning so clear as to engender certitude in the mind. [For example] to know what "four" means we have no need for other language to explain the denotation of the word'.<sup>54</sup> But again controversies arose. Each jurist in his own geographical region construed the meaning of the phrases differently from other jurists. Resorting to the original Medinan meanings of words by Malik emerged out of this context. Thus, firstly there was no agreement about what makes a proposition of the

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<sup>52</sup> Joseph Lowry, 'Does Shafi'i Have A Theory of 'Four Sources' of Law?' in Bernard G Weiss (ed), *Studies in Islamic Legal Theory* (Brill) 23; A more detailed account of the literalist tendencies in early Islamic history can be found in Gleave, above n 35.

<sup>53</sup> Pakatchi, above n 43, 45–48.

<sup>54</sup> Hallaq, above 39, 45.

Qur'an or hadith clear, unambiguous and assertive, and what makes it ambiguous and polysemic. Secondly, even if there was a common view that a specific verse is a *nass*, there was a myriad of ways to dismiss it if the overall meaning of the text was not according to the opinion of the jurist. A jurist's agency was disrupted with the dictation of the text and his social and cultural inclinations found their way into *fatwa*. This happened in three different stages: first, in the process of the evaluation of the chain of transmission of a text and its authenticity; second, once the text is accepted as authentic, the semantical evaluation begins, in which each jurist interprets the text according to his own opinion rather than necessarily to an objective meaning of it; and finally, the jurist had another tool to transcend all of these atomic perspectives of the text and give a systematic comprehensive account of the spirit of the Law. I will discuss each of these stages under separate headings below.

#### VIII DISQUALIFY THE TEXT AS A LEGAL TEXT

According to legal theory, before we start to establish any argument in any text — be it the Qur'an or hadith — a jurist has to verify if the text is authentic and original or not. That is to say, the jurist has to make sure that the text they are referring to, and justifying their ruling on, is really issued from the Prophet or his Companions and is not a fabricated one. When applied to the Qur'an, it functions with a different dynamism. According to the general belief of jurists, the Qur'an, in its current composition, is words of God verbatim and is sacred, letter by letter, though some rulings of it are abrogated by others. Thus, even with the Qur'an, prior to making any legal ruling, one has to ascertain that the verse in question has not been abrogated. So, while the form is different, the general concept both in the Qur'an and in hadith remains the same: to evaluate the eligibility of the text to act as the basis for a legal ruling. In hadith it comes through transmission chain evaluation and in the Qur'an through abrogation theory. At first sight, both procedures seem to be of a formal nature, that what is the object of evaluation is the chain of transmission, regardless of the content of the passage being transmitted. However, further contemplation shows that the content of the text is heavily involved in evaluating its transmission. This means, in turn, that jurists have tried to disqualify reports which were not consistent with their understanding of Islam and the whole frame of their rationality.



In general, each hadith is comprised of two parts: one is its chain of transmission (*sanad*), which lists the people who have narrated the hadith from the Prophet or Companions, and the other is its content or body (*matn*). It is generally understood that if the transmission chain of a hadith is authentic enough, the body of the hadith, or its content, is authentic and binding. In evaluating the chain of transmission of a hadith, scholars assess two different factors: first, the frequency of narration of a report, and second, the authenticity of its narrators. If, for example, a hadith is transmitted from the Prophet by five different Companions in parallel and independently, it is considered more authentic than a hadith narrated through only one Companion. Similarly, if all narrators of a certain hadith are famous for piety and truthfulness, that hadith will be more authentic than one with some narrators in its chain who are notorious for fabrication or untruthfulness. The evaluation process seems, at first sight, clear-cut and formal, but in practice, it is more than just formal “objective” assessment: it is a holistic conflict-resolution and consistency-making process which involved many factors, including jurists’ philosophical and theological beliefs governing the case in question, public opinion and customs about the case, and the rationally accepted stance on it.

The most qualified hadiths with reference to the number of transmitters are known as Concurrent (*mutawatir*) hadiths: a hadith ‘with so many transmitters that there could be no collusion’.<sup>55</sup> While this definition appears to demarcate quite clearly the boundaries between Concurrent and Solitary hadiths (*non-mutawatir* or *Akhbar Ahad*), problems arise when applying it to real cases: what are the practical criteria on the ground? Even when on such criteria some kind of agreement is reached, the number of Concurrent hadiths is tiny compared to the total body of hadith literature.

It is often said that the validity of a tradition depends not on the text but on the *isnād*. While this is generally true, it is not the whole story. For example, al-Ḥākim (Maʿrifat ‘ulūm al-ḥadīth, 59 ff.) mentions some traditions with very reliable men in the *isnād* which he holds to be faulty and weak. He argues that one requires considerable knowledge to detect this, and can arrive at a conclusion only after discussion with people learned in the subject.<sup>56</sup>

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<sup>55</sup> J Robson, 'Hadith' in P Bearman, Th Bianquis, C E Bosworth, E van Donzel, and W P Heinrichs (eds) *Encyclopedia of Islam, Second Edition* (Brill Online, 2016) accessed on 07 June 2016 <[http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/hadith-COM\\_0248](http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/hadith-COM_0248)> .

<sup>56</sup> Ibid.

So, the main substantive source of Law, besides the Qur'an, is the Solitary hadith, which does not have the same authenticity as the Qur'an or the Concurrent hadith. One of the discussions in which we can discover jurists' views about the weight of reason as compared to other sources is when a conflict happens between a Solitary hadith and other sources like the Qur'an or the other beliefs of a jurist. For example, in the case of inconsistency between two sources of Law (say, the Qur'an and Consensus), which one has priority? In the case of the Qur'an, it is almost unanimously agreed that if there is a clear verse in the Qur'an about a legal case, it has final say over all other sources of Law.<sup>57</sup> But the majority of inconsistencies occur in more contentious sources, like between two Solitary hadiths, a hadith and a Legal Analogy (*qiyas*), a *mutawatir* hadith and the Qur'an, and the like, which makes it very difficult for a jurist to favour one source over the other. This has been the main motive behind legal theorists who have developed a detailed and sophisticated problem-solving apparatus to achieve reconciliation between conflicting sources — often called *tarajih* or legal preponderances.

The significance of *tarajih* literature is partly because it reveals the epistemic status of each Legal source for any jurist. Evidently enough, if a jurist considers a verse of the Qur'an as giving certain knowledge and a Solitary Report as only probable knowledge, then he will consider the Qur'an as the governing indicant. But if there is an inconsistency between a Solitary report and a rational principle, the conflict is between the epistemic weight of the hadith and reason, and the result will depend on how textualist or rationalist a jurist is. For *Mu'tazilites*, reason was so central that anything contradicting it was deemed unacceptable and should therefore be dismissed by this or that hermeneutical tool.<sup>58</sup>

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<sup>57</sup> As we will see, some scholars, including Al-Tufi, believed that even a Qur'anic ruling is subject to *maslaha*.

<sup>58</sup> The possibility of disqualifying a holy text as a source of Law was not limited to hadith; it also included the Qur'an, though in a more delicate way which did not infringe on its verbatim sacredness. Invalidation of a hadith was possible by questioning the genuineness of its transmission chain. This, however, was absolutely inapplicable to the Qur'an: belief in its verbatim origin was a necessary condition of the faith. Abrogation theory was devised as a response to this impasse, which preserved the holiness of the text while at the same time berefted it of its legal significance (see Joseph Burton, *The sources of Islamic law* (University of Edinburgh Press, 1990)). With abrogation theory, scholars were able to keep the wordings as holy even while dismissing a ruling. Abrogation theory opened up another space of manoeuvring for jurists to disqualify the verses of the Qur'an as a source of Law.

## IX ALTERNATIVE MEANINGS

A traditional jurist starts with the authenticity of the text. Once the text is established as eligible to be a source of Law, then the struggle over its meaning begins. Dispute over the meaning of passages in the Qur'an is as old as the Qur'an itself. In ancient Arabia there was no standard Arabic language, and the linguistic differences between the southern and northern Arabian peninsula were remarkable.<sup>59</sup> There are reports traced back to the time of Omar, the second caliph, who, when asked by Companions of the Prophet about the meaning of the word "abban" in Qur'an 80:31, replied: 'I do not know, we are responsible unto which we have a knowledge'.<sup>60</sup> Later on, Ibn Abbas wrote a treatise on the problematic lexicon of the Qur'an in response to some Companions.<sup>61</sup> On the other hand, there were many variations in the recitations of the Qur'an, all of which were considered to be canonical and binding; yet the differences between them were significant and leading to different legal and theological propositions. While modern scholars and exegetes of the Qur'an advertently or inadvertently have erased the question of differences between recitations, it was of great importance in the early formative period of Islam. One of the main manoeuvring spaces for jurists was the textual variants of the Qur'an, which could pave the way for new ways of understanding text.

While there was no written standard and agreed-upon Arabic syntax in the peninsula, there were immigration flows after the conquests which intensified this complexity. People from South Arabia were unable to understand many of the passages in the Qur'an, which was written in Northern Arabic. Even in close geographical proximity, the dialect of each tribe was different from the next and not all tribes were able to fully grasp the Qureshi dialect of the Prophet.<sup>62</sup>

Jurists were not unaware of those variations in meaning, however. From the second century there were detailed lexicographical compendiums in the Arabic language to record all of its subtleties of meaning. In legal theory, they developed a full word-level semantics, which normally occupies a voluminous part of any legal theory book. Again,

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<sup>59</sup> Michael CA Macdonald, 'Reflections on the linguistic map of pre-Islamic Arabia' (2000) 11(1) *Arabian archaeology and epigraphy* 28.

<sup>60</sup> Al-Tabari, *Tafsir al-Tabari* (Dar Al-Kutub Al-'Ilmiyya, 1999) Volume XXIV, 120.

<sup>61</sup> Pakatchi, above n 43, 47.

<sup>62</sup> *Ibid* 49.

the jurist is endowed with numerous tools to choose between alternative meanings of the scripture and understand the text according to his/her own web of belief rather than being exposed to an objective and clear meaning of the text. In this sense, meaning is a dialogical, reciprocal process between the jurist and the text and the jurist's agency has more to do with meaning formation than the voiceless, silent text which is open to different interpretations.

A tool for explaining away a literalist reading of a text is the distinction between the literal and metaphorical interpretation of the passage. It was during theological debates of early Muslim history about the meaning of verses which ascribe certain bodily attributes to God — which was against the beliefs of the majority of theologians on the immortality, immateriality, and transcendence of God — that this way out was devised. These theologians held that bodily verses are uttered in metaphorical language, not literal language. Take, for example, this anthropomorphic passage in the Qur'an: 'and thy Lord cometh, and His angels, rank upon rank' (89:22). A majority of theologians interpreted this verse in a way that evaded the materiality of God or His having incorporeal attributes by stating that the verse should be construed in a metaphorical way. Here one can observe how theologians struck an epistemic balance between inconsistent elements in their web of beliefs by abandoning the literal meaning of a text rather than jeopardising a theological belief which they deemed more central. The epistemic status of the proposition that "God is immaterial" was considered a necessity, while the belief in its literal meaning was viewed with less epistemic vigour (merely a contingent truth).<sup>63</sup> This was also the case for many other problematic verses in the Qur'an, and in almost every book of legal theory or Qur'anic sciences there is a separate, independent section allocated to this topic. The same strategy could be employed in different cases of Law to dismiss problematic texts in favour of progressive principles, provided those principles are situated at the centre of the web of belief of a jurist. After all, the core issue is not the existence of this or that verse, but the strength of the challenge it poses to one's web of beliefs and one's willingness to dismiss such verses in order to preserve other core beliefs.

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<sup>63</sup> Not surprisingly, Ibn Taymiyyah, the forefather of Salafism, rejected the whole taxonomy of meaning into literal and metaphorical in his famous *Book of the Faith* Taqi Al-din Ibn Taymiyyah, *kitab al-iman* [The Book of the Faith] (Al-maktab Al-Islami, 1996).

The space open to a jurist for understanding a text in a non-literal way is not limited to the dichotomy of literal/metaphorical — there are many other conceptual apparatuses, including *general* and *particular*, *unconditioned* and *conditioned* phrases, *ambiguous* and *clear*, and so on. On the other hand, there is the option of rejecting an immediate, literal meaning by referring to the context of the utterance or original meaning. There are apparatuses for understanding the pragmatics of a text as well. There are traditions which explain the historical context of revelation of each verse in the Qur'an, known as Occasions of Revelation (*asbab al-nozool*). These are noteworthy, especially for the purpose of limiting the applicability of some general verses of the Qur'an by situating such verses in a specific historical context, thus preventing them from being generalised unconditionally.

#### X THE SPIRIT OF THE LAW: JURISTIC ANALOGY AND *MASLAHA*

Even if a text is vigorous in its transmission chain and clear and assertive in its denotation, there remains another significant way of nullifying it: to approach the sources holistically as a whole of interconnected propositions serving an ultimate divine purpose. This is a game-changer in Islamic jurisprudence. Muhammad Abed al-Jaberi believes that Arab rationality is a specific kind of rationality which reflects the Arab lifestyle of solitary, Bedouin, self-contained and independent Arabs.<sup>64</sup> This is reflected in the epistemology of Arabs by an over-emphasis on atomic units of meaning or single sentences instead of a system of meaning or its holistic content which reflects the relationality of the meaning. This explains why the hadith always has been seen as an independent, self-sufficient unit — one that can be read and understood, act as a source of Law without reference to other hadiths, and without being interpreted within a wider body of literature. The very style of hadith collection, which places special emphasis on single sentences rather than a book or a systematic body of texts, reveals this reality. Whether we accept this justification or not, from the early centuries of Islamic jurisprudence the inadequacy of the atomic text-based method of jurisprudence led jurists to devise tools for a more systematic understanding of legal texts.

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<sup>64</sup> Abed Mohammed Al-Jaberi, *Naqd al-'Aql al-'Arabi* [The Critique of Arab Reason] (Arab Cultural Centre, 1991).

In the 11<sup>th</sup> century, Al-Ghazzali developed a comprehensive theory of Purposes of the Law which was almost fully retained in later legal theory books. According to Al-Ghazzali, every legal ruling is associated with one of the main five Purposes of the Law, which are the preservation of religion, life, mind, family, and property.<sup>65</sup> This was a step forward compared to previous theories, where each legal ruling was considered self-sufficient and independent of other rulings. Though the theory of Purposes of the Law was accepted by the majority of later jurists, it had suffered from a lack of instantiating criteria and remained on the level of theory rather than practice. Al-Ghazzali believed that it is God who knows the *ratio legis* of all rulings, and although in theory all rulings are made according to *maslaha*, it is outside of human rational capacity to capture it in a case-by-case basis.<sup>66</sup> According to this, the applicability of *maslaha* was confined to cases where there was no textual evidence or where inconsistencies existed between multiple indicants.<sup>67</sup> Later, scholars were more or less of the same mind as Al-Ghazzali (in terms of the ineligibility of independent human rationality to grasp the *maslaha* of a legal ruling). It was Najm al-Din Al-Tufi who established a theory of *maslaha*, which placed *maslaha* considerations above all other legal indicants. Al-Tufi's theory rests on three main pillars. First, unlike earlier scholars, recourse to *maslaha* was not confined to cases without textual evidence; rather, he believed in the validity of what is known as unattested *maslaha* (*maslaha mursala*). Furthermore, he believed that *maslaha* should be considered in all legal rulings, not only in contested ones. Moreover, in cases of conflict or incompatibility, *maslaha* should be given preponderance over all other indicants of the Law. For the second pillar, unlike earlier scholars, Al-Tufi believed that God has endowed humans with the faculty of recognising the purposes of legal rulings not only in principle (conceptually) but also in their instantiation. This equates to considering rationally identified *maslaha* as a source of Law on par with the Qur'an and the Sunnah. Thirdly and most importantly, he places *maslaha* at the top of the sources of the Law and able to invalidate all other sources, including the Qur'an and the Sunnah, in case of any inconsistency between them. He lists 19 indicants of the Law (Qur'an,

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<sup>65</sup> Asifa Quraishi, 'Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American jurisprudence' (2006) 28(1) *Cardozo Law Review* 67, 102.

<sup>66</sup> Ibid.

<sup>67</sup> The Arabic word for indicant is *dalil* (pl. *dalael*).

Sunnah, Consensus, Analogy, among others) and considers *maslaha* to be the strongest indicant of Sharia, with priority over all the others.<sup>68</sup> As Opwis stated:

[Al-Tufi] considers safeguarding *maslahas* to be the strongest indicant of the Law. All rulings except those which concern matters of worship and ordinances fixed in the authoritative texts have to comply with the imperative of safeguarding *maslahas*.<sup>69</sup>

Surprisingly, Al-Tufi ascribed this belief to all other jurists, stating that ‘except for negligible textualist dogmatists, other jurists believe in the priority of *maslaha* over all other legal indicants’.<sup>70</sup>

When there was a conflict between *maslaha* and legal analogy, views differed in terms of which has priority over the other. *Hanafis* considered any textual document prior to and governing any conflicting rational legal analogy. Whatever has even a faint trace of scripture, such as a contentious hadith, was to be prioritised over other non-scriptural sources of the Law.<sup>71</sup>

Al-Razi, a Shafi’ite scholar with substantive rational tendencies, sided with Hanafis, though favouring a more nuanced, case-by-case approach. Malikis considered legal analogy to have the final say since, as al-Baji puts it, ‘singular tradition may be subject to abrogation, error, negligence, lying, and specification whereas legal analogy is void in only one way, namely, when the *ratio legis* is wrongfully established. Therefore, legal analogy enjoys preponderance’.<sup>72</sup> Al-Qarafi, another Maliki-inclined jurist, argues that ‘legal analogy concurs with the precepts of the Law because it encompasses attaining *maslahas* and averting harms (*mafasid*). In contrast thereto, the singular hadith does not necessarily encompass such precepts’.<sup>73</sup> But even Al-Qarafi did not place reason above Scripture: he believed in only prioritising one kind of textually driven proof over another of the same type.<sup>74</sup>

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<sup>68</sup> Najm al-Dīn al-Ṭūfī, *Risāla fī ri‘āyat al-maṣlaḥa* (Dār al-miṣriyya al-lūbnāniyya, 1993).

<sup>69</sup> Felicitas Meta Maria Opwis, *Maslaha: An Intellectual History of a Core Concept in Islamic Legal Theory* (PhD Thesis, Yale University, 2001) 195.

<sup>70</sup> Al-Ṭūfī, Najm al-Dīn, *Risāla fī ri‘āyat al-maṣlaḥa* (Dār al-miṣriyya al-lūbnāniyya, 1993), 30–31.

<sup>71</sup> Ibid 129.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid 130.

<sup>74</sup> al-Ṭūfī, above n 69.

## XI CONCLUSION

The main argument of this paper, in philosophical terms, is the underdetermination of legal rulings by scripture. That is, that there are far more factors involved in jurisprudence than the literal reading of texts. The sacred text is not a set of propositions perfectly combined to provide a very definite ruling through a neat legal/logical line of reasoning. I have tried to show in detail how a jurist is left with ample room to interpret a text holistically according to his web of beliefs. I have not argued in a normative way to provide jurists with guidelines as to how to diverge from literal readings, but only described what their counterparts have done in previous times. They can use the same toolbox now to argue for progressive causes like democracy and gender equality, as they did centuries ago in a myriad of occasions and cases. As I have shown in this paper, the main problem with legal rulings is not the capacity of a text to be read differently or the conceptual apparatus to provide a jurist with such reading, but the very hierarchy of values a jurist holds, which dictates to him/her which evidence to keep and which to ignore. To reiterate, these tools are available in traditional legal theory and are not constructed innovations of modern scholarship. They are well rooted in Islamic legal history and, more or less, are agreed upon by the majority of jurists.

One may wonder why, with such elaborate dynamisms of change, Islamic law contains such strange rulings as stoning, women's inequality, and the like. My answer to such questions would again refer to the web of beliefs, reiterating that the problem lies not in jurisprudence but in the beliefs of the jurist. If such inconsistencies between their web of beliefs and the problematic rulings of Sharia existed, they would have had sufficient tools to resolve it. Again, it is not the case that the epistemological status or weight of some texts are so central and crucial that removing them would result in the collapse of the whole system, but that such inconsistencies do not exist in the first place. One who is versed in the long history and the twists and turns of Islamic law will admit that such core, central beliefs (if any) have been always subject to change. So, what is the problem and why does change not occur?

I firmly believe that change in Islamic law is a function of change in the overall framework of rationality of the individual and the society. Whenever and wherever the general mindset of people changes, the Law adjusts itself to those changes. A comparative and chronological investigation of Sharia rulings will demonstrate that



change has been remarkable. Examples of jurists having changed their views extensively can be pointed to in almost all areas of life.

## REFERENCE LIST

*A Articles/Books/Reports*

- Al-Ashghar, Omar Suleiman, *Al-madkhal Ila Al-Shari'a va Al-Fiqh Al-Islami [An Introduction to Islamic Sharia and Law]* (Dar Al-Nafaes, 2005)
- Al-Jaberi, Abed Mohammed, *Naqd al-'Aql al-'Arabi [The Critique of Arab Reason]* (Arab Cultural Centre, 1991)
- Al-Tabari, *Tafsir al-Tabari* (Dar Al-Kutub Al-'Ilmiyya, 1999) Volume XXIV
- Al-Ṭūfī, Najm al-Dīn, *Risāla fī ri'āyat al-maṣlaḥa* (Dār al-miṣriyya al-lūbnāniyya, 1993)
- An-Na'im, Abdullahi Ahmed, *Islam and the secular state: Negotiating the future of Sharia* (Harvard University Press, 2009)
- Asad, Talal, *Formations of the secular: Christianity, Islam, modernity* (Stanford University Press, 2003)
- Bernard, M, Mu'āmalāt P Bearman, Th Bianquis, C E Bosworth, E van Donzel, and W P Heinrichs (eds) *Encyclopedia of Islam, Second Edition* (Brill Online, 2016) accessed on 07 June 2016 <[http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/muamalat-SIM\\_5271](http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/muamalat-SIM_5271)>
- Bousquet, G-H, 'Ibādāt P Bearman, Th Bianquis, C E Bosworth, E van Donzel, and W P Heinrichs (eds) *Encyclopedia of Islam, Second Edition* (Brill Online, 2016) accessed on 07 June 2016 <[http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/ibadat-SIM\\_3014](http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/ibadat-SIM_3014)>
- Burton, Joseph, *The sources of Islamic law* (University of Edinburgh Press, 1990)
- Casanova, José, *Public religions in the modern world* (University of Chicago Press, 2011)
- Coulson, Noel James, *A history of Islamic law* (AldineTransaction, 2011)
- Donner, Fred M, 'The historical context' (2006) *The Cambridge Companion to the Qur'an*
- Gleave, Robert, *Islam and literalism: literal meaning and interpretation in Islamic legal theory* (Oxford University Press, 2012)

- Hallaq, Wael B, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh* (Cambridge University Press, 1999)
- Hidayatullah, Aysha A, *Feminist Edges of the Qur'an* (Oxford University Press, 2014)
- Ibn Taymiyyah, Taqi Al-din, *kitab al-iman* [The Book of the Faith] (Al-maktab Al-Islami, 1996)
- Katz, Marion Holmes, *Body of text: the emergence of the Sunni law of ritual purity* (SUNY Press, 2012)
- Koraytem, Tabet, 'Two Surprising Aspects of Islamic Saudi Liberalism in Public and Private Law' (2013) 27(1) *Arab Law Quarterly* 87
- Lowry, Joseph, 'Does Shafi'i Have A Theory of 'Four Sources' of Law?' (2002) *Studies in Islamic Legal Theory* 23
- Lowry, Joseph, 'Is There Something Postmodern about Uṣūl Al-Fiqh? Ijmā', Constraint, and Interpretive Communities' in A Kevin Reinhart and Robert Gleave (eds), *Islamic Law in Theory* (Brill, 2014) vol 37, 283
- Macdonald, Michael CA, 'Reflections on the linguistic map of pre-Islamic Arabia' (2000) 11(1) *Arabian archaeology and epigraphy* 28
- Maghen, Ze'ev, 'Strangers and Brothers: The Ritual Status of Unbelievers in Islamic Jurisprudence' (2006) 12(2) *Medieval Encounters* 173
- Mahmood, Saba, *Religious Difference in a Secular Age: A Minority Report* (Princeton University Press, 2016)
- Mallat, Chibli, *The Renewal of Islamic Law: Muhammad Baqer as-Sadr, Najaf and the Shi'i International* (Cambridge University Press, 2003) vol 29
- Mehta, Pratap Bhanu, 'Cosmopolitanism and the Circle of Reason' (2000) 28(5) *Political Theory* 619
- Motzki, Harald, 'Alternative accounts of the Qur'an's formation' (2006) *The Cambridge Companion to the Qur'an*, I. Dammen McAuliffe (ed). Cambridge 59

- Opwis, Felicitas, 'Maşlaḥa in Contemporary Islamic Legal Theory' (2005) 12(1) *Islamic Law and Society* 182
- Pakatchi, Ahmad, *tarikhe tafsire Qur'ane karim* [The History of the Qur'an Exegesis] (Imam Sadiq University Press, 2011)
- Quine, Willard V, 'Main trends in recent philosophy: Two dogmas of empiricism' (1951) *The philosophical review* 20
- Quine, Willard Van Orman and Joseph Silbert Ullian, *The web of belief* (Random House New York, 1978) vol 2
- Quraishi, Asifa, 'Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American jurisprudence' (2006) 28 *Cardozo Law Revue* 67
- Reinhart, A Kevin, 'Impurity/no danger' (1990) 30(1) *History of Religions* 1
- Reinhart, A Kevin, 'Ritual Action and Practical Action: The Incomprehensibility of Muslim Devotional Action' in A Kevin Reinhart and Robert Gleave (eds), *Islamic Law in Theory: Studies on Jurisprudence in Honor of Bernard Weiss* (Brill, 2014) vol 37, 55
- Robson, J, 'Hadith' in P Bearman, Th Bianquis, C E Bosworth, E van Donzel, and W P Heinrichs (eds) *Encyclopedia of Islam, Second Edition* (Brill Online, 2016) accessed on 07 June 2016 <[http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/hadith-COM\\_0248](http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/hadith-COM_0248)>
- Schacht, Joseph, *An introduction to Islamic law* (Clarendon Press Oxford, 1964)
- Shalakany, Amr A, 'Islamic legal histories' (2008) 1 *Berkeley J. Middle E. & Islamic L.* 1
- Wadud, Amina, *Qur'an and woman: Rereading the sacred text from a woman's perspective* (Oxford University Press, 1999)