

Contemporary Theories in Islamic Law

Overview

This Chapter attempts to answer the following questions:

- Are the classic schools of law that the previous chapter surveyed still strictly followed?
- And if the map of schools and theories of the Islamic law had changed, as many researchers maintain, what names can we give to the new schools and theories in the Islamic law?
- What are the principal features that define each contemporary school?
- And how much do they agree or disagree with classic schools?

This chapter attempts to answer the above questions. It starts with a survey of contemporary classifications of the theories of Islamic law and presents a new concept-based and multi-dimensional classification. The proposed concept-based classification attempts to overcome some of the drawbacks of feature-based classifications. The analysis presented in this chapter will show how contemporary theories endorse or criticise classic theories of Islamic law. The next chapter will build upon this chapter and the previous chapter's analysis in developing a systems approach to the Islamic law.

5.1. CONTEMPORARY CLASSIFICATIONS AND LABELS

Background

The twentieth century CE witnessed radical changes in the map of theories/schools of Islamic law. By the end of the nineteenth century, the most powerful modern countries had colonised the vast majority of countries with large Muslim populations.¹ The invading modernity, despite its many failures, is largely responsible for a revival in Islamic *ijtihād* in two different ways: (1) colonisation brought with it new problems which required new solutions, and (2) colonisation brought with it new perspectives and ideas in every field of knowledge.

By the beginning of the twentieth century, scholars and muftis realised that new *fatāwā* were needed, and historical collections of opinions within each traditional *madhhab* proved inadequate to deal with problems that modernity created. Thus, many muftis began to widen their horizons to include other *madhāhib* in their *fatāwā*. As a result comparative studies of *fiqh* started to gain popularity. Eventually influential Islamic institutions considered reform in the theory of Islamic law necessary. On the other hand, modernity brought new philosophies and new ideas to traditional Islamic institutions, especially via some talented Muslim lawyers and jurists who were directly influenced by western scholarship. Examples are Rifaa al-Tahtawi, Mohammad Iqbal, and Mohammad Abdu. Eventually, western philosophical ideas started to find their way to Islamic thought in general and Islamic law in particular, and new fundamental methodologies began to emerge.

Today's classification of contemporary theories in Islamic law is by and large no longer along the lines of Shāfi'ī, Ḥanbalī, Ja'farī, and other traditional schools of law, as will be illustrated. However, there is still a general clear division between Sunni, Shia, and Ibādī schools of law, and a minority of Sunni scholars still adhere to one of the four Sunni *madhāhib* in all aspects of jurisprudence. This book will classify the tendency to remain within the historic boundaries of specific *madhāhib* as 'scholastic traditionalism.'² Nevertheless, I will argue

that most contemporary scholars use traditional schools of law as ‘supporting arguments’ rather than ‘original authorities.’ This section proposes a new ‘typology’ of current theories of Islamic law, which represents today’s landscape of fiqh more comprehensively than traditional *madhāhib* classification. The scope of the new classification includes all researchers and scholars of Islamic law, regardless of their backgrounds and geographical locations. First, current alternative classifications of Islamic schools of thought (or ‘ideologies’) will be introduced critically.

Islamic ‘Ideologies’

Current studies on Islam and society, especially on what is called ‘political Islam,’ typically start with a ‘typology of Islamic ideologies.’ The purpose of these typologies is to define and assign certain labels to various groups, politicians, and thinkers, in order to decide strategies for ‘dealing’ with each. In these studies, ‘ideology’ is defined in a number of ways, perhaps depending on the ‘ideology’ of the writers and the goals of their studies. ‘Classic’ classifications, such as H. Gibb’s, W. Smith’s, A. Hourani’s, L. Binder’s, H. Mintjes’s, and R. Humphrey’s, divide these ‘ideologies’ into the popular threefold typology of ‘traditionalism/fundamentalism,’ ‘modernism,’ and ‘secularism.’³ This classic classification is merely a classification of reactions to Western political domination in the Islamic world, rather than a classification of theories of the Islamic law. Moreover, this threefold classification itself is a reflection of the above writers’ concepts of ‘fundamentalism,’ ‘modernity,’ and ‘secularism,’ in their own environments. John Esposito preferred to analyse ‘attitudes towards modernisation and Islamic socio-political change,’⁴ which he classified into ‘conservative,’ ‘neo-traditionalist,’ ‘Islamic reformist,’ and ‘secularist’ attitudes. Yvonne Haddad also refers to ‘attitudes’ or ‘tendencies,’ which she divided into ‘neo-normativist,’ ‘normativist,’ and ‘acculturationist.’⁵ William Shepard considered the Islamic ideologies to be ‘responses to the western impact and of proposals for rehabilitating Muslim history,’ and came up with eight categories in a two-dimensional classification of ‘Islamic totalism’ and ‘modernity.’⁶ John Voll analysed

‘styles of action’ in Islamic history, and classified them into ‘adaptionist,’ ‘conservative,’ and ‘fundamentalist.’⁷ Fazlur Rahman contrasted ‘neo-fundamentalism’ with ‘Islamic modernism,’ which in his opinion, meant ‘the induction of change into the content of the shari‘ah.’⁸ He also defined a ‘postmodern fundamentalist’ trend, whose ‘basic élan is anti-Western.’⁹ Despite the variations in the above classifications, I would say that they still revolve around the old three-class typology of fundamentalism, modernism, and secularism. There is also a general tendency in the above studies to divide modernism into two distinct levels, and hence, wind up with four classes. Chart 5.1 summarises the expressions/labels that were used for these four classes.

1	2	3	4
Fundamentalism	Apologetic modernism	Modernism	Secularism
Traditionalism	Neo-fundamentalism	Reformism	Liberalism
Literal Salafism	Neo-traditionalism	Neo-modernism	Modernism
Radical fundamentalism	Conservatism	Salafi reformism	Acculturationism
Conservative traditionalism	Neo-normativism	Normativism	Adaptionism
Conservatism	Rejectionist neo-traditionalism	Accommodationist neo-traditionalism	Rational reformism
Normativism	Salafi reformism	Reformist traditionalism	
Rejectionist traditionalism	Reformist traditionalism	Traditionalism	
Postmodern fundamentalism			

Chart 5.1. A summary of the expressions used in typologies of ‘Islamic ideologies.’

Tariq Ramadan’s typology does not follow the ‘classic’ three-fold classification. It rather identifies ‘tendencies’ in ‘Islamic thought’ and, hence, represents the streams of Islamic thought of various groups/movements more accurately than the other (classic) classifications.¹⁰

RAND's Classification

Another significant classification is provided in RAND Corporation reports on Islamism.¹¹ The 2004 report stated its objective, which is to contribute to the efforts of those who 'want to prevent a clash of civilisations.' Similar to the above-mentioned typologies, the RAND report presents a four-class typology of four 'essential positions,' namely, fundamentalism, traditionalism, modernism, and secularism. Yet, RAND's typology is of particular relevance to our research because these 'positions' represent, more or less, *fiqhī* positions over a number of contemporary issues. These issues, which the report says 'have become contentious in the Islamic world,' are related to 'political and individual freedom, education, the status of women, criminal justice, the legitimacy of reform and change, and attitudes towards the west.' Examples of these issues are polygamy, *ḥijāb*, flogging, public participation of women, and jihad.

The following is a brief summary of RAND's typology, followed by my comments.

1. Fundamentalism was divided into scriptural fundamentalism and radical fundamentalism:
 - (a) Scriptural fundamentalists believe in an expansionist and aggressive version of Islam that is grounded in theology, imposes a strict public observance of Islam, and resorts to violence. In terms of Islamic law, their sources are defined as the Qur'an, Sunnah, charismatic leaders, and radical authors. Iranian revolutionaries, Saudi-based Wahhabis, and the Turkish Kaplan congregation were all included in this category.
 - (b) Radical fundamentalists believe in an expansionist and aggressive version of Islam, and they can resort to violence and 'terrorism.' In terms of Islamic law, their sources are defined as the Qur'an, Sunnah, charismatic leaders, and Islamic philosophy. Al-Qaeda, Taliban, Hizb-ut-Tahrir, and other Islamic movements, are given as examples.
2. Traditionalism was divided into conservative traditionalism and reformist traditionalism.

- (a) Conservative traditionalists support a literal and strict form of Islam, but do not resort to violence. They resist modernity and change. Those who live in a traditional society are also described as less educated and less capable of distinguishing local customs from Islamic doctrine. In terms of Islamic law, their sources are defined as the Qur'an, Sunnah, local customs, and opinions of local clerics. Akbar Ahmad and Abdur-Rahman Doi are given as examples.
- (b) Reformist traditionalists are described as 'more ready to make some concessions' in the literal application of orthodoxy through reform and re-interpretation, with an objective to conserve the 'spirit of the law.' In terms of Islamic law, their sources are defined as the Qur'an, Sunnah, scholars (including secular philosophers), modern laws and ethics, and community consensus. Yusuf al-Qaradawi and Ruqaiyyah Maqsood are provided as examples.
3. Modernism was not divided into further classes, and modernists are described as 'ready to make far-reaching changes in the current orthodox understanding of Islam.' They are also described as believers in the 'historicity of Islam,' i.e., the report says, 'Islam as practiced during the time of the Prophet is no longer valid.' In terms of Islamic law, their sources are also defined as the Qur'an, Sunnah, scholars (including what the report called 'secular philosophers'), and modern laws and ethics. Khaled Abou El-Fadl, Mohammad Shahrur, Serif Mardin, Bassam Tibi, and Nawal Saadawi were given as example modernists.
4. Secularism was divided into mainstream secularism and radical secularism.
- (a) Mainstream secularists 'want the Islamic world to accept a division of church and state in the manner of western industrial democracies, with religion relegated to the private sphere.'
- (b) Radical secularists are essentially 'anti-American' and 'extremely hostile.'

The following are my comments on the above categorisation in point form.

1. This classification is by and large based on the above groups' current political positions on the United States' foreign policy, especially its 'war on terror' policy. The typology is not clearly related to Islamic law, 'western values,' the 'international community,' or 'modernity,' as the report claims.
2. Despite numerous practical and 'lifestyle' examples given in the report, the comparison does not capture the basic theoretical differences in these groups' versions of the fundamentals of Islamic law (*uṣūl*), upon which they build their ideological stances.
3. The Qur'an and prophetic tradition are mentioned amongst the sources for all trends (except for the secularists). However, it is essential to consider the detailed methodology of dealing with these two sources and the role of other sources (such as *maṣlaḥah* and *urf*). In extreme/conservative groups, for example, patriarchal traditions do override the script on all practical levels, as the next subsection demonstrates. This also explains part of the report's surprise with the conservatives' 'considerable liberties' with the 'literal substance of Islam.' In modernist trends, for another example, the concept of *maṣlaḥah* often generates new approaches to politics that are rather pragmatic.
4. The differentiation between scriptural fundamentalists (for example, Wahhabis) and radical fundamentalists (for example, Al-Qaeda and Taliban) based on 'theology' is not accurate. All these groups have the same theological positions, which are based on the 'Salafi creed' (*ʿaqīdah al-salaf*). On the other hand, the positions of many 'Iranian revolutionaries' differ from the above groups on a number of theological issues (except for their general ideological stances from the United States). 'Iranian revolutionaries' themselves are divided across the spectrum of the Islamic positions, despite, again, their similar political stands on the current United States' foreign policies. The next subsection will illustrate how some of them contributed to 'modernist approaches' to the Islamic law, such as Mohammad Khatami and Abdul-Karim Soroush.
5. Despite the accurate analysis of the 'reformist traditionalist' strategy of 're-interpretation,' 'secular philosophers, modern laws

and ethics' are certainly not amongst their 'sources of Islamic law.' However, the inclusion of secular philosophers and modern ethics amongst modernist scholars' sources is accurate. In fact, modern values are the essential core of the modernists' positions, based upon which scriptural re-interpretation itself is carried out.

6. The concept of 'historicity of Islam' is mentioned in the report as a 'modernist' feature. However, in this section, various forms and degrees of 'historicisation' will be analysed, based on postmodern, rather than modern, philosophy. This Chapter will stress the importance of differentiating between modern and postmodern critical positions.
7. It is more accurate to divide the modernist category into at least two categories, based on the difference between 're-interpretation' and 'radical criticism' strategies, as this section will suggest.
8. It would be more accurate to identify Islamic positions in terms of theories, rather than specific personalities and names. Many of the names associated with specific categories in the report actually shift their positions along two or more of the proposed categories, depending on the issue. For example, Shaykh al-Qaradawi takes what could be classified as a 'traditionalist' position on issues he classifies as 'constant fundamentals' (*uṣūl thābitah*), a 'modernist re-interpretation' position on issues that he classifies as 'variable' (*mutaghāirāt*), and yet, what could be called a 'secular position' on issues he classifies as belonging to the 'field of no legislation' (*majāl al-farāgh al-tashrīī*).¹²
9. Despite the report's classification of the three of them under 'modernists,' Nawal Saadawi's position is radically different from Mohammad Shahrur's or Khaled Abou El-Fadl's. While Saadawi denounces 'Islam, and all religions,' for being patriarchal and restrictive towards women,¹³ Shahrur and Abou El-Fadl are clearly working within the Islamic juridical tradition, despite their feminist and modernist 're-interpretations.'¹⁴

'Script-Based' Classifications

Apart from the typologies that are based on 'Islamic ideologies,' there are a few typologies of approaches based on the Islamic primary

sources, namely, the Qur'an and prophetic traditions. Scholars who suggested these typologies assert their belonging to a 'centrist' trend. Centrism (*Waṣaṭiyyah*, often translated as 'moderation') argues a position of 'revitalisation' or 'reform' (*iḥyā'*, *nahḍah*, or *iṣlāḥ*) between two 'extremes,' typically called 'literalism' (*ḥarfīyyah*) and 'westernisation' (*taghrīb*).¹⁵ The following is a summary of the features of these three-class categorisations, which are becoming increasingly popular in juridical literature written in the Arabic language.

1. *Literalism or Stagnation*: Literalists (often called 'neo-literalists') are usually described as considering the literal meanings of the scripts and 'ignoring their purposes.'¹⁶ Stagnation refers to the strict following of one of the Islamic *madhāhib*, which is, in the 'neo-literalist' case, the Ḥanbalī school in its modern Salafi/Wahhabi version. Wahhabism is an Islamic movement that was named after Imam Mohammad ibn Abdul-Wahhab, who led a movement in Arabia in order to 'retain the pure and original form of Islam and purify it from all the Sufi innovations.'¹⁷ Abdul-Wahhab allied with Abdul-Aziz al-Saud, the founder of today's Saudi Arabia, and followed the Hanbali school, especially Ibn Taymiyah's opinions.
2. *Secularisation or Westernisation*: This is a label for 'radical critiques' of mainstream Islamic thought/law based on contemporary philosophy or methodology. Secularists are 'emerging from a fundamental philosophical reference to western civilisation.'¹⁸ They are also accused of abandoning the Islamic scripts (*nuṣūṣ*) for the sake of their own reasoning.¹⁹
3. *Centrism or Renewal*: This is a new school of Islamic law that argues a position between the above two positions. Generally, centrists do not restrict themselves to a specific traditional school of Islamic law, but choose from amongst their opinions in order to achieve people's interest (*maṣlaḥah*) in real life situations.²⁰

The following are my comments on the above categorisation.

1. This categorisation is, also, a ‘pigeon-holes’ division of methods that assumes consistency in its ‘ideal types.’ However, there is more than one identifiable trend within each of the above-mentioned trends. ‘Literalism,’ sometimes uses methods that do not strictly abide by the literal meanings of the scripts, but rather by the popular traditions/customs, first and foremost.
2. It is more accurate to classify methods rather than scholars, for the reason that many scholars shift their theoretical positions based on circumstances.
3. The ‘centrist/moderate school,’ contributed an important departure from the strict adherence to traditional Islamic *madhāhib*. It also endorsed forms of contemporary re-interpretation of the scripts that aimed to keep with the ‘spirit of the law.’ However, there is a large variety of methods of (re)interpretation of *madhāhib* and scripts, some of which could also be rightly classified as ‘modernist’ or even ‘secularist.’
4. ‘Westernisation’ and ‘modernisation’ are incorrectly used as synonyms, as Mohammad Khatami has rightly noted.²¹ Despite the fact that modernism emerged from ‘the west,’ it was ‘interpreted’ in a variety of ways in various parts of the world.
5. ‘Western’ philosophy did have a significant impact on the ‘moderate’ stream itself, via the influence of Mohammad Abdu and others.
6. ‘Secularism’ is a label given to a variety of methods, some of which are unrelated to the concept of the ‘separation of religion and state,’ which is the original definition of secularism.
7. Dividing the entire world into an ‘Islamic domain’ and ‘the West’ is a remnant of the old land of war/land of Islam division. It is unfortunate, however, that the current international political situation only gives credit to these binary classifications. We began the twenty first century with a number of conflicts that further enforced an antagonistic approach towards the ‘Islamic world’ in many western countries, and a parallel defensive approach in the other direction.
8. There is a difference between ‘modernist’ approaches, which were influenced by modernism one way or the other, and what this

book will call ‘postmodernist’ approaches to the Islamic law, which were influenced by postmodern theory/philosophy one way or the other.

Next, I will propose a classification that is focused on contemporary schools/theories of Islamic law, based on a number of dimensions that include ‘levels of authority’ and sources of the law. The next section begins with an explanation of these dimensions.

5.2. A PROPOSED CLASSIFICATION

Levels of Authority

Much of the *uṣūlī* debates drew upon two levels of legitimacy or authority (*ḥujjiyyah*), namely, authority/sound/proof (*ḥujjah*) and invalid/unsound/radically criticised (*bāṭil*). A *ḥujjah* is a base for a ruling while a ‘*bāṭil*’ evidence/argument is ‘radically criticised’ and does not have authority, as a matter of principle and under all circumstances. Examples are the books/articles that were written by imams about the invalidity of some evidences and methods, such as, al-Shāfi‘ī’s ‘*Ibṭāl al-Istiḥsān*’ (Invalidating Legal Preference), Dāwūd’s ‘*Ibṭāl al-Qīyās*’ (Invalidating Analogical Reasoning), Ibn Taymiyah’s three volumes on ‘*Ibṭāl Qawl al-Falāsifah*’ (that is, Invalidating the Philosophers’s Arguments), Ibn al-Rāwandī’s ‘*Ibṭāl al-Tawātur*’ (Invalidating Most-Famous Narrations), Ibn al-Qayyim’s ‘*Buṭlān al-Kīmyā*’ (Invalidity of Chemistry), and so forth.²² Chart 5.2 illustrates this popular binary classification of authorities.

Chart 5.2. Traditionally, evidences/arguments are always divided between two categories, sound (*ḥujjah*) and unsound (*bāṭil*).

<i>ḥujjah</i>	<i>bāṭil</i>
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In a few cases, jurists from various schools referred to evidences that do not have direct and definite authorities, but are rather ‘supporting evidences’ (*li al-isti’nās*). This is a level of authority that is good for ‘additional justification’ rather than being *ḥujjah* in its own right.²³

For example, al-Shāfi‘ī accepted narrations with disconnected-ends (*marāsīl*) from Ibn al-Musayyab, ‘as supporting evidence (*isti’nās*), not because they were valid (*ḥujjah*) in their own right’ (Chart 5.3).²⁴ Moreover, there are a number of evidences that jurists, especially from the Shāfi‘ī school, endorsed at the level of *isti’nās*, such as, ‘applying the minimum denominator’ (*al-akhdh bi-aqall mā qīl*), ‘inspiration’ (*al-ilhām*), ‘the implication of the context’ (*dilālah al-sīyaq*), and ‘taking precautions’ (*al-iḥtīyāt*).²⁵ However, in today’s theories of Islamic law, there are several juridical evidences, which were classically ‘original’ evidences, that had been moved to the level of ‘supporting’ (*isti’nās*) evidences, as explained in the next subsections.

Chart 5.3. Supporting evidence (*isti’nās*) is an intermediate level of *ḥujjiyyah* that appears in a few rulings.

<i>ḥujjah</i>	<i>isti’nās</i>	<i>bāṭil</i>
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In some cases, jurists applied ‘*ta’wīl*’ (literally, interpretation) to verses of the Qur’an or narrations.²⁶ I will translate *ta’wīl* as ‘re-interpretation,’ however, since it is always an interpretation that is different from the usual interpretations offered in usual accounts of exegesis. Jurists put some conditions for the validity of *ta’wīl*, which al-Zarkashī summarised as follows:

1. not to contradict the linguistic rule of correctness in Arabic,
2. not to contradict the normal/customary use of the Arabic language,
3. and not to contradict the general principles of the Islamic law.²⁷

Ta’wīl usually entailed some form of restricting the meaning (*takhṣīs*). For example, Shāfi‘īs ruled that the pool of zakah includes vegetables, despite the hadith that states that, ‘there is no charity (*ṣadaqah*) on vegetables.’ They ‘re-interpreted’ the word ‘*ṣadaqah*’ to restrict it to optional charity, rather than the obligatory charity of

Chart 5.4. *Ta’wīl* is a level of *ḥujjiyyah* between *ḥujjah* and *isti’nās*.

<i>ḥujjah</i>	<i>mu’awwal</i>	<i>isti’nās</i>	<i>bāṭil</i>
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zakah.²⁸ Thus, this re-interpreted evidence is ‘*mu’awwal*,’ and not up to the level of *hujjah* (Chart 5.4).

In a few other cases, some jurists criticised evidences in a way that does not totally discredit them in the usual (binary) manner. They used expressions such as, ‘*fīhi shā’*’ (there is something wrong about it), or ‘*fīhi maghmaz/khadshah*’ (there is a flaw in it).²⁹ For example, al-Laknawī al-Ḥanafī used this expression to criticise his Ḥanafī school’s method of giving precedence to abrogation (*al-naskh*) over conciliation (*al-jam’*) in resolving opposing narrations (*al-muta’aridāt*).³⁰

<i>hujjah</i>	<i>mu’awwal</i>	<i>isti’nās</i>	<i>fīhi shā’</i>	<i>bāṭil</i>
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Chart 5.5. *Fīhi shā’* is a minor criticism between *isti’nās* and *baṭlān*.

Recently, however, two new types of *ta’wīl* became common in the field of Islamic law, namely, apologetic (re)interpretation and radical (re)interpretation. Apologetic interpretations introduce ‘sensible explanations’ for traditional rulings that are thought to contradict ‘reason’ or ‘acceptable behavior,’ without entailing any change to the ruling itself on a practical level. Examples include: re-interpreting polygamy, mentioned in verse 4:3, to mean that it is meant to be a solution for the ‘natural’ imbalance between the numbers of men and women; re-interpreting verse 2:282, which equated a man’s testimony with the testimony of two women, to be ‘better than legal systems which did not accept the testimony of women at all,’ or to be ‘particular to economic transactions;³¹ and re-interpreting verse 4:34, which mentioned ‘chastisement’ (*ḍarb*) of women, to mean that ‘chastising is allowed only using a toothbrush.’³² On the other hand, radical interpretations do not contradict possible dictionary meanings of words in the Arabic language, in accordance to what jurists had allowed for acceptable interpretations. However, they are unprecedented and usually at odds with the customary usage of these words in the Arabic language, contrary to what jurists had allowed. In the above examples, some radical re-interpreters of verse 4:3 argued that polygamy in the Islamic law is restricted to marrying widows.³³ Similarly, verse 2:282

on a woman's testimony is to be linked to 'historical practical considerations.'³⁴ They also re-interpret verse 4:34, which mentions 'chastising' (*ḍarb*) of women, to mean 'mentioning a similitude to them' (*ḍarb al-mithāl*),³⁵ as a sort of advice. Chart 5.6 summarises all of the above suggested 'levels of authority.'

Proof (<i>ḥujjah</i>)	Apologetic interpretation	Interpreted (<i>mu'awwal</i>)	Supportive evidence (<i>isti'nās</i>)	Minor criticism (<i>fīhi shai'</i>)	Radical re- interpretation	Void (<i>bāṭil</i>)
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Chart 5.6. This book suggests five additional levels of 'authority' between 'proof' and 'void.'

A multidimensional systems approach, as explained in Chapter Two, entails a shift from the usual binary categorisation of authority into a multi-level categorisation, as explained above. Thus, it is more 'systematic' to present the above categories on an open scale rather than the pigeonhole boxes of Chart 5.6. The practical advantage that a 'spectrum' offers is openness to, yet, more levels of *ḥujjiyyah* between the presented levels. Chart 5.7 illustrates how I view the different levels of *ḥujjiyyah* in a continuous spectrum between proof (*ḥujjah*) and radically criticised/void (*bāṭil*).

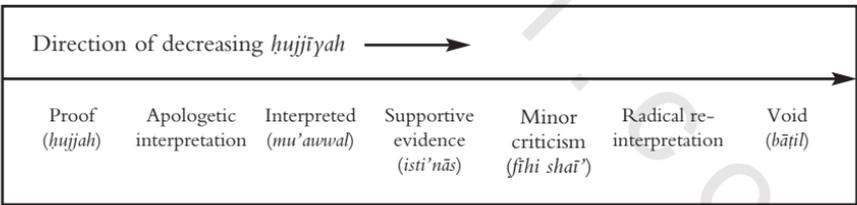


Chart 5.7. A multi-valued spectrum of *ḥujjiyyah*, from 'proof' to 'void.'

Current 'Sources' in Islamic Law

In Chapter Four, traditional sources/evidences of Islamic law were briefly mentioned, namely, the Qur'an, prophetic tradition, consensus, analogy, interest, juridical preference, custom, the imam's opinion, the companion's opinion, and presumption of continuity. However, contemporary theories of Islamic law draw on a different set of sources/

evidences, which this subsection attempts to identify based on a survey carried out on a large number of contemporary references, including those that are mentioned in this chapter's endnotes.

Today's jurists basically refer to Qur'anic verses, prophetic narrations, and rulings issued by the traditional schools of Islamic law. However, perceptions of Qur'anic exegesis, hadith collections, and various rulings issued by schools of law are shaped by available edited-manuscripts. The twentieth century witnessed a broad movement of manuscript editing and publication, particularly Arabic books related to Islamic law and its sources. Publishing houses, especially in Beirut and Cairo, printed and widely publicised books that were only accessible to a few scholars/students of Islamic law in traditional Islamic universities. The selection of these manuscripts depended on the (traditional) curricula in these universities, in addition to what was available in major manuscript libraries around the world. Recently, a large number of Islamic internet websites and software companies have contributed to even much wider distribution of these books.³⁶ Moreover, manuscript editing is becoming a trend in graduate studies related to Islamic law in Islamic universities and in departments/programs of Islamic Studies outside these universities.

It is not possible to keep track or carry out a full survey of all the edited/printed manuscripts around the world that are related to Islamic law. Yet, from my frequent visits and dealings with university libraries, book fairs, and publishing houses in various countries, I could identify the main scholars/jurists (between the second and twelfth Islamic centuries), whose edited-manuscripts are shaping current research in Islamic law and the perception of its 'literature.' The following is a list of these scholars in the areas of exegesis, hadith, and fiqh and *uṣūl* in various schools of law.

1. Qur'anic exegesis. Today, the most well known exegetes from various schools are: Ibn Kathīr, al-Ṭabarī, al-Bayḍawī, al-Zamkhsharī, al-Rāzī, al-Shanqīṭī, al-Baghawī, Abu al-Saud, al-Saadi, al-Nasafī, al-Ṭabṭaba'i, al-Qummi, al-Ṭusi, Ṣadr al-Mut'allihīn, al-Waḥīdī, al-Tha'alibi, al-Suyuṭī, al-Qurṭubi, al-Alusi, al-Samarqandi, al-Kashānī, al-Janābidhi, Abdul-Jabbar, al-Sam'ani, al-San'ani, Ibn Taymiyah, al-Shawkānī, al-Mawardi, al-Ḥabri, al-Kūfi, al-Hawwari, Iṭfeesh, and al-Khalili.

2. Hadith collections. The most popular compilers of standard hadith collections from various schools are: al-Bukhārī, Muslim, al-Ḥākim, Ibn al-Jārūd, Ibn Ḥibbān, Ibn Khuzaimah, al-Bayhaqī, al-Nassā'ī, Abū Dāwūd, Ibn Mājah, al-Tirmidhī, al-Dārquṭnī, al-Dāramī, Ibn Bābawayh, al-Ṭaḥnawī, Mālik, al-Shāfi'ī, Abū Ḥanīfa, Abdul-Razzaq, al-Ṭabarī, al-Ṭabarānī, Ibn Abī-Shaybah, al-Bazzār, al-Rabī' Ibn Ḥabīb, al-Killīnī, al-Majlisī, and al-ʿĀmilī.
3. Fiqh and *uṣūl*. The following jurists are the most prominent in their respective schools of Islamic law, and their edited-manuscripts are now considered 'textbooks' for studying these schools.
 - (a) The Ḥanafī school: Abū Ḥanīfa, Abū Yūsuf, Moḥammad ibn al-Ḥasan, al-Sarkhasī, al-Bazdawī, Ibn Nujaym, al-Rāzī, al-Merghayānī, al-Kasānī, al-Zayla'ī, al-Samarqandī, al-Ṭaḥāwī, al-Sīwāsī, Ibn Mūsā, al-Laknawī, Shaikhizādah, Ibn al-Humām, and Ibn ʿĀbidīn.
 - (b) The Mālikī school: Mālik, Ibn Wahb, Saḥnūn, Ibn al-ʿArabī, al-Qarāfi, al-Mawwāq, al-Abdarī, al-Thalabī, al-Qayrawānī, al-Ghīrnāṭī, Ibn ʿAbdul-Barr, al-Kurdī, al-Adawī, Ibn Rushd, al-Shāṭibī, al-Dardīr, Ibn Farḥūn, al-Kharshī, al-Wansharīsī, al-Shādhilī, and al-Sunūsī.
 - (c) The Ḥanbalī school: Ibn Ḥanbal, al-Marwazī, al-Khallāl, Ibn Taymiyah, Ibn al-Qayyim, al-Tūfi, Ibn Rajab, Ibn al-Lahhām, Ibn Baṭṭah, al-Mīrdawī, al-Bahwatī, al-Maqdisī, Ibn Mufliḥ, Ibn Qudāmah, al-Baghawī, al-Zarkashī, al-Marwazī, al-Ba'li, and al-Kharqī.
 - (d) The Zaydī school: Zayd, al-Wāsiṭī, Ibn al-Zabarqān, Ibn Muzāḥim, Aḥmad Ibn ʿĪsā, al-Qāsim, al-Hādī, Ibn Ishāq, al-Ansī, Ibn al-Murtaḍā, Ibn Muftaḥ, and recently, al-Shawkānī.
 - (e) The Ibādī school: Jābir ibn Zayd, al-Busaidī, Itfēesh, al-Bahlawī, Ibn Ja'far, al-Ḥawarī, al-Salīmī, al-Shamakhī, al-Autabī, and al-Shaqṣī.
 - (f) The Ja'farī school: Ja'far, al-Killīnī, Ibn Bābawayh, Ibn Qawlawayh, Ibn al-Junaid, al-Ṣadūq, al-Mufīd, al-Murtaḍā, al-Ṭūsī, al-Khū'ī, al-Ḥasan al-Ḥillī, al-Muḥaqqiq al-Ḥillī, al-Muṭaḥhar al-Ḥillī, al-ʿĀmilī, al-Ṭabṭaba'ī, and al-Najafī.
 - (g) The Shāfi'ī school: Al-Shāfi'ī, al-Qaffāl al-Shāshī, al-Juwaynī, al-Ghazālī, al-Māwardī, al-Shirbīnī, al-Fairūzabādī, al-Ṣan'ānī, al-Nawawī, al-Ḥaḍramī, al-Haithamī, al-Bijirmī, al-Shirāzī, Ibn al-Ṣālah, al-Anṣārī, Ibn Raslān, al-Subkī, Qalyūbī, ʿUmayrah, and al-Ramlī.
 - (h) The Zāhiri school: Dawūd and Ibn Ḥazm.
 - (i) The Mu'tazilī school: ʿAbdul-Jabbār, al-Bājī, Abū al-Ḥussain al-Baṣrū, Abū Ḥāshim, al-Ka'abī, al-Jubba'ī, Ibn Khallād, al-Nazzām, Ibn al-Hudhail, and Abū Muslim.

The twentieth century also witnessed a great deal of research and writing on issues related to the Islamic law, written in all known languages. Authors/Researchers gave the above-mentioned classic jurists and their works a 'level of authority' that ranged from '*hujjiyyah*' to 'radical criticism.'

In addition, some other 'sources of law' were considered to have 'authority' in their own right, such as, higher principles and interests, 'rational' arguments, and 'modern' universal values and rights.

Therefore, the following is a list of current sources on the Islamic law. The next subsection will explain how various theoretical approaches considered these sources at different levels of authority.

1. Verses of the Qur'an, usually interpreted according to one of the exegeses mentioned above.
2. Prophetic traditions, usually cited in one of the collections that are mentioned above.
3. 'Islamic' higher interests (*maṣāliḥ*), which are induced from the scripts and narrations, as explained in Chapter One.
4. Rulings from traditional schools of Islamic law, according to one of the schools' jurists mentioned above.
5. 'Rational' arguments, or rationality, which could mean a number of things. However, the common feature of all 'rational' arguments is their reliance on pure human reasoning, rather than an outside (divine) source of knowledge.
6. Modern values, the reference of which is usually the Universal Declaration of Human Rights and similar international and national declarations.

Chart 5.8 illustrates how I view these sources as a representation of a dimension of human experience versus revelation. Qur'anic verses are at the right end of the spectrum, even though its interpretation is subject to human experiences, as obvious from the science of exegesis. The prophetic traditions range from 'pure conveyance of the message' to 'pure human judgements,' as will be elaborated in the next chapter. Interests represent human cognition of the higher objectives of the revelation. It was also explained in Chapter One how perceived interests

are subject to each jurist's 'worldview' and agenda of reform. Rulings made by jurists, who belonged to traditional *madhāhib*, are legal opinions (*fatāwā*), which were given in certain geographical and historical contexts. Thus, on the spectrum shown, they are closer to 'human experience' than 'revelation.' What some Muslims view as a 'rational norm' is an expression of human experience, even though it is also shaped, in part, by popular perceptions of Islam. Finally, politicians compiled modern declarations of universal human rights in order to preserve 'human intrinsic dignity.' Thus, these declarations represent the ultimate human experience in deciding the law. Some current scholars of Islamic studies have suggested them as the most justifiable sources of 'Islamic' law for today. The following subsections will elaborate on these sources.

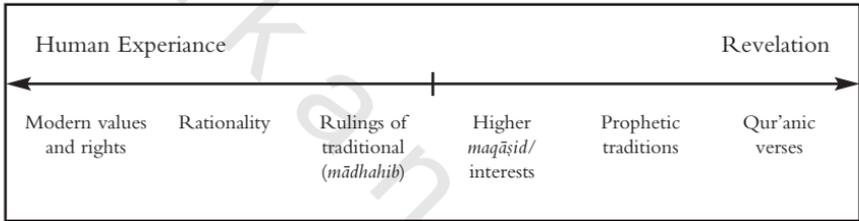
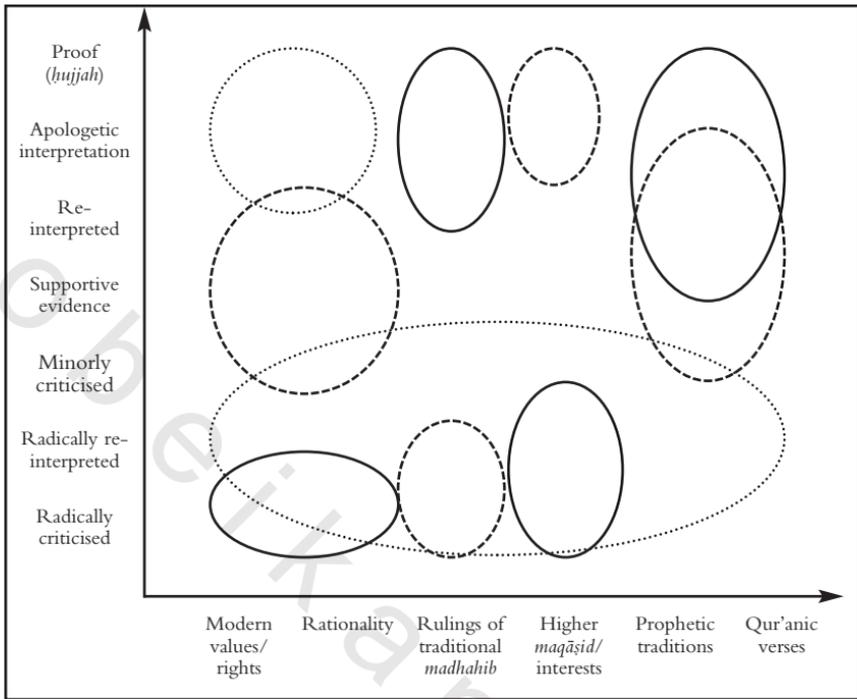


Chart 5.8. A multi-valued spectrum of sources according to a dimension of 'human-experience' versus 'revelation.'

Current 'Tendencies' in Islamic Law

Chart 5.9 presents a two dimensional classification that illustrate the current various sources of Islamic law versus the current various levels of authority given to them. In other words, verses of the Qur'an, prophetic traditions, rulings from traditional schools of Islamic law, Islamic higher principles/interests, rationality, and modern values, were given 'authority' that ranged from 'proof' (*ḥujjah*) to 'radically criticised' (*buṭlān*), including various degrees of interpretation and criticism. Within this two-dimensional space, I identified three major 'tendencies' in various contemporary theories of Islamic law, namely, traditionalism, modernism, and thirdly, postmodernism. The hypotheses presented by these tendencies are marked by regions on the



Modernism ----- Postmodernism Traditionalism ———

Chart 5.9. A two-dimensional illustration of where the proposed tendencies stand in terms of sources of the Islamic law versus 'levels of authority.'

chart. 'Tendencies' do not necessarily represent specific schools with exclusively defined theories, nor do they necessarily represent specific scholars/researchers, since scholars often change positions and move between 'tendencies' over time and subject to the topic at hand.

The intersections of these regions explain the similarity in positions and arguments that one might notice between scholars coming from quite different angles. For example, traditionalists and postmodernists use similar 'anti-eurocentrism,' 'anti-rationality,' and 'anti-purposefulness' arguments. Traditionalists and modernists both use similar 'apologetic re-interpretations' of the scripts and traditional *madhāhib* rulings. Likewise, modernist and postmodernist approaches sometimes use the literal meanings of the scripts for 'supportive evidence,' and the 'historicity' radical critique for Islamic schools of law, all in very similar ways. And so on.

I propose that each of the above ‘tendencies’ is the result of a number of theoretical ‘streams’ that contributed to it. The next three subsections will elaborate on these streams that formed the tendencies of traditionalism, modernism, and postmodernism, respectively.

5.3. TRADITIONALISM

Traditionalism includes a few streams that address different sources of the law in their endorsements or critiques. I will identify them as scholastic traditionalism, scholastic neo-traditionalism, neo-literalism, and ideology-oriented theories.

Scholastic Traditionalism

Scholastic traditionalism³⁷ holds the opinions of one classic school of Islamic law (for example, Shāfi‘ī, Mālikī, Ḥanafī, Ḥanbalī, Shia, or Ibādī) as ‘text addressing the issue at hand’ (*naṣṣun fī al-mas’alah*).³⁸ Verses from the Qur’an or narrations of hadith that agree with the conclusions of the *madhhab* are used, in effect, for ‘supportive evidence’ (*li al-isti’nās*). They are seldom used as proof in their own right. When the verse or a hadith contradicts with the conclusions of the *madhhab*, they are re-interpreted (*yu’awwal*) or considered ‘abrogated’ (*yunsakh*) in order to fit the conclusions of the *madhhab*.³⁹ Scholastic traditionalism allows *ijtihad* only if there is no previous ruling in the chosen *madhhab*, and in this case *ijtihad* is based on analogy with some related previous rulings in the literature of the school.

One illustrating example of scholastic traditionalism is a graduate thesis on *fiqh*, presented to Imam Saud Islamic University in Riyadh, entitled, ‘Leadership of Women in the Islamic Law’ (*Wilāyah al-Mar’ah fī al-Fiqh al-Islāmī*).⁴⁰ The thesis starts with the Ḥanbalī interpretation (especially, Ibn Taymiyah’s) of the hadith narrated in Bukhārī, ‘Those who entrust their affairs to a woman will never know prosperity.’⁴¹ The writer rejects, without much explanation, traditional and contemporary objections to the Hanbali interpretation of this hadith, which are based on the effect of the political context of the

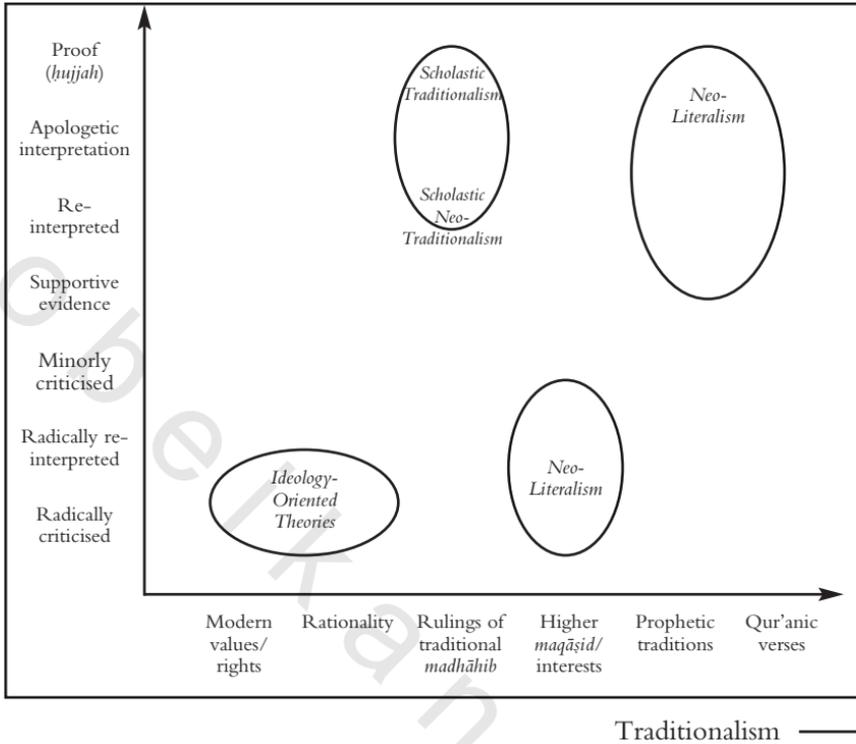


Chart 5.10. Traditionalism tendency in terms of its contributing streams.

narration, in addition to questioning the narrator’s integrity.⁴² Then, the thesis discusses at length all shapes and forms of ‘wilāyāt’ (leadership responsibilities) that a woman could possibly assume. They are all rendered ‘unlawful,’ except for three ‘leadership’ roles, which are women’s responsibility over their own money, women working in specific educational and medical jobs, and women leading other women in prayer. All other leadership roles that a woman could ever assume in any other social, legal, political, judicial, media, economic, military, or educational domain are said to be unlawful in ‘Islam.’ The opinions presented in this thesis are typical and even legalised in some countries, and clearly illustrate how scholastic traditionalism fails to achieve justice and equality in that it takes certain narrations and opinions out of every historical and geographical context and applies them to today’s world.

Scholastic Neo-Traditionalism

Scholastic neo-traditionalism⁴³ is opened to more than one school of law for reference on valid rulings and not restricted to one school. There are various degrees of this openness, the highest of which is openness to all schools of law mentioned above, as well as opinions of companions and other pre-*madhāhib* scholars. A lesser degree of openness is to accept opinions only within the circle of either the four Sunni schools (in addition to Ibādīs) or the Shia schools. The reason behind the neo-traditionalism insistence on choosing one *madhhab*'s opinion, rather than creating a new one, is the abiding of its adherents by the fundamental (*aṣl*) of consensus (*ijmā'*). Despite the many theoretical differences in defining *ijmā'* itself, as explain before, compliers with it insist that a chosen opinion must be supported by at least one school.⁴⁴ For Shia and Ibādī schools, however, *ijmā'* is the consensus of jurists in their own school.⁴⁵

The criteria of choosing amongst these schools also vary. One criterion is the 'authenticity' of the schools' evidences, judged based on a contemporary revision of chains of narrators carried out by Shaykh al-Albānī, for example.⁴⁶ Another criterion is some sort of 'majority vote,' which supports the chosen opinion by showing that a majority of the currently popular schools accepts it.⁴⁷ Yet, a third criterion for choosing one traditional opinion over the others is the 'best interest' of people (or *maṣlahah*),⁴⁸ or the purposes of the law (*maqāsid al-shar'ah*).⁴⁹ This is where I think that scholastic neo-traditionalism intersects with modernist reformism (refer to Chart 5.9). Modernist reformism refers to the Qur'an and prophetic tradition as the 'only sacred Islamic *nuṣūṣ*,'⁵⁰ even though they are always understood, in this particular stream, through the opinions of scholars from one of the traditional schools, as the next subsection explains.

I would argue that scholastic neo-traditionalism is currently the mainstream approach in traditional Islamic academic institutes, such as universities and fiqh academies. Typically, issuing a fatwa or researching an issue (*mas'alah*) involves a descriptive comparison of one or more opinions from traditional schools of law, usually followed by a recommendation of one of them through resorting to one of the criteria outlined above. In this circle, *ijtihad* is restricted to the area of

fatwa, but not fundamental sources or methodology (*uṣūl*), which are generally considered fixed (*thawābit*).⁵¹ Given the enormous breadth of Islamic juridical literature and the element of rationality/*maṣlahah* in the neo-traditionalist approach, it is always possible to find some historical opinion that answers a contemporary question, however different the context or circumstances are.⁵² Nevertheless, because neo-traditionalists restrict themselves to historic *fatāwā* for contemporary issues, the premises upon which these *fatāwā* are based are sometimes outdated. One example is the fatwa given by the European Fiqh Council for Fatwa and Research (EFCR) on allowing house mortgages for Muslim minorities in the West for the sake of their public interest (*maṣlahah*). The fatwa was ‘supported’ by a classic Ḥanafī fatwa that allowed Muslims to deal in usury (*ribā*) outside the ‘land of Islam.’⁵³ The concepts of ‘land of war’ and ‘land of Islam’ are historic constructs that described a world once divided into two distinct fighting campaigns – Muslims and the ‘others.’⁵⁴ Basing a contemporary fatwa in Europe on such concept is highly counter-productive, for a number of obvious reasons, and goes against the ‘Muslim-integration’ mission of EFCR itself. Another example is the deliberation of the same council regarding women who convert to Islam while their husbands choose to remain non-Muslim.⁵⁵ Several council members stated in their papers that the couple should be divorced if one of them is in the ‘land of war’ while the other is in the ‘land of Islam.’

An additional example that shows how deep the same binary land of Islam/land of war classification is in neo-traditionalist methodology is a graduate thesis presented to the High Institute of Judges in Riyadh, which discusses the issue of ‘different lands’ (*ikhtilāf al-dārāin*).⁵⁶ The thesis studied rulings related to the dealings between two people, one of them living in the ‘land of Islam’ while the other is living in the ‘land of war.’ The researcher takes this classification for granted and goes on to discuss other related concepts, such as ‘enslavement’ (*istirqāq*), ‘apostasy’ (*riddah*), and the contract of protection for non-Muslim minorities (*dhimmah*). The researcher did not restrict himself to his specific Ḥanbalī stream, but made his choices from amongst the opinions endorsed by classic (Sunni) schools based on, more or less, a ‘majority decision.’ However, restricting the scope of research to the

classic schools of law, despite the obvious historical difference in underlying circumstances, hindered the researcher from addressing the above issues from a contemporary and realistic perspective.

The concept of *ijmāʿ*, in the above sense, prevents contemporary jurists from having direct contact with the Islamic primary scripts and, hence, practically rendering them 'supportive evidences.' This contributes to 'inflexibility' in the Islamic law, in terms of new circumstances and questions. For example, all classic schools do not allow Muslim women to carry out their marriage contracts/vows by themselves (except for the Ḥanafī's opinion which gives an exception to widows and divorcees). According to classic schools, the girl has to delegate a close male relative,⁵⁷ which is a traditional Arabic practice that 'protects the girl from being called shameless.'⁵⁸ The juridical opinion that supports this practice is based on an isolated narration that states: 'A woman's marriage without the permission of her male guardian is void, void, void.'⁵⁹ In addition to the debate on the authenticity of this hadith in traditional sources,⁶⁰ several verses of the Qur'an are clearly against this opinion and set a general principle of equality in 'legal capacity.'⁶¹ Neo-traditionalism does not break the *ijmāʿ* on this ruling and, therefore, finds apologetic justifications for placing such restrictions on every woman's legal capacity, despite their contradiction with a number of scripts.⁶²

Neo-Literalism

Neo-literalism⁶³ is another stream of traditionalism that is named in relation to the (extinct) *Zāhirī* school.⁶⁴ However, literalism is not only a Sunni phenomenon but a Shia phenomenon as well. One medieval Shia group, *al-madrasah al-akhbāriyyah* (Narration school), was against not only analogical reasoning but all forms of *ijtihād*.⁶⁵ However, the effect of the Narrationists (*al-akhbāriyyīn*) on the Shia thought has significantly decreased since Imam Bahbahānī's reform movement in the late eighteenth century.⁶⁶ The difference between the old Literalist school (for example, Ibn Ḥazm's version) and the Neo-literalist school is that literalists were open to a wide collection of hadith narrations (as clearly appears from Ibn Ḥazm's '*al-Muḥallā*,' for example).⁶⁷ However, contemporary (neo-)literalism depends

mostly on the hadith collection of one school of law (for example, the Wahhabi version of the Ḥanbalī school, or the Shia hadith collections). Moreover, the old literalist school endorsed *istiṣhāb* (presumption of continuity) as a fundamental source of jurisprudence that has a component of ‘purposefulness’ (*maqāṣidiyyah*) to it, as the next chapter explains. However, neo-literalists are against the idea of the purposes/*maqāṣid* being a legitimate source of jurisprudence. In fact, neo-literalism radically criticises the theory of *maqāṣid* as ‘secular ideas in disguise,’⁶⁸ which is, interestingly, the same criticism, word for word, of some ‘postmodernists’ to the same approach.⁶⁹

‘Blocking the means’ is a recurring theme in current neo-literalist approaches, which is utilised by some authoritarian regimes for their own ends, especially in the areas of laws related to women. For example, in the name of blocking the means, women are prohibited from ‘driving cars,’ ‘traveling alone,’ ‘working in radio or television stations,’ ‘serving as representatives,’ and even ‘walking in the middle of the road.’⁷⁰ To illustrate one such mis-application of ‘blocking the means,’ the following is a fatwa issued by the Saudi High Council of Fatwā regarding women driving cars.⁷¹

[Question]: Under circumstances of necessity is it permissible for a woman to drive an automobile by herself, without the presence of a legal guardian, instead of riding in a car with a non-*mahram* man [stranger]?

[Fatwa]: It is impermissible for a woman to drive an automobile, for that will entail unveiling her face or part of it. Additionally, if her automobile were to break down on the road, if she were in an accident, or if she were issued a traffic violation she would be forced to co-mingle with men. Furthermore, driving would enable a woman to travel far from her home and away from the supervision of her legal guardian. Women are weak and prone to succumb to their emotions and to immoral inclinations. If they are allowed to drive, then they will be freed from appropriate oversight, supervision, and from the authority of the men of their households. Also, to receive driving privileges, they would have to apply for a license and get their picture taken. Photographing women, even in this situation, is prohibited because it entails *fitnah* [mischief] and great perils.

The next chapter will elaborate on the Mālikī juridical method of ‘opening the means’ (*fath al-dharā’i*), which has not been adequately utilised in current theories of the Islamic law.

Ideology-Oriented Theories

A stream of traditionalism overlaps with postmodernism in criticising modern ‘rationality’ and values for their biased ‘euro-centricity’ and ‘internal contradictions.’ Perhaps this is why Fazlur Rahman categorised its advocates as ‘postmodernist fundamentalists.’⁷² Their arguments are usually used against ‘the west,’ and especially democracy and democratic systems, which is rendered ‘fundamentally contrary to the Islamic system.’⁷³ The main argument of this stream is that ‘governance, legislation, and sovereignty’ (*al-ḥākimiyyah wa al-tashrī wa al-sīyādah*) is a ‘right for God alone,’ and is not to be given to people based on any contract or right. A number of other supportive arguments are used, for popular consumption, based on the ‘consequences’ of democracy, such as, ‘the west’s freedom of disbelief ... promiscuity ... immorality ... usury ... monopoly ... double-standard policies ... secularism.’⁷⁴ This stream’s ‘basic élan is anti-Western,’⁷⁵ as Fazlur Rahman notes. Thus, they are supported by a number of dictatorships for their own political interests. I agree with Abdullah An-Na‘im that, ‘Islam, like any religious tradition, can be used to support human rights, democracy, and respect among different communities, or oppression, authoritarianism, and violence ... There is no inherent or inevitable “clash of civilisations;” all depends on the choices we all make, everywhere, Muslims and non-Muslims alike.’⁷⁶

The next section will analyse the various streams that form ‘Islamic modernism,’ according to the new classification.

5.4. ISLAMIC MODERNISM

The terms ‘Islamic modernism’ and ‘Islamic modernists’ have been used recently by several scholars. Charles Kurzman uses it to identify a movement that ‘sought to reconcile Islamic faith and modern values,

such as constitutionalism, as well as cultural revival, nationalism, freedom of religious interpretation, scientific investigation, modern-style education, women's rights, and a bundle of other themes.⁷⁷ Ebrahim Moosa uses the term to identify a group of Muslim scholars who 'were tremendously impressed by both the ideals and reality of modernity,' and 'truly believed that Muslim thought as they imagined it from their medieval incarnation' was 'sufficiently flexible to foster innovation and adapt to change commensurate with time and space.'⁷⁸ Ziauddin Sardar uses the term to categorise a group of twentieth century reformers who 'made a serious attempt at *ijtihad*,' to 'modernise Islam' in terms of 'western modes of thought and social organisation,' and especially 'using *maṣāliḥ* (interests).'⁷⁹ Neil Robinson mentions how modernists 'called for a new *ijtihad* which would disregard the established schools.'⁸⁰

While agreeing, in principle, with the above definitions, I do not restrict modernists to early twentieth century scholars. As a matter of fact, the popularity of modernist approaches, as described below, is currently growing in both Islamic and western academic institutes. Moreover, I will present modernism in terms of theories rather than specific scholars. The examples presented below are meant to illustrate modernism, rather than to classify certain scholars as 'modernists.' As mentioned before, scholars often shift their approaches based on the issue they address and due to their own development throughout their lives.

I will discuss Islamic modernist approaches to Islamic law in terms of a number of 'streams,' namely, reformist re-interpretation, apologetic re-interpretation, dialogue-oriented re-interpretation, *maṣlaḥah*-oriented theories, and *uṣūl* revisionism. These streams have dealt with juridical sources in a variety of ways. The following is an outline of these ways, which Chart 5.11 summarises.

Two key contributors to Islamic modernism, in its various streams, were Mohammad Abduh (1849–1905 CE), the Chief Egyptian Mufti at his time, who was influenced by both his Islamic and French juridical studies, and Mohammad Iqbal (1877–1938 CE), who was an Indian poet-lawyer-philosopher, educated in both England and Germany, in addition to India. Both scholars, from both geographical sides of the

Islamic world, integrated their Islamic and western studies into new proposals for Islamic reform. 'Re-interpretation' of Islam and its classic knowledge was a common theme in both proposals. Iqbal distinguished between universal principles of the Qur'an, on one hand, and their relative interpretation in practical life, on the other hand.⁸¹ Abduh wrote some exegesis based on his own direct understanding of the Qur'anic Arabic language and without quoting any previous exegete, for the first time in Islamic scholarship history.⁸² Although Abduh did not mention in explicit terms any influence of French theories of law on his juridical methodology, one could draw a link between Abduh's 're-interpretation' methodology and the French 'exegetical school,' which was powerful at the time he studied law in France in the late nineteenth century. Abduh wrote in his autobiography that before he went to France, he perfected the French language 'in order to be able to study the French law directly from its sources.'⁸³ At that time, French exegetes were 're-interpreting' the French code in terms of 'themes,' regardless of the articles' order⁸⁴ which is identical to the methodology that Abduh endorsed, as he explained in the introductory notes of his exegesis.⁸⁵

Abduh's student, Rashid Rida, made similar 'reformist interpretations' in his exegesis, *al-Manār* (The Lighthouse),⁸⁶ which is now a standard reference in contemporary Qur'anic studies, even though it was left incomplete. Then, another student of Abduh's, al-Tahir ibn Ashur, the Shaykh of the Zaitunah Mosque at his time, wrote a full exegesis of the Qur'an, *al-Tahrīr wa al-Tanwīr* (Liberation and Enlightenment). In his introduction, he explained how he believed in interpretation 'according to the meanings one directly derives from the Qur'anic language.'⁸⁷ These pioneering exegeses paved the way to new methods and schools of interpretation/re-interpretation, which have contributed to modern reformist streams.⁸⁸

Abduh's re-interpretation aimed to prove that 'Islam is coherent with modern science and rationality.'⁸⁹ This is reminiscent to the old debate in Islamic philosophy on resolving the 'contradiction between reason and revelation' (*ta'ārūḍ al-ʿaql wa al-naql*). However, what Abduh called 'science' was actually late nineteenth century experimental physics and biology, which lead Abduh to seek metaphorical

interpretations for all Islamic ‘metaphysical’ matters, in the nineteenth century sense, such as the tree of Adam and Eve, the existence of angels, and the harm of envy. Perhaps under the effect of Darwinian grand theories, which were popular at that time, Abduh re-interpreted the verses that narrated the story of Adam and Eve to be a ‘metaphoric story that is mentioned in the Qur’an not as a scientific fact, but merely as a lesson and example for human beings.’⁹⁰ He further re-interpreted ‘the tree’ from which Adam and Eve ate to be a metaphor for human ‘evil and disobedience,’⁹¹ and re-interpreted the angels, to whom the Qur’an attributed some actions, to simply mean ‘forces of nature.’⁹² He also re-interpreted ‘the evil of envy’ to be the evil plots that an envious person carries out against the envied,⁹³ rather than any special metaphysical power, which he excluded as unscientific.

Mohammad Abduh’s support for ‘experimental logic,’⁹⁴ which he expressed in his new interpretation of the Qur’an, reminds me of Abū Ḥamid al-Ghazālī’s support for Aristotle’s deductive logic through his innovative interpretation of some Qur’anic verses to prove the validity of basic inference principles, such as logical implication and exclusive-OR.⁹⁵ While both interpretations might be valid linguistically, neither should necessitate that the Qur’an is meant to endorse a specific system of logic. Science and its bases of logic are ‘human’ and both are ever changing. This takes us back to the ‘cognitive nature’ of human reasoning that was explained in Chapter Two.

On the other hand, today’s science says that it neither has proofs nor counterproofs for metaphysical hypotheses such as ‘angels’ and ‘the power of an envious eye.’ In fact, New Age literature suggests the actual useful and harmful physical effects of human ‘energy’ without any physical contact, and this movement can even back its hypotheses with the ‘science’ of sensitive energy photography.⁹⁶

Reformist Re-interpretation

A new approach to interpretation, which I will call ‘reformist re-interpretation,’ is popularly known as the ‘contextual exegesis school’ (*madrasah al-tafsīr al-mawḍū‘ī*), ‘thematic exegesis school’ (*madrasah al-tafsīr al-miḥwārī*) or to use Fazlur Rahman’s expression, ‘systematic interpretation.’⁹⁷ Early contributors were Imams Abduh, al-Tabtabai,

Ibn Ashur, and al-Sadir. This method reads the Qur’an, as a whole, looking for general themes across its entirety, its chapters, and groups of verses. Traditional exegetes used to put all their emphasis on the explanation of single words or verses, but rarely on a group of verses in a specific context. Abduh and Ibn Ashur stressed the importance of thematic interpretation in the introduction of their exegeses and hinted to several new links between particular Qur’anic stories and sections.

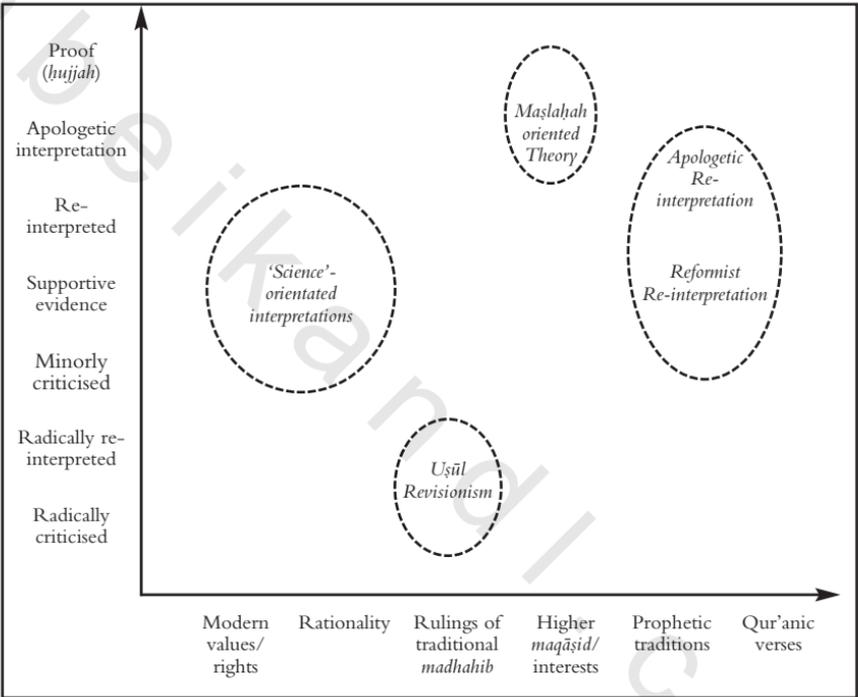


Chart 5.11. Modernism tendency in terms of its contributing streams.

Modernism -----

However, neither wrote exclusively on the subject. Later, Ayatollah al-Sadir gave an important series of lectures in Najjaf, Iraq, on the methodology of thematic interpretations and applied it to interpret how the Qur’an presented the concepts of history and ideal society.⁹⁸ Later, Mohammad al-Ghazaly, Hasan al-Turabi, Fazlur Rahman, Abdullah Draz, Sayyid Qutb, Fathi Osman, and al-Tijani Hamed, all suggested new interpretations based on the new methodology.⁹⁹

More recently, Taha J. al-Alwani called for a new reading of the scripts that ‘acknowledges that people’s rational faculties, cultures, experiences, and knowledge, completely shape what they understand from the scripts.’¹⁰⁰ Abdul-Karim Soroush highlighted the merits of al-Tabtabai’s new interpretation of the Qur’an using the Qur’anic language itself, in a ‘hermeneutical circle,’ while not focusing on the ‘meanings of the words, only their functions.’¹⁰¹ Based on these ‘functions,’ Soroush further suggested differentiating between the verses that are ‘functions of cultural, social and historical environment’ and other verses that are not.¹⁰² Fazlur Rahman criticised medieval Islamic thought for not producing ‘a single work of ethics squarely based upon the Qur’an, although there are numerous works based on Greek philosophy.’¹⁰³ He wrote that a new interpretation of the Qur’an based on ethics is necessary to derive a workable Islamic law,¹⁰⁴ which places emphasis on the ‘purposes’ rather than the ‘quantified actions.’¹⁰⁵ Salwa El-Awa took a modern linguistic approach to the Qur’an, though not in a ‘deconstructionist’ sense (as the following subsection will explain). Following the modern London Linguistic School, she stressed the importance of considering the emotional, situational and cultural context or ‘brackets’ while interpreting the Qur’an. She further proposed that these contexts were the reason behind the occurrence of multiple-meanings (*wujūh* or *ta‘addud dilālī*) that traditional exegesis scholars suggested in several Qur’anic expressions.¹⁰⁶ Recently she proposed a ‘systematic approach to exegesis.’¹⁰⁷ The above re-interpretation streams ended the monopoly on Qur’anic interpretation, which had been held by traditional exegetes.¹⁰⁸ The significance of reformist re-interpretations is the new paradigms and positions they produced on practical everyday issues, such as family issues, economy, and politics. The following is an illustration of these new positions in the area of ‘Islam and politics.’

Ali Abdel-Raziq, an Azhari judge, sparked a heated discussion in 1925, which is still alive up till now, on whether Islam is a ‘religion that has a political character’ or not. In a re-interpretation style, he quoted numerous Qur’anic verses and prophetic traditions to argue that Prophet Muhammad only had ‘authority as a prophet’ and not dominion as ‘king, caliph or sultan’ and that he established ‘religious unity’

and not 'a political state.'¹⁰⁹ Abdel-Raziq's point, as I see it, is that the Islamic law is neutral about political systems, i.e. Muslim societies are free to choose any political system they wish, without making any system an Islamic obligation. Abdel-Raziq's opinion is actually quite similar to traditional *fiqhī* opinions that made political leadership (*imāmah*) 'an obligation based on rationality (*bi al-ʿaql*) rather than revealed knowledge (*bi al-sharʿ*).'¹¹⁰ Although these interpretations are not new, they costed him a trial and the revocation of his Azhari degree.¹¹¹

Apologetic Re-interpretation

The difference between reformist re-interpretations and apologetic re-interpretations is that reformist re-interpretations have a purpose of making real changes in the practical implementation of the Islamic law, while apologetic re-interpretations are justifying a certain status quo, 'Islamic' or 'non-Islamic.' The following are examples of re-interpretations in the area of 'Islam and politics' after Abdel-Raziq, which I classify as 'apologetic.' Mahmoud Mohamed Taha supported the idea of 'socialism' in Islam,¹¹² through a different interpretation of, ironically, the same verse that Abdel-Raziq quoted: 'You [Muhammad] have no dominion over them' (Qur'an 88:22). He goes further to interpret the verses requiring *shūrā* (consultation) and zakah (obligatory charity) to be 'necessary stages in preparation' for socialism. Sadek Sulaiman concluded from the same script on *shūrā* that 'democracy and *shūrā* are synonymous in conception and principle ... and are thus one and the same.'¹¹³ Mohammad Khalaf-Allah interpreted the same *shūrā* concept, in light of the Prophet's implementation of it, as the authority of 'majority vote.'¹¹⁴ Abdulaziz Sachedina explored the 'Islamic roots of democratic pluralism' in the Qur'an and evidences of 'civil society' in Madinah's early Muslim community in order to 'legitimise modern *secular* ideas of citizenship in the Muslim political culture' (italics mine).¹¹⁵

Although all of the above interpretations are linguistically valid, given the flexible nature of the Arabic language, none of them should necessitate that the Qur'an must support a specific political system or

voting system. Rachid Ghannouchi was more cautious than other modernists when he supported democracy and democratic principles not based on a direct interpretation of the scripts, but rather on the fact that 'the essence of God's laws, for which all divine messages were sent, is the establishment of justice for mankind.'¹¹⁶ Mohammad Khatami, Iran's fifth president, followed the same line of argument and added that he supports democracy because the only available alternative is dictatorship, which goes against Islam's principles.¹¹⁷

The above argument is, obviously, not meant to demean a British-style democracy, majority vote, party systems, or an American model of civil society. I am arguing here that this level of detail about any 'worldly matter' should not be given a sacred halo by forcefully reading them into the Qur'an or hadith. Direct democracy, for example, could very well be as successful as, if not actually better than, a multi-party democratic system,¹¹⁸ and they both aim at the same set of 'higher values.' Approval voting systems, pair-wise elections, multi-level voting systems, and (the Swedish style) multiple-member district systems are equally valid alternatives to majority vote systems in achieving fair representation in a 'multi-participant decision making environment.'¹¹⁹ Transparency, tolerance, volunteerism, teamwork, reciprocity, and mutual respect do not have to happen in a society exclusively through the American model of non-governmental organisations.¹²⁰ And so on. The point here is that scripts should be read in terms of higher values (or *maqāṣid*) rather than specific detailed political structures, as apologetic modernists do.

The same suggestion applies to the Muslim feminist re-interpretation of the scripts.¹²¹ For the same reasons, they should be in terms of the higher human and social values that the scripts advocate, rather than specific preconceived egalitarian models.¹²² Women's issues, however, make a much more complex case since, in this area, long-established interpretations that were made to support medieval traditions are deep-rooted in the fabric of the Islamic law.

Scripts should neither be (a) used for the sake of powerful people nor (b) hindered from playing an effective role in future generations when people discover better ways of carrying out their affairs. This is precisely what happened with early (apologetic) interpretations that

were meant to support certain prevailing political structures. In our day, these interpretations are considered integral parts of the ‘Islamic law’ that are difficult to challenge, and had impeded political development and modern reform in Islamic societies. One illustrative example is al-Māwardī’s ‘*al-Aḥkām al-Sultāniyyah*’ (The Rulings of the Kings).

Al-Māwardī legitimised the Abbasid tribal and monarchic system, which he found most excellent at his time, through his book ‘*al-Aḥkām al-Sultāniyyah*.’ Al-Māwardī’s book is now a standard textbook in ‘*al-sīyāsah al-shar‘iyyah*’ (that is, Islamic political theory). Al-Māwardī ‘interpreted’ the scripts to imply ‘protecting people with noble lineages [such as the Abbasids] from having a governor over them unless he comes from more noble roots,’¹²³ ‘legitimising a caliph who is appointed by another of his own,’¹²⁴ ‘giving people money from the trust according to their tribal lineages,’¹²⁵ and giving the caliph the right to ‘have a monopoly over decision making’ (*al-istibdād bi al-amr*).¹²⁶ Al-Māwardī’s views obviously do not realise justice, good governance, or civility in any contemporary sense. Yet, they are considered ‘Islamic law’ rather than ‘history of Islamic law.’ Any attempts to modernise them, in order to realise the (Islamic) principles of justice and consultation, are labeled by popular traditionalist voices as ‘acts of deviance.’¹²⁷

Maṣlaḥah-Based Theories

A *maṣlaḥah*-based approach, which is also one of the approaches classified here under ‘modernism,’ attempts to avoid the shortcomings of apologetics by reading the scripts in terms of the interests they achieve, rather than specific pre-conceived policies. Mohammad Abdu and al-Tahir ibn Ashur paid special attention to interests and purposes in the Islamic law and considered them components of their fundamental reform in the Islamic law.¹²⁸ Ibn Ashur’s proposal for the revitalisation of the Islamic law was based on ‘paying much less attention to the *uṣūl* discipline altogether and focusing on a new methodology that is based on *al-maqāṣid*.’¹²⁹ He harshly criticised the traditional schools of Islamic law for ‘ignoring the purposes of the Islamic law,’¹³⁰ which in his opinion were ‘the only shared reference that deals effectively with the dilemmas of change of circumstances

and differences of opinion¹³¹ However, the form of imperfect inductive reasoning that Ibn Ashur used was previously criticised in western philosophy since the time of Aristotle, and also in traditional Islamic fundamental references, because of its ‘uncertainty.’¹³²

Al-Sadir’s contribution on the methodology level, was to legitimise induction as ‘an established basis for both science and theology.’¹³³ He studied inductive reasoning extensively in his ‘*al-Usus al-Mant’iqiyah li al-Istiqrā*’ (Logical Bases of Induction). Al-Sadir maintained that, ‘induction was the main reasoning tool that the Qur’an had used to prove the existence of God.’¹³⁴ After an interesting and careful mathematical analysis, al-Sadir acknowledged induction’s ‘uncertainty’ but proposed that this uncertainty decreases as more ‘empirical evidence’ is found, based on the theory of probability. However, despite Ibn Ashur and al-Sadir’s contributions to the *maqāṣid*-based project of reform in the Islamic law, ‘it was a project that has been left incomplete.’¹³⁵

Uṣūl Revisionism

Another stream of ‘Islamic modernism’ attempted to revise the fundamentals of the Islamic law (*uṣūl al-fiqh*), despite objections of neo-traditionalists to any alteration of the ‘fundamentals,’¹³⁶ and the harshness of some regimes that claim to be ‘Islamic.’¹³⁷ However, a number of *uṣūl* revisionists expressed the fact that, ‘no significant development in the Islamic law could be carried out without developing the law’s fundamental methodology.’¹³⁸

Mohammad Abduh, for example, questioned the notion of ‘consensus’ in both of its forms – consensus over rulings and consensus over prophetic narrations. He called for a ‘rational study’ of the rulings and prophetic traditions rather than ‘depending on the inheritance of juridical literature.’¹³⁹ Abduh’s rationality led him to asking serious questions about the validity of many ‘isolated narrations’ (*ahādīth āḥād*). He wrote:

What is the worth of a chain of narrators that I myself know nothing about? I know neither those narrators’ behavior nor how capable they

were to understand and memorize. For us, these narrators are merely names that the Shaykhs copied and repeated, and we followed them without having the ability to investigate for ourselves.¹⁴⁰

Abduh referred to the script of the Qur'an for evaluating the content of prophetic narrations and understanding the practical rulings. He also urged scholars to focus on the Qur'anic message of 'moral education, spirituality, knowledge, and guidance to an excellent social life.'¹⁴¹ He called Islamic law, according to this fundamental methodology, 'the real law.'¹⁴²

When Abduh applied his rational principles as Mufti and judge, he came up with *fatāwā* that were clearly against the established 'consensus.' For example, he issued *fatāwā* to limit polygamy, give Muslim women divorce rights, legalise sculptures, encourage 'all forms of useful arts,' and to require every Muslim scholar to learn at least one European language.¹⁴³

Ayatollah al-Sadir also introduced some modifications to some basic concepts of *uṣūl al-fiqh*, such as consensus and resolving contradictions (*ḥall al-ta'āruḍ*). In addition to the traditional Ja'fari definition of the 'consensus of *al-ʿitrah*,' he approved consensus based on 'the agreement of a large number of jurists and muftis on a certain ruling.'¹⁴⁴ Al-Sadir, again, used the 'theory of probabilities' to prove that the increase in the number of these jurists means the 'conversion' of probability to certainty.¹⁴⁵ Regarding 'resolving contradictions' between two evidences, al-Sadir suggested a method which finds coherence between the direct implication of one evidence with the purpose of the legislator (*maqṣūd al-shāriʿ*) of the second evidence.¹⁴⁶

Several contemporary modernists followed Abduh and al-Sadir's ideas in revising 'consensus,'¹⁴⁷ and other *uṣūl*, such as abrogation (*naskh*) of the Qur'anic verses,¹⁴⁸ and authenticating the prophetic traditions based on how much they agree with the principles of the Qur'an.¹⁴⁹ Ibn Ashur, differentiated between prophetic traditions that were meant to be part of the law and other traditions that were merely related to prophetic personal choices and were not meant to be part of the law, as explained before. Several contemporary scholars further developed this view.¹⁵⁰ Ibn Ashur also criticised the classic

knowledge of *uṣūl* for ‘disregarding the purposes of the law, not including them in the fundamentals, and merely studying them in a partial way within the sections of analogical reasoning, under appropriateness and unrestricted interests, even though they were supposed to be the fundamental of the fundamentals.’¹⁵¹

A number of contemporary modernists suggested extensions and re-interpretations of other key notions of *uṣūl* to include the fundamental rule that renders ‘rulings changeable according to change in time and place,’¹⁵² or ‘to consider the role of time and place in modern *ijtihād*.’¹⁵³ For example, new interpretations of *maṣlaḥah* (interest) argued for extending its individualistic orientation to a societal orientation, i.e., considering what is good for the society as a whole instead of being restricted to individuals.¹⁵⁴ Modernists also have a variety of opinions as to the practical implications of *maṣlaḥah* and its relationship with reason in current time.¹⁵⁵

Analogical reasoning (*qiyās*) is another ‘secondary source of legislation’ that was re-interpreted from its traditional deductive structure (considering a single case mentioned in the script as a basis for judgment for a new case) to a form of abduction (considering the largest possible number of cases that are related to the topic and deducing general guidelines for judgement).¹⁵⁶ A number of *uṣūl* revisionists called this new method of *qiyās*, ‘wide analogy’ (*al-qiyās al-wāsiʿ*).¹⁵⁷

‘Science’-Oriented Re-interpretation

Another stream of Islamic modernism takes another approach to re-interpretation. It is a new school of exegesis that introduces a ‘scientific interpretation of the Qur’an and Sunnah.’ In this approach, ‘rationality’ is defined in terms of science, and verses of the Qur’an and prophetic hadith are re-interpreted to fit the latest scientific discoveries.¹⁵⁸ In my view, this approach is apologetic and reformist at the same time. It is reformist in the sense that it opens the script of the Qur’an for new interpretations given what humankind knows today. Meanwhile, it is apologetic when it forces the scripts to mean certain scientific theories, whereas science itself is in a process of evolution.

Generally speaking, modernist approaches to Islamic law overcome a number of shortcomings of both classic and traditionalist

approaches and present more realistic answers to everyday questions. However, as western modernism has been increasingly criticised in ‘postmodern discourses,’ Islamic modernism is also criticised in what I will call ‘postmodernist approaches to the Islamic law.’ The next section elaborates.

5.5. POSTMODERNIST APPROACHES

Postmodernism is a contemporary and powerful intellectual, political and cultural process/force that aims to disintegrate and reformat a multitude of artistic, cultural, and intellectual traditions. It is a term that has many contradictory definitions ranging from eclecticism and montage to neo-skepticism and anti-rationalism.¹⁵⁹ However, it seems that all postmodernists agree, in various ways, on the failure of modernity, especially in the first half of the twentieth century, due to its own deterministic and universal values.¹⁶⁰ A number of scholars in the field of Islamic studies have internalised a variety of postmodern approaches and applied them to Islamic law.

The common method in all these postmodern approaches is ‘deconstruction.’ Deconstruction is an idea/process/project proposed by Jacques Derrida in the 1960s as a development of Heidegger’s call for the ‘destruction’ of the western metaphysical tradition.¹⁶¹

Deconstruction is a ‘tactic of de-centering,’¹⁶² i.e., disrupting repressive and arbitrary hierarchies. Derrida aimed at deconstructing ‘logocentrism,’ which is a combined term derived from *logos* (God’s word) and centrisim (being central).¹⁶³ Derrida talked about ‘logocentrism’ as follows:

[T]o focus attention on what I shall call *logocentrism*: the metaphysics of phonetic writing (for example, of the alphabet) which was fundamentally – for enigmatic yet essential reasons that are inaccessible to simple historical relativism – nothing but the most original and powerful ethnocentrism, in the process of imposing itself upon the world, controlling in one and the same *order*: 1. the *concept of writing* in a world where the phoneticisation of writing must dissimulate its own

history as it is produced; 2. *the history of (the only) metaphysics*, which has ... always assigned the origin of truth in general to the *logos*: the history of truth, of the truth of truth, has always been ... the debasement of writing, and its repression outside 'full' speech.¹⁶⁴

To put the above 'definition' in less obscure terms, I would say that Derrida believed that 'binary and logocentric' terms, (such as, good, man, white, or Europe) are not supposed to be authoritarian and repressive 'centers,' while the 'Other' terms (such as, evil, women, black, or Africa) remain 'marginalised.' He also called for an 'Other logic,' by which the deconstruction of logocentric terms is achieved by shifting the marginalised terms in order to become, 'as feasible as the logocentric term in occupying the center.'¹⁶⁵ The new hierarchy of 'authority' eventually becomes equally unstable; moreover people will wind up surrendering to 'the complete free play of the opposites.'¹⁶⁶ Derrida's theory, or 'project,' as he prefers to call it, prevents any speech (or writing) from being a 'script' or 'text' because, he writes, 'in the absence of a center or origin, everything became discourse.'¹⁶⁷ This theory has an impact on the meaning of 'implication,' because, 'the meaning of meaning (in the general sense of meaning and not in the sense of signalisation) is infinite implication, the indefinite referral of signifier to signified.'¹⁶⁸ With this separation of the signifier from the signified in every 'discourse,' interpretation itself is deconstructed.¹⁶⁹ Thus, a new culture of 'unmaking' is created based on what Hasan described as, 'decreation, disintegration, deconstruction, de-centerment, displacement, difference, discontinuity, disjunction, disappearance, decomposition, de-definition, demystification, de-totalisation, delegitimation.'¹⁷⁰

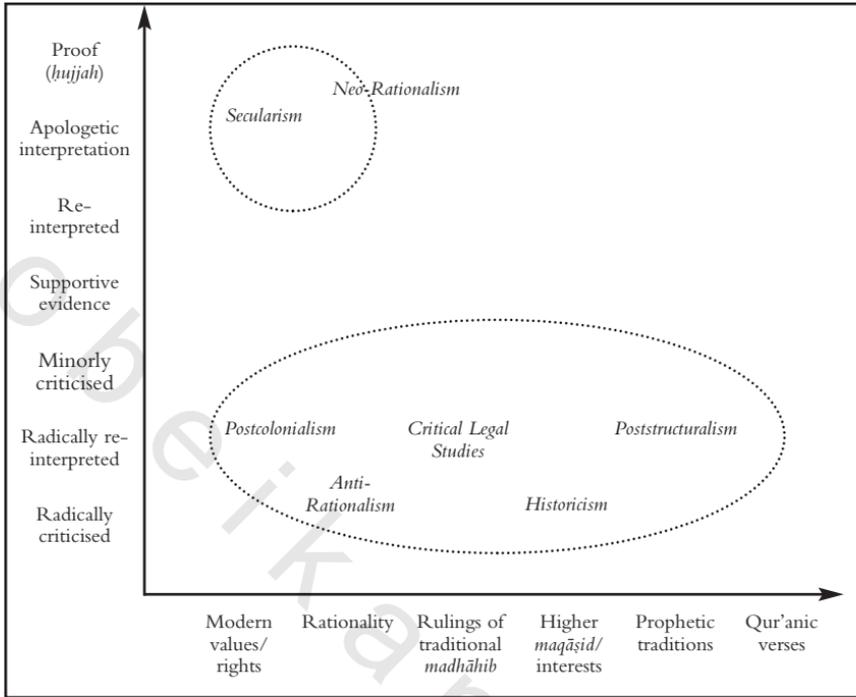
Despite the obvious 'binary' logic of the deconstructive 'Other' logic, all postmodern approaches to Islamic law¹⁷¹ apply deconstruction in order to de-center some sort of binary logocentrism. For the sake of analysis, I will divide these approaches into a number of streams, namely, post-structuralism, historicism, critical legal studies, post-colonialism, neo-rationalism, anti-rationalism, and secularism, as illustrated in Chart 5.12. The differences between these approaches are in what they consider to be their 'logocentric' target, whether it is

the Qur'an, the prophetic era, the Islamic schools of thought, discriminatory traditions, or orientalism. Post-structuralists' logocentric terms is the Qur'an itself. Historicists' logocentric term is the prophetic era. Anti-rationalists' logocentric terms are modernist rationality and logic. Critical legal studies scholars' logocentric terms are the traditional schools of thought and discriminatory traditions in the Islamic world, especially against women and non-Muslim minorities in Muslim-majority societies. Finally, post-colonialists' logocentric term is western domination via orientalism. The following will address the above streams, respectively.

Post-Structuralism

Post-structuralism is an analytic tool of postmodernism by which 'texts' are analysed, where text is viewed as the basis of speech,¹⁷² and all human knowledge is considered 'textual.'¹⁷³ Several Islamic studies scholars have taken a post-structuralist deconstruction or de-centering approach to the 'text' of the Qur'an, which they view as occupying the 'center of the Islamic culture.'¹⁷⁴ The concept of 'revelation' in the script is re-interpreted/shifted from the traditional position as a divine message to mean that the Prophet received the Qur'an as a 'deciphered message' and delivered it to his people according to his own language and cultural context.¹⁷⁵ The aim of this deconstruction project is to 'free people from the (divine) authority (or sovereignty) of the script,' which is a common theme in the writings of Mohamed Arkoun, Nasr Abū Zaid, Hasan Hanafi, al-Tahir al-Haddad, and also Ebrahim Moosa.¹⁷⁶

Moreover, semiotic theory entails that 'language does not refer directly to reality,'¹⁷⁷ and metaphysical concepts of that sort are considered, according to postmodernists from Nietzsche to Derrida, a sort of self-projection.¹⁷⁸ In his *al-Turāth wa al-Tajdīd* (that is, Cultural Inheritance and Revitalisation), Hasan Hanafi follows this line of thought, until he concluded that 'scholars of the fundamentals of the religion, when they talk about God, His essence, His attributes and His actions, are actually talking about a perfect human being exaggerated to the maximum possible extent.'¹⁷⁹ He, therefore, calls for the



Postmodernism

Chart 5.12. Postmodernism tendency in terms of its contributing streams.

replacement of the ‘absolute and essentialist’ terms of ‘God, heaven, hell and hereafter’ with the ‘non-ambiguous’ concepts of ‘freedom, democracy, nature and reason.’¹⁸⁰ I fail to understand how these later group of terms are free from ambiguity, and why Hasan Hanafi thought that they are necessarily at odds with the former group of terms! Isn’t this way of thinking the very same binary and essentialist thinking that postmodernism is up against?

Deconstruction, in a semiotic sense, might be a good idea/process to finally ‘de-center’ oppressive social structures and discriminatory laws as will be explained below. However, to put forward a theory for the revitalisation (*tajdīd*) of the Islamic law, as poststructuralists did, one should necessarily build on Muslims’ basic established beliefs; otherwise, the theory will be ‘non-Islamic’ and will certainly never materialise into application.

In this respect, I find Talal Asad's 'postmodern' concept of 'discursive traditions' useful for situating Muslim discourses within their discursive context. Building on Foucault, Asad defines a discursive tradition as a discourse which seeks to instruct practitioners about forms and purposes of their practices.¹⁸¹ He argues that Islam is a discursive tradition that 'includes and relates itself to the founding texts of the Qur'an and hadith.'¹⁸² Thus, new local developments in Muslims' lives are in an ongoing interaction with the larger framework of Islam to which the core texts belong.

All Muslims, regardless of their differences, believe in God, Prophet Muhammad, and the divine message of the Qur'an. The entire Islamic religion was founded on these three bases and, hence, post-structuralist approaches that end up 'deconstructing' the very concepts of God and divine messages leave no credibility for such proposals of law and creates what I would call an 'epistemological vacuum.'

In terms of the factor of history, we really do not have to say that the Qur'an is a 'coded message' that the Prophet 'deciphered in his own human language' in order to prove that the Qur'anic language and 'signs' are functions of the Arabian seventh century's context. We can simply differentiate between the parts of the Qur'an that deal with specific matters, events, or objects, related to the early Islamic era and other parts that deal with rulings and values that serve human interest at any place and time (despite postmodernism problems with any shape or form of universalism).

Historicity of Means and/or Ends

A historicist postmodern approach suggests that our ideas about texts, cultures and events are determined by their position and function in their original historical context as well as also their later historical developments.¹⁸³

Some deconstructionists have applied the historicism concept to the Qur'an, only to conclude that the Qur'anic script is a 'cultural product' of the culture that produced it.¹⁸⁴ Therefore, they claim, the Qur'an is a 'historic document,' in the sense that it could only be helpful in learning about a specific historic community that existed in the prophetic era.¹⁸⁵ Moghissi claims that 'the shari'ah is not compatible with the

principle of equality of human beings.’¹⁸⁶ Ibn Warraq claims that the Islamic human rights scheme shows ‘inadequate support for the principle of freedom.’¹⁸⁷ Thus, for Moosa, Islamic jurisprudence could not be evidence for an ‘ethical vision,’ in the contemporary sense,¹⁸⁸ a position similar to western historicists’ position on western jurisprudence, in any case.¹⁸⁹

Postmodernists also criticise various modernist scholars for ‘reinforcing text-fundamentalism’ by re-interpreting the scripts to support contemporary ethical norms, although the scripts themselves, historicists believe, are in conflict with these norms.¹⁹⁰ Common examples for this criticism are the modernists’ re-interpretation of the scripts to support egalitarianism in the Islamic political model and the status of women in the Islamic law.¹⁹¹ For Moghissi, ‘no amount of twisting and bending can reconcile the Qur’anic injunctions and instructions about women’s rights and obligations with the idea of gender equality.’¹⁹² Arkoun called the whole interpretation movement a ‘secular movement disguised by religious discourse.’¹⁹³

I would like to say here that the ‘historicisation’ of Islamic scripts *in toto* and, therefore, rendering their scheme of rights and values ‘immoral,’ goes against the very belief in the divine source of the Qur’an and the excellence of its value system that Muhammad had applied. Having said that, I also believe that historical events and specific juridical rulings detailed in the Qur’an should be understood within their cultural, geographical, and historical context of the message of Islam. Based on such understanding, Qur’anic specifics could very well apply universally in every place and time. The moral purposes in the Qur’an’s various stories and the rulings’ purposes and values should guide our *ijtihad* in order to project these specifics to our changing contexts in the dimensions of space and time, or geography and history. The law that is an outcome of that *ijtihad* should never contradict with the principle moral values and *maqāṣid* of Islam.

Mentioning the supremacy of moral values in the system of Islamic law, it might be useful to reiterate Ibn al-Qayyim’s famous words:

Islamic Law is based on wisdom and achieving people’s welfare in this life and the afterlife. Islamic Law is all about justice, mercy, wisdom,

and good. Thus, any ruling that replaces justice with injustice, mercy with its opposite, common good with mischief, or wisdom with nonsense, is a ruling that does not belong to the Islamic Law, even if it is claimed to be so according to some interpretation.¹⁹⁴

The above belief-based position dealing with the Qur'an is a form of interpretation that is on the borderline or overlap area, if you wish, between modernist and postmodernist methods. It is also a position adopted by a number of current scholars. For example, Ayatollah Shamsuddin recommended for today's jurists to take a 'dynamic' approach to *nuṣūṣ*, and 'not to look at every script as absolute and universal legislation, open their minds to the possibility of "relative" legislation for specific circumstances, and not to judge narrations with missing contexts as absolute in the dimensions of time, space, situations, and people.'¹⁹⁵ He further clarifies that he is 'inclined to this understanding but would not base (any rulings) on it for the time being.' Nevertheless, he stresses the need for this approach for rulings related to women, financial matters, and jihād.¹⁹⁶ Fathi Osman, for another example, 'considered the practical considerations' that rendered a woman's testimony to be less than a man's, as mentioned in verse 2:282. Thus, Osman 're-interpreted' the verse to be a function to these practical considerations.¹⁹⁷ Hasan Turabi holds the same view regarding many rulings related to women and their daily-life practices.¹⁹⁸ Rouget Garoudi's expression of this position was to 'divide the scripts into a section that could be historicised,' such as, again, 'rulings related to women,' and another section that 'represents the eternal value in the revealed message.'¹⁹⁹ Similarly, Abdul-Karim Soroush suggested that the scripts should be 'divided into two parts, essentials and accidentals, accidentals being functions of the cultural, social, and historical environment of the delivery of the main message.'²⁰⁰ Other similar views regarding the prophetic traditions included Mohammad Shahrur's, who argued that some prophetic traditions are 'not to be considered Islamic law, but rather a civil law, subject to social circumstances, that the Prophet practiced organising society in the area of permissibility, in order to build the Arabic State and Arabic society of the seventh century,' and thus, 'could never be

eternal, even if it were true one hundred percent and authentic one hundred percent.’²⁰¹

A similar expression is Mohammad al-Ghazaly’s differentiation between ‘means’ and ‘ends.’ He allowed the ‘expiry’ (*intihā*) of the former and not the latter, which is, in my view, another expression of the above method of interpretation that kept a safe distance from ‘historicism.’ Mohammad al-Ghazaly mentioned ‘the system of spoils of war,’ as an example of these ‘changeable means.’²⁰² More recently, Yusuf al-Qaradawi and Faisal Mawlawi, elaborated on the importance of the ‘differentiation between means and ends.’ During the deliberations of the European Council for Fatwa and Research, they both applied the same concept to the visual citation of the *hilāl* (Ramadan new moon) being a means for knowing the start of the month rather than an end in its own right. Hence, they concluded that pure calculations shall be today’s means of defining the start of the month.²⁰³ Yusuf al-Qaradawi had applied the same concept to Muslim women’s garment (*jilbāb*), which he viewed as mere means for achieving the objective of modesty.²⁰⁴

In my view, ‘differentiating between means and ends’ opens a whole lot of possibilities for new and ‘radical’ *ijtihād* in the Islamic law. For example, Taha al-Alwani proposed a ‘project for reform’ in his *Issues in Contemporary Islamic Thought*, in which he elaborated on his version of the method of ‘differentiation between means and ends.’ The following illustrates how al-Alwani applied this approach to the issue of gender equality.

The Qur’an transported the people of those times to the realm of faith in absolute gender equality. This single article of faith, perhaps more than any other, represented a revolution no less significant than Islam’s condemnation of idolatry...In the case of early Muslim society, given the long established customs, attitudes and mores of pre-Islamic Arabia, it was necessary to implement such changes in stages and to make allowances for society’s capacity to adjust itself accordingly ... By establishing a role for a woman in the witnessing of transactions, even though at the time of revelation they had little to do with such matters, the Qur’an seeks to give concrete form to the idea of woman as

participant ... The objective is to end the traditional perception of women by including them, “among such as are acceptable to you as witness” ... the matter of witnessing served merely as a means to an end or as a practical way of establishing the concept of gender equality. In their interpretations of “mistake” and “remind”, Qur’anic commentators have approached the issue from a perspective based on the assumption that the division of testimony for women into halves is somehow connected with women’s inherent inequality to men. This idea has been shared by classical and modern commentators alike, so that generations of Muslims, guided only by *taqlīd* (imitation), have continued to perpetuate this faulty understanding. Certainly, the attitudes engendered by such a misunderstanding have spread far beyond the legal sphere ...²⁰⁵

The above approach is ‘postmodern’ in the sense of tying the scripts to their historical context. Yet, its referral to the scripts as the divine source for rulings, even in the sense of these rulings being ‘means to an end,’ is a modernist (albeit radical) re-interpretation.

Neo-Rationalism

Neo-rationalists take a historicist approach to the Islamic law, and refer to the conventional Mu‘tazilī/Rational school for a traditional reference for their views.²⁰⁶ The Mu‘tazilī school gave authority to reason (*‘aql*) as an independent source and as the law’s most fundamental evidence, as explained before.²⁰⁷ However, the difference between neo- and old-rationalists is that the Mu‘tazilīs, as explained in the previous chapter, by and large applied the evidences of the Qur’an, hadith, and other secondary sources to the law in a manner that was very similar to other classic schools.²⁰⁸ Mu‘tazilīs acknowledged the ‘authority of the Qur’an’ as a source of legislation ‘based on reason,’ because ‘according to reason, good and bad could be differentiated and the authority of the Qur’an could be proven, as well as the authority of the prophetic traditions and consensus.’²⁰⁹ Neo-Rationalists/Mu‘tazilīs, however, gave ‘reason’ the ability to ‘abrogate’ scripts.²¹⁰ Nevertheless, according to Derrida, and Moosa, ‘reason’ is one of the

concepts that modernity put ‘in the center,’ and which has to be deconstructed.²¹¹

Critical Legal Studies

Critical Legal Studies (CLS) is a movement that originated in the United States, which aims to deconstruct accepted legal doctrines in order to support pragmatic policy reform.²¹² Its ‘deconstruction’ is directed towards those in positions of ‘power’ who structured the law.²¹³ Philosophers and political activists from diverse roots have subscribed to the CLS movement, such as feminists and anti-racism theorists. A number of scholars of Islamic studies used the CLS methodology to analyse and deconstruct all ‘powers’ which have affected the Islamic legal system, ranging from ‘men’ to powerful Arabic tribes.

‘Muslim feminists,’ for example, challenged the effect that traditional male elitism had on the formation of both the Islamic traditional juridical system and the collection of narrated prophetic traditions that addressed men-women relations.²¹⁴ However, it is to be noted that Muslim postmodern feminists take a different approach from other postmodern feminists. While other postmodern feminists deconstruct the ‘binary system of gender,’ i.e. the very notion of male and female ‘difference,’²¹⁵ Muslim feminists focus specifically on the historical ‘power struggle’ between Muslim men and women.

Both modernist and postmodernist Islamic feminism criticise the effect of this power struggle on traditional law authorities, such as Imams, Shaykhs and Ayatollahs.²¹⁶ However, postmodern Muslim feminism differs in that it includes in its criticism the authority of the Qur’an and the Prophet himself.²¹⁷ Mernissi, for example, challenged every ruling in the Islamic sources that ‘puts restrictions on a woman’s sexual self-determination,’²¹⁸ from the institution of marriage, children’s patriarchal lineages, and the veil, to the rulings of divorce, waiting period (*‘iddah*), and even the ‘prohibition of prostitution!’²¹⁹ Similarly, some radically ‘different’ re-interpretation of the Islamic scripts reads ‘diversity in sexuality’ into the verses and hadith that mention diversity in people’s ‘colors’ as a sign of God’s creation.²²⁰

The Qur'anic description of the 'sin' (*fāḥishah*) of the People of Lot is twisted to have merely meant their 'transgressive behavior with their guests,' rather than any other act.²²¹ It is obvious that this method stretches the wordings, in the name of interpretation, in order to legalise certain behavior, even when at odds with well-established Islamic principles. Similar to the 'apologetic interpretations' that were mentioned before, 'radical interpretation' is merely a means to justify certain pre-assumptions. My criticism here of such twisted interpretation certainly does not entail any support to systematic violence or discrimination against the interpreters. Judging some act as a 'sin' is one thing, and 'persecuting sinners' is a totally different thing!

Some other scholars took a CLS approach in questioning the political motivations of powerful Arabic tribes, such as Quraysh and Banī-Umayyah, in relation to some juridical and fundamental rulings. For example, Nasr Abū Zaid relates Imam al-Shāfi'ī's historic piece on the fundamentals of the Islamic law to the desire of Quraysh to 'transform its traditions and culture into a revelation.'²²² Patricia Crone also questioned the effect of the powerful Umayyad caliphs on the formation of the law.²²³ Wael Hallaq strongly disagreed,²²⁴ and Abdul-Majeed al-Sagheer wrote a lengthy analysis to prove a view opposite to Crone's. Al-Sagheer proved that al-Shāfi'ī and other jurists proposed the fundamentals of the Islamic law to 'protect the law' from the whims and personal interests of the ruling power, especially the Umayyads, rather than enforce them.²²⁵

Post-Colonialism

Postcolonial studies were founded to support voices previously marginalised by western colonisation and to 'reject western presumptions of cultural and racial prominence.'²²⁶ Edward Said, following Foucault on the relationship between forms of knowledge and power, was a key contributor to this field.²²⁷ Several scholars took a postmodernist approach to Islamic Studies in a post-colonial sense.²²⁸ Their approach aimed to deconstruct western 'globalising and homogenising forces,'²²⁹ 'project[ing] their own faults onto other people,'²³⁰ 'pre-assuming the west to be the center of the world,'²³¹ 'coupling

westernisation with contemporarisation,²³² presenting Muslim political and social life as defined by a ‘non-rational religion,’²³³ and, recently, ‘promoting the idea of an “Islamic threat” to the Western civilisation.’²³⁴ Postmodernists call for celebrating the ‘Other’s’ cultural difference.²³⁵ Post-colonialism has also been evident in some scholars’ criticism of traditional Orientalist approaches to the Islamic law, which derive ‘from essentialist fallacies (prejudices) about Islamic cultures’²³⁶ and pre-assume that the ‘Islamic divine is, at best heavily indebted to the juridical traditions of the cultures that gave birth to western civilisation and, at worst, little more than a replica of these traditions.’²³⁷ For classic examples of these traditional Orientalist approaches, which are no longer held by the vast majority of researchers, refer to Goldziher, Schacht, and Gibb’s earlier works.²³⁸

Postmodern approaches to the Islamic law challenged both the traditionalist and modernist approaches by questioning the power/authority that certain concepts, schools, imams, and political leaders had assumed. However, despite their claimed war against ‘binary opposites,’ postmodern approaches tend to be binary, reductionist, and uni-dimensional. The next chapter will revisit postmodernism, as presented in this section, and will attempt to develop its radical criticism into a more ‘multi-dimensional’ and ‘holistic’ approach.

Based on the analysis of classic and contemporary theories of Islamic law that were presented in the previous chapters, the next chapter will propose a systems approach to the theory of Islamic law and present some specific suggestions to enhance its ‘openness’ and ‘purposefulness.’ The proposed theory will build on the analysis of sources, implications, and evidences in classic theories, the literature of schools of Islamic law endorsed by traditionalists, new modernist re-interpretations, and the criticism presented by postmodernists.