NEO PAGANISM; ENCOUNTERING THE REVIVALIST ISLAMIC IDEOLOGY

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INTRODUCTION

In May 2006, I was working as a Public Prosecutor[1] for the Egyptian Ministry of Justice, and I was interviewing detainees in the down town Cairo demonstrations. At the time political activists from all backgrounds held massive protests united under the banner of the judges club demanding political reform and judicial independence.

Over several non-consecutive nights I interviewed people with no clear political agendas, their only conception of politics was to over through the current regime.

I must confess my reassurance when my views of the "*change for change*" groups were confirmed.[2] I interviewed innocent bystanders, people who got arrested whilst trying to catch trains, walking down the streets of downtown Cairo, or your typical curious Egyptian who had nothing better to do but to go and watch the exciting confrontation between activists and the riots police. I also interviewed a few Islamists.

Of all activists, they (Islamists) exclusively entertained a political agenda. The interviewee (member of a radical Islamic movement) answered my questions by confirming his intentions to change the regime by force (Islamic revolution). It was evident that his belief value system drew a binary between a society and a government of apostates and an otherwise proper Islamic state/community. To me it was quite clear that this "Religious Binary" is an inter-Islamic conflict situation.

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[1] Public Prosecutors in Egypt undertake, in addition to the Public Action, the work of investigating judges.
[2] Their mediocre political message/agenda.

On December 28, 2007, I was at the Institute of Advanced Legal Studies, University of London, attending a workshop on Comparative Legal research[3] where I learned of the assassination of Benazir Bhutto the former prime minister of Pakistan. On October 18th 2007 she had landed in Karachi airport after, according to her, eight lonely and difficult years of exile.[4] She was assassinated on December 27, 2007 in Rawalpindi, Pakistan.

Right after her death all British news papers mourned her, commemorated her, and interviewed her son (undergraduate student at Oxford) and now head of the Pakistan People's Party (PPP). Most importantly the newspapers spoke of a book she had just finished its manuscript on Islam and the West.

Impatiently I awaited the book which appeared in the name of "*Reconciliation; Islam, Democracy and the West*".[5] In her book, the late Mrs. Bhutto attempted to argue that true Islam (according to her views) is not naturally conflicting with Western norms like Democracy, equality, and non discrimination.[6] According to her the perpetrators of the 9/11, London, and Madrid bombings are imposters to the true message of Islam.[7] On the thematic level she opposes both Samuel Huntington[8] and Bernard Lewis[9] by preaching Reconciliation between civilizations as opposed to clashes.[10] She does so whilst at the same time recognizing an existing intra-Muslim sectarian violence.[11] It seemed to me that

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[3] As partial fulfillment of the requirements of my studies towards a PhD degree from the University of London.
[4] She lived in Dubai with her husband and co-partisan *Asif*, and their two daughters *Bakhtawar* and *Aseefa*. Their son *Bilawal* is studying at Oxford University.
[5] Benazir Bhutto, "*Reconciliation; Islam, Democracy and the West*", Simon & Schuster, 2008.
[6] *Ibid* P. 18, 19.
[7] *Ibid* P. 17.
[8] In his article "*The Clash of Civilizations?*" in the journal of Foreign Affairs, summer of 1993.
[9] In his 1990 article "*The roots of Muslim Rage*".
[10] Benazir Bhutto, "*Reconciliation; Islam. Democracy and the West*", Simon & Schuster, 2008, p. 233.
[11] *Ibid* P.2.

the late Mrs. Bhutto believed that the "Religious Binary" is an inter-civilizational conflict situation.

Intrigued by the illusive/confusing nature of the "Binary" and believing that a major part of Islamic thought is pure legal theory, the following questions came to mind: How does Islamic radicalism get created? Where can we classify Islamic Legal Radicalism? How can we counter them, should we disagree with them? Where is the point of confrontation? Is it Islam v. West? Is it Islam v. Islam?

I stand strongly with the position that we can not answer the above questions, because we do not have a functioning classification system that detects precisely the progression and methodology of the different Islamic schools of thought. Consequently, we would not know where to take issue should we wish to address a certain school. I also realized that there exists a dichotomy between two persistent understandings concerning the current Islamic struggle. The first believes that the inter-Islamic confrontation is the battle frontier whereas the Islam-West clash is secondary to the fact, although, equally important. The other is convinced that the inter-civilizational conflict is ground zero of the un-necessary evil of universal clash while intra-Muslim sectarian wars are an inherent vise triggered by the desire to create an Islamic state immune vis-à-vis Western assaults.

This is an essay to rethink Islamic Radicalism (as a theory of law) and how to counter it through Islamic Law Modernism. I argue first that there is an overwhelming problem in defining terms when it comes to Islamic Jurisprudence because of an epistemological confusion from the researchers' part. I secondly argue that those who engage in unwinding the Islamic tension miss the primary conflict and focus on the secondary one and hence will never succeed in the current, fashionable, counter Terrorism saga. Last I

attempt to contribute to the existing art of the field by proposing my own Islamic Post Modernist Agenda.

The importance of the topic of this essay manifests itself even more clearly in view of the unfolding events of the Arab Spring and the rise of Islamic movements to legitimate political power for the first time in history. I hope this essay will help my readers both in the west and the Arab world to deal better with any persistent Islam-phobia.

I have to ask, *a priori*, for the forgiveness of my dear reader for any confusion, difficulty or inconvenience caused by the mixture of transliterated Arabic with English in this essay.

EPISTIMOLOGICAL CONFUSION

The unchecked wisdom has it that Islamic Legal thought is divided into Fundamentalism (Radicalism), Traditionalism, and Reformism. Reformism in its part, according to this classification system, is sub divided into Utilitarianism, Hybridism, and Liberalism. The purpose of this part of my essay is to check this classification and propose another a new. The orthodoxal classification of Islamic Legal Thought is defective in two aspects; first it does not address the thematic foundations (background theory) of each line of jurisprudence and hence sketches non reflective categories of lines of thought. It thus fails to identify each school of legal thought let alone calling a trend of Islamic Comparative legalism "Secular" which is not in reality secular at all. Second, it confers the "Fundamental" term on a specific line of thought whilst all Islamic Legal theorists, including the Hybrids, are indeed fundamental. The current system of classification is accordingly wanting in grounding theory on one hand and imprecise on the other.

I-   Background theory

The orthodoxal classification of Islamic Legal Thought tries to give what it has not by attempting to encompass what it fails to embody. It is a classification system of jurisprudence whereas it detects outcomes rather than themes and then, strangely enough, categorize themes. The three trends of Islamic Legal Thought according to this system are either; backward (Fundamentalist/Radical), conservative (Traditionalist), or progressive (Reformist). It judges upon the social policy/outcome of a given legal theory to classify that legal theory instead of examining the intricacies of the background theory of each legal theory to decide on their cause. By

doing so it fails to achieve what any system of classification aspires to attain. That is to classify.

It is, unfortunately, an exercise of self defeating epistemology. What makes it even more tragic is its widespread acceptance and adaptation.

A legal theory is a body of generalized notions of what law is, how it is made, and its role in society. Different legal theories should thus be differentiated according to its variant views on the very nature of law, its deduction/induction, and hence forward effects thereof. The legal arrangements (specific applications) itself has nothing to do with characterizing its grounding legal theory (general norms). A legal answer (specific rule/solution) depends on a general adopted/applied legal theory. Consequently one can not characterize a legal theory on the grounds of the legal answers drived there from.

This is truer when it comes to Islamic Legal Thought. For Islamic Legal Theory is dealt with under the term "*Usul Al fiqh*" literally the "Roots of Jurisprudence" whereas the applications are called "*furu' al fiqh*" literally "Branches of Jurisprudence" and the distinction between the two fields could not be more highly emphasized and the confusion between the two could not be more criticized.[12] The classical Shafe'i critique to Hanafi jurisprudence is that Abu Hanifa and his direct disciples issued numerous *fatwas* (legal opinions) without a specific background theory, that is to say no coherent mechanism of legal induction/deduction. In that sense, to the Shafe'is the Hanafi doctrine was spontaneous, limited only to *Furu'* (branches) with no *Usul* (roots) and hence considered lacking in jurisprudential

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[12] Yossif Qassem, "*Usul Al Hokm Al Share'I*", Al Nisr Al dahabi liltiba'ah, 3rd ED. 2001, P.27. "Roots of Islamic Jurisprudence".

essence. The Hanafi school of thought was not, because of that defective nature, accepted as a "proper" Islamic legal school of thought. An allegation so degrading that on a later stage when the Shafei way of deduction came to prominence through its official adaptation (thanks to Ahmad Ibn Hanbal) the Hanafi jurists had to come up with a theory of *Usul* and claim it of their own just to be recognized as "proper" Islamic legalese. This was done by Abi Al Hassan Al Karkhy who latter became the head of the Hanafi doctrinal order[13] in his book "*Al mokhtassar fi al fiqh*" (Nutshells in jurisprudence).[14]

To classify the "*Usul*" (roots) based upon its "*furu*'" (branches) is like starting to read a book from its end. And the current classification system is trying to do, in a subconscious apologetic/late Hanafi like manner, what Al Karkhy did more than a thousand years ago; invent and categorize/classify a theory of law on the basis of an aggregation of specific legal arrangements. Only we are now doing it to all schools of Islamic Law.

If we say, according to the orthodoxal classification system, that a certain trend of Islamic Legal Theory is backward then it is "Fundamental/Radical", if it is conservative then it is "Traditional", and if it is progressive then it is "Reformist". This is of course done with no examination of their respective background theories. Background theories are studied thoroughly do not get me wrong, but instead of understanding how any school of legal thought reaches its decisions and accordingly, pursuant to a predetermined criteria, categorize it. The current art in the field looks first at the various juristic opinions (and not how these opinions are reached) and

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[13] Died in 340 hijri, 126 years after Shafei had died.
[14] Yossif Qassem, "*Usul Al Hokm Al Share'I*", Al Nisr Al dahabi liltiba'ah, 3rd ED. 2001, P.28. "Roots of Islamic Jurisprudence".

consider its place in a conservative-modern spectrum, gives the school its name and then starts to examine how they reach their decisions. An example of this is the term "Liberal".

What does it mean to say a certain school of law is "Liberal"? Does it mean that the school is progressive? Are not both the Utilitarians and the Hybrids, progressive? What I am trying to say here is we are using terms that mean nothing and that fail to differentiate between the various schools.

We should thus try to put a classification system that examines Islamic Legal Theories according to their background theory, as the starting point instead of commencing by looking at the respective social policies.

II-   Imprecision of the generic term "*Fundamentalism*"

Taking from what I am saying above, all Islamic Legal Theories are fundamental. Even those who would like to think of themselves as anti-fundamentalist are fundamentalists.

"American Protestants were the first to use the term Fundamentalism. In the early decades of the twentieth century, some of them started to call themselves "fundamentalists" to distinguish themselves from the more liberal Protestants, who were, in their opinion, entirely distorting the Christian faith. The Fundamentalists wanted to go back to the basics and to reemphasize the "fundamentals" of the Christian tradition, which they identified with a literal interpretation of scripture and the acceptance of certain core doctrines."[15]

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[15] Karen Armstrong, "*The battle for God; Fundamentalism in Judaism, Christianity, and Islam*", Harper Perennial 2004, P. X.

Fundamentalism is "*Usuliyyah*" in Arabic which literally means "Resorting to the roots". I can actually rest my case that all Islamic Legal theories are Fundamental on the sole ground of language. If legal theory is "*Usul al fiqh*", i.e. "the roots of jurisprudence", and resorting to the roots of jurisprudence is "*usuliyyah*" then every Islamic Legal Theoretical endeavor is by nature Fundamental.

The jurisprudential point of my argument is even more apparent, all Islamic Legal Theories are fundamental because all Islamic Legal theorists go back to the basics/fundamentals of Islam, i.e. the scripture. In other words they attribute, however minimal this attribution is, legal positivism to revelation. How they deal/interpret these fundamentals is the actual difference between them.

This journey back to the basics is what differentiates between Islamic Legal theorists from legal secularists who deny holly scripture legal meaning.

Fundamentalism as a generic term to denote conservativism, regression, and radicalism is misleading.[16] Even the Arabic term that is alternatively used to characterize the very same schools of thought, "*Salafiyyah*", which literally means "Ancestral" is also misleading,[17] although more correct than the dominant English term "Fundamental" (*usuliyyah* in Arabic).

III-   The case with Hybrid Islamic Legal Theory

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[16] Karen Armstrong "*The battle for God; Fundamentalism in Judaism, Christianity, and Islam*", Harper Perennial 2004, P. X.
[17] Mohamed E'marra, "*Tayarat Al fikr Al Islami*", Dar Elshorouk, 2nd ED. 2007, P. 127. "Trends of Islamic Thought".

Some might say, to refute my above hypothesis, that Hybridism, as a Reformist Islamic Legal Theory, is not fundamental (and consequently un-Islamic) because it relies heavily on Western Comparative Legalism as the tool of Islamic Law reform.[18] This, nonetheless, can simply be rebutted by two things; a) the view that Hybridism is un-Islamic[19] is incontestably a residue of early twentieth century Pan-Arabism wherein national patriotism, Arabic nationalism, and Islamic affiliationism conflicted amongst each others in proposing an alternative for the falling Ottoman Empire.[20] This can be easily concluded from the writings of Tarek Al Bishri[21] who is usually cited[22] in regards to the un-Islamic (non-authenticity) critique to Hybridism. b) Gamal Eldin Elafghani, Abd Elrahman Al Kawakbi, Muhammad Rashid Reda, and Muhammad Abdou, have relied on Western law/thought in their modernization project although no one has ever questioned their Fundamentalism.[23] It is worth mentioning that this same Tarek Al Bishri was called upon, by the Egyptian Supreme Military Council, after the former Egyptian president – Hosni Mubarak- stepped down to preside over the committee assigned with the task of drafting the proposed constitutional amendments to the Egyptian 1971 constitution after the 25th of January 2011 revolution. Ironically following a referendum wherein 80% of the Egyptians

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[18] Amr Shalakany, *Sanhuri and the Historical Origins of Comparative Law in the Arab World*, in ANNELISE RILES, ED., RETHINKING THE MASTERS OF COMPARATIVE LAW (2001), p.154.

[19] Tareq Al Bishri, "*Fi al masaala'ah Al Islamiyyah Al mo'aserah; Manhag Al nazar fi Al nozom Al siyasiyah Al Mo'aserah Libildan Al a'lam Al Islami*", Dar El Shorouk, 1st ED. 2005, P. 8. "The contemporary Islamic question; Viewing the contemporary political systems of the countries of the Islamic world".

[20] Bernard Lewis, "*From Babel to Dragomans; Interpreting the Middle East, Pan Arabism*", Weidenfeld & Nicolson, 2004, pp.156-180.

[21] Tarek Al Bishri, "*Fi al masaala'ah Al Islamiyyah Al mo'aserah; bayn al game'ah al diniyah wa al game'ah al wataniyah fi al fikr al siyasi*", Dar El Shorouk, 1st ED. 1998, P. 85. "The contemporary Islamic question; Between Religious affiliation and National affiliation in political thought".

[22] Amr Shalakany, *Sanhuri and the Historical Origins of Comparative Law in the Arab World*, in ANNELISE RILES, ED., RETHINKING THE MASTERS OF COMPARATIVE LAW (2001), p.154.

[23] Mohamed E'marra, "*Tayarat Al fikr Al Islami*", Dar Elshorouk, 2nd ED. 2007, P. 139. "Trends of Islamic Thought".

supported the proposed amendments the Supreme Military Council unilaterally set aside the constitution.

Some have even wished that Muslims follow the foot steps of Westerners when it comes to social reform.[24] Others clearly have expressed their admiration of Europe and European Enlightenment (arts, sciences, private autonomy, and democracy), yet strongly believed in Islamic fundamentalism and claimed that Muslims were only glorious when they had a proper Islamic state.[25]

Hybridism is in essence a Fundamental movement as it resorts to the fundamentals of Islamic jurisprudence (*Quran* and *Sunna*). It only uses Archetypical Comparative Law as its elected methodology of dealing with these basics. The end of this project is codification of what laws deducted from Islamic origins.[26]

IV-   The Scripture Authority Test (SAT)

By now I should have, hopefully, convinced the reader that the orthodoxal classification of Islamic Legal Theories (Fundamentalism/Radicalism, Traditionalism, Reformism) is unsatisfactory, that the term Fundamentalism is misleading, and that all Islamic Legal Theories are fundamental including Hybridism.

I would like now to illustrate my proposed classification system, the Scripture Authority Test (SAT). A system very simple yet very effective as it follows the abstraction philosophies Marcus Aurelius Verus[27] used to explain the world. Ask the

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[24] Abd Elrahman El Kawakbi, "*Taba'i Al Istibdad wa masare'i Al Isti'bad*", Dar Elshorouk, 1st ED., P.88. "Attributes of Tyranny and termination of slavery".
[25] Qassim Amin, "*Al A'mal Al kamla*", Dar Elshorouk, 3rd ED. PP. 271. "Complete works of Qassim Amin".
[26] Nadia Al Sanhouri and Tawfiq Alshawi, "*Al Sanhouri min khilal awraqoh al shakhsiyyah*", Dar Alshorouk, 2005, PP. 74. "Sanhouri from his personal papers"
[27] 121-180 A.D. The most illustrious member of the Antonine dynasty, which governed the Roman Empire during the 2nd century. See further, Encyclopedia Americana, Grolier Incorporated 1982, 18, PP.306.

simplest of questions; what is it in its nature? What does it do? This is exactly what I have done to rest upon this system.

What is Islamic Legal Theory in its nature? I think it is a theory of derivation of positivist legal rules from general holly scripture. The hypothesis is as follows: There is a divine will to govern this created universe (*Lex Aeterna*). This will is revealed to us through the *nomous* (scientific laws, or laws of nature learned by observing the behavior of material objects), and the *Lex Divina* (divine law as revealed to men in scripture). This divine law, however, is not self explanatory so jurists start to explain it, seeking the will of God, using a body of interpretive rules (law derivation) to reach the positivist laws (*Lex Humana*) applicable in our daily lives. The law derivation rules is what we call *usul al fiqh* (roots of jurisprudence), and the *Lex Humana* is what we call *furu' al fiqh* (branches of jurisprudence).

This differentiation between the *Lex Divina* and the *Lex Humana* is essential, as an attribute of Islamic Legalism is the confusion between both. Muslims usually confuse the humanly drived (religious thought) positive law (*Lex Humana*) as the actual will (religion) of God (*Lex Divina*). And of course the jurists and political elites have helped create and nourish that confusion.[28]

What does Islamic Legal Theory do? I guess it is quite obvious now; it drives positive law from scripture. How it drives its positive law, is what I call background theory.

The very first question any Islamic Legal school of thought asks is how much authority should it give to any given text? If the text is not absolutely authoritative then the jurist will have to reason his way out of the legal odyssey. From this one

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[28] Muhammad Said Ashmawi, "*Usul Al shari'a*", al intishar alarabi, 5th ED. 2004, P.73. "Origins of Islamic Law".

reasonably conclude that every Islamic legal question forms a some what struggle between *aql/ra'ay* (reason/opinion) and *naql/nass* (copying/text). How each theory resolves this struggle formulates its background theory and the actual difference between them. This is how my SAT works, the *aql*/rationality and *naql*/text dichotomy.

To imagine what I mean by textual/*Naql* sources of divine law derivation and the rational/*Aql* sources please consider the following diagram.
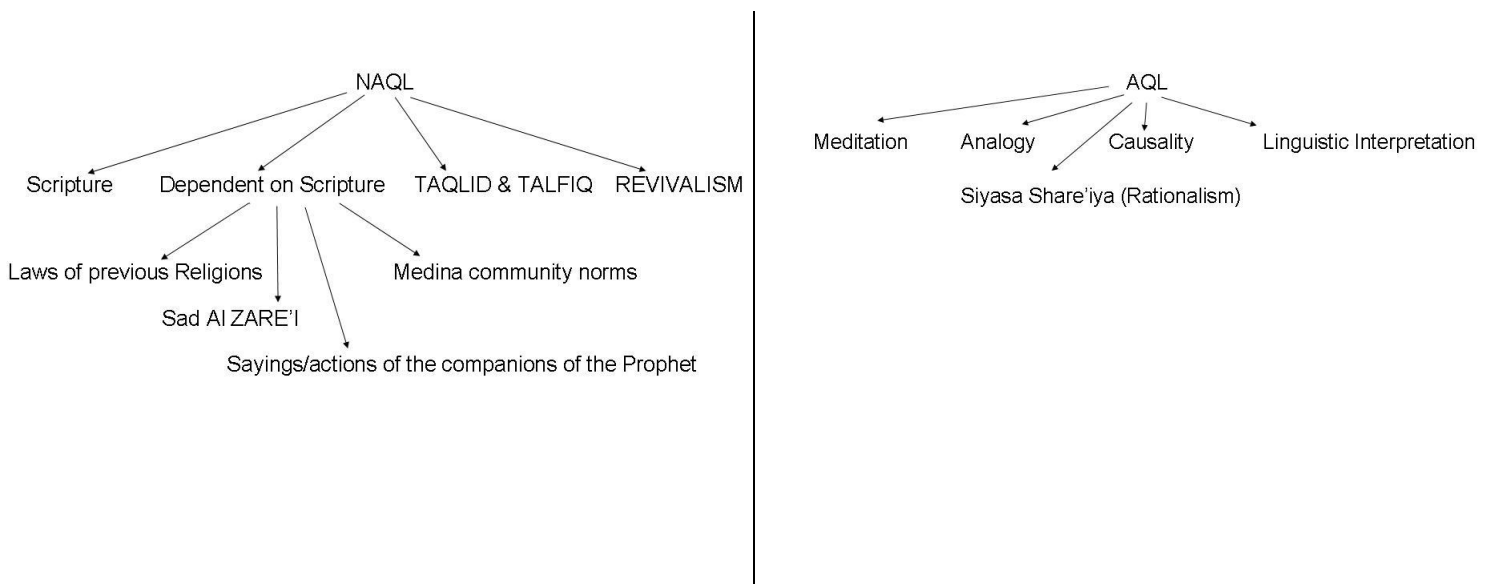

Depending on what kind of sources each school is using to drive its positive laws, we can differentiate between the schools of legal thought.

1- *Aql* v. *Naql*:

A spectrum could be imagined to detect how different schools use the above illustrated sources. The schools will differ amongst them in believing in textual exclusivity of the revealed texts, how binding do they find the ways of the communities within which these texts were revealed, what kind of analogy they use, what kind of linguistic alteration can they apply, do they use policy analysis, do they

use comparative legalism, do they apply interdisciplinary comparative legalism, are they secular, and finally, do they think that the revealed text is just a figure of speech?
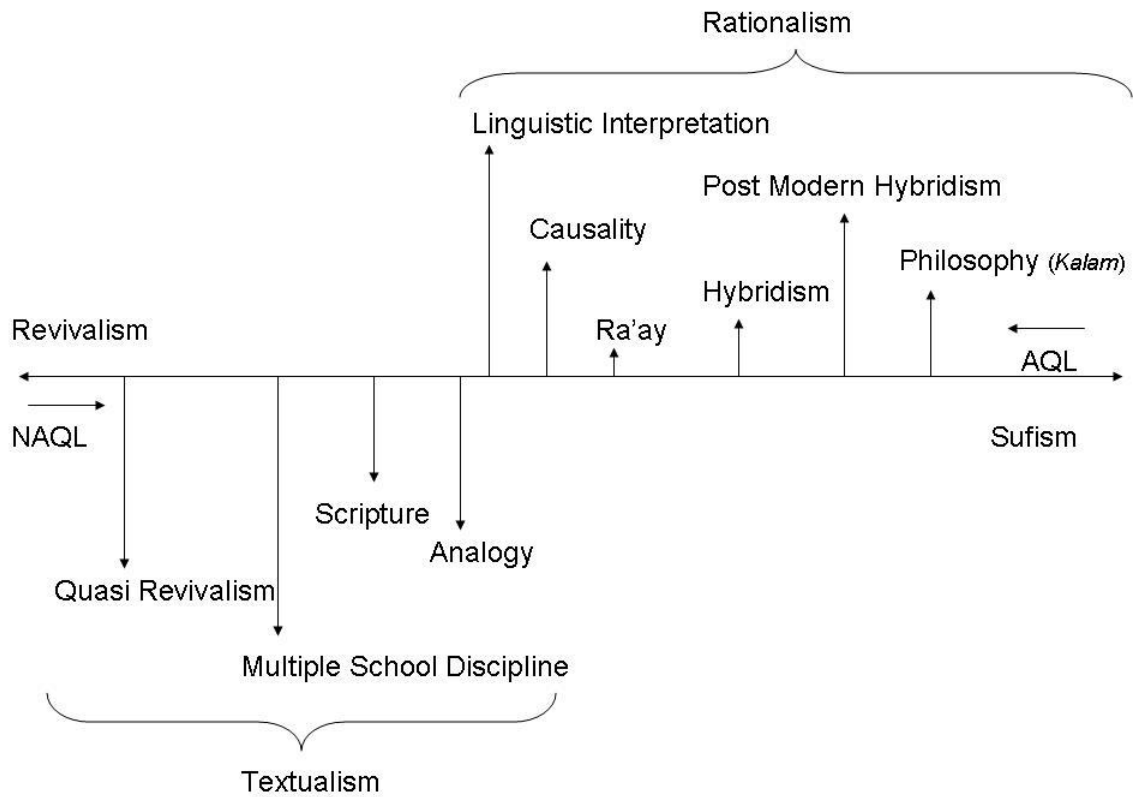
2- Schools of Islamic Legal thought according to the SAT:
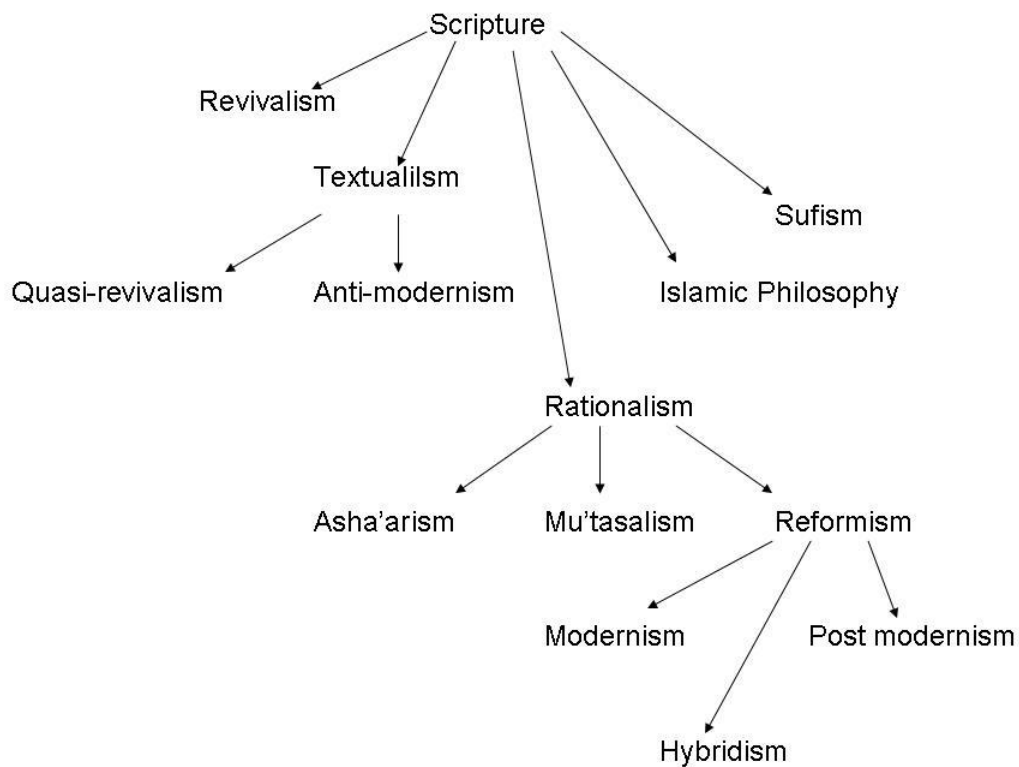
Hence according to the SAT we have three schools of Islamic Legal Thought: Revivalism, Textualism, and Rationalism. Rationalism is subdivided into *Asha'arism*, *Mu'tasalism*, and Reformism. Reformism in its part is further divided into: Modernism, Hybridism, and Post Modernism.

NEO PAGANISM

I turn now to shed some light on the Revivalist ideology. As said earlier all Islamic Legal movements are fundamental. Furthermore they all suffer from a historical nostalgia

where a jurist or a group of jurists yearns to a certain moment of Islamic history and wishes to restore it.[29]

Revivalism, as a legal theory, does more than that. It does not merely admire a certain glorious past like all other schools, nor does it imitate that aggregate body of legal literature like the Textuals. What it does is that it attributes divine legal bind-ness to the early Islamic history and creates a duty to relive it and hence the name Revivalist (*Ehiya'i*). In this part I would like to account for the first school of thought to introduce the apostasy slogan to the Islamic public sphere. I would then briefly consider the jurisprudential origins of Revivalism as a radical (violent) school of legal thought. At the end I try to explain the mental stages a Revivalist go through.

1- *Al-Khawarig*

The first to introduce the *kufr* (apostasy) dialect, and hence holly violence, in the Islamic arena were *Al-khawarig* in 37 *hijri* (657 AD) when they revolted against *Ali bin Abi Taleb* as he agreed to recourse to arbitration to resolve his conflict with *Moa'weiyah bin Abi Sufian*. Both (*Ali* and *Moa'weiyah*) were fighting over power and based their claims on politics not religion. *Al-khwarig* however, who were supporting Ali at the time, revolted against *Ali*, and naturally against *Moa'weiyah* on the grounds that they were exclusively the true believers. At the beginning they supported Ali as fellow true believer and joined his cause in fighting non believers/should be Muslims. However as Ali agreed to make peace where a holly duty of war exists, he became along with the rest of the Muslim community an apostate.[30]

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[29] Mohamed E'marra, "*Tayarat Al fikr Al Islami*", Dar Elshorouk, 2nd ED. 2007, P. 127. "Trends of Islamic Thought".

[30] *Ibid* P. 13.

Soon most if not all Islamic sects will borrow the same argument and cover their political ideology with the slogan of religion and classify their opponents as non believers. A state of believe monopoly and hence sectarian violence began and acquired mass like a snow ball through Islamic history from that moment. In their jurisprudence, *Al-khawarig* says that a revolution is a religious duty if there are forty true believers (i.e. members of their sect), and that such a revolution is an ongoing duty so long as there are non believing states (otherwise, Muslim) in this world.[31] They call this *had al shira'a* (quorum of buying). Meaning that a certain number of people (40) is needed for them to engage with the enemies of God, die or win and thus pay for immortality in paradise with their own blood. From a theological point of view Al-Khawarig believe that a person's actions in addition to his/her metaphysical-moral convictions (*a'qae'd*) are an integral part of believing in god and thus committing a mortal sin, irrespective of gravity, constitutes apostacy.

Al-khawarig, though believed that other Muslims are not true believers if they are not members of their sect, however they did not engage in a specific revivalist methodology.

2- Jurisprudential origins of Revivalism

During the Abbasid Dynasty, the Islamic empire was vast, rich, cosmopolitan, and powerful. The heads of states were investing in sciences, commerce, and arts. In such an atmosphere the *Mu'tasalism* (a group of scholars believing in reason and logic should govern scripture interpretation) movement flourished and gained strong official support. On a later stage *Mo'tassim* (one the Abassid caliphs) decided to form his army of Turkish

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[31] Mohamed E'marra, "*Tayarat Al fikr Al Islami*", Dar Elshorouk, 2nd ED. 2007, P. 22. "Trends of Islamic Thought".

soldiers to avoid the old Arabic alliances and secure his rule. The Turks gained much power and became very influential, they however were extremely authoritarian and hence developed a strong detest against the *Mu'tasalists* who always called for political accountability and removal from office. When *Al-mutawakil* (another Abbasid caliph 232-247 hijri/847-861 AD) came to power he decided that the logical liberal thinking of *Mu'tasalism* is too dangerous to the Abbasid regime and appointed the nominees of *Ahmad ibn Hanbal* as judges and high officials.[32]

The Hanbali school of legal thought was the first to introduce the revivalist methodology (using Shafe'i doctrines) by saying that Muslim communities lost their faith when they became cosmopolitan, modern, scientific, and philosophical. He considered the Medina and Mecca Islam to be the only true Islam and wanted everything restored to its nomadic/pre imperial origins. He was strongly textual, (Textuals consider him the true founder of the *ahl Al-hadith* not Shafe'i)[33] authoritarian (he prohibited political accountability), and discriminatory (pro-Arabism). He did not, though being the Revivalist he is, call for a war against now pagan/was Muslim communities. He lobbied for a peaceful restoration of faith, in which he was extremely pragmatic and knew well his way to this was to gain favor of the heads of the political order which he exactly did by securing their regimes religiously and acting as advisor to the caliph. The innovation he introduced to the realm of Islamic Legal Theory is the understanding that the ways of living of the people of Medina and Mecca at the time of the prophet (even the clothing) are of religious value and thus legally binding.

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[32] Mohamed E'marra, "*Tayarat Al fikr Al Islami*", Dar Elshorouk, 2nd ED. 2007, P. 136. "Trends of Islamic Thought".

[33] Ibn Al-qaiyym, "*A'llam al-mowaqeiyn*", Part I, p. 28. This is also found in Mohamed E'marra, "*Tayarat Al fikr Al Islami*", Dar Elshorouk, 2nd ED. 2007, P. 141. "Trends of Islamic Thought".

The next was the Wahabi school of legal thought which was founded by *Muhammad ibn Abdel Wahab* (1115-1206 hijri/1703-1792 AD). He descended from a family of jurists (all Hanbalis) and became a jurist himself. His reaction to a growing new Sufi order after the fall of the Fatimid Dynasty was a dire need to restore the true faith by force. He declared Sufis and all other Muslims (save Hanbalis) to be apostates and preached a holly war against everyone including the Ottoman Empire. As pragmatic as his teacher (Ahmad ibn Hanbal) he resorted to power and formed an alliance (he had a famous saying "*God conveys with power what he does not convey with Quran*") with *Osman ibn Ahmad ibn Mo'amir* (one of the rulers of hijaz at the time) and together they launched the war of restoration.[34] As they were defeated, he moved to dere'yah where he formed yet another alliance with *Muhammad Ibn Saud* and launched his second war which was quite successful compared to the first. They soon had all hijaz under their command (including Mecca and Medina) and invaded *karbala'a* in Iraq. They were only stopped by Muhammad Ali, ruler of Egypt, (at the request of the Ottoman Caliph who wanted to stop this revolution against his caliphate) on September 8th 1818.

His preaching and teaching, however, continued and later on indeed constituted statehood and religion of the now Arab Gulf.[35] From this we conclude that Revivalists and Textuals only differ in the extent of the past they wish to revive. Textuals find the ways of the past binding whereas Revivalists find the struggles of the past- in addition to scripture- binding.

4- Mental stages of Revivalism

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[34] Mohamed E'marra, "*Tayarat Al fikr Al Islami*", Dar Elshorouk, 2nd ED. 2007, P. 258. "Trends of Islamic Thought".
[35] *Ibid* P. 260.

A Revivalist passes through three mental stages representing three incidents in early Islamic history.

A) Early Mecca

Their point of departure is that they (believing minority) live in a pagan society. They draw resemblance to what the prophet and his few companions experienced in the early Mecca stage when they mingled amongst pagans. The Revivalist does as the early Muslims did and try to deliver (redeliver) the message of God. Here the Revivalist is still optimistic in saving the community by regaining people to faith.

An example of Revivalists at this stage is the *eiya'det al da'wa* (re-preaching) group which organized its people to re-preach and re-spread the true teachings of Islam to the Egyptian people who according to the members of the organization are the neo-pagans.

B) Immigration to Medina

When the state started arresting them for state security reasons, they decided to move to the desert, establish secluded communities there, and live far away from the non-believing/neo pagan community which rejected them and the word of God. Here they try to relive the history of the prophet immigration to Medina after his and his companions' persecution in Mecca. The Revivalist at this stage loses all hope in the faith of the community.

The neo-immigrants called themselves *al takfir wa al-hijra* (declaring the apostasy of society and immigration).

C) Medina supremacy

What happens next is even more dangerous, where they do what the prophet did in Medina. Establishing an authority and an army, and believing in his superiority he

conquers Mecca. This is called the state of Medina supremacy (*al-iste'la'a al-madani*).
Here the Revivalist launches his/her holly war (*jihad*) against the neo-pagans to conquer by sword what they failed by preaching.

Here we find terrorists groups like Qaeda, Taliban, Al-gama'a al-islamyyia, Al-jihad, and hizb al-tahrir.

4- The Neo Pagans

From the above brief account of the insight of the Revivalist movement, we take it that their first enemy is not the West; it is their fellow Muslims. Muslims are the neo-pagans. Islamic terrorists are not concerned with the West. Like the *Hashashin* (the Assassins group) they are preoccupied with their Islamic enemies whom they think as tyrants and usurpers.[36] They might attack the West but this is done only to serve an ally or to hurt an enemy not on the merits. Those who think that Islamic radicalism is primarily concerned with the West make the very same mistake the crusaders made regarding the *Hashashin*.

ISLAMIC POST MODERNIST HYBRIDISM

The reason I wrote this essay was to introduce a new classification system for Islamic Legal Theories and through it understand better how to counter Islamic Radicalism and develop contemporary Islamic communities.

This agenda, as I said about others and now it is my turn, stems out of a certain nostalgia for a truly cosmopolitan, modern, and yet spiritual Islamic community. I am strongly of the opinion that a certain Reformist movement, enlightened and glorious started with *Gamal El Din Al Afghani*, and alas it was stopped at a very early stage as the ruling and

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[36] Bernard Lewis, "*From Babel to Dragomans; Interpreting the Middle East ,Religion and murder in the Middle East*", Weidenfeld & Nicolson, 2004, pp.104.

religious elites sensed the troublesome of the learned human mind. I am also convinced that a recent movement is starting with a better chance than the old one.

At the end I speak my mind about how I see the way forward.

I-   Authenticity, Post Modern Hybridism, and group hatred

Of all Reformist movement I put all my money on Post Modern Hybridism to deliver the task of Islamic law modernization.

By Post Modern Legalism I mean an interdisciplinary and a relativist movement[37] which when used in interpreting and evaluating scripture shall emphasize textual contexts, causal links, policy analysis, sciences, economics, politics, etc. What is more important is the Post Modern recognition of the Human Mind as a driving force and yet acceptance of its ever changing nature.

Revivalism and Textualism suffer of three basic ailments: 1- Textual exclusivity (Formalism)[38], 2- the belief that human beings lack sound judgment, 3- Authenticity phobia.

If we counter argue the three core issues in their thought, I believe we can achieve our goal. The first and the second core issues have been dealt with in great detail, thus I wish to say two things concerning the third; first, it is crucial, yet only reasonable and logical, to realize that development is a product of an inter-power relation where competition forces the weaker end to fortify its position in order to survive. It is thus not only natural, but necessary to learn from the "other" should one elect to become the stronger party at a certain future point. Having said this, and taking into

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[37] T. May, "Social Research Issues, Methods and Process", Buckingham, Open University Press, 1997, P. 16.

[38] Amr Shalakany, Deduction/Policy and Qiyas/Istihsan, in THE ANALYTICS OF THE SOCIAL IN PRIVATE LAW THEORY (SJD Dissertation, Harvard Law School. 2000), pp. 139.

consideration that the world passes through development cycles, one has to confess that there is no such thing as a genuine heritage (*mawroth*) and an alien one (*wafid*).This does not mean that I am a Universalist. I am a believer in social relativity.

The second thing I have to say is that authenticity phobia is a secondary feeling not an ideology. The first feeing is hatred, group hatred. It has nothing to do with a rational debate what so ever. "The instinct (group hatred) is there, and it comes out in all sorts of unexpected situations. To pretend that it does not exist and that it is some sort of ideological aberration can not lead anywhere useful".[39] Any one who tries to support his authenticity phobia is simply in denial of his/her natural impulses and is either simple minded enough or thinks we are to believe otherwise.

Based upon the above I think the interdisciplinary and relativist nature of Post Modernism (anti-formalism,logic, interdisciplinary, and private autonomy), and the comparativism in Hybridism (cosmopolitan), are the only way to overcome the limitations of Islamic Revivalism and Textualism.

II-   Islamic Constitutional Law reform project is paramount

Now to the final question; Where to start? I say Islamic Constitutional Law reform project is paramount.

I say this for the following reasons:

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[39] Bernard Lewis, "*From Babel to Dragomans; Interpreting the Middle East, A Taxonomy of Group Hatred*", Weidenfeld & Nicolson, 2004, pp.197.

1- I believe that there can be no Islamic law reform if there is no political accountability and proper constitutional democratic succession in power. This view stems from the belief that tyranny is the mother of all evils.[40]

2- There is no true theory of a contemporary constitutional Islamic state. We have some books about what powers an Islamic state entertains,[41] its historical origins,[42] or some literature that addresses remote questions without putting a theory of governance.[43] The problem is magnified when one understands that throughout Islamic history religion has been always constantly used to support tyranny.[44] This was first done by the Omayyad Compulsory ideology (*al gabr*) and *al irga'a* (the postponement).[45] The two combined together made people believe that it is part of believing in destiny (God's will) to accept tyranny and that a tyrant is not accountable on this earth but shall be judged by God.

I call for putting a comprehensive theory dealing with the source of political power in the state, the form of the state, the form of government, the different constitutional powers, checks and balances, sources of law, and Human Rights.

3- This comes as first priority because it is, and always has been, the concern of all the radicalist groups.[46]

[40] Abd Elrahman El Kawakbi, "*Taba'i Al Istibdad wa masare'i Al Isti'bad*", Dar Elshorouk, 1st ED., P.16. "Attributes of Tyranny and termination of slavery".
[41] Al Mawardi, "*Al Ahkam Alsultaniyya wa Al welaiyyat Al diniyya*", Maktabet Al Tawfikiyyah. "Sultan decrees and religious powers".
[42] Muhammad Selim El Awwa, "*fi alnizam al siyyasi lil al dawla al Islamiyya*", Dar Alshorouk, 2n ED. 2006. "The political system of the Islamic state".
[43] Yussif Al Qaradawi, "*min fiqh al dawla fi al islam*", Dar Alshorouk, 3rd ED. 2001. "From the state jurisprudence in Islam".
[44] Abd Elrahman El Kawakbi, "*Taba'i Al Istibdad wa masare'i Al Isti'bad*", Dar Elshorouk, 1st ED., P.30. "Attributes of Tyranny and termination of slavery".
[45] Mohamed E'marra, "*Tayarat Al fikr Al Islami*", Dar Elshorouk, 2nd ED. 2007, pp. 37, 45. "Trends of Islamic Thought".
[46] Muhammad Said Ashmawi, "*Al Islam Al siyyasi*", Al intishar al arabi, 5th ED. 2004. P.70. "Political Islam".

4- I recognize the instrumental and constructive [47] role political reform and freedoms play in economic development of any given society.

5- This is the battle field of countering Terrorism. Islamic Radicalism is in essence an inter-Islamic struggle not a clash of civilizations. The counter arguments have to remain Islamic. We will not be able to stop the Radicalist tide if we keep imposing a purely Western agenda.

6- In addition to the above theoretical/doctrinal importance of my studies it is also rather crucial in satisfying the needs of billions of Muslims in Muslim countries who aspire for a democratic surrounding where their liberties and human dignities remain intact and yet keep their Islamic identity.[48]

Are my studies romantic? I think not. For now the shadow of Islamic textualism and xenophobia casts its might over any reformist project.[49] I will have to introduce a reformist agenda that addresses the question whether Islam and liberty coexist? I will have to answer to those who think they can not[50], explore the different ways to reconcile the tensions[51] and being an advocate of the view that: democracy is an

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[47] Amartya Sen, "*Development as freedom*", Oxford University Press, 2001, pp. 152, 154.

[48] On this, see further: "*Who speaks for Islam? What a billion Muslims really think*", John L. Esposito and Dalia Mogahed, Gallup Press, 2007.

[49] See further: "*Khurafit al taqdum wa al ta'akhor*" Galal Amin, Dar El Shorouk, 1st E.D. 2005, P. 85. The myth of development and under-development. And "*Al hadathah Al mumkinah*", Radwa Ashour, Dar El Shorouk, 1st E.D. 2009 P. 10. Possible modernity.

[50] See further on this: "*The Middle East, westernized despite itself*", Bernard Lewis, in "*From Babel to Dragomans; Interpreting the Middle East*", Bernard Lewis, P. 225.

[51] For similar attempts see further: "*Islamic Theology and moral agency: Beyond the pre-modern and the post modern*", Anver M. Emon, in "*Constitutional design for divided societies: integration or accommodation?*", Edited by Sujit Choudry, Oxford University Press, 2008. And "*The erasure of Islamic difference in Canadian and American family law*", Pascale Fournier, 10 J.L. & Pol'y 51 2001. And "*In the Canadian shadow of Islamic Law: Translating mahr as a bargaining endowment*" Pascale Fournier, Osgoode Hall Law Journal, Vol. 44, No. 4, 2006. And "*Enhancing democracy, respecting religion; a dialogue on Islamic values and freedom of speech*", Anver M Emon in "*Faith and law: How religious tradition from Calvinism to Islam view American law*", Edited by Robert F. Cochram Jr., New York University Press. And "*The limits of constitutionalism in the Muslim world: History and identity in Islamic Law*", Anver M. Emon.

integral part of Islam without neither the need for reconciliation nor for transplanting legalism[52] I will have to make a challenging case.

The quest for neutral principles of a contemporary, democratic, functioning, constitutional Islamic state is the only effective war against tyranny, poverty and terror.

<div align="center">THE METAMORPHYSIS OF POWER</div>

In December 2011 a spokesman of a conservative Islamic political party[53] running for a seat in the post revolution Egyptian parliament renounced democracy in a press conference! He explained his position on the grounds that democracy makes us believe that people are the source of power whereas the Quran tells us that God is the source of power.

The source of power is the epitome of Islamic constitutional law discourse. Determining the source of power in an Islamic state and identifying the guidelines within which it is practiced will define the realm of liberties, political legitimacy and constitutional justice in the Muslim society.

I-   Empiricism:

Growing up, I relied on observing my surroundings to bring method into the apparent madness of the world in which we live. I resisted any abstract presumptuous explanation of this earthly existence. I came to trust in deductive logic. I learned that

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[52] For further account of this view please see: "*Al dawla wa al mogtama'a*", Muhammad Shahrour, Al Ahali, 1995, P. 143. The state and society.
[53] Al Noor party.

knowledge and rationalization are the ultimate empowering tools. I call this "Empirical Epistemology"[54].

As the name suggests, Empirical Epistemology is a theory of knowledge founded upon: observation, consideration of the surroundings, drawing patterns and reaching consequential conclusions. I trust in this methodology simply because unlike most of other lines of thought and philosophical disciplines its point of departure is tangible as opposed to mere presumptions. In addition to empirical examination of surroundings (philosophy) I also rely on scripture to reach what I believe to be true.[55] Human beings and their behavior are at the very core of Empirical Epistemology. As this is a world mastered by humans, we are the starting point for explaining the worldly order. The primary interpretational tool of "our" world is, indeed, "us". This is, by no means, an easy task. For one must assume both the roles of "examiner" and "subject of examination".

Observations of human behavior lead me to conclude that our actions are dictated by four basic drives; a) survival, b) existing in a group, c) belief in a greater power and d) ornamentation.

II-   *Homo economicus*:

Survival can be, roughly, explained as the individualistic drive to keep oneself, seeking personal pleasure, pursuit of personal happiness and avoiding both hardships and pain.[56]

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[54] For further consideration of Empiricism, please see: "*hay ibn yaqzan*" – *philosophus autodidactus*, Ibn Tufail and "An essay concerning human understanding", 1690, John Locke.

[55] For a further account of Averroism, please see: "*fasl al maqal fima bayn al hekma wa al shar'a min ityssal*", Ibn Rushd-Averroes.

[56] For further account of this definition please see further: "The History of Sexuality, Volume III- the care of the self" (*Histoire de la sexualite, III: le souci de soi*), 1984, Michel Foucault.

In a socio-legal context the "survival drive" denotes that each human being is driven, solely, by his own best self interest (*homo economicus*).[57]

From my perspective; this "survival drive" is the most crude of all our derivatives of locomotion on account of being most akin to animals' cause of action. This "survival drive" is most apparent in children. The more developed and complex we become the more the other drives kick-in and the more the "survival drive" subsides to a more advanced evolutionary form (*homo reciprocans*).[58]

III-   *Zoon politikon*:

Existing in a group can be explained as the individualistic drive to join, live within and rely on a gathering of other people (*Zoon politikon*)[59].

At first it may seem that this "pack drive" is nothing more but an application of a deeper and more immediately demanding "survival drive". After all, does not a person seek existence in a group to satisfy his/her (and not the group's) needs of mating, shelter and exchange of goods and services? One must conclude, nonetheless, that the "pack drive" serves a purpose of its own independent of a more basic drive. No man is an island[60] indeed. And it is this swaying between the "survival drive" and the "pack drive" that would allow us an explanation of the most perplexing of legal concepts. Things like the source of power, political legitimacy, constitutional justice and the redistributional role of law in economic development.

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[57] Please see further on this: "Theory of Moral Sentiments", 1759, Adam Smith and "An inquiry into the nature and causes of the wealth of nations", 1776, Adam Smith. See generally the Utilitarian work of John Stuart Mill.

[58] For an Islamic account of the topic, please see further: "Self-interest, Homo Islamicus and some behavioral assumptions in Islamic economics and finance", 2006, Mohammad Omar Farooq.

[59] Please see further: "Politics", Aristotle.

[60] Please see further: "Devotions upon emergent occasions and several steps in my sickness-Meditation XVII", 1624, John Donne.

Some would like us to believe that humans invented religion during the Palaeolithic age some thirty thousand years ago. According to them: coming to live in organized groups (*Zoon politikon*) lead our ancestors to believe in something greater than themselves (*Homo religiosus*) [61]. The "Dogma drive" was born.

I, humbly, reject this proposition. Not because the most recent studies of ancient cites in Turkey forced scientists to reconsider their position and declare that – perhaps- people came to live together (*Zoon politikon*) to practice their worship (*Homo religiosus*) for I also refuse to adopt these latest of findings as reasoning to my line of thought (despite the fact that I grew very fond of them because, I must admit, they support my initial conclusions). Observing human behavior one must conclude that we are driven to believe in something greater than ourselves (dogma). Whether a person is a naturalist, materialist, religious or agnostic, the point of departure remains non-altering: we all need to believe in some greater abstract concept than our mortal flesh (dogma) if we are to lead a healthy existence. This basic understanding of the nature of religion is our building block for establishing a platform wherefrom we can address Islamic law reform.

IV- Aesthetics:

Human beings did not stop at using animal skin and fur to protect their bodies from the elements. Apparently they were not satisfied with this purely "functional" role of fabric and went about to invent weaving cloth. They, however, did not stop there and started fashion trends corresponding with seasons. Fashion, evidently, was not

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[61] For an account of the concept of *homo religiosus*, please see further: "the case for God", 2009, Karen Armstrong.

satisfactory either and they laid down rules dictating what is and is not "correct" wear irrespective of being fashionable.

Our ancestors did not confine themselves to signaling at each other as means of communication. They instead resorted to sounds. Sounds became words, words became languages and languages became a disciplinary science (Philology) in their own merit. Demonstration of linguistic prowess took the form of literature. Sitting in judgment of someone's linguistic capabilities became literary critic. The methodology of appraising someone's linguistic capabilities became literary critic theory.

Humans found it unsatisfactory to seek shelter in caves, on top of trees or even in houses. Instead they erected some very commanding structures exhibiting great skill in both design and execution.

This "ornamentation drive" (to admire, seek and acquire beauty) forcing us to forsake the basically functional in favor of the aesthetic is an integral part of the human moral structure[62] and a corner stone for tackling law reform and art.

V-   The origin of power:

Both the "survival" and "pack" drives in their absolute forms are mutually exclusive. To seek unrestrained personal interests whilst sharing the very same limited resources with other human beings (who in their turn are also seeking unrestrained personal interests) is deeply conflicted. Some sort of organization/compromise must exist to sustain our existence (collective consciousness)[63]. Both social order as well as

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[62] On this topic, please see further: "Inquiry concerning beauty, order, harmony and design", 1725, Francis Hutcheson.

[63] On the topic of interdependence (mechanical and organic solidarities), please see further: "*De la division du travail social*" – The division of labor in society, 1893, Emile Durkheim.

political power is thus the product of social necessity.[64] Power is not the product of divine right or social contract. It is founded upon basic human needs. We simply can neither exist nor function without order.

Understanding that power was organically-automatically invented to serve a social need[65] helps us attribute, consequentially, a purpose of power and a criteria of judging the legitimacy of its exercise; the Greatest Happiness Principle[66].

Exercise of power is considered legitimate if and only if, it realizes the greatest possible happiness (all things considered) of the addressees of such an exercise of power (Rule Utilitarianism-Act Utilitarianism).[67] Any control of personal liberty is only legitimate if and only if such limitation of individual rights is necessary for the welfare of society.[68]

Sole reliance on human endeavors to determine the Greatest Happiness Principle (Positivism)[69] is almost a practical impossibility[70]. We need a greater power to act as compass to what "generally" will bring us the greatest happiness. This is the role of scripture. Neither God nor humans are the source of power. Believing in God is to acknowledge his omnipresence, omni-power, omni-wisdom and providence. Only God exercises such divine powers. To put in legal terms: when the Lord decides to act

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[64] More on the topic please see: "*Droit constitutionnel et institutions politiques*" – Constitutional law and political institutions, 1972, Andre Hauriou.

[65] More on the topic of public service please see further: "*l'etat, les gouvernants et les agents*"- The state, governments and agents, 1903, Leon Duguit.

[66] More on the theory of the Greatest Happiness Principle please see further: "Utilitarianism", 1863, John Stuart Mill.

[67] Please see on the Utilitarian exercise of political power/legislation: "The principles of morals and legislation", 1781, Jeremy Bentham.

[68] Please see further: "*L'etat, le droit objectif et la loi positive*" – The state, objective rights and positivist law, Leon Duguit.

[69] On the transformation from the Theological to the Metaphysical to the Positivist, please see further: "The course in Positive Philosophy", 1830-1842, Auguste Comte. See also: "A general view of Positivism", 1844, Auguste Comte.

[70] On the impracticality of identifying the Greatest Happiness choice, please see further: "Darwin's dangerous idea", 1995, Daniel Dennett.

he acts in his own capacity with neither agencies nor proxies. The only way for us to learn of his divine will is to examine scripture.

Governance is on the other hand, a product of need. Political power is exercised by agency of social necessity not by either divine right or public consent. Power is a means to an end. The manner by which it is exercised is judged (like all form) by the quality of its service to its function, the "function" being popular welfare and happiness.

Assuming that no Muslim claims to be an agent of God, the exercise of earthly power is determined by the people's welfare and happiness with the general guidance of scripture. In this day and age people's welfare and happiness is best realized in a neo-liberal constitutional state of institutions, rule of law, political legitimacy, political accountability and constitutional justice. We do not need to renounce democracy to be Muslims.