

RIGHTS IN ISLAMIC LEGAL WORKS

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To write about human rights in Islam is to deliberately step into a minefield. Like other Islam-related topics, it is an activity that involves using a limited conceptual language to represent an “other” that speaks a different language and “articulate[s] itself conceptually, socially, institutionally and culturally in manners and ways vastly different from those material and non-material cultures that produced modernity and its Western distinct traditions.”⁸¹ In the field of rights, the modern episteme assumes the nation-state to be the ultimate form of organized collective life and the defender of rights. It therefore conceptualizes these rights through the language of law (read: state law), the leitmotif of the modern humans. The state, so central to today’s conceptions, was simply absent from the legal thinking of Muslim jurists writing between the eighth and nineteenth centuries. Not only did this absence contribute to a different understanding of law, but it also, and perhaps consequently, gave rise to a different language through which rights were articulated. Attempting to comprehend this conception of rights through a distinctly modern (and largely Latin) academic language therefore entails significant hardships. Notwithstanding these hardships, the stakes of such an activity remain high.

For many of today’s Muslims—who constitute around 24 percent of the world’s population—Islam and its

sharia⁸² remain an important source of religious and moral authority. These Muslims, however, live in modernity,⁸³ through which they relate to their tradition and are forced to negotiate their way between these different languages in their pursuit of a good, moral life. This is a negotiation that leads to a variety of outcomes, ranging from full endorsement of the status quo and subordinating Islam with its sharia, to resorting to sheer violence to restore “Islamic order.” Also at stake is preserving a platform, an alternative worldview from which to critique the modern condition and identify its shortcomings, and pave the way for material and spiritual survival, while appreciating the achievements of the collective struggles and human beings.

This paper will outline the foundations of Muslim legal scholars’ (fuqaha, sing. faqih) conception of rights,⁸⁴ and identify a set of important questions and points of contention. It highlights some of the possible implications of the fuqaha’s conceptions, especially in the fields of criminal law and the “war on terror,” where that usually dismissed perspective can help improve the state of human rights.

The Foundations of Rights in Islam

At the heart of fuqaha’s conception of rights is the theological conception of God as both omnipresent

81 W. Hallaq, *Sharia: Theory, Practice, Transformations* (New York: Cambridge University Press, 2009).

82 The term “sharia” is often (mis)translated as Islamic law. This translation is problematic in many ways. Importantly, as Hallaq argues, “the very use of the word law is a priori problematic; to use it is to project, if not superimpose, on the legal culture of Islam notions saturated with the conceptual specificity of nation-state law, a punitive law that, when compared to Islam’s jural forms, lacks (note the reversal) the same determinant moral imperative” (see Hallaq, *Sharia*, 2).

83 The term “modernity,” with its twin terms “modernization,” “modern,” etc., are admittedly problematic and mean different things for different scholars. In this paper, I use the term to designate the ensemble of technologies and institutional organization that originated through the (uneven) interaction between Europe and its colonies, particularly in the nineteenth century. For the purpose of this paper, the most important material manifestation of modernity is the modern state.

84 While reflecting mainstream views in the *Shafi’i* legal school (one of the four main Sunni legal schools), the paper relies primarily on the works of the late medieval Egyptian jurist Ibrahim al-Bajuri (1786-1861). In the words of Spevack, he was an “archetypal scholar,” a learned *Shafi’i* jurist, Ash’ari theologian, and *Naqshbandi* Sufi of an authoritative voice within Sunni Islam’s discursive tradition. As such, his life and works were “normative, exemplifying what many of the major premodern Sunni scholars and institutions stood for.” Further, al-Bajuri was *Shaykh al-Azhar* from 1847 until his death in 1861. His works (mostly commentaries on works of earlier scholars, written between 1807 and 1822) outlived those of his contemporaries, “especially in *Shafi’i* fiqh and Ash’ari Usul al-din.” His magnum opus, the 1842 *Hashiya ‘ala sharh ibn al-Qasim al-Ghazzi ‘ala matn Abi Shuja’* (A gloss on Ibn al-Qasim al-Ghazzi’s commentary on Abu Shuja’s text) was written at the cusp of the modern era, at a time when traditional schools of *fiqh* and theology were still “taken as the norm, before major reformist tendencies had spread to the degree that they did shortly thereafter.” In many ways, it is the seal of the traditional genre of *fiqh* manuals, and was followed only by the likes of Abduh and al-Afghani challenging this entrenched tradition to its core at a time when its very unity was dismembered. In his manual, al-Bajuri operates “within a connected tradition whose pedagogy dictates that one study and be firmly rooted in the tradition, yet also offer a service to his contemporaries by clarifying, or in some cases, challenging, the works of previous authors.” His is therefore not merely a voice within the tradition, but rather a highly authoritative one. See A. Spevack, *The Archetypal Sunni Scholar: Law, Theology and Mysticism in the Synthesis of al-Bajuri*, PhD Dissertation, Boston University, 2008. While al-Bajuri’s *Hashiya* serves as the primary legal reference for this short paper, it is supplemented by other (and earlier) legal works, from the *Shafi’i* and other legal schools, to fill in theoretical gaps whenever necessary. Notably, however, the exclusive focus of this paper is the fuqaha’s conception of rights, which is only one (albeit an important one) of Islam’s discourses. A somewhat different conception could be traced through Sufi discourses.

and the sole and ultimate owner of the universe. In Chapter 5, verse 120, the Quran states that to God “belongs the dominion of the heavens and the earth and whatever is within them.”⁸⁵ Far from rhetorical, this theological conception entails rights. While human ownership and rights are taken seriously by fuqaha, even a quick survey of fiqh manuals makes clear that God’s dominion places real restrictions on property rights.⁸⁶ Ownership by humans is understood to be contingent, temporary, and entailing the right to dispose—only within the dictates of God’s ownership. And so unlike the Euro-Christian God of enlightenment, sited apart in the supernatural, there is no space in the fuqaha’s conception for “nature” as profane material. Rather, it is produced, owned, and continuously sustained by God. God, in other words, is the real and ultimate owner, while humans are designated by Quran as viceroy (2:30).

From this theological conception follows the legal categorization of rights into the “rights of God” (huquq Allah) and the “rights of humans” (huquq al-‘Adamiyyin). And because God’s dominion is all-encompassing, the former category subsumes the latter. Legal discussions of homicide are a case in point. In conceptualizing the crime, jurists insist that the culprit transgresses three times. He violates God’s right by damaging His creation; violates the victim’s right by taking their soul, and violates their kin’s right by depriving them of their existence.⁸⁷ A transgression on the rights of another human, that is, is at the very least a double violation of rights: it entails the violation of the immediate sufferer’s rights but also a violation of the rights of God as both creator and the lawgiver.

The name given to the fuqaha’s category of rights of humans can be misleading. It does not represent a universal set of rights, but rather legal claims made by certain individuals against others’ violations and transgressions on their property (mal) or selves (anfus, sing. nafs). Only the injured and their legal representatives can claim these rights. Successfully proving a violation in court usually results in financial and/or corporal compensation/punishment. It is a domain of legal claims that allows (but does not encourage) the plaintiff to pursue compensation or punishment with dispute and avarice (al-mukhasama wal-mujadalah),⁸⁸ and therefore necessitates a meticulous weighing of individuals’ claims against one another.

This legal domain is juxtaposed to two others. First (and, significantly, of less importance) is the de facto domain of sultan law,⁸⁹ concerned primarily with the maintenance of public order and therefore expandable in moments of crisis, posing a potential threat to human rights. Scholars argue, however, that sultan law code was only “absolute with regard to the ruler himself and his men,”⁹⁰ and historical studies make clear that the expansion of this legal domain was always exceptional: it was limited to instances of “civil strife,” short-lived, and concerned primarily with restoring the peace.⁹¹ Notably, the fuqaha’s discussions of this domain are largely restricted to attempts to circumscribe it.⁹² Equally important is the fact that rights were not defended only by the state, for the law (if sharia could ever be translated as law) was not necessarily tied to the ruler or the central authority.⁹³ As such, even at moments of exception, basic rights remained intact.

85 Unless otherwise stated, translations from Quran and *fiqh* manuals are the author’s.

86 Examples of these restrictions on ownership rights include, but are not limited to, a. *shuf’a* (sale contract preemption), which restricts the owner’s right to dispose of his land and/or share in partnership; b. inheritance laws, which define heirs’ shares irrespective of their or the deceased’s will, with the latter’s power to dispose being restricted to one-third of his estate; c. *zakat* (obligatory wealth tax), a share of property automatically transferred to the poor’s ownership at the end of the financial year; and d. Quranic and Prophetic restrictions on the domain of the ownable, leaving some life essentials, including water, for example, communal.

87 I. al-Bajuri, *Hashiyat al-Shaykh Ibrahim al-Bajuri ‘Ala Sharh al-‘Allama ibn-Qassim al-Ghazzi ‘Ala Matn Abi-Shuja’* (Beirut; Dar al-Fikr, 1994), v. 2: 291.

88 I. al-Bajuri, *Hashiyat al-Bajuri*, v. 2, 4-6.

89 Unlike *fiqh*, sultan law remains significantly undertheorized. As Stilt notes, there is no equivalent of *usul al-fiqh* for *siyasa* or sultan law “although some jurists did attempt to sketch out, descriptively and normatively, constitutional structures of authority.” See Kristen Stilt, *Islamic Law in Action: Authority, Discretion and Everyday Experiences in Mamluk Egypt* (Oxford: Oxford University Press, 2011), 205.

90 W. Hallaq, *The Impossible State: Islam, Politics, and Modernity’s Moral Predicament* (New York: Columbia University Press, 2014), 68.

91 See, for example, Stilt, *Islamic Law in Action*, Chapters 7-9.

92 Kristen Stilt notes that while the “methodologies used by the jurists are fairly well-documented in the literature of *usul al-fiqh* . . . For the rulers, the methodology of *siyasa*-based power can best, and perhaps only, be understood by studying what rulers actually do, since the writings that do attempt to define the power of the rulers were written by jurists, whose goal was typically to circumscribe it.” See Stilt, *Islamic Law in Action*, 37.

93 Hallaq argues that throughout its historical existence, sharia was primarily a communal law, and that rather than permeating from the ruler to the community, it was a grassroot system that “took form and operated within the social universe and, more importantly, within the moral community; the Sharia as law and culture travelled upward with diminishing velocity to affect, in varying degrees and forms, the modus operandi of the minimal ‘state.’” See W. Hallaq, “What Is Sharia?” *Yearbook of Islamic and Middle Eastern Law*, 12 (2005), quote from 159.

The second legal domain juxtaposed to the rights of humans is that of the rights of God. This domain is distinguishable from others in at least two ways. First, it is much broader in scope. It covers two main fields: His rights as sovereign⁹⁴ lawgiver, namely upholding the sharia (referred to in legal works as the pure right of God, *haqq Allah al-mahdh*⁹⁵), and His rights as creator. This latter category is primarily concerned with the protection and respect of His creation, and since He is the creator of all, it encompasses the entire universe, leaving no room for “unprotected,” exploitable, profane nature. Not all creation is equally *muhtaram* (worthy of protection), however.

Two key criteria seem to define proprieties. First is the *mukallaf*'s⁹⁶ observance of others' rights. Transgressing on this front leads to a temporary lift of protection, allowing those others to use all necessary measures to defend their rights.⁹⁷ The second criterion is relative privilege, with both Quranic and *fiqh* discourses emphasizing the rights of the underprivileged. The Quranic language in encouraging charity is a case in point. In doing so, Quran either calls upon believers to “loan Allah a goodly loan” that He may repay in many multiples (2:245), or asserts God's ownership of all wealth, and firmly commands those who possess it to give to those who do not (24:33)—a language that had far-reaching impact on the *fuqaha*'s legal thinking. Importantly, it meant consistently privileging necessities⁹⁸ of the vulnerable over property rights.

Take, for example, the case of starving individuals. While *fuqaha* unequivocally declare the individual's right (and, in some cases, obligation) to defend one's property (or the property of others) against theft and destruction, including using proportionate violence that might entail killing the aggressor in defense of self, others, or property, they exempt starving individuals. In fact, they declare with equal assertion that it is the starving individual's right to take the food she needs, that the owner has no right to resist this starving individual, and that if he does, he is in a state of violation of the creator's (and ultimate owner's) dictates and is fully liable for the consequences of his violence. If he injures or kills the starving individual while defending his property, he is culpable in accordance with homicide law.⁹⁹ And so whenever redistributive mechanisms (e.g., *zakat*, *waqfs*, and charity) fall short of providing for life essentials, the *fuqaha* assert the needy's right to these essentials without resorting to the ruler.

Noteworthy is the fact that these rights are not limited to humans. Animal and human rights—both instances of God's creation—are conceptualized in somewhat similar terms in various chapters of *fiqh* manuals. In the discussion of sale contracts, *fuqaha* stress the impermissibility of selling a young colt without its mother, for such a transaction would lead to prohibited separation (*tafriq muharram*) between mother and child.¹⁰⁰ Legal discussions of the right to water are another example. Even in the rare occasions in which water is assigned to someone (*mukhtas bi-shakhs*),¹⁰¹ *fuqaha* define several

94 God, in this context, is sovereign in the Schmittian sense. He defines both the scope of law and exceptions thereto. His rule, in one important sense, is arbitrary; for, as Quran makes clear, “Indeed, Allah ordains what He intends,” (5:1); “He is not questioned about what He does, but they will be questioned,” (21:23), and “Allah decides; there is no adjuster of His decision” (13:41). The work of the *fuqaha* could be understood as attempts to define and limit the scope of this sovereign power, and to allow more space for negotiation among people in different communities, using their social norms, to define their laws.

95 See, for example, the legal discussion on the difference between a confession to theft and a confession to illicit sex. While the latter confession is fully retractable with no consequences (as discussed below), the former, entailing transgressions against both the creator and the property owner, is more complicated. Retracting the confession drops the corporal punishment (God's right), but not the property owner's right. Even upon retracting the confession, therefore, the said property is owed by the confessor to the property owner. See I. al-Bajuri, *Hashiyat al-Bajuri* v. 2, 4-8; S. al-Bujayrami, *Hashiyat al-Bujayrami 'Ala al-Iqna'*, v. 3, 143-145.

96 The *mukallaf* is the subject of sharia. In theological literature, *mukallafs* are those who are a. of legal age (*al-baligh*), b. compos mentis (*al-'aqil*), c. with sound senses, at least hearing or seeing (*salim al-hawas wa-law al-sam' aw al-basar faqat*), or d. have received the call to Islam (*balaghat hu al-da'wa*). (See, for example, I. al-Bajuri, *Hashiyat Shaykh al-Islam Ibrahim al-Bajuri 'Ala Matn al-Sanusiyya Fi 'Ilm al'Tawhid* (Cairo: Mostafa al-Halaby, 1955), p. 14.) In *fiqh* literature, however, the subject of *taklif* is the compos mentis Muslim who is of legal age. And whereas most contemporary literature reduces *taklif* to legal capacity, the notion (as defined by mainstream premodern Muslim jurists) implies both obligation and legal capacity.

97 For example, it is permissible (and sometimes obligatory) to stop others damaging property using proportionate levels of violence. Harming others (i.e., the aggressor) is permitted out of necessity; and while the individual defending her/others' property should observe the proportionality of violence, she is not liable for whatever she destroys even if she kills the aggressor. If the aggressor is an animal, however, she is responsible for paying its owner the equivalent of its value. See I. al-Bajuri, *Hashiyat al-Bajuri*, v. 2, 466-469. Another example is *al-kalb al-'aqour*.

98 It should be noted that “necessity” is a technical term in *fiqh* works. It is not just a state of “need,” but is rather a state in which not satisfying this need can lead to serious harm.

99 I. al-Bajuri, *Hashiyat al-Bajuri*, v. 2, 267.

100 I. al-Bajuri, *Hashiyat al-Bajuri*, v. 1, 507.

101 They are rare instances because the general rule is that water is permitted (*mubahah*) for everyone. Water resources such as rivers, water springs in mountains, rain, etc., cannot be owned, and people should have equal access to these resources (*al-nas tastawi fi-ha*). A prophetic hadith, repeatedly quoted by the *fuqaha*, stipulates that people are equals and have equal access to water, food, and fire (*al-nas shuraka' fi thalatha: al-ma' wal-kala' wal-nar*) and are partners in three things: water, herbage, and fire. See, for example, I. al-

instances in which cattle cannot be denied access to this water, including when this water is proximate to pastoral fields (*bi-jiwar kala' mubah tar'ah al-mashiya*), as long as this does not lead to damaging the owner's agricultural produce.¹⁰²

If God the creator steps in for the vulnerable, compromising the rights of the privileged in important ways, God the lawgiver demands much less, at least in this life. Violations of His law that do not involve violations of others' rights (*haqq Allah al-Mahdh*) are hardly punishable in practice. If the domain of rights of humans (with the allowance of the pursuit of punishment/compensation with dispute and avarice) is on one end of the spectrum, God's right as sovereign lawgiver (i.e., in instances in which no other rights are involved) is on the other end. It is in these cases that the legal maxim stating that "God's rights are based on forgiveness, seeking an exit from punishment, and not pursuing the aggressor" (*al-musamaha . . . wa al-dar' wal-satr ma-amkan*),¹⁰³ marking the second distinguishing criterion for rights of God from rights of humans, is most manifest.

Take the case of an extramarital consensual sexual relationship, in which God's right as lawgiver (i.e., His prohibition of such relationships) is violated, but no abuse is involved. In this case, the more serious punishment possibly awaits unrepentant violators of law on the day of judgment. Escaping punishment in this life, however, is much easier. Only two kinds of evidence could prove this violation in court, namely confession and the testimony of four upright trustworthy eyewitnesses offering identical testimonies. If the latter is practically impossible except in cases of public sex (given sharia's strict prohibition of spying and entering private places without prior permission), *fuqaha* have consistently discouraged the former, arguing that it is recommended for individuals to not confess, and for judges to discourage them from confessing, and, if they do, to encourage them to retract these confessions, and

hence allow more space for "seeking an exit from punishment" in a manner consistent with their conception of the lawgiver's mercifulness.¹⁰⁴

It is in light of these legal categories (governed by significantly different premises, ranging from the pursuit of forgiveness and seeking an exit from punishment, to avarice in the pursuit of compensation and retaliation) that sharia's procedural law is best understood. Unlike state law, which utilizes different medical and scientific discourses to produce truth-narratives that weigh more than verbal testimonies, sharia and its *fiqh*, in both procedural and substantive terms, sometimes work to conceal this truth. This is the case, most importantly, when God's rights or corporal punishments are at stake, and even the slightest doubt (*shubha*) therefore suffices to halt the punishment.

In these cases, as mentioned above, only confession and testimony suffice as evidence in court. The criteria for a witness to qualify as upright (*'adl*) and therefore have one's testimony admitted are significantly difficult to match.¹⁰⁵ Sharia's unequivocal prohibition of spying¹⁰⁶ further restricts the scope of court testimony. Confession, as mentioned above, is retractable with no legal consequence in the case of God's rights. In the case of rights of humans, and while retraction does not nullify the confession, strict measures are taken to protect the confessor against compulsion. Significantly, one's very imprisonment at the time of the confession suffices as evidence of compulsion that disqualifies the confession upon one's claim.¹⁰⁷

This procedural law was one of the first targets of the "reform" project initiated in the colonial period, with both "Muslim reformers" and colonial officers calling for relaxing the evidentiary criteria to allow for broader application of the law. In colonial India, for example, British officials—"baffled by the leniency of Islamic criminal law and by the loopholes that often precluded

Bajuri, *Hashiyat al-Bajuri*, v. 2, 58.

102 I. al-Bajuri, *Hashiyat al-Bajuri*, v. 2, 60.

103 I. al-Bajuri, *Hashiyat al-Bajuri*, v. 2, 6.

104 I. al-Bajuri, *Hashiyat al-Bajuri*, v. 2, 5.

105 Jurists list at least ten criteria for the witness, including being morally upright, avoiding major sins, not insisting on (i.e., repeatedly committing) minor wrongdoings, maintaining *muru'a* (respect, i.e., refraining from provocative or hurtful behavior, including, for example, eating in the streets, where hungry passersby would be hurt by the sight of food), and others. They list other criteria for the testimony itself. Most importantly, it is valid only if the witness is called by the court to testify, whereas a volunteer witness's testimony is dismissed, except in the case of the pure rights of God, where it is considered to be a form of *hisba*. See, for example, I. al-Bajuri, *Hashiyat al-Bajuri*, v. 2, 659-665.

106 Ghazali insists that even the *muhtasib*, assigned by the ruler to "command good and forbid evil," has no right to interfere if the wrongdoer "conceals the wrongdoing [by keeping it] behind closed doors." The "appearance" of wrongdoing from behind closed doors, however, means it is no longer concealed. Ghazali's examples of this *zuhur* (appearance) include loud voices, etc. See A. al-Ghazali, *Ihya' Ulum al-Din*, v. 4, 598.

107 I. al-Bajuri, *Hashiyat al-Bajuri*, v. 2, 8.

the infliction of what they saw as adequate punishment for serious criminals¹⁰⁸—initiated the reform project. Their stance, not unlike the French counterparts in Algeria, fellow nationals in Egypt, or Muslim reformers of the late nineteenth century, to name a few, stemmed from a modern, state-centric episteme that failed to capture the fuqaha's theoretical and legal categories and the habitus in which they exist. The success of their project therefore meant nothing less than the obliteration of this habitus.

Implications and Tensions

The fuqaha's conceptualization of rights differs from (secular) human rights in at least two ways.

First, and through emphasizing God-qua-creator rights, it somewhat blurs the distinction between the human and nonhuman, allowing for a more serious inclusion of the latter in the domain of rights. In this conception, the environment cannot be reduced to mundane material without powerful advocates in legal debates, nor can animal rights be framed as a separate issue. Second, and notwithstanding the important role of (sharia-trained) judges in settling disputes over rights, the state (or, more generally, central political authority) appears in this conceptualization as an afterthought, unlike the secular human rights discourse in which the state is (more or less) the source¹⁰⁹ and defender of rights.

The distinction between rights as citizen (i.e., rights tied to political authority) and human rights becomes increasingly blurred (if it does not completely collapse), and the discussion of rights therefore becomes

less alienated from practice. Rights as conceptualized by the fuqaha were both broader in scope, and based on laws that are less dependent on rulers in their application. This is why, as Hallaq argues, “despite the inescapable cruelties of human life and its miseries (which obviously are not the preserve of premoderns only), Muslims, comparatively speaking, lived for over a millennium in a more egalitarian and merciful system and . . . under a rule of law that modernity cannot fairly blemish with critical detraction.”¹¹⁰

Notwithstanding the aforementioned egalitarianism, mercifulness, and rule of law throughout the course of an entire millennium, it remains somewhat alien from practice, and falls short of responding to key challenges in today's world. The reason is rather straightforward: unlike Europe, which “lives somewhat more comfortably in a present that locates itself within a historical process that has been of its own creation”¹¹¹ and therefore encounters a different set of challenges, the fuqaha's conception sits today in a world it played no significant role in shaping, and therefore shares very little of its thematic.¹¹²

Bringing the fuqaha's thematic into the modern world therefore poses significant challenges on different fronts. Importantly, it faces difficulties in conceptualizing the human body; difficulties that manifest themselves on two fronts. First is the domain of sexual rights. While policing sexuality has radically changed with the rise of the modern state,¹¹³ and while court records reveal a far more relaxed treatment of sexual violations than the rather draconian punishment in the letter of law,¹¹⁴ the fuqaha's conception allows no room for a right to

108 R. Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge: Cambridge University Press, 2009), 106.

109 In his work on human rights, Talal Asad points to “a basic assumption about ‘the human’ on which human rights stand: Nothing essential to a person's human essence is violated if he or she suffers as a consequence of military action or of market manipulation from beyond his own state when that is permitted by international law. In these cases, the suffering that the individual sustains as citizen—as *the national of particular state*—is distinguished from the suffering he undergoes as a *human being*. Human rights are concerned with the individual only in the latter capacity, with his or her natural being and not civil status. If this is so, then we encounter an interesting paradox: the notion that inalienable rights define the human does not depend on the nation-state because the former relates to a state of nature, whereas the concept of citizen, including the rights a citizen holds, presuppose a state that Enlightenment theorists called political society.” See T. Asad, *Formations of the Secular*, 129.

110 W. Hallaq, *The Impossible State*, 110.

111 W. Hallaq, *The Impossible State*, 3.

112 In his *Nationalist Thought and the Colonial World*, Chatterjee distinguishes the “thematic” from the “problematic.” He defines the former as “an epistemological as well as ethical system which provides a framework of elements and rules for establishing relations between elements[;] the problematic, on the other hand, consists of concrete statements about possibilities justified by reference to the thematic.” See P. Chatterjee, *Nationalist Thought and the Colonial World: A Derivative Discourse* (Minneapolis: University of Minnesota Press, 1986), 38. By applying this distinction to the topic at hand, we find that most approaches to Islamic human rights are premised on a full compromise of fuqaha's thematic, and operating entirely from within the thematic of the modern state and the contemporary human rights discourse, with mild attempts to “Islamize” it. See, for example, Y. al-Qaradawi, *Kayf Nata'amal Ma' al-Quran al-'Azim* (Cairo: Dar al Shorouk, 1999). The fuqaha's thematic, that is, is (almost entirely) lost in contemporary debates. This is to a large extent due to the rupture caused by the nineteenth century colonial encounter, and the “Islamic reform” movement that followed.

113 See, for example, L. Kozma, *Policing Egyptian Women: Sex, Law and Medicine in Khedival Egypt* (New York: Syracuse University Press, 2011).

114 Semerdjian notes that in the Ottoman Aleppo, for example, “court records [were] reluctant to use explicit or even standard juridical

explicitly engage in an extramarital sexual relationship, and maintains a heteronormative¹¹⁵ stance. Because of the theological foundation of rights, fuqaha's conception allows very little room for disposing of one's body in a manner that violates the lawgiver's dictates.

Modern medicine and the way in which it altered understandings and possibilities of the human body also leads to significant difficulties. This is manifest on three fronts. First is the question of abortion. While agreeing that abortion is "forbidden after ensoulment (literally 'the inbreathing of spirit') which is held . . . to occur after 120 days of gestation," premodern fuqaha consistently allow expansive leeway to anchor the decision to the parents' consciousness and not the law as implemented by the executive.¹¹⁶ Second is the question of organ transplantation. Not only does it deal with technically and morally difficult questions, including defining the moment of death, considering the different socioeconomic factors involved in organ flight, and calculating medical risks on donors, but also, and perhaps more importantly, it encounters what modern medicine takes to be an obsolete understanding of the human body.¹¹⁷ Third is the question of sex reassignment surgery. While contemporary legal scholars in both Sunni and Shia traditions have issued fatwas (nonbinding legal opinions) authorizing such operations in some situations,¹¹⁸ they are yet to fully address the implications, and the debates over such issues are far from mature. These and other technological and

scientific "discoveries" continue to pose serious challenges to the classical fuqaha's conceptualization of the human body and rights tied thereto.

Another domain of contention has to do with the aforementioned sultan law. This domain of law, previously constituting a thin layer of temporary legislation with very little (if any) impact on the "law of the land," was radically transformed with the coming of modernity and its paradigmatic state. It grew both in scope and thickness, and became more permanent, allowing for the organization and government of collective life through central political authority. This, in turn, led to circumventing the fuqaha's conception of rights in terms of source, scope, and means of claiming.

Take, for example, the rights of the nonhuman. While allowing for (potentially) more extensive legislation protecting both the environment and animals, the acceptance of this thickened law and its conflation with sharia in state law left no room for meaningfully claiming rights, individually or collectively, without the authorization of the executive. No rights can be meaningfully and legally defended against the executive.

Another question stemming from the modern government of collective life is that of data collection and state surveillance. Clearly infringing on the sharia-stipulated right to privacy, such practices are commonly justified by the need to protect the public against organized

language . . . to describe the crime of *zina*" (95). Refraining from using explicit language allowed to *fuqaha* and *qadis*, as well as members of the community, to distance themselves from the very narrow domain in which violations of rights of God as lawgiver are punishable. As such, "prostitutes, as well as other violators of societal norms concerning sexuality, did not receive the draconian punishment mandated in Islamic juridical writing. Instead, their punishment was to be banned from living in the neighborhood where the crime took place" (94). Prostitutes, attempting to defend themselves against this verdict, often appeared before court, and—also avoiding explicit language which would count as a legal confession—"confessed to wrongdoing, and vowed to pursue a change of lifestyle of their accord" (114), hence clearing their records from claims made by neighbors, who also had to refrain from using explicit language to avoid the sharia punishment of *Qathf* (false accusation of sexual violation). See E. Semerdjian, *Off the Straight Path: Illicit Sex, Law and Community in Ottoman Aleppo* (New York: Syracuse University Press, 2008).

115 This is not to suggest that same-sex desires and practices did not exist, nor that they were particularly condemnable in a way qualitatively different from the condemnation of heterosexual nonmarital relationships. Rather, and given the very different kind of policing, it is the category of homosexual that did not exist. See, for example, K. Rouayheb, *Before Homosexuality in the Arab-Islamic World 1500-1800* (Chicago: University of Chicago Press, 2009); J. Massad, *Desiring Arabs* (Chicago: University of Chicago Press, 2007).

116 M. Katz, "The Problem of Abortion in Classical Sunni Fiqh," in J. Brockopp (ed.), *Islamic Ethics of Life: Abortion, War and Euthanasia* (Columbia, South Carolina: University of South Carolina Press, 2003), 30-31. Katz argues that while none of the schools of *fiqh* allows abortion, *fuqaha* were "perfectly aware that women might know of their own pregnancy long before the legal requirements for proof of a fetus could be fulfilled" and that therefore what was more at stake was "one's relationship to God as the author of life and provider of sustenance for all living things" (33-34), and that a basic feature of the *fuqaha's* discussion of rights "is their high level of tolerance for ambiguity and complexity, which avoids absolutist simplifications of the intricate moral issue raised by fetal life" (45). In light of the above outlining of the *fuqaha's* conceptualization of rights, it could be argued that this ambiguity and indecisiveness stems from the ambiguous status of the fetus. *Fuqaha* have conceptualized the status as progressing gradually towards "fully realized and fully protected human life. However, it is less clear precisely what the criteria for full humanity (and this full legal protection) might be" (31). As such, treatment of the question oscillates between the meticulous investigation to defend rights of humans, and the forgiveness characterizing the pursuit of the rights of God. This was not a pressing question for classical fuqaha, however, for abortion was conceived more as accidental or caused by third-party violence than a deliberate choice of the mother/parents.

117 See, for example, S. Hamdy, *Our Bodies Belong to God: Organ Transplantation, Islam and the Struggle for Human Dignity in Egypt* (California: University of California Press, 2012).

118 For a discussion of these fatwas, their reasoning, and their implications, see, for example, M. Alipour, "Islamic Shari'a Law, Neotraditionalist Muslim Scholars and Transgender Sex-Reassignment Surgery: A Case Study of Ayatollah Khomeini's and Sheikh al-Tantawi's Fatwas," *International Journal of Transgenderism* 18, no. 1, 2016: 91-103.

crime and terrorist attacks. And while ethical and legal critique of such practices on sharia grounds can be developed fairly easily, to reject these practices wholesale is to ignore the necessity of maintaining peace and protecting the anfas and mal protected by sharia. The technologies facilitating both mass destruction and violence, and surveillance, are products on a different worldview that does not sit well with the fuqaha's episteme and that of the world in which they operated.

Providing a platform that allows for turning the anthropological gaze onto our contemporary understanding of rights, meaningfully bringing the fuqaha's episteme into the modern world, therefore requires more than "unearthing" their conception of rights or moral resources. Even if the modern condition is at odds with this episteme, it is a reality that could be neither ignored nor wished away.

Conclusions and Recommendations

The fuqaha's conception of rights is therefore evidently alien to today's world. They do not, however, belong to a distant past that needs to be transcended, nor are they mere objects of academic studies. Rather, they are sophisticated interlocutors whose legal theory can improve the state of rights in contemporary Muslim-majority countries, and the world at large, on various fronts.

First is the revision of criminal law to (at least) restrict the application of capital punishment. In Egypt, for example, where state law follows in many cases the substantive rules of sharia, hence conflating both bodies of law,¹¹⁹ capital punishment takes place in the name of sharia. Yet criminal courts follow a radically different process. Unlike sharia's qadi courts, however, they admit forensic and circumstantial evidence (inadmissible in a qadi court, which relies solely on confessions and eye witnesses); revoke the deceased's legal heirs' Islamic right to pardon (encouraged by sharia and Islam's other discourses); and utilize different investigative and interrogative methods to assess the suspect's culpability. Ironically, capital punishment is issued only after consulting the state-appointed mufti, and it is this

Islamic façade that allows for the continued expansion of the practice. Removing the punishment's Islamic façade and building on fuqaha's strictness and high evidentiary requirements to prove such crimes allows for restricting the application of capital punishment. Building on the experience of premodern Islamic legal systems, with the sharia/siyasa divide, modern investigative sciences can be utilized to establish culpability that still falls short of evidentiary criteria stipulated by sharia to apply corporal punishment.

Second is the fuqaha's keenness on ensuring the confessor's free will. Throughout their discourse, legal scholars highlight the importance of choice in all legal actions. For example, they insist that compulsion does not entirely suspend taklif (legal capacity/obligation),¹²⁰ and that taklif persists as long as the compelled has apparent choice.¹²¹ And yet despite their keenness on expanding taklif's scope, the fuqaha accept a person's imprisonment as shubha (legal doubt/uncertainty) that suffices to validate one's retraction of confession. Adopting this position preempts security forces' attempts to force detainees to confess to certain acts and crimes, and encourages a more dignified treatment of prisoners, especially with jurists' unequivocal condemnation of using physical violence against detainees, calling it "absolutely forbidden"¹²² regardless of its justification.

In relation to the political system is the question of (militant) rebellion, including that of violent, religiously motivated actors. While such actions are legally condemned by fuqaha, they are much more lenient towards aggressors than they are towards highway robbers, despite the crime being somewhat similar. The reason is that, unlike robbers, the former actors are trying to fulfill what they think of as a moral obligation. In the fuqaha's conception (not tied to the state-centric understanding of law and order), these militants are (albeit wrongfully) trying to right the wrongs of the political leadership, namely injustice and corruption. Unlike the case of highway robbers (qutta'), fuqaha stress several restrictions on fighting bughah. They are not to be fought unless the rebellion is armed, and it is forbidden to fight them (yahrum qitaluhum)

119 See, for example, H. Agrama, *Questioning Secularism*, especially the introduction.

120 H. al-Attar, *Hashiyat al-Attar 'ala Sharh al-Jalal al-Mahalli 'ala Jam' al-Jawami' fi Usul al-Fiqh al-Shafi'i* (Beirut: Dar al-Kutub al-'Ilmiyya, 2009), 195.

121 Al-Ghazali, for instance, argues that whereas in most cases the mukrah who is under threat is allowed to obey his compeller (*mukrih*), some of his acts are still prohibited. If he was ordered to kill, he must refrain, even if he feared being killed (*in ukriha 'ala al-qatl jaz an yukallaf tark al-qatl li-annah qadir 'alayhi wa-in kan fi-hi khawf al-halak*), because a. he still has a choice, and b., as al-Mahalli argues, he has no right to prioritize his life over another's (*li-iytharihi nafsahu al-baqa' 'ala mukafa'atih allathi khayarahu baynahuma al-mukrah . . . fa ya'tham bil-qatl min jihat al-iythat la al-ikrah*). See A. al-Ghazali, *al-Mustasfa fi 'Ilm al-Usul* (Baghdad: Dar al-Muthanna, 1970), 90; and H. al-Attar, *Hashiyat al-Attar*, 193.

122 S. al-Bujayrami, *Hashiyat al-Bujayrami 'Ala al-Iqna'*, v. 3, 145. Al-Bujayrami states that "with regards to beating [detainees]: it is absolutely forbidden" (*qa-amma al-darb fa-haram mutlaqan*).

before sending a messenger/mediator to listen to their complaints.

If it is an instance of injustice (*mathlama*), the ruler (or the messenger/mediator if empowered) should fix it. If they have rebelled based on a specious argument that resembles a valid one (*shubha*), learned, trustworthy scholars should clear it. If they do not provide any explanation for their military rebellion, the messenger/mediator should inform them that if they insist on their position, they will be fought. If all reconciliation attempts fail, the *bughah* fleeing the battlefield should not be sought, their injured fighters and prisoners of wars should not be killed,

prisoners should be held only until the war is over (*yuhbas hatta tanqadi al-harb*), and their property, including their weapons, should not be confiscated, but should be kept aside until the war is over and then given back to them, and should not be used until then.¹²³

Besides being morally superior to contemporary approaches, taking more seriously the concerns of such actors (rather than simply assuming they are motivated by a desire to destroy and a hatred of freedom), and upholding their rights in the war on terror, dismantles the intellectual and material base for radicalization more effectively.

123 I. al-Bajuri, *Hashiyat al-Bajuri*, v. 2, 470-478.