

# **A Case Study of Patriarchy and Slavery: The Hermeneutical Importance of Qur'ānic Assumptions in the Development of a Values-Based and Purposive Oriented Qur'ān-sunna Hermeneutic**

**Adis Duderija**

*Visiting Senior Lecturer, Gender Department, University Malaya  
adisduderija@gmail.com*

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*If past meanings are potentially part of our own future, we must prepare ourselves to receive them when they arrive again. Such preparation includes learning to recognize what is past about them. Only then will we know how to accommodate them properly when they meet us upon their return.<sup>1</sup>*

## **Abstract**

It is the task of this paper to argue that the development of a new Qur'ān-sunna hermeneutic (and therefore Islamic legal theory) which hermeneutically privileges an ethico-religious and purposive approach to a Qur'ānic interpretation (based on ethically objectivist nature of ethical value) has the potential to engender a gender symmetrical Islamic law. In order for this to be achieved, it is argued further, that the hermeneutical importance of the mirroring of the various socio-cultural and ethico-moral assumptions prevalent in the Qur'ān's revelatory milieu in the actual Qur'ānic text itself must be taken into account as evident in those passages pertaining to the patriarchal nature of socio-legal aspects of gender dynamics and existence of slavery, especially female concubinage. Additionally, in the first part of the paper, I briefly discuss one reason why I consider the classical Islamic scholarship failed to explore the hermeneutical significance of these assumptions and therefore did not engender a Qur'ānic hermeneutic and Islamic legal theory that hermeneutically privileges an ethico-religious and purposive based approach to interpretation of Qur'ān and sunna. I refer to this process as a hermeneutical shift from a Qur'ān-sunna interpretive dialogical approach to that of a sunna-ḥadith episteme.

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<sup>1</sup> Peter, M. Wright, "Modern Qur'ānic Hermeneutics", Ph.D. Thesis, Chapell Hill, 2008, p. 197.

**Keywords**

Qurʾān, Qurʾānic hermeneutics, Islamic legal theory (*usūl ul-fiqh*), sunna, ḥadīth, patriarchy, women in Islam, gender, slavery

**Introduction**

When engaging in the process of developing Qurʾānic hermeneutic<sup>2</sup> and Islamic legal theory (*usūl ul-fiqh*) and, generations upon generations of Islamic legal theorists (*usuliyūn*), jurists (*fuqahā*) and exegetes (*mufasssīrūn*) have *primarily* concerned themselves with the questions of what the Qurʾān has to *say* on a particular issue or theme but not what the Qurʾān tacitly assumes to be normative as understood by its direct audience and as evident in the Qurʾān's content. They did not fully recognize the interpretational implications of the Qurʾānic pre-suppositions present in its discourse, especially in relation to developing a Qurʾānic hermeneutic and Islamic legal theory whose most powerful hermeneutical tool would entail an ethico-religious values and purposive (*qasd*)<sup>3</sup> based-approach to

<sup>2</sup> According to the leading Western theoretician of hermeneutics of the 20th century Hans-Georg Gadamer hermeneutics is “the classical discipline concerned with the art of understanding texts.” Hans-Georg Gadamer, *Truth and Method*, 2nd rev. Ed., trans. rev. Joel Weinsheimer and Donald G. Marshall (London: Continuum, 2004,) 164. As such hermeneutical theories deal with “1.) nature of a text; 2.) what it means to understand a text; and 3.) how understanding and interpretation are determined by the presuppositions and beliefs (the horizon) of the audience to which the text is being interpreted.” Van A. Harvey, “Hermeneutics”, “Encyclopedia of Religion”, Ed. Lindsay Jones. Vol. 6. 2nd ed. (Detroit: Macmillan Reference USA, 2005) 3930–3936, 3930. In the context of religion, hermeneutics refers to the study of the interpretation of sacred texts, especially texts in the areas of theology and law. H. A. Virkler: *Hermeneutics: Principles and Processes of Biblical Interpretation*, (Grand Rapids: Baker Book House, 1981). Hermeneutics is therefore a process comprising of “both the understanding of the rules of exegesis and the epistemology of understanding—the study of the construction of meaning in the past and their relationship to the construction of meanings in the present.” D. S. Ferguson, *Biblical Hermeneutics: An Introduction*, Atlanta: John Knox Press, 1986.

<sup>3</sup> In other words I subscribe to the view that the Author of the Qurʾān structured revelatory texts in such a way that its texts have intended meanings which in principle are discoverable rationally. In context of the Islamic tradition on this see Hashim Kamali, Mohammad Hashim Kamali, *Maqasid Al Shariʾah and Ijtihad as Instruments of Civilisational Renewal: A Methodological Perspective, Islam and Civilisational Renewal*, 2,2, (2010): 245–271. Kamali on p. 250, gives following examples from the Qurʾān which support this view: the purpose of law of retaliation is preservation of life (2:179); the underlying objective of jihad is to fight injustice (22:39); the aims of performing prayers (salat) are to repel evil and immorality (29:45); the payment of the compulsory alms tax is to prevent circulation of

interpretation of the Qurʾān and sunna and the purposive nature of Islamic law and its philosophy.<sup>4</sup> By ethico-religious values-based approach, I mean a broader hermeneutical method, which stipulates that the actual nature and character of the Qurʾān-sunna discourse is hermeneutically best served and privileges its own interpretation on the basis of certain ethico-religious principles such as justice, righteousness, equality etc., as based on the ethically objective nature of these values.<sup>5</sup> By purposive nature of Islamic law and its philosophy I mean that the primary function of Islamic law and the most fundamental element in its methodology is based upon a realization and fulfillment of its purposes (*maqāsid*) which, in turn, is identified on the basis of a legal theory methodology that hermeneutically privileges an ethico-religious values based approach to the interpretation of the Qurʾān and sunna mentioned above. The ethico-religious valued and maqasid based approaches to Islamic legal philosophy and Qurʾānic hermeneutics, therefore, are very closely hermeneutically interrelated. As noted by Kamali, they are derived from the idea that the laws and the teachings of the Qurʾān and sunna, both in the realm of muʾāmalāt (civil transactions) and the ʿibādāt (rituals) are in essence goal oriented and rational (*taʿlilī*) in nature.<sup>6</sup>

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wealth among the rich only (59:7). On the appropriateness of interpreting sacred texts in terms of authorial-intent discourse in the Christian tradition, see Wolterstorff, *Divine Discourse*; T. Longman, “Literary Approaches to Biblical Interpretation,” in *Foundations of Contemporary Interpretation*, eds. Philips Long et al. (Grand Rapids, Mich.: Zondervan Publishing House, 1996). In context of the Islamic tradition see Hashim Kamali, *Mohammad Hashim Kamali, Maqasid Al Shari’ah and Ijtihad as Instruments of Civilisational Renewal: A Methodological Perspective, Islam and Civilisational Renewal*, 2,2, (2010): 245–271.

<sup>4</sup> Jasser Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law*, London, International Institute for Islamic Thought, 2008.

<sup>5</sup> This theory is known as ethical objectivism according to which there are real qualities or relations of acts that make them right independent of opinions of people or Revelation. This is to be contrasted with ethical subjectivism according to which ethical value terms mean only what is approved or disapproved, commanded, or forbidden by God. In terms of legal theory (*usūl ul-fiqh*) this would translate into a view that all ethico-moral and legal rules must ultimately be derived from prescriptions enunciated by God. See G. Hourani, ‘Ethical Presuppositions of the Qurʾān’, *Muslim World*, 70 (1980) pp. 1–28.

<sup>6</sup> Qurʾānic evidence Kamali provides for taʿlil nature of the Qurʾān and its laws are reference to the proclamation on just retaliation (*qisās*) that “in qisas there is (saving of) life for you, you men of understanding” (Q 2:179); the prohibition of wine-drinking and gambling being premised on the rationale of preventing “hostility and rancor” among people and interference with the remembrance of God (Q 5:91). Legal alms and charities are

I argue that the development of any Islamic legal theory (and therefore Qur'anic hermeneutics) must recognize that, firstly, the Qur'an does not provide a systematic, ahistorical and comprehensive system of universal ethics that can be simply retrieved or discovered but that some principles of universalist ethics/morality can be deduced or derived based upon the Qur'an's 'comprehensive contextualisation' and a view that Islamic law and its philosophy is essentially purposive in nature. By comprehensive contextualization I mean investigating, in a methodical manner, the role of context in shaping of the very content of the Qur'an and its worldview. For this to take place we need to recognize the Qur'an's orientation towards the assumed operational discourse of its revelational context that manifests itself in the Qur'anic content and is reflected in the grammatical and syntactical structures employed in the Qur'an's language. This Qur'anicly assumed operational discourse must be seen as often reflecting the prevalent religious, cultural, social, political and economic situation of its direct audience, its community of listeners and participants upon which a dialogical nature of the Qur'an's discourse is premised.

It is the task of this article to argue that the development of a new Qur'an-sunna hermeneutic and therefore Islamic legal theory which hermeneutically privileges an ethico-religious values and purposive (*maqāsid*) approaches to a Qur'anic interpretation has a potential to engender a more gender egalitarian or gender just Islamic legal theory.

This is not to reduce the task of the entire edifice of Qur'an-sunna hermeneutics to that of the potential discovery of Qur'anic intentionality since this Qur'anic intentionality driven hermeneutics is hermeneutically derived, as I have shown elsewhere,<sup>7</sup> on the basis of a particular broader Qur'an-sunna hermeneutic, which includes what I term comprehensive contextualization (described above), a particular view of the nature of language and revelation that considers Qur'an, for interpretational purposes, as a socio-culturally produced text, a thematic/holistic approach to interpretation of Qur'an and ḥadīth textual indicants based on the principle

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levied in order to prevent the concentration of wealth among the rich (Q 57:7). With reference even to the prophethood of Muhammad, "We have not sent thee but a mercy to mankind" (Q 21:10). Mercy in this verse and communication (Q 5:92) and warning in other places (Q 22:49), Hashim Kamali, "Fiqh and Adaptation to Social Reality", *The Muslim World*, 86/1 (1996), pp. 62–84, p. 76.

<sup>7</sup> See Adis Duderija, *Constructing A Religiously Ideal Believer and Women in Islam: Neo-Traditional Salafi and Progressive Muslim Methods of Interpretation* (New York: Macmillan, 2011).

corroborative induction (*istiqrāʾ*) that views texts as interwoven web-like sets of ideas, a reader oriented determinacy of meaning hermeneutics,<sup>8</sup> the endorsement of the objective nature of ethical values in revelation and epistemological,<sup>9</sup> methodological,<sup>10</sup> and hermeneutical<sup>11</sup> divorcing of the sunna from ḥadith.

Additionally, in the first part of the paper I discuss one reason why I consider the classical Islamic scholarship failed to develop this approach, namely a hermeneutical shift from a dialogical Qurʾān-sunna hermeneutic to that of a sunna-ḥadith episteme.

At the outset it is to be acknowledged that some modern Muslim and non Muslim scholars have alluded to what Qurʾān assumes to be normative by its direct recipients when developing their models of Qurʾānic interpretation and/or Islamic legal theory.<sup>12</sup> For example, Moosa maintains that the Qurʾān without its' direct recipient audience would cease to be the Qurʾān.<sup>13</sup> Achrati elsewhere argues that the oral-based culture of the Arab beduins strongly influenced the character and the nature of the Qurʾānic discourse.<sup>14</sup> Similarly Abu Zayd considers that the Qurʾānic discourse reflects the dialectical relationship between the Qurʾān and the reality of

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<sup>8</sup> Which highlights the important role of the reader in determining or helping produce meaning. In contrast to that of the text or the author and her intention.

<sup>9</sup> By epistemological divorcing I mean that Sunna and hadith are considered to have been perpetuated by different mechanisms having different epistemological values.

<sup>10</sup> By methodological divorcing I mean that the compliance of certain theological, legal or ethical values, norms or principles with Sunna did not need to be determined by sifting through numerous narratives reportedly going back to the time of the Prophet Muhammad via a sound chain of narrators (*isnād*).

<sup>11</sup> By hermeneutical divorcing I mean the distinction made in the function and role Sunna and hadith played in the overall theory of interpretation vis a vis the Qurʾān.

<sup>12</sup> See, for example, Khaled Abou El-Fadl, *Speaking in God's Name: Islamic Law, Authority and Women*, Oxford, Oneworld, 2001; Amina Wadud, *Qurʾān and Woman-Rereading the Sacred Text from a Woman's Perspective*, 2nd ed, Oxford, Oxford University Press, 1999; Saeed, *Interpreting the Qurʾān*, *op. cit.*; Nasir Abu Zayd, *Re-thinking the Qurʾān—Towards a Humanistic Hermeneutic*, Utrecht, Humanities University Press, 2004; Fazrul Rahman, *Islam and Modernity: The Transformation of an Intellectual Tradition*, Chicago, Chicago University Press, 1982; Hasan Hanafi, *Islam in the Modern World*, Vol. II Heliopolis, Dar Al Kebaa, 2000; Asma Barlas, *Believing Women in Islam—Unreading Patriarchal Interpretations of the Qurʾān*, Austin, University of Texas Press, 2002.

<sup>13</sup> Ebrahim Moosa, "The Debt and Burdens of Critical Islam", in *Progressive Muslims: On Social Justice, Gender and Pluralism*, ed. O. Safi, Oneworld, Oxford, 2003, pp. 111–128.

<sup>14</sup> Achmed, Achrati, "Arabic, Qurʾānic Speech and Postmodern Language: What the Qurʾān Simply Says," *Arabica*, 54/2 (2008), pp. 161–203.

the early Muslim community.<sup>15</sup> Soroush goes even further by asserting that the experiential, evolutionary, and dialogical nature of the prophetic experience had a very significant impact on the nature and the content of the revelation itself.<sup>16</sup> Neuwirth has similarly noted, the social concerns and theological questions of the Qurʾān's first listeners permeate the Qurʾān and are reflected in its content.<sup>17</sup> Halverson concurs with this by stating that the Qurʾān not only addresses its first audience in the particular language that they spoke but also the world in which they lived.<sup>18</sup> In similar fashion, Wright perceptively remarks that:

The Qurʾān reaches out allusively not simply for the purposes of shaking hands with members of its audience, but to activate the power of a prior knowledge it recognizes as resident among them.<sup>19</sup>

This dialectical nature of the Qurʾān in turn is based upon its essential orality and has important hermeneutical implications.<sup>20</sup>

None of these studies explicitly investigated the relationship between this dialogical nature of the Qurʾānic discourse and the development of an Islamic legal theory whose most powerful hermeneutical tool is an ethico-religious values and purposive based approach to its interpretation.<sup>21</sup>

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<sup>15</sup> Hamid Nasir Abu Zayd, "The Qurʾān: God and Man in Communication", unpublished paper available <http://www.stichtingsocrates.nl/teksten/The%20Qu%27ran%20God%20and%20man%20in%20communication%20-%20Oratie%20Rijksuniversiteit%20Leiden.pdf>.

<sup>16</sup> Abdul Kareem Soroush, *The Expansion of Prophetic Experience—Essays on Historicity, Contingency and Plurality in Religion*, tr by N. Mobasser, edited with an analytical introduction by F. Jahanbakhsh, Leiden, Brill, 2009, pp. 3–13, pp. 63–90.

<sup>17</sup> Angelika Neuwirth, "Two Faces of the Qurʾān: Qurʾān and Mushaf", *Oral Tradition*, 25/1 (2010), pp. 141–156, p. 144.

<sup>18</sup> Jeffrey Halverson, *Theology and Creed in Sunni Islam: The Muslim Brotherhood, Asharism and Political Sunnism*, (New York :Macmillan, 2010), 134.

<sup>19</sup> Peter, M. Wright, "Modern Qurʾānic Hermeneutics", Ph.D. Thesis, Chapell Hill, 2008, 155.

<sup>20</sup> Angelika Neuwirth, "Two Faces of the Qurʾān: Qurʾān and Mushaf", *Oral Tradition*, 25/1 (2010), pp. 141–156, p. 144.

<sup>21</sup> An exception to this would be Hamid Nasir Abu Zayd, "The Nexus of Theory and Practice", in *The New Voices of Islam—Rethinking Politics and Modernity, A Reader*, ed. M. Kamvara, Berkley and Los Angeles, University of California Press, 2006, pp. 153–176. He argues that the value of "justice" embedded in the overall Qurʾānic worldview, ought to be considered as its most hermeneutically privileged tool. See also Ahmad Souaiaia, *Contesting Justice—Women, Islam, Law, and Society*, New York, SUNY, 2008, p. 115. On the

Additionally, there are no existing studies that examine how the change in the hermeneutical relationship and hierarchy between the Qurʾān and sunna, sunna and ḥadīth and therefore Qurʾān and ḥadīth bodies of knowledge as formulated by the pre-classical and that of the classical Islamic scholarship influenced the Islamic scholarship on Islamic legal theory. In other words, the question why the Qurʾān has the content it does, including various suppositions embedded in its content, and to what extent did the given context shape and determine its content has not been systematically explored.

Prior to discussing some of the assumptions evident in the Qurʾānic content and their interpretational implications a brief discussion of the pre-classical and classical hermeneutical hierarchy governing the hermeneutical relationship between the Qurʾān, sunna and ḥadīth bodies of knowledge requires some elaboration. This enables us to understand the shift from an understanding of a Revelation based on an orally based, symbiotic, reason inclusive, ethically objective, values-oriented relationship between the Qurʾān and sunna bodies of knowledge that existed during the formative period of Islamic thought<sup>22</sup> to that of a textually and ḥadīth dependent, largely reason deductive (i.e. syllogistic or analogical reason), non-values based approach to it. Additionally, the knowledge of the mechanisms responsible for the above process itself marginalised, if not obstructed, the importance of the recognition of Qurʾānic assumptions as evident in its content and their hermeneutical function as “pointers” to a development of a Qurʾānic hermeneutic and Islamic legal theory founded on a purposive ethico-religious values-based-approach as its most hermeneutically privileged interpretational mechanism. We will first discuss the nature of the hermeneutical relationship between Qurʾān and sunna and then that of sunna and ḥadīth. Since the classical definition of the concept of sunna conceptually conflates the ḥadīth and sunna bodies of knowledge,<sup>23</sup>

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importance of these assumptions and the literary devices in the Qurʾānic text employed in relation to understanding the nature of the Qurʾān and the development of its hermeneutic see, Wright, *Modern Qurʾānic Hermeneutics*, *op. cit.*

<sup>22</sup> For this see Duderija, *Constructing A Religiously Ideal Believer and Woman in Islam*, *op. cit.*

<sup>23</sup> For a discussion of a classical definition of *sunna* and the implications it has on the nature of hermeneutical relationship between the Qurʾān and *sunna* and *sunna* and ḥadīth bodies of knowledge see Adis Duderija “A Paradigm Shift in Assessing/Evaluating the Value and Significance of ḥadīth in Islamic thought- From ulūm-ul—ḥadīth to usūl-ul-fiqh”, *Arab Law Quarterly*, 23/2 (2009), pp. 195–206.

we shall also discuss the implications this has on the overall Qur'anic hermeneutic.

### **A) The Pre-Classical and Classical Views on the Nature of the Hermeneutical Relationship between the Qur'ān and Sunna Bodies of Knowledge**

The post-formative, classical Islamic scholarship engendered a largely ḥadīth-based Qur'ān-sunna hermeneutic<sup>24</sup> hermeneutically marginalizing the importance of the various assumptions evident in the Qur'ānic text pertaining to issues relating to ethics, morality, socio-cultural norms and gender relations to name but a few. This markedly affected the methodological and epistemological parameters within which Qur'ānic interpretation operated as well as the methodological and epistemological tools, which governed its hermeneutic.<sup>25</sup> The recent works of Souaiaia have convincingly demonstrated that oral traditions and precedents originating from the generations of Companions and Successors were, however, instrumental in imparting, assigning and fixing particular meaning/s to the written-based sources such as Qur'ān and sunna and were embodied in classical jurisprudential doctrines such as abrogation (*nash*), 'adl (justice), and the practice of the regency of living scholar (*marja'yya*) in Shi'ism.<sup>26</sup> I do not dispute this fact but merely wish to emphasize the point that the Islamic legal theory, as a result of what I call the process of traditionalisation of the Islamic thought and the ḥadīthification of sunna<sup>27</sup> was framed and constrained by a progressively increasing written body of knowledge, mainly in form of prophetic reports, which were conflated with the concept of sunna and as described below changed the nature and the hermeneutical character of the Qur'ān-sunna discourse.

During the pre-classical period of Islamic thought the concept of sunna was organically linked to that of the Qur'ān and was not considered as an

<sup>24</sup> See Duderija, *Constructing A Religiously Ideal Believer and Woman in Islam*, *op. cit.*

<sup>25</sup> *Ibid.*

<sup>26</sup> A. Souaiaia, *The Function of Orality in Islamic Law and Practices: Verbalizing Meaning*, Edwin Meller Press, 2006; cf. A. Souaiaia, 'On the Sources of Islamic Law and Practices', *Journal of Law and Religion*, 20, 2005, pp. 125–149.

<sup>27</sup> Explained in the main text below.

independent entity.<sup>28</sup> This coupling of the Qurʾān and sunna was based on two premises. Firstly, it was based on the principle of the *Deutungsbeduerftigkeit* of the Qurʾān (i.e. its need of/for interpretation) on whose basis its *distinct* ethico-moral (*ahlāq*), law (*fiqh*), and creedal (*ʿaqīda*) teachings are to be deduced and contrasted against the prevalent socio-cultural values, worldview assumptions, and norms governing pre-Qurʾānic Arabia. Secondly, it was based on the need for the practical manifestation of certain Qurʾānic injunctions, which are to be carried out in action (*ʿamal*) but was not described in detail in the Qurʾān (e.g. how to perform prayer, hajj, ablution etc.). We refer to these as ritual-based (*ibāda*) or practice-based (*amal*) components of the Qurʾānic worldview. Therefore, the function and scope of the sunna would involve a practical embodiment of the Qurʾānic *ʿaqīdah*, *akhlāq*, *fiqh*, and *ʿamallʿibāda*,<sup>29</sup> which permeate the Qurʾān in the form of the phrase ‘Obey Allah and His Messenger.’

This hermeneutically intimate relationship is also noted by Sachedina who avers the following:

Explication of the divine intention of the revelation was among the functions that the Qurʾān assigned to the Prophet. The Prophet functioned as the projection of the divine message embodied in the Qurʾān. He was the living commentary of the Qurʾān, inextricably related to the revelatory text. Without the Prophet the Qurʾān was incomprehensible, just as without the Qurʾān the Prophet was no prophet at all.<sup>30</sup>

The nature of this conceptually and hermeneutically symbiotic Qurʾān-Sunna relationship can also be gleaned from the following passage from Graham who maintains that:

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<sup>28</sup> Adis Duderija, “The Evolution in the concept of Sunna during the first four generations of Muslims in relation to the development of the concept of an sound hadith as based on recent western scholarship”, *Arab Law Quarterly*, 26,4, (2012), 393–437. Also see out discussion below.

<sup>29</sup> Adis Duderija, “Toward a Methodology of the Nature and the Scope of the Concept of Sunna”, *Arab Law Quarterly*, 21/3 (2007), pp. 269–280. The practical embodiment of the Qurʾān can be divided into actions that pertain to rituals such as prayers, hajj, fasting, etc. which are termed *ibāda* or worship, and non- ritual based actions (*muʿāmalāt*) including commerce, marriage, and charitable deeds of various kinds, etc.

<sup>30</sup> Abdul Aziz Sachedina, “Scriptural Reasoning in Islam”, *Journal of Scriptural Reasoning*, 5/1 (2005), n.p.

It appears [that] for the Companions and the early Followers of the Prophet, the divine activity manifested in the mission of Muhammad was a unitary reality in which the divine word, the prophetic guidance, and even the example and witness of all who participated in the sacred history of the Prophet's time, were all perceived as complementary, integral aspects of a single phenomenon.<sup>31</sup>

Similarly, in his investigation of an early Hanafi jurist, 'Īsā b. Abān (d. 221/836), Bedir asserts that at this time the hierarchy of Qur'ān and sunna was not yet clear.<sup>32</sup> This unity of "prophetic-revelatory event", to use Graham's phrase, has from the very beginning and throughout the first 150 years of the formative Islamic thought reflected the early Muslim understanding of the function, nature the scope and the relationship between Qur'ān and sunna.<sup>33</sup> This interdependent, symbiotic relationship between Qur'ān and sunna, therefore, seems to have enjoyed wide-spread acceptability in early Islam.

Therefore the Qur'ān and sunna bodies of knowledge existed in what we describe as a symbiotic or organically linked relationship. We refer to this relationship between Qur'ān and sunna discourses as a Qur'ān-sunna dynamic to highlight this conceptual,<sup>34</sup> epistemological<sup>35</sup> and hermeneutical<sup>36</sup> interdependence between two concepts.

There are a number of other characteristics that defined the nature of the Qur'ān and Sunna during this pre-classical period apart from their symbiotic relationship. One such delineating feature is that both concepts were primarily understood as being primarily ethico-religious in nature. A number of Muslim scholars have argued for the predominantly ethico-religious character of the Qur'ān and Qur'ānic legislative dimension based

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<sup>31</sup> William Graham, *Divine Word and Prophetic Word in Early Islam—A Reconsideration of the Sources, with Special References to the Divine Saying or Hadith Qudsi*, Hague, Mouton, 1977, p. 15. See also Zafar Ansari, "The Contribution of the Qur'ān and the Prophet to the Development of the Islamic Fiqh", *Journal of Islamic Studies*, 3/2 (1992), pp. 141–171.

<sup>32</sup> Murteza Bedir, "An Early Response to Shafi'i: 'Īsā b. Abān on the Prophetic report (Khabar)", *Islamic Law and Society*, 9, (2002), pp. 285–311, p. 303.

<sup>33</sup> Graham, *Divine Word and Prophetic Word in Early Islam*, p. 12.

<sup>34</sup> By conceptual relationship I mean to what extent were/are Sunna and Qur'ān and sunna and hadith considered to constitute same bodies of knowledge.

<sup>35</sup> By epistemological relationship I mean to what extent were/are Sunna and Qur'ān and sunna and hadith considered to have been perpetuated by same mechanisms having same epistemological value.

<sup>36</sup> By hermeneutical I mean which function and role did sunna play in the overall theory of interpretation vis à vis the Qur'ān and hadith.

on its overriding concern for the moral conduct of humans<sup>37</sup> that translated itself into Prophetic activity which emphasized a person's moral responsibility and God consciousness rather than positive law formulation.<sup>38</sup> This nature and the character of the Qur'anic revelation including its legislative element, embodied by the Prophet, was geared towards certain underlying legislative norms which were based on certain ethico-religious purposes and objectives.<sup>39</sup> In this context, it should come to us as no surprise that one of the ways the concept of Sunna was understood and conceptualised even in the second century Hijri was sunna as a *righteous practice* of Muslims in general (*as-sunna al-'adila; jarāt al-Sunna*).<sup>40</sup>

In addition to the ethico-moral nature of the Qur'ān and sunna, the interpretation of the Qur'ān and sunna was considered to be reason inclusive and the nature of ethical values in these bodies of knowledge was generally considered to be objective. For example, modern scholars of Muslim tradition such as Hourani, maintain that the Qur'ān cannot be said to completely disregard the value of *'aql* (inherent human reason) in forming ethical judgments, while Reinhart asserts that “[T]he Qur'anic message time and again appeals to impartial knowledge that confirms the Qur'anic summons.”<sup>41</sup> Moreover, argues Reinhart, *'aql*'s explicit Qur'anic endorsement in recognizing God's existence, Unity and Grandeur is considered to favour its implicit usage in the realms of ethics and morality.<sup>42</sup> Furthermore, Hourani forms the view that:

Qur'ān and Muhammad both display a common sense attitude and that we should not expect either of them to claim that for every ethical judgement he makes a man must consult a book or a scholar, or work out an analogy when the book or scholar give no direct answer to the Problem.<sup>43</sup>

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<sup>37</sup> In this context Ansari following remarks are quite pertinent: 'Qur'anic legislation differs from legal codes in form as well as in spirit and purpose. Its basic motivation is religious and moral rather than 'legal' in a narrow sense of the term. Its aim is to lay down certain standards of conduct that are intrinsically good and conducive to the good pleasure of God. Ansari, “The Contribution of the Qur'ān”, p. 143.

<sup>38</sup> Or more precisely legal norms were conceived more in ethico-religious terms.

<sup>39</sup> Ansari, “The Contribution of the Qur'ān”, pp. 144–146.

<sup>40</sup> Ansari, “The Contribution of the Qur'ān”, pp. 103–104.

<sup>41</sup> Reinhart, K. *Before Revelation—The Boundaries of Muslim Moral Thought*. Albany, State University of New York Press, 1995, p. 178.

<sup>42</sup> G. Hourani, “Ethical Presuppositions of the Qur'ān”, *Muslim World*, 70 /1 (1980), pp. 1–28, p. 25.

<sup>43</sup> *Ibid.*, p. 23.

In his exhaustive investigation of the moral world of the Qur'ān, Draz echoes this view by concluding that, according to the Qur'ānic moral world, the human consciousness is prior to Revelation and that it is capable of divorcing right from wrong without it.<sup>44</sup> A further argument, which gives credence to the objective nature of ethical values in the Qur'ān, refers to its assumptions regarding the meaning and the usage of moral principles. In the famous Qur'ānic maxim of enjoying the good (*ma'rūf*) and forbidding the evil (*munkar*), which forms the basis for political governance of a Muslim state, El-Fadl argues that the word *ma'rūf* means that which is commonly known to be good. "Goodness, in the Qur'ānic discourse, is part of what one may call a lived reality-it is a product of human experience, and constructed normative understandings."<sup>45</sup>

A final characteristic that influenced the nature of the Qur'ān-sunna relationship in pre-classical Islam was the Qur'ān's essential discursive, oral and rhetorical nature.<sup>46</sup> According to Abu Zayd, "Qur'ān was an outcome of dialogue, debate, augment, acceptance and rejection, both with the pre-Islamic norms, practices and culture, and with its own previous assessments, presuppositions and assertions."<sup>47</sup> Sunna reflects this discursive nature of the Qur'ān itself and is therefore, part from its 'ibadat element, an ethco-religious, dynamic and not a reified, textually-fixed concept.

Apart from these considerations pertaining to the nature and character of the Qur'ān and sunna and their relationship, as convincingly demonstrated by Souaiaia, interpretative strategies that were based on the primacy of oral-based sources permitted an epistemologically and methodologically more flexible and fluid interpretive framework that often authorised interpretations of the Qur'ānic enunciations that were contradictory to its literal meaning and were based on the principle of the Qur'ān's (and sunna's) overall purpose and objective/s (*qasḍ/maqāsid*) or that of *maslaḥa* (social expediency).<sup>48</sup> For example, Islamic law pertaining to inheritance often diverges from explicit Qur'ānic enunciations based on these considerations. Several well known jurisprudential decisions made by the second

<sup>44</sup> M.A. Draz, *The Moral World of the Qur'ān*, London, I.B. Taurus, 2008.

<sup>45</sup> Khaled Abou El-Fadl, "The Place of Ethical Obligations in Islamic Law", *UCLA J. Islamic and Near E.L.*, 4/1 (2005), pp. 1–40.

<sup>46</sup> A. Neuwirth, Two Faces of the Qur'ān: Qur'ān and Mushaf, *Oral Tradition*, 25, 1, pp. 141–156.

<sup>47</sup> Hamid Abu Zayd, *Reformation of Islamic Thought-A Critical Historical Analysis*, Amsterdam, Amsterdam University Press, 2006, p. 99.

<sup>48</sup> Souaiaia, *The Function of Orality*, *op. cit.* Also Auda, *Maqasid Al-Shari'ah*, *op. cit.*

caliph ‘Umar Al Khattab that contradicted the literal Qur’ānic injunctions of the practice of the Prophet are also suggestive of the nature of the Qur’ān-sunna as described above.<sup>49</sup> Table one below presents a summary of the discussion so far.

**Table One: The hermeneutical relationship between the Qur’ān and the sunna and the Qur’ān and the ḥadīth bodies of knowledge during the pre-classical and classical periods of Islamic thought.**

Body of knowledge: Qur’an	Pre-classical or formative period (up to 3rd century Hijrah)	Classical or post-formative period
Nature Character / Aspects <sup>50</sup>	Ethico-religious, principals and value—oriented; values based on ethical objectivism principle, law a minor component, reason inclusive, oral discourse	Law-based, edified, largely reason-exclusive, values based on ethical voluntarism, textual
Nature of transmission	Predominantly oral	predominantly written
Epistemological validity	Mutawātir	Mutawātir
Hermeneutical relationship with Sunna	Symbiotic, interdependent, non-hadith based, based on ethico-religious values and certain ethically objectivist values/ principles	Largely Hadith-based, Qur’ān and sunna conceptually different bodies of knowledge
Hermeneutical relationship with Hadith	Divorced conceptually, methodologically and epistemologically	Hadith as primary hermeneutical, methodological and exegetical tool

<sup>49</sup> A. Souaiaia, “On the Sources of Islamic Law and Practices”, *Journal of Law and Religion*, 20/1 (2005), pp. 125–149, pp. 134–140.

<sup>50</sup> As above the Qur’an and sunna bodies of knowledge consist of four aspects: ‘aqīda, ablaq, fiqh and ‘amall ‘ibāda.

During the classical period of Islamic thought, however, the process of traditionalisation of the Islamic thought and the “ḥadithification” of sunna<sup>51</sup> changed the nature of the hermeneutical relationship between the Qur’ān and sunna bodies of knowledge as summarised in table three. By “ḥadithification” of sunna I mean that the written ḥadith body of knowledge became to be seen by some Muslim scholars, mainly belonging to the Shafi’i and Habali madhahib, as epistemologically sunna’s only vehicle of transmission/embodiment. By ḥadithification of sunna I also refer to the process of the development of a ḥadith-dependent methodology of derivation of sunna. By methodologically ḥadith dependent concept of sunna, I wish to convey the idea that among some Muslim scholars emerged a view that the sunna compliance (or otherwise) of certain legal, ethical or theological practices, values or norms is and can only be determined by sifting through numerous narratives reportedly going back to the time of the Prophet Muhammad via an sound chain of narrators (*isnād*).

I define traditionalisation of Islamic thought as those social, political and jurisprudential mechanisms, which throughout the second century of Hijri contributed to:

- The continued growth and proliferation of ḥadith,
- The increased perceived importance given to ḥadith at the cost of the ethico-religious and ‘amal-based concept of sunna,
- The articulation of practically and other non verbally<sup>52</sup>—based sunna into individual sound ḥadith,
- The increased application of ḥadith in Qur’ānic and sunnaic sciences such as *usūl-ul-dīn*, *tafsīr*, *usūl-ul-fiqh* and *usūl-as-sunna*, and
- The development of *hierarchical*, *semi-contextualist* legal hermeneutical models that were entirely textually-based (i.e. based on Qur’ān and ḥadith) and marginalisation of non-textually based epistemologico-methodological tools of sunna (and Qur’ān) such as notion

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<sup>51</sup> This would exclude some of the Hanafi and Maliki fuqaha/usuliyyun for whom the concept of sunna remained epistemologically independent of the concept of sound hadith. On Maliki madhhab see Umar F. Abd-Allah Wymann Landgraf, *Malik and Medina-Islamic Reasoning in the Formative Period*, (Brill, Leiden: 2013), forthcoming. For Hanafis see V. I. Stodolsky, *A New Historical Model and Periodization for the Perception of the Sunna and his Companions*, (Ph.D. thesis, University of Chicago, 2012).

<sup>52</sup> Such as the idea that Sunna represented and embodied certain abstract ethico-religious principles and norms.

of *ra'y*, *istihsān* and *ijtihād* or the view that *sunna* was conceptually coterminous with certain ethical values or principles such as justice or righteous conduct including the expression *sunna al-'adīla* that was employed by Muslims in the second century Hijri.<sup>53</sup>

Resultantly, the nature and the character of the Qur'ān and *sunna* were increasingly legalistic, edified and the nature of the ethical values was based on the principal of ethical voluntarism rather than objectivism. Other changes that occurred in the classical period will be discussed below in the context of ḥadīth body of knowledge.

**Table Two:<sup>54</sup> The hermeneutical relationship between the Sunna and the Qur'ān and sunna and the ḥadīth bodies of knowledge during the pre-classical and classical periods of Islamic thought.**

Body of knowledge: <b>Sunna</b> <sup>55</sup>	<b>Pre-classical or formative period</b> (up to 3rd century Hijrah)	<b>Classical or post-formative period</b>
Nature/ Character	Ethico-religious, principals and value—oriented; values based on ethical objectivism principle, law a minor component, reason inclusive, not-restricted to the authority of the Prophet only but also to Companions or to certain abstract principles such as justice	Law-based, edified, largely reason-exclusive, values based on ethical voluntarism, largely restricted to the authority of the Prophet only
Nature of transmission	Oral and written	Primarily written

<sup>53</sup> See Ansari, Z.I. 'Islamic Juristic Terminology before Shafi'i: A Semantical Analysis with Special Reference to Kufa'. *Arabica*, xix, 1972.

<sup>54</sup> Based on Duderija, "The Evolution of the concept of Sunna", *op. cit.*

<sup>55</sup> Since based on a symbiotic relationship with the Qu'an same as for Qur'anic body of knowledge as outlined in the main text above.

Table Two (cont.)

Body of knowledge: <b>Sunna</b>	<b>Pre-classical or formative period</b> (up to 3rd century Hijrah)	<b>Classical or post-formative period</b>
Epistemological validity	mutawātir <sup>56</sup>	Hadith-based, therefore primarily ahad <sup>57</sup>
Hermeneutical relationship with Qur'an	Symbiotic, interdependent, non-hadith based	Hadith-based, Qur'an and Sunna conceptually different bodies of knowledge, breaking of symbiotic relationship
Hermeneutical relationship with Hadith	Divorced conceptually, methodologically and epistemologically	Hadith as primary hermeneutical and exegetical tool, conceptually conflated, methodologically and epistemologically dependent on hadith. <sup>58</sup>

### B) The Pre-Classical and Classical Views of the Nature of the Hermeneutical Relationship between the Ḥadith and Sunna and Ḥadith and Qur'an Bodies of Knowledge

During the *tadwīn* period the above-defined process of “ḥadithification” of sunna was taking place which further contributed to the above mentioned traditionalisation of Islamic thought. In the pre-*tadwīn* era sunna was understood to exist in what I termed a hermeneutically symbiotic relationship with the Qur'an and was conceptually (*i.e.* epistemologically, methodologically and hermeneutically) divorced from ḥadith. With the process of conceptual conflation of ḥadith and sunna among some Muslim scholars (excluding some Hanafi and Maliki jurists),<sup>59</sup> the nature of the

<sup>56</sup> 'Amal or practised based *sunna* that includes the 'ibādāt such as prayer and hajj. Non-'amal based aspects are based on a particular Qur'anic hermeneutic.

<sup>57</sup> This would exclude the concept of Sunna among some Hanafi and Maliki jurists belonging to their respective madhāhib. See footnotes 51 and 52.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

hermeneutical relationship between the Qurʾān and sunna and sunna and ḥadīth bodies of knowledge changed. As a result of this process the nature and the character of the Qurʾān and sunna also changed and they became increasingly legalistic and edified. Importantly, this phenomenon also changed the way in which the nature of the Qurʾān-sunnaic ethical values was understood shifting from the one based on the principal of ethical voluntarism to that of ethical objectivism.<sup>60</sup> Additionally, having been increasingly (but not entirely) conceptually conflated with the concept of a sound ḥadīth, the concept of sunna changed both epistemologically and methodologically and the concept of a sound ḥadīth was considered the main vehicle of sunna's transmission and embodiment among some Muslim scholars.<sup>61</sup>

Four main factors seemed to have provided the impetus for the forces of traditionalisation and the process of “ḥadīthification” of sunna in the second half of the first century hijri. They included:

- A general perception that the expanding Muslim empire would become organically detached from the Qurʾānic and sunnaic teachings was becoming wide spread, thus a need for a systematic development of Islamic thought, especially law arose;
- The partisan tensions that emerged within the nascent Muslim community that brought serious schisms based on conflicting claims regarding successorship to Prophet's political authority;
- Certain theological controversies prevalent at the time;
- Gradual transition from oral to written based transmission of knowledge.<sup>62</sup>

These trends resulted firstly in the concept of sunna being increasingly clad in the mantle of a written-based, predominantly purely Prophetic sunna, and secondly in the development of more stringent mechanisms in establishing the soundness validity of written-based sunna, especially in terms of the mode of its transmission, i.e. *ulūm-ul-isnād*, which further contributed to the ḥadīthification of sunna by (supposedly) making in more sound.<sup>63</sup>

<sup>60</sup> Duderija, “Evolution in the Concept of Sunna”, *op. cit.*

<sup>61</sup> *Ibid.* For exceptions see fn 51 and 52.

<sup>62</sup> Duderija, *Constructing a Religiously Ideal ‘Believer’ and ‘Women’ in Islam*, *op. cit.*, see chapter one in particular.

<sup>63</sup> A. Duderija, “The evolution in the canonical Sunni Hadith body of literature and the Concept of an Sound hadith During the Formative Period of Islamic Thought as Based on Recent Western Scholarship”, *Arab Law Quarterly*, 23 (2009): 1–27.

Having been conceptually conflated with the concept of a sound ḥadīth, the concept of sunna changed in several ways as summarized in the table below.

**Table Three:**<sup>64</sup> **The hermeneutical relationship between the ḥadīth body of knowledge and the Qur’ān and sunna during the pre-classical and classical periods of Islamic thought**

Body of knowledge: <b>Hadīth</b>	<b>Pre-classical or formative period</b> (up to 3rd century Hijri)	<b>Classical or post-formative period</b>
Nature/ Character	Politically motivated, <i>awāil</i> /anecdotes put in circulation by <i>qusass</i> , <i>tarhīb wa targhīb</i> genre,	All comprehensive, no distinction between ethico-moral and legal; Law-based, edified, largely reason-exclusive, values based on ethical voluntarism, largely restricted to the authority of the Prophet only
Nature of transmission <sup>65</sup>	Oral and written	Primarily written
Epistemological validity	<i>Mutawātir</i>	ḥadīth-based, therefore primarily <i>ahad</i>
Hermeneutical relationship with Qur’ān	Divorced conceptually, methodologically and epistemologically	Ḥadīth-based, Qur’ān and sunna conceptually different bodies of knowledge, ḥadīth as primary hermeneutical and exegetical tool therefore the breaking of the symbiotic relationship between Qur’ān and sunna

<sup>64</sup> Based on *ibid.*

<sup>65</sup> As based on work of Souaiaia as cited in footnotes 20 and 21.

Table Three (cont.)

Body of knowledge: <b>Hadith</b>	<b>Pre-classical or formative period</b> (up to 3rd century Hijri)	<b>Classical or post-formative period</b>
Hermeneutical relationship with sunna	Divorced conceptually, methodologically and epistemologically	Hadith as it only vehicle of perpetuation/ embodiment and transmission, conceptually conflated, methodologically and epistemologically dependent on hadith. <sup>66</sup>

Importantly, the above mentioned hermeneutically interdependent and symbiotic relationship between the Qur'ān and sunna was severed as the Qur'ān, and therefore Islamic legal theory, became increasingly hermeneutically dependent upon the ḥadith body of knowledge. This changed the nature and the character of the Qur'ān (and sunna) bodies of knowledge, the way its/their worldview was conceptualised and most significantly for the purposes of this article, the way in which the interpreters approached the Qur'ānic for the purposes of its interpretation. Namely, the above processes shifted the interpreters' focus away from the actual text, its dialogical and purposive nature,<sup>67</sup> and the assumptions governing its revelational context to that of interpreting it through the lens of extra-Qur'ānic sources of knowledge, mainly in the form of ḥadith.<sup>68</sup> This is one reason why I consider that the classical Islamic Legal theory did not sufficiently examine the importance of textual pre-suppositions evident in the Qur'ānic

<sup>66</sup> Again, exception would be some Hanafi and Maliki scholars. See footnotes 51 and 52.

<sup>67</sup> For example, ibn Ashur, a contemporary proponent of such an approach argues that pre-modern usūl legal theories: disregard[ed] the purposes of the law, not including them in the fundamentals [of Islamic legal methodology], and merely studying them in a partial way within sections of analogical reasoning, under appropriateness and unrestricted interests, even though they were supposed to be the fundamental of the fundamentals. Tahir Al-Ashur, *Alaysa al-Subh bi Qarib?* Al-Shakirah al-Tunisiyyah li-funun al-rasm, Tunis, 1988, p. 237.

<sup>68</sup> Hence the development of *tafsīr al-mā' thūr* genre.

discourse as they manifest themselves in its actual text and what the hermeneutical implications of these suppositions are.<sup>69</sup>

More specifically, in relation to issues surrounding the role and status of women in Muslim societies, which is one of our case studies to be discussed below, other factors which contributed to at times androcentric and at times very patriarchal interpretations of the Qur'ān and sunna, apart from the methodological and hermeneutical mechanisms mentioned above, include the nature of interpretative communities (namely overwhelmingly male community of interpreters operating within an androcentric/patriarchal socio-cultural and historical context) and the nature of political and sexual power during the formative period of Islam.<sup>70</sup> Since these have been discussed in some detail in other studies they will not be elaborated upon here.<sup>71</sup>

The aim of the rest of this paper is to identify some of these assumptions present in the Qur'ānic discourse and the implications they have on the development of a Qur'ānic hermeneutic and Islamic legal theory whose most hermeneutically powerful mechanisms is an ethico-religious values and purposive-based approach to interpretation.

Before these pre-suppositions are considered, a few preliminary remarks as to how they manifest themselves in the Qur'ānic text are necessary.

### C) Qur'ānic Textual Assumptions and their Hermeneutical Implications

As we shall see below manifestations of Qur'ānic assumptions are evident in its usage (to its direct audiences) of familiar concepts (e.g. sunna, Allah),

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<sup>69</sup> Several recent studies on the historical development of Islamic Law have argued that Qur'ān reflects the greater ethico-legal trends that were embedded in the late antiquity Near Eastern religions. See Wael Hallaq, *The Origins and Evolution of Islamic Law*, Cambridge, Cambridge University Press, 2005; Hina Azam, *Sexual Violence in Maliki Legal Ideology-From Discursive Foundations to Classical Articulation*, Ph.D. thesis, Duke University, 2007; W. Young, *Stoning and Hand-Amputation-The pre-Islamic origins of the hadd penalties for zina and sariqa*, MA Thesis, McGill University, 2005.

<sup>70</sup> Generally on this among many see Ahmed, L. *Women and Gender in Islam*, Yale University Press, London, 1992. A. Barlas, *Believing Women in Islam-Unreading Patriarchal Interpretations of the Qur'ān*. University of Texas Press, Austin, 2002. Also, Abou El Fadl, *Speaking in God's Name*, *op. cit.* Wadud, *Qur'ān and Woman*, *op. cit.*, Duderija, *Constructing a Religiously Ideal 'Believer' and 'Woman' in Islam*, *op. cit.*

<sup>71</sup> See *ibid.*

peoples stories/people (e.g. story of various Prophet's such as Lut, Noah, Abraham etc.),<sup>72</sup> beliefs (angels, scriptures, etc.), ethical terms (e.g. *ma'rūf*, *sharr*, *ḥasan*) and the use of particular words/phrases/grammatical/ philological constructs (e.g. the primary Qur'ānic addressees are assumed to be male, hence, the believers are primarily addressed as *mu'minūn*, i.e. second person plural *male*).<sup>73</sup> Halverson aptly summarizes the reason for this, who in this context asserts:

The Qur'ān employs a set of existing religious ideas, themes, and concepts, or what some scholars refer to as an existing body of "religious knowledge," while simultaneously extracting and modifying certain elements necessary to successfully transfer these characters and traditional narratives into the service of the text and reinforce its fundamental precepts (e.g., *al-tawḥīd*).<sup>74</sup>

In order to make a better sense of these assumptions, we shall categories them into two groups, namely socio-cultural and ethico-moral.

#### I) *Socio-Cultural Suppositions—The Case of Patriarchy*

One of the most evident assumptions evident in a majority of the passages in the Qur'ān is the existence of an all-embracing patriarchy<sup>75</sup> existing in its historically revelatory milieu.<sup>76</sup> Husband's right to unilateral dissolution of marriage, known as *ṭalāq*, is one aspect of this patriarchal milieu. According to Joseph Schacht:

The right to a one-sided dissolution of a marriage belonged to the man exclusively, among the pre-Islamic Arabs. Long before Mu ḥammad, this *ṭalāq* was in general use

<sup>72</sup> Not all aspects of stories in the Qur'ān were known to either the Prophet or his direct audience but their existence and general outlines were certainly known since a number of Jews and Christians lived in the area. For more on this, among many, see e.g. Kenneth Cragg, *The Event of the Qur'ān—Islam in its Scripture*, Oxford, Oneworld, 1971; Arthur Jeffery, *Qur'ān as Scripture*, Russel Moore Company, New York, 1952.

<sup>73</sup> And only on rare occasions the female gender equivalents are mentioned.

<sup>74</sup> Halverson, *Theology and Creed in Sunni Islam*, 140.

<sup>75</sup> There are many definitions of patriarchy but in our case we shall define it as control/ rule of fathers/men over women at each/or some levels of society, (e.g. family, public life in terms socially acceptable norms and behaviours), law (e.g. family law) and politics (partaking in having a say in which a society is run).

<sup>76</sup> Which does not imply that Qur'ān is necessary or in essence a patriarchal text. In fact the Qur'ān can sustain multiple interpretations some of which can be seen as being anti-patriarchal. For example, Barlas, *Believing Women in Islam-Unreading*, *op. cit.* For a contrary view See Souaiaia, *Contesting Justice*, p. 115 in particular.

among the Arabs and meant the immediate definite abandonment by the man of all rights over his wife, which he could insist upon as a result of his marriage.<sup>77</sup>

At the philological level this patriarchal revelation context is evident in the Qur'ānic injunctions, which are exclusively directed at men in matters pertaining to divorce and marriage. For example, Qur'ān<sup>78</sup> (65:1–2) instructs the Prophet that if the *men* divorce their women (*ṭalāqtumu nisā'*) they should allow women to reside in their marital home during their 'idda (waiting period) and then instructs *men* to keep or stay with their *wives* in dignity or you divorce them in kindness and dignity.<sup>79</sup> In the pre-modern Qur'ānic commentary (*tafsīr*) literature that I consulted (Suyūti, Ibn 'Abbas, Al Qurtubi, At—Tabari, Al-Zamakhshari, Ibn Kathīr, and Al-Wāḥidi) on this verse it is evident that all of the exegetes (*mufasssīrūn*) considered that the unilateral right of men to divorce their wives was a 'pre-given' and 'natural' order of things and did not problematize it at all apart from emphasizing that although the verse addresses the Prophet it also speaks to all the male believers (*mu'minūn*). Instead they either focused on the discussions surrounding the 'idda and/or proper wife's treatment during this time and provided the circumstance for the revelation of the verse (eg. Prophet's divorcing of Hafza or 'Abd Allah Ibn 'Umar divorcing his wife when she had menses).<sup>80</sup>

Qur'ān (2:230) stipulates that if a *man* divorces a woman (*fa inn ṭalāq -ha*) irrevocably, a man cannot remarry her until she is married to another.<sup>81</sup> Again as in the case of *tafsīr* of 65:1 the same pre-modern exegetes simply assume the validity of unilateral *ṭalāq* being the sole prerogative of men and clarify that in this case *fa inna ṭalāqa-ha* means the third divorce after which the husband cannot re-marry the same woman prior to her marrying

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<sup>77</sup> J. Schacht, J. and A. Layish, "Ṭalāq (a)." *Encyclopaedia of Islam, Second Edition*. Edited by: P. Bearman; Th. Bianquis; C.E. Bosworth; E. van Donzel; and W.P. Heinrichs. Brill, 2012. Brill Online. University of Melbourne. 18 January 2012.

<sup>78</sup> Y. Ali's translation of the Qur'ān is used here.

<sup>79</sup> O Prophet! When ye do divorce women, divorce them at their prescribed periods, and count (accurately), their prescribed periods: And fear Allah your Lord: and turn them not out of their houses, nor shall they (themselves) leave... (65:1) Thus when they fulfil their term appointed, either take them back on equitable terms or part with them on equitable terms... (65:2).

<sup>80</sup> The *tafsir* are available here: <http://mosshaf.com/web/>.

<sup>81</sup> So if a husband divorces his wife (irrevocably), He cannot, after that, re-marry her until after she has married another husband and He has divorced her.

another man and having sexual intercourse with him and waiting for the ‘*idda*’ period to be completed. Some also document the occasions (asbāb) of the revelation about a woman who was divorced by her husband and married another man and wished to return to her first previous husband.

Again, in 33:49 the *male* believers are told that if they married believing women and then divorced them (*ṭalāqtumuhunna*) before touching them, they do not need to count the ‘*idda*’.<sup>82</sup> As far as *tāfāsīr* go the same analysis applies to this verse as in the case of 65:1 and 2:230 above. Namely, the assumption of husband’s unilateral right to divorce is assumed.

Similarly, in 2:236 *men* (masculine second person plural- *ṭalāqtumu nisāʾ*) are, in case of divorcing women before consummating marriage, told to bestow gifts upon them.<sup>83</sup>

It seems that, at least in these instances,<sup>84</sup> decisions pertaining to both men and women in relation to divorce and related matters have been surrendered entirely to men and that women play only a derivative and non-autonomous role.

The famous *qawwama* (4:34)<sup>85</sup> and its ‘sister’ verse (2:228)<sup>86</sup> verse which bestows upon men a qualified degree (*darajāt*) over women based on the male’s socially privileged role of breadwinners including the right to

<sup>82</sup> O ye who believe! When ye marry believing women, and then divorce them before ye have touched them, no period of ‘*Iddat*’ have ye to count in respect of them: so give them a present. And set them free in a handsome manner.

<sup>83</sup> There is no blame on you if ye divorce women before consummation or the fixation of their dower; but bestow on them (A suitable gift), the wealthy according to his means, and the poor according to his means.

<sup>84</sup> However, in cases dealing with spiritual or religious matters such as those pertaining to salvation and the Hereafter, the Qur’ān is gender egalitarian.

<sup>85</sup> Men are the protectors and maintainers of women (ar rijalu qawwamuna ‘ala nisa’), because Allah has given the one more (strength) than the other, and because they support them from their means. . . . It is interesting that some of the mufasssrun (e.g. Zamakhshari) have given example of the husband’s unilateral right to divorce his wife as one of the reasons why men are qawwamuna over women. Like in other verses discussed in the main text above the vast majority of the mufasssrun did not question the basic underlying premise of men’s *qiwama* although some did link it to, among other religious or ‘naturally’ inherent reasons, to the issue of *mahr*. For more on Karen Bauer, “Room for Interpretation: Qur’ānic Exegesis and Gender” (Princeton University, Ph.D. thesis, unpublished, 2008).

<sup>86</sup> . . . And women shall have rights similar to the rights against them, according to what is equitable; but men have a degree (of advantage) over them.

physically punish (*daraba*)<sup>87</sup> recalcitrant (*nushuz*)<sup>88</sup> women can be considered as another aspect of the patriarchal revelational milieu mirrored in the Qur'an at the level of socio-cultural rights/rules. The same would also apply to the inheritance verses in *surat-ul-Nisa'* which stipulate unequal shares/proportions to men and women (in favour of men)<sup>89</sup> or the tribal practice of taking the women and children of defeated tribes as spoils of war that is indirectly referred to in the Qur'an and was the practice at the time of the Prophet.

What I wish to highlight for the purposes of the present paper is that all of the above examples pre-suppose the existence of a social and cultural order which confers the right to entering into marriage [contract], divorce, physical punishment, disciplining and even possession of women (as in case of slavery- as shall be demonstrated below) solely to men, the reality of which is assumed, acknowledged and addressed by the Qur'an. However, does this necessarily mean that Qur'an endorses the same powers to men or does it attempt to mitigate and limit them?

If we examine carefully the above stated verses pertaining to divorce or marriage matters in general, as El-Fadl astutely observes, they all were performing the function of "protecting women from the power of men [they] already possess[ed] by the virtue of the customs and practices of the society in which Islam was revealed."<sup>90</sup> Abu Zayd furthermore argues that based on the semantical and historical analyses of this verse it would be safe to assert that this Qur'anic injunction's primary aim is to limit the rights of men that existed in the patriarchal and tribal-based social, economic,

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<sup>87</sup> On the significant prevalence of physical violence against women among the Muslim community during the life of Prophet Muhammad see Manuela Marín, "Disciplining Wives: A Historical Reading of Qur'an 4:34", *Studia Islamica*, 97 (2003), 5–40. Cf. Ayesha S. Chaudry, "Wife-Beating in the Pre-Modern Islamic Tradition: An Inter-Disciplinary Study of *Hadith*, Qur'anic Exegesis and Islamic Jurisprudence", (Ph.D thesis, New York University, 2009). Chaudry states for example that both "Qur'anic exegesis and Islamic jurisprudence assume a husband's right to discipline his wife and the ethical deliberations therein are concerned only with the procedure of hitting", viii.

<sup>88</sup> On wife *nushuz* see Chaudry, *Wife-Beating*, *op. cit.*, 184–202.

<sup>89</sup> See Qur'an 4: 11–12. For a detailed discussion of inheritance verses in relation to women from the Qur'anic and classical Islamic law perspectives see Souaiaia, *The Function of Orality*, *op. cit.* and A. Souaiaia, *Contesting Justice—Women, Islam, Law, and Society*, State University of New York Press, Albany, 2008.

<sup>90</sup> Khaled Abou El-Fadl, "The Pearls of Beauty", in his *A Search for Beauty in Islam: The Conference of the Books*, Rowman and Littlefield, University of America Press, 2001, p. 275.

cultural and political reality of the Qurʾānic revelational milieu, rather than stipulate absolute inheritance portions.<sup>91</sup> Additionally, argues El-Fadl the Qurʾānic verses 65:6<sup>92</sup> and 2:229<sup>93</sup> could be used to argue for this mitigating effect of Qurʾānic injunctions.<sup>94</sup> The same mitigating effect applies to the concept of sunna.<sup>95</sup> But is this mitigating process an end in itself or just a means to a more just end?

If this principle of the Qurʾānic textual assumption of certain patriarchal practices prevalent in its milieu and their subsequent mitigation on the basis of other relevant Qurʾānic verses was recognised as a hermeneutical tool on the basis of which a moral trajectory could be extrapolated this would contribute towards the development of an ethico-religious values and purposive based Qurʾānic hermeneutic. This is exactly what Abu Zayd argues when suggesting that all the legal injunctions in the Qurʾān<sup>96</sup> are to

<sup>91</sup> Abu Zayd, “The Nexus of Theory and Practice”, pp. 164–165.

<sup>92</sup> Let the women live (in ‘iddat) in the same style as ye live, according to your means: Annoy them not, so as to restrict them. And if they carry (life in their wombs), then spend (your substance) on them until they deliver their burden: and if they suckle your (offspring), give them their recompense: and take mutual counsel together, according to what is just and reasonable. And if ye find yourselves in difficulties, let another woman suckle (the child) on the (father’s) behalf.

<sup>93</sup> A divorce is only permissible twice: after that, the parties should either hold Together on equitable terms, or separate with kindness. It is not lawful for you, (Men), to take back any of your gifts (from your wives), except when both parties fear that they would be unable to keep the limits ordained by Allah. If ye (judges) do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of them if she gives something for her freedom. These are the limits ordained by Allah; so do not transgress them if any do transgress the limits ordained by Allah, such persons wrong (Themselves as well as others).

<sup>94</sup> Verses such as 2:227; 2:230 and 4:35 which address both parties in marriage suggest that there was “an incremental empowerment of women” scheme unfolding in the Qurʾān, El-Fadl, “The Pearls of Beauty”, p. 275.

<sup>95</sup> Madeleine Fletcher, “How Can We Understand Islamic Law Today?”, *Journal of Islam and Christian-Muslim Relations*, 17/2 (2006), pp. 159–172. In this context she states: “Prophet’s mission is not correctly indicated by reified content of Islamic Law but rather by the direction of his reforms”, and more specifically to issues pertaining to women “Prophet’s message with respect to the Arab sunna must be clearly understand to benefit women and to reform the existing practices extremely prejudicial to women.” *Ibid.*, p. 163 and p. 165.

<sup>96</sup> These legal injunctions mentioned in the Qurʾān, according to Abu Zayd, ought not to be considered to actually be Qurʾānic. The only purely or solely Qurʾānic values are those that have been *initiated* by the Qurʾān. He also adds that, based on this criterion none of the Qurʾānic injunctions pertaining to punishments (*budūd*), inheritance or divorce laws

be hermeneutically interpreted so that they are in accordance with the hermeneutically most powerful *Qur'ānic* value of justice. In this context the words of Al-Alwāni are instructive, who makes a following observation in relation to the question of female witnesses in the Qur'an:

By establishing a role for a women in the witnessing of transactions, even though at the time of revelation they had little to do with such matters, the Qur'an seeks to give concrete form to the idea of women as participant... The objective is to end the traditional perception by including them, among such are acceptable to you as witness'... the matter of witnessing served merely as a means to an end or a practical way of establishing the concept of gender equality.<sup>97</sup>

This concept of a moral trajectory was not used as a hermeneutical tool of highest order by the majority classical Islamic interpreters of the Qur'an and legal theorists because the interpretational or hermeneutical implications of these presuppositions embedded within the Qur'anic text were not fully acknowledged and applied hermeneutically. However, as perceptively recognized by a young Tunisian thinker Shaykh Al Tahir Al Haddād (1901–1935) “there is no textual evidence or proof that suggests that what had gradually been achieved in the life of the prophet, is the final goal after which there is no further purpose; as long as those matters that are connected with gradualism continue to present difficulties then it is appropriate to eliminate such hardship.”<sup>98</sup>

One of the reasons for this hermeneutical ‘failure’ of classical Islamic scholarship forms the subject matter of this very article, namely the shift from a dialogical, symbiotic and ethico-religious and purposive nature of early Qur'an-sunna hermeneutic to that of its sunna-ḥadith episteme.<sup>99</sup>

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(i.e. those that differentiate on the basis of gender or social status in general) are Qur'anic or divine imperative as they were not initially established by the Qur'an, Rather they reflect the historical and cultural norms within which Qur'an was revealed and initially operated. The Qur'an initially operated within this context, argues Abu Zayd further, in order that its immediate addressees would ‘get’ or comprehend its ultimate message which is theological and moral in nature. Elevating this historical aspect of the Qur'an to divine status or at the expense of the divine and perennial Qur'anic values such as justice, argues Abu Zayd, would violate the actual Word of God. “The Nexus of Theory and Practice, pp. 154–167.

<sup>97</sup> Taha Al-Alwani, *Issues in Contemporary Islamic Thought*, London, International Institute of Islamic Thought, 2005.

<sup>98</sup> Al Tahir Al Haddad, *Kalima Shukr*, reproduced in Al Tahir Al Haddad (Al Haj Yahya and Al Marzuqi editions, n.d.), 16.

<sup>99</sup> Cf. Abu Zayd, “The Nexus Between Theory and Practice”, *op. cit.* Souaiaia has also adduced evidence to argue that even the classical Islamic law and legal theory has

This resulted in a formulation and subsequent canonisation of a legal and socio-cultural tradition based primarily on a ḥadith-based Qurʾān-sunna hermeneutic which contained several misogynist and gender discriminative practices clearly disadvantaging Muslim women.<sup>100</sup> In the context of discussing the penal code (*ḥudūd*) as it appears in the Qurʾān Abu Zayd makes exactly this point by averring that:

Through my research and study I have concluded that the Qurʾānic objectives that jurists long ago agreed upon were deduced from the penal code alive and well during the seventh century on the Arabian Peninsula. The objectives were not deduced from looking at the paradigm of the entire Qurʾān.<sup>101</sup>

## II) *Ethical/Moral Assumptions—the Case of Free Individuals vs. Slaves Social Stratification*

Although slavery is a social ill, its repugnance is certainly moral in nature. The existence of slavery (including female sex slavery and female concubinage) is another socio-cultural reality that Qurʾān assumes as a culturally accepted as evident in for example in *Sura An-Nisāʾ*.<sup>102</sup>

In the pre-Qurʾānic Arabia it was a common practice that masters (almost exclusively male) would force their (female) concubines into prostitution and would not set them free if they (i.e. the concubines) wanted to get married in order to live more ‘honourable’ lives. Qurʾān’s attitude towards this ill was to make moral appeals to slave owners [exclusively men

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methodological and hermeneutical mechanisms in place that *theoretically* could be interpreted or construed to uphold the hermeneutical primacy of justice (*tahqīq alʾadalaʾ*) and social expediency (*maṣlaha*) as its purpose and core but which were never realized as the concepts of “justice” and “fairness” did not evolve past the formative period of Islamic thought. Souaiaia, *Contesting Justice*, p. 47.

<sup>100</sup> See for example Ziba Mir-Hosseini, “Islam and Gender Justice”, *Voices of Islam*, Volume 5, *Voices of Change*, eds. V. Cornell, O. Safi and V. Henry, Connecticut and London, Westport, 2007, pp. 85–113.

<sup>101</sup> Abu Zayd, “The Nexus Between Theory and Practice”, p. 154.

<sup>102</sup> *E.g.* 4:25. If any of you have not the means wherewith to wed free believing women, they may wed believing girls from among those whom your right hands possess: And Allah hath full knowledge about your faith. Ye are one from another: Wed them with the leave of their owners, and give them their dowers, according to what is reasonable: They should be chaste, not lustful, nor taking paramours: when they are taken in wedlock, if they fall into shame, their punishment is half that for free women. This (permission) is for those among you who fear sin; but it is better for you that ye practise self-restraint. And Allah is Oft-forgiving, Most Merciful.

e.g. 4:25] in order to limit these abuses and alleviate/mitigate their unfavourable/miserable conditions. Acknowledging the different mentality and conditions under which slaves were brought up and having lived, a different set of punishments were instituted by the Qurʾān (4:25) in addition to a different set of social and behavioural norms.<sup>103</sup> Indeed, the entire edifice of the subsequent Islamic Law and its legal theory was based on the notion of what Azam terms “differentiated and hierarchical ethico-moral and legal subjectivity” with the free Muslim man at the top and the slave woman at the bottom.<sup>104</sup>

It is commonly known that the practice of setting free of slaves was one way in which Qurʾān sanctions the expiation of one’s sins. Furthermore, one of the Qurʾān’s consistent features is the highlighting the importance of kind and gentle treatment of slaves. Moreover, Prophet’s example/instructions as to the proper conduct when dealing with slaves was in complete accordance with these Qurʾānic instructions.<sup>105</sup> Thus based on above Qurʾān-sunna indicants the *mitigating effect* of Qurʾān-sunna attitude becomes evident again.

Given the overall evidence and attitude of Qurʾān and sunna towards slavery it could be easily argued, as it was in the case of patriarchy, that the moral trajectory taken by the Qurʾān-sunna attitude warrants the complete eradication of slavery and thus obliteration of separate moral standards/normative behaviour for free and enslaved human beings.

Again for the hermeneutical shift from the pre-classical to classical Islam just like in the case of issues related to male-female gender dynamics, the mitigating effect of the Qurʾān-sunna élan premised upon the recognition of the hermeneutical implications of the ethico-moral acceptance of slavery in the Qurʾānic revelatory milieu was not fully recognised as a legitimate hermeneutical tool that could lay path toward an ethico-religious values and purposive-based approaches to Qurʾān-sunna hermeneutics.<sup>106</sup> This, in turn, translated itself in the field of Islamic Law and legal theory.

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<sup>103</sup> The fuqaha in the second and third centuries have made for example distinctions between the ʿawra (area of body to be covered during the prayer) of slave and free women. See Abou El-Fadl, *Speaking in God’s Name*, pp. 255–257, ft. 106–107.

<sup>104</sup> Azam, *Sexual Violence in Maliki Legal Ideology*, pp. 17–20. cf. Fatna Sabbah, *Woman in the Muslim Unconscious*, tr. M.J. Lakeland, New York, Pergamon Press, 1984.

<sup>105</sup> As based upon *corroborative* written evidence found in relevant *sīra*, *tarīh* and ḥadīth sources.

<sup>106</sup> Indeed, all books on explication of law (*usūl-ul-fiqh*) deal with subjects relating directly to slavery.

Indeed, as Azam argues, despite what “may have been the liberatory intent of the Qur’ān and the Prophetic example (sunna) the fact [remains] that Islamic Law legitimizes the pre-Islamic view that human being in an abstract sense—occupies a dual space as both a person and property, subject and object, owner and commodity”.<sup>107</sup>

## Conclusion

In summary one important component in developing ethico-religious values and purposive based Qur’ānic hermeneutic and, therefore, that of Islamic legal theory, is the taking into account the Qur’ānic pre-suppositions evident in its text/content as well as the pre-classical nature of the Qur’ān-sunna discourse based on their hermeneutically symbiotic, dialogical, ethico-religious and purposive based nature. As it was demonstrated in the case of some aspects of male-female gender dynamics and slavery, the Qur’ān-sunna mitigating effect would seem to suggest that the deeply embedded contextual patriarchal and slavery practices not only do *not* form the inherent components of their worldview but that the overall Qur’ān-sunna principles premised on the alleviation of unjust practices at the time of the Prophet mitigated these practices and paved the way towards their future complete abolition. However, often these practices and norms were, and in many of its aspects still are, considered by some Muslims as an integral and essential part of the Qur’ān-sunna normative worldview. In this context the purpose of this article was to emphasize that it is important to recognize that one of the reasons for the development and the continued embeddedness of this view was a result of a particular hermeneutical hierarchy and relationship between the Qur’ān, sunna and ḥadīth bodies of knowledge that was formulated during the classical period of Islamic thought.<sup>108</sup> Attempts to interpret the Qur’ān-sunna indicants in a light of a different hermeneutic or to develop an Islamic legal theory that is more in tune with the pre-classical Islamic thought premised on the hermeneutical primacy of ethico-religious values and purposive based approaches to Qur’ān-sunna hermeneutics are fiercely resisted by certain schools of thought within the Islamic tradition and are considered as undermining the very foundational pillars of an Islamic *Weltanschauung* as

<sup>107</sup> Azam, *Sexual Violence in Maliki Legal Ideology*, p. 17.

<sup>108</sup> For other reasons in the context of status of women in Islam see Souaiaia, *Contesting Justice*, *op. cit.*

*they conceptualize it.* In the final analyses these approaches, however, in this author's mind, not only betray the pre-classical understanding of the nature of the Qur'ān-sunna but also restrict the inherently polysemic character of the Qur'ānic text, and therefore the Islamic legal theory, to its medieval interpretational possibilities which are based on, among others, patriarchal and slavery condoning values, norms and practices.

