

# Identifying Gender Biases in Islamic Legal Literature: An Examination of Analogical Arguments to Prohibit Women from Leading Prayer

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## Abstract

It is generally assumed that gender biases played an important role in shaping Islamic Law, particularly some legal rulings that are unfavourable to women. Determining the degree of this influence is problematic, since the claims jurists make about gender in Islamic legal texts are meant to defend a given law and therefore might be purely polemical and not accurately represent the original reasons for the law. In this paper, a methodology is suggested to gauge the influence of gender attitudes in works of Islamic Law. The legal expositions from a broad survey of legal texts are compared with the framework of Islamic legal theory to identify assumptions operating behind the formal legal arguments and demonstrate how those assumptions impacted on the jurists' conclusions. This methodology is applied to the case of how juristic analogy (*qiyās*) is used to prohibit women from leading men in prayer.

**Keywords:** Islamic Law, Analogy, Qiyās, Legal Theory, Usūl al-Fiqh, Gender

## Introduction

How have gender biases influenced Islamic Law? Sa'diyya Shaikh identifies the need to "ask critical questions about the nature of human beings and gender differences assumed within the traditional *fiqh* discourse."<sup>2</sup> This is not as straightforward as simply identifying gender attitudes in the statements the jurists make. Bauer cautions that discussions of gender in classical Islamic legal works "may at the time have had less to do with jurists' perceptions of women's abilities than with their desire to find a coherent justification for the law."<sup>3</sup> Katz cautions that normative claims might not always reflect "the practical mores of

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<sup>2</sup> Sa'diyya Shaikh, "In Search of al-Insān: Sufism, Islamic Law, and Gender," *Journal of the American Academy of Religion* 77, no. 4 (2009): 7.

<sup>3</sup> Karen Bauer, "Debates on Women's Status as Judges and Witnesses in Post-Formative Islamic Law," *Journal of the American Oriental Society* 130, no. 1 (2010): 2.

surrounding society.”<sup>4</sup> Jurists were defending the pre-existing rulings of their legal schools, and the statements they made about women might not be motivated by anything else.

This is not an insurmountable difficulty. There are ways to gauge how gender assumptions influenced the rulings. This is especially true when they are implicitly assumed, or underlie a textual interpretation, or are subtly embedded in analogies and other legal arguments. In these cases, they would indicate what Shaikh describes as “the specific understandings of gender relationships assumed by dominating discourses in the *fiqh* canon.”<sup>5</sup> The various ways in which gender-related ideas operate in the legal texts are exceptionally important, and a methodology is needed that successfully reveals the assumptions operating behind the formal arguments and demonstrates how they impact on the jurists’ conclusions.

## Methodology

This research presents an approach for determining how assumptions about women and gender influenced the development of specific legal rulings. First, a legal question is selected for study. Then, a survey of essential Islamic legal texts is conducted, focusing on where those texts discuss the selected legal question. A legal-hermeneutical analysis is then applied to the surveyed texts, which focuses on the jurists’ ideological and methodological framework – another genre of legal writing known as Islamic legal theory (*usūl al-fiqh*). The legal arguments found in the surveyed legal texts are identified according to the relevant theoretical rubrics that are set forth in the corresponding legal theory literature. It is important to note that legal theory developed after the formative period of the law<sup>6</sup> and was largely deduced by later scholars from the rulings and statements of each school’s foundational jurists, which helps to explain a lack of perfect correspondence between theory and practice.<sup>7</sup> Where the legal arguments fall short of the theoretical ideals projected in the legal theory works, the discrepancy is studied to determine what other influences and assumptions are evident in the legal texts that enable the jurists to suggest those arguments. These influences are identified and

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<sup>4</sup> Marion Holmes Katz, *Women in the Mosque: A History of Legal Thought and Social Practice* (New York, Columbia University Press, 2014), 36.

<sup>5</sup> Shaikh, “In Search of al-Insān,” 8.

<sup>6</sup> Though it is widely held that the first work in Islamic legal theory was the *Risālah* of al-Shāfi‘ī (d. 204/820), Lowry points out that mature legal theory is quite different and he identifies the work of the Ḥanafī jurist al-Jaṣṣās (d. 370/980) as being the first work representative of the discipline in its classical form. See Joseph Lowry, *Early Islamic Legal Theory* (Leiden: Brill, 2007), 360-1.

<sup>7</sup> See Umar Abd-Allah, “Malik’s Concept of ‘Amal in the Light of Maliki Legal Theory” (PhD dissertation, University of Chicago, 1978), 6-7.

examined to determine how they function to lend added strength to legal arguments that would otherwise be defective according to the professed methodologies of the jurists who proposed them.

This approach is applicable to any of the sources of evidence recognised by Islamic legal scholars (like the Qur'an or Sunnah) or any of their interpretive methods, and it can be applied to any legal ruling or set of rulings where the influence of gender (or other social factor) is suspected. In this study, the ruling prohibiting women from leading men in prayer is examined, and the focus is on the use of juristic analogy (*qiyās*). Of course, jurists have other evidence for the ruling. However, this study is not critiquing the ruling itself, but revealing how gender biases function in Islamic legal thought. Therefore, the point in analysing these instances of analogical reasoning is not simply to look for defects, but rather to uncover the assumptions that made those analogies appear sound to the jurists who proposed them.

This study surveys major works from the four Sunni schools of law. The Ḥanafī, Mālikī, and Shafī'ī schools are represented by eight texts each, and five were selected to represent the Ḥanbalī school. Works representing different historical periods were chosen for their authoritativeness and thoroughness in presenting evidence. Abou El Fadl identifies all "Sunni schools of legal thought" as possessing sufficient overlap in their methodologies of discourse to constitute a single interpretive community, with each of the four schools constituting communities of interpretation within this broader one.<sup>8</sup> They adhere to the same theological tenets, refer to a common body of ḥadīth literature, share the same beliefs regarding clerical authority, and recognise roughly the same essential legal principles. I present my conclusions as relevant to Sunni Islam and as one example for exploring how gender attitudes can influence Islamic legal rulings.

## **Juristic Analogy (*Qiyās*)**

There are four primary sources of law that are agreed upon by the canonical schools. They are: the Qur'an, the Sunnah, consensus (*ijmā'*), and juristic analogy (*qiyās*).<sup>9</sup> There are other sources recognized by some

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<sup>8</sup> Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (Oxford: Oneworld Publications, 2001), 124.

<sup>9</sup> The early Ḥanafī legal theorist, al-Shāshī (d. 344/955) is probably the first to list the four sources in this way in a legal theory text, where he writes: "The sources of Islamic law are four: God's Book, the Sunnah of His Messenger, the consensus of the community, and analogous reasoning (*qiyās*), and it is imperative to study each of these to know how to

but not all the legal schools. Juristic analogy (*qiyās*) is defined in Islamic legal theory as the extension of a legal ruling from one case to another case due to a similarity that justifies the presence of the ruling in both cases.<sup>10</sup> Though the four schools of law differ on some matters, a general description of the process can be given.

There are two widely recognised types of *qiyās*. The most accepted type is *qiyās al-‘illah* based on determining the ruling’s effective cause (*‘illah*). It has four elements: an original case, its original ruling, the new case, and the effective cause, which is legal rationale for extending the ruling to the new case. The effective cause is a meaning that is appropriate for the ruling to the original case. When this same meaning is found in a new case whose ruling is unknown, the ruling can be applied to it due to the shared presence of the effective cause.

The standard example for this is wine, which is prohibited by the Qur’an. The effective cause for this prohibition is intoxication. This ruling is extended by way of *qiyās* to other intoxicating substances, which are the new cases. In this way, the ruling established by the text of the Qur’an can be applied to many cases the Qur’an does not directly address.

The second widely recognised form of *qiyās* is an analogy of resemblance (*qiyās al-shabah*). This is generally understood as comparing the new case to other existing cases to determine which of these it most closely resembles.<sup>11</sup> The ruling of that original case is then applied to the new

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derive legal rulings from them.” Aḥmad b. Muḥammad al-Shāshī, *Uṣūl al-Shāshī*, edited by ‘Abd Allah Muḥammad al-Khalīlī. (Beirut: Dār al-Kutub al-‘Ilmiyyah, no date), 12.

<sup>10</sup> Al-Ghazālī (d. 505/1111) defines *qiyās* as: “Applying one known matter to another by establishing or negating a ruling for both by way of something that brings them together through the assertion or negation of a ruling or attribute...and every *qiyās* must have a new case, an original case, an effective cause and a ruling.” Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī, *al-Mustasfā fī ‘Ilm al-Uṣūl*, edited by Najwā Daww. (Beirut: Dār Ṭhyā’ al-Turāth al-‘Arabī, no date) 2:96. Al-Qarāfī (d. 684/1285) defines *qiyās* as: “Establishing a ruling like that [which exists] for one known matter in another known matter due to their resembling each other in the ruling’s effective cause in the opinion of the one who engages in it.” Aḥmad b. Idrīs Shihāb al-Dīn al-Qarāfī, *Sharḥ Tanqīḥ al-Fuṣūl*, edited by Muḥammad ‘Abd al-Raḥmān al-Shāghūl. (Cairo: al-Maktabah al-Azhariyyah li-Turāth, 2005), 357. Ibn Qudāmah (d. 620/1223) defines it as follows: “Applying to a new case the ruling of an original case due to something that brings them together.” ‘Abd Allah b. Aḥmad b. Muḥammad b. Qudāmah al-Maqdisī. *Rawḍat al-Nāẓir wa Jannat al-Munāẓir*, edited by Dr. ‘Abd al-Karīm al-Namlah. (Riyadh: Maktabat al-Rushd, 2003), 3:797. Al-Sarakhsī (d. 490/1096) describes it as “exercising opinion to analogise from original cases whose rulings are known by textual evidence to extend the textual ruling to new cases.” Muḥammad b. Aḥmad al-Sarakhsī, *Uṣūl al-Sarakhsī*, edited by Dr. Rafiq al-‘Ajam. (Beirut: Dār al-Ma’rifah, 1997), 2:118.

<sup>11</sup> See al-Juwaynī (d. 478/1085), *al-Waraqāt*, 10. Ibn Qudāmah gives this definition in *Rawḍat al-Nāẓir*, 3:868, and then gives an alternate definition of “bringing together the original case and the new case by way of an attribute that [merely] implies it contains some wisdom for the ruling that brings benefit or repels harm.” According to this definition, the appropriateness

case. This is what jurists must resort to when they are unable to determine the effective cause by way of textual evidence, *ijmā'*, or identifying an appropriate factor.<sup>12</sup>

Regardless of the form it takes, the purpose of *qiyās* is to reveal the intended scope of a ruling that is established by the Qur'an, the Sunnah, or *ijmā'*. Its function is merely to extend the ruling established by that evidence to new cases. This is particularly true for the Shafī'ī and Ḥanbalī schools. By contrast, *qiyās* enjoys a strength in Mālikī law above that of isolated individual-narrator ḥadīth.<sup>13</sup> Likewise, since Mālikī jurists regard the general scope of textual statements to be uncertain, analogical reasoning can easily narrow the scope of the Qur'an's general statements.<sup>14</sup> Furthermore, Abd-Allah argues that when Mālik himself engaged in *qiyās*, he did so primarily on the basis of established legal axioms, rather than particular legal rulings established by textual evidence. These axioms were derived through inductive reasoning from many individual instances of law. He claims that this remained the case for Mālikī law in practice, even though post-formative Mālikī jurists present the process in the same way that the other legal schools present it.<sup>15</sup>

## 1. Comparing Prayer Leadership to Political Leadership

In this example, political leadership is the original case, and the ruling is that it is prohibited for women to hold political office. The ruling is transferred by analogy to prayer leadership. This argument is cited by two early Mālikī scholars, al-Māziri (d. 536/1141)<sup>16</sup> and al-Rajrāji (d. before 680/1281)<sup>17</sup>, who explicitly assert that they are engaging in *qiyās*. It reappears with a much later Mālikī scholar al-Nafrāwī (d. 1126/1714).<sup>18</sup>

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of the effective cause is merely suspected, as opposed to *qiyās al-'illah* where the appropriateness for the ruling is obvious.

<sup>12</sup> Al-Ghazālī defines *qiyās al-shabah* as: "Bringing together the new case and the original case on the basis of a quality while admitting that the quality is not the ruling's effective cause." al-Ghazālī, *al-Mustaṣfā*, 2:142-3. He also states that it is a weaker form of evidence than *qiyās al-'illah*. See *al-Mustaṣfā*, 2:145.

<sup>13</sup> Refer to al-Qarāfi, *Sharḥ Tanqīḥ al-Fuṣūl*, 361.

<sup>14</sup> al-Qarāfi, *Sharḥ Tanqīḥ al-Fuṣūl*, 189.

<sup>15</sup> Umar Abd-Allah, "Malik's Concept," 124.

<sup>16</sup> Abū 'Abd Allah Muḥammad b. 'Alī b. 'Umar al-Tamīmī al-Māziri, *Sharḥ al-Talqīn*. edited by Muḥammad Mukhtār al-Salāmī (Tunis: Dār al-Gharb al-Islāmī, 2008), 2:670-1.

<sup>17</sup> Abū al-Ḥasan 'Alī b. Sa'īd al-Rajrāji. *Manāḥij al-Tahsīl wa Natā'ij Laṭā'if al-Ta'wīl fī Sharḥ al-Mudawwanahwa Ḥall Mushkilātih*, edited by Abū al-Faḍl al-Dimiyātī and Aḥmad b. 'Alī (Casablanca: Markaz al-Turāth al-Thaqāfi al-'Arabī, 2007), 1:298-300.

<sup>18</sup> al-Nafrāwī, Aḥmad b. Ghunaym b. Sālim. *al-Fawākih al-Dawānī 'alā Risālah Abī Zayd al-Qayrawānī* (Beirut: al-Maktabah al-'Aṣriyyah, 2005), 1:300.

Al-Rajrājī claims that the original ruling is established by consensus (*ijmāʿ*). He identifies the effective cause to be the woman's deficiency as a human being, making her undeserving of "a position of honour and a lofty station." He is therefore asserting that both political leadership and prayer leadership share in being lofty positions that require someone who is "complete in religion and essence." He cites the ḥadīth about women being "deficient in intellect and religion"<sup>19</sup> as proof for the effective cause, not as proof for the ruling itself, so he avoids the error of using the same text as evidence for the original and derived rulings.<sup>20</sup> Al-Māziri seems to be doing the same thing, since he first rejects a positive comparison between a woman and a slave, because "the deficiency of being female is more certain and more severe," and then paraphrases the ḥadīth.

It is unclear how this deficiency is first applied as the effective cause to prohibit women from political office, in order to be shown to exist in prayer in a comparable manner. It does not help that the ḥadīth, used to establish the effective cause, is very specific about what the deficiencies are. Al-Rajrājī tries to resolve this problem by using the ḥadīth to argue for a woman's deficiency in some vague, general sense. Then he invokes the "principle that everyone who is characterized by deficiency and lowliness has no share in positions of high status". However, this makes it a *qiyās* on a general precept or axiom, and not on another legal ruling (which supports Abd-Allah's assertion that this is the way Maliki *qiyās* actually operates).

Otherwise, al-Rajrājī needs to show how matters as different as prayer and political leadership can be compared, so that the woman's deficiency to assume political authority can be transferred to prayer leadership where the responsibilities are quite different both in nature and scale. Indeed, the famed Mālikī legal theorist al-Qarāfī (d. 684/1285) flatly rejects the

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<sup>19</sup> The full text is as follows: God's Messenger said: "O assembly of women! Give charity and seek forgiveness often, for I have seen that you form the majority of the denizens of Hell." A well-spoken and perceptive woman from among them asked: "Why, O Messenger of God, why are we the majority of the denizens of Hell?" He replied: "You curse frequently and are ungrateful to your husbands. And I have not seen from among those who are deficient in intellect and religion anyone so capable as you are of overwhelming a sensible man." She then asked: "O Messenger of God, what is the deficiency in intellect and religion?" He said, 'As for the deficiency in intellect, the testimony of two women equals the testimony of one man. This, then, is the deficiency in intellect. She spends many a night without offering prayers, and she abstains from fasts during Ramaḍān. This, then, is the deficiency in religion.'" In *Ṣaḥīḥ al-Bukhārī*, it is related from Abū Sa'īd al-Khudrī (304, 1462, 1951, and 2658). In *Ṣaḥīḥ Muslim*, it is narrated from 'Abd Allah b. 'Umar (79) and Abū Hurayrah (80).

<sup>20</sup> The legal theorist al-Āmidī (d. 631/1233) writes: "The evidence indicating the ruling of the original case must not also indicate the ruling in the new case. Otherwise, there is no point in designating one of them as the original case and the other one as the new case, or the other way around." Abū al-Ḥasan 'Alī b. Abī al-Āmidī, *al-Iḥkām fī Uṣūl al-Aḥkām*. Edited by Ibrāhīm al-'Ajūz (Beirut: Dār al-Kutub al-'Ilmiyyah, no date), 1:199.

possibility of *qiyās* between political leadership and prayer in his magnum opus on legal theory, *Nafā'is al-Uṣūl*, where he writes:<sup>21</sup>

What does prayer have to do with political leadership? Indeed, there are heavy conditions imposed on political leadership that are not imposed on prayer leadership, and it is a matter of consensus (*ijmā'*) that *qiyās* is false whenever there are differences.

Nevertheless, centuries later al-Nafrāwī invites the comparison again. Writing in *al-Fawākih al-Dawānī*, he says: "This is the case even if men are absent, since leadership in prayer is a position of honour in religion and in the rites of the Muslims." Al-Nafrāwī goes further than al-Rajrājī, because he asserts that a woman is unworthy of the honour of religious leadership for a congregation of women where no other rationale, like temptation or the presence of someone "worthier", could be cited to divest her of such an honour. In al-Nafrāwī's argument, her unworthiness is not relative to that of a man, but an assessment of her absolute human value. This is the assumption enabling the *qiyās*.

## 2. Comparing Speaking in Prayer to Leading Prayer

The Shāfi'ī jurist al-Māwardī (d. 450/1058) presents this analogy in *al-Ḥāwī al-Kabīr*.<sup>22</sup> The original case is the prohibition of speaking for women who notice the imām making a mistake in prayer. They are supposed to clap instead of saying "Glory be to God" as men are told to do. The effective cause he identifies for the original ruling is the temptation women are presumed to cause with their voices. He argues that the woman is a shameful being, and the reason why clapping is prescribed for her, is to avoid her voice tempting men. The new ruling that he deduces from this analogy is to prohibit women from leading prayer.

This analogy presents a number of difficulties from a legal theory standpoint. The first of these regards the original case. In Shāfi'ī law, as al-Māwardī states elsewhere in *al-Ḥāwī al-Kabīr*, it is permissible for women to say "Glory be to God" instead of clapping, just like it is permissible for men to clap. It does not nullify their prayers and does not even require a prostration of forgetfulness.<sup>23</sup> It is just preferable for women

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<sup>21</sup> Aḥmad b. Idrīs Shihāb al-Dīn al-Qarāfi, *Nafā'is al-Uṣūl fī Sharḥ al-Maḥṣūl*, edited by Muḥammad 'Abd al-Qādir 'Aṭā (Beirut: Dār al-Kutub al-'Ilmiyyah, 2000), 3:441.

<sup>22</sup> Abū al-Ḥasan 'Alī b. Muḥammad al-Māwardī, *al-Ḥāwī al-Kabīr*, edited by 'Abd Allah Muḥammad Najīb Awwāmah (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 2009), 2:309-10.

<sup>23</sup> al-Māwardī, *al-Ḥāwī al-Kabīr*, 2:164. He also says after enumerating the various ways in which a woman's prayer is different from a man's prayer: "If she violates these forms and follows what is for men, she is doing wrong, but her prayer is valid. As for what nullifies the

to clap instead. The logic behind this is given by al-Shirāzī (d. 476/1083) in *al-Muhadhdhab* where he explains that both acts are prescribed when the imām makes a mistake, so both fall under what is commanded in that circumstance.<sup>24</sup> Therefore, saying “Glory be to God” is not even disliked (*makrūh*) for a woman; it is merely less preferred than clapping. Since the original ruling is one of permissibility, *qiyās* cannot be used to derive a ruling of prohibition. *Qiyās* must extend the same ruling from the original case to the new case. However, al-Māwardī seems to be saying that identical rulings are operating in both cases when he asserts: “The same applies to following her in prayer.”

Turning to the effective cause, al-Māwardī identifies it as the woman being shameful in her entirety. This is problematic for a couple of reasons. First, it is not the Shāfi‘ī position that a woman in her entirety, including her voice, is shameful. Elsewhere in *al-Ḥāwī al-Kabīr*, al-Māwardī defends the Shāfi‘ī position that even the woman’s face and hands are not shameful, and thus can be shown, both in prayer<sup>25</sup> and in the presence of men.<sup>26</sup> He clearly states that the woman’s maximum shameful area (*al-‘awrah al-kubrā*) is what must be concealed in prayer and in the presence of unrelated men, and this maximum area is the body apart from the hands and face.<sup>27</sup>

Moreover, the successful application of this juristic analogy would result in contradicting two other rulings in Shāfi‘ī law. The first is that it is permissible for women to lead other women in prayer.<sup>28</sup> There is nothing in the *ḥadīth* to indicate that the ruling of clapping instead of speaking applies only to women praying in congregation with men. The ruling is general for all prayers, whether men are present or not.<sup>29</sup> Consequently, if speaking is prohibited for all prayers and this ruling is carried over to prayer leadership, it follows logically that it would be prohibited for women to lead women in prayers as well. It would be a formal error to assert that the original ruling is general for all prayers and then argue that since the effective cause is the woman’s voice being shameful, the analogy only applies to women leading men in mixed congregations. This would violate

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prayer or requires a prostration of forgetfulness, they are the same for men and women, with no difference between them in any of these matters.” *al-Ḥāwī al-Kabīr*, 2:163.

<sup>24</sup> See al-Nawawī, Abū Zakariyyā Yahyā b. Sharaf. *al-Majmū‘ Sharḥ al-Muhadhdhab*, edited by ‘Adil Aḥmad ‘Abd al-Mawjūd *et al.* Beirut: Dār al-Kutub al-‘Ilmiyyah, 2002, 5:130-2.

<sup>25</sup> al-Māwardī, *al-Ḥāwī al-Kabīr*, 2:167. See also ‘Abd al-Malik al-Juwaynī, *Nihāyat al-Maṭlab fī Dirāyat al-Madhhab*, edited by ‘Abd al-‘Azīm Maḥmūd al-Dīb (Jeddah: Dār al-Minhāj, 2007), 2:190.

<sup>26</sup> al-Māwardī, *al-Ḥāwī al-Kabīr*, 11:39. See also al-Juwaynī, *Nihāyat al-Maṭlab*, 12:31.

<sup>27</sup> al-Māwardī, *al-Ḥāwī al-Kabīr*, 2:170.

<sup>28</sup> al-Māwardī, *al-Ḥāwī al-Kabīr*, 2:333.

<sup>29</sup> Aḥmad b. Ḥamzah al-Ramlī, *Nihāyat al-Muḥtāj fī Sharḥ al-Minhāj*, edited by Muḥammad ‘Alī Bayḍūn (Beirut: Dār al-Kutub al-‘Ilmiyyah, 2003), 2:48.



a condition of a valid analogy, which is that the effective cause must result in the same ruling in both cases. Here the original ruling applies to all prayers, whether men are present or not, but the effective cause that is identified can only prohibit women from leading men in prayer.

Even if it were to be granted that the original ruling only prohibits a woman to say “Glory be to God” when men are present,<sup>30</sup> and does not apply to congregations of women, it would still contradict another ruling in Shāfi‘ī law, which is that the woman imām’s prayer is valid while the prayers of the men who follow her are invalid.<sup>31</sup> Since the prohibition of saying “Glory be to God” is directed at the women in the original ruling, it must be directed at the women in the new ruling and require their prayers to be invalid, with the prayers of the followers being invalidated only secondarily. This is an unavoidable consequence of this analogy. It cannot invalidate the prayers of the male followers but not invalidate the prayer of the woman leading them.

All of these problems explain why this *qiyās* is not taken up by other Shāfi‘ī jurists. Interestingly, the crux of the argument is the shamefulness of women and the inevitable temptation they are expected to cause, even by just uttering the phrase “Glory be to God.” This argument, which is formally defective, and which contradicts numerous rulings in Shāfi‘ī law, could only appear compelling to those who already assume that the woman is a temptress by nature.

### **3. Comparing Women to the Insane**

The woman is compared to an insane person on the basis that neither can give the call to prayer. Consequently, since an insane person cannot lead the prayer, this ruling should apply to her as well. This *qiyās* is an analogy of resemblance (*qiyās al-shabah*) and it is first argued by Ibn Qudāmah (d. 620/1223) in *al-Mughnī*.<sup>32</sup> He is followed in this by all but one of the later Ḥanbalī works in the survey.

Ibn Qudāmah elaborates on the nature of the resemblance while discussing the call to prayer. He states that an insane person does not have the legal capacity to engage in acts of worship. He then says that a

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<sup>30</sup> This opinion is, in fact, attributed to the Shāfi‘ī scholar Badr al-Dīn al-Zarkashī (d. 794/1391) in *Nihāyat al-Muhtāj* 2:48.

<sup>31</sup> Muḥammad b. Idrīs al-Shāfi‘ī, *al-Umm*, edited by Ḥassān ‘Abd al-Mannān (Amman: Bayt al-Afkār al-Dawliyyah, no date), 118.

<sup>32</sup> ‘Abd Allah b. Aḥmad b. Muḥammad Ibn Qudāmah al-Maqdisī, *al-Mughnī Sharḥ Mukhtaṣar al-Khiraqī*, edited by ‘Abd Allah b. ‘Abd al-Muḥsin al-Turkī and ‘Abd al-Fattāh Muḥammad al-Ḥilū (Riyādh: Dār ‘Ālam al-Kutub, 1997), 3:32-4.

woman is not among those sanctioned (*laysat mimman yushra` lahu*) to give the call to prayer.<sup>33</sup> In this way she resembles an insane person with respect to the call for prayer. He does not give any reason at this point why the call to prayer is not sanctioned for women. There are, of course, many matters that are not sanctioned for the insane, including other aspects of worship, commercial dealings, being witnesses and contracting marriages. However, we do not find Ibn Qudāmah arguing that where a woman is also restricted in some of these matters, she is like an insane person so that other somewhat related rulings which are applied to an insane person can be applied to her as well. Why, then is he arguing this here?

The three later works that reiterate this *qiyās* in their discussions on prayer leadership provide little help to clarify this matter. When we turn to their discussions on giving the call to prayer, we find nothing resembling Ibn Qudāmah's discussion. Ibn Mufliḥ (d. 884/1479 AH) in *al-Mubdi`* gives reasons why a woman should not give the call to prayer, citing a ḥadīth to that effect and arguing that it entails her raising her voice, but he does not provide the comparison with the insane person or hint at any reason why her ruling of not giving the call for prayer should be compared to an insane person's.<sup>34</sup> Al-Bahūtī (d. 1051/1641) favours the view that the call for prayer is disliked for women if they do not raise their voices, and prohibited if they raise them in the presence of male non-relatives.<sup>35</sup> Al-Ruhaybānī (d. 1243/1827) also favours the ruling that it is disliked, but argues that this is because it is "the occupation of men, and therefore implies their imitating men."<sup>36</sup>

Despite their varying arguments and opinions on women calling to prayer, none of them brings up the idea advanced by Ibn Qudāmah that she resembles an insane person in not having the call to prayer sanctioned for her. Nevertheless, all three of them, while discussing prayer leadership, repeat Ibn Qudāmah's statement almost verbatim, that she should not lead prayer due to her resemblance to the insane man in this way. It seems that they are merely reiterating the *qiyās* argument of their predecessor without subscribing to the rationale behind it.

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<sup>33</sup> Ibn Qudāmah, *al-Mughnī*, 3:68.

<sup>34</sup> Ibrāhīm b. Muḥammad b. Mufliḥ, *al-Mubdi` Sharḥ al-Muqni`*, edited by Muḥammad Ḥasan Muḥammad Ḥasan Ibrāhīm al-Shāfi'ī (Beirut: Dār al-Kutub al-'Ilmiyyah, 1997), 1:274.

<sup>35</sup> Maṣṣūr b. Yūnus al-Bahūtī, *Kashshāf al-Qinā` 'an Matn al-Iqnā`*, edited by Muḥammad 'Adnān Yāsīn Darwīsh (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1999), 1:322.

<sup>36</sup> Muṣṭafā b. Sa'd al-Suyūṭī al-Ruhaybānī, *Maṭālib Ūlī al-Nuhā fī Sharḥ Ghāyat al-Muntahā*, edited by Abū Muḥammad al-Aṣyūṭī (Beirut: Dār al-Kutub al-'Ilmiyyah, 2009), 1:208.

It is interesting that al-Zarkashī (d. 772/1370) does not cite this *qiyās*,<sup>37</sup> although he is writing just a few years after Ibn Qudāmah. This might be due to his greater openness to the opinions of the earlier Ḥanbalī scholars who allowed women to lead men in certain voluntary prayers. Of course, accepting the *qiyās* of the woman on the insane man requires adopting Ibn Qudāmah's stance that a woman should never lead men under any circumstances. Indeed, Ibn Qudāmah introduces the *qiyās* specifically to achieve this purpose.

Yet, even for Ibn Qudāmah, this *qiyās* proves problematic. In a complete reversal, he rejects an almost identical analogy when discussing the question of women leading other women in prayer. He attributes to Mālik the argument that a woman cannot lead any prayer, because she cannot make the call for it. He then dismisses this argument by saying it is only disliked for women to make the call to prayer since it entails their raising their voices, and women are not meant to do that. He then brings another *qiyās* of resemblance as a counter-argument where he asserts that women actually resemble (sane) men because prayer is equally incumbent upon them, so likewise their all-female congregations are equally allowed. This is an effective way to refute a *qiyās* of resemblance, which depends on establishing a closer resemblance. Here, he is claiming that women resemble legally accountable men more than insane men with respect to prayer, consequently refuting the very *qiyās* he advocated only a few pages earlier in his book.

It is difficult to see how Ibn Qudāmah comes up with this strange argument. It is telling, however, how he can compare a woman with an insane person in a matter of religious devotion. Insanity is a severe deficiency that negates legal accountability.<sup>38</sup> This hints at a very negative view of women. Elsewhere in *al-Mughnī*, Ibn Qudāmah describes the four qualities necessary for "complete" legal capacity. A person must be "adult, sane, male, and free".<sup>39</sup> The opposite embodies a deficiency in legal capacity, to be juvenile, insane, female, and slave. The state of being female is grouped with the states of childhood, insanity, and being the property of others. It should be noted that this groups men with other privileged groups and women with other marginalised groups. The attitude that is explicitly stated in the context of legal capacity is implicit in this *qiyās* used to prohibit women from leading prayers.

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<sup>37</sup> Muḥammad b. 'Abd Allah al-Zarkashī. *Sharḥ al-Zarkashī 'alā Mukhtaṣar al-Khiraqī*, edited by 'Abd Allah b. 'Abd al-Raḥmān al-Jibrīn (Riyadh: Maktabat al-'Ubaykān, 1993), 2:95-6.

<sup>38</sup> Ibn Qudāmah, *al-Mughnī*, 2:50 and 7:263.

<sup>39</sup> Ibn Qudāmah, *al-Mughnī*, 14:12.

#### 4. An Opposing Argument: Comparing Women to Slaves

This analogy is allegedly the argument of Abū Thawr (d. 240/854), an early jurist who was famous for permitting women to lead men in prayer.<sup>40</sup> Al-Māwardī describes the analogy to debunk it. The argument is as follows: The slave is more deficient than a woman, and since a slave can lead free men in prayer, a woman can do so as well. Al-Māwardī claims that Abū Thawr believed the slave to be more deficient because a slave can be killed in retribution for murdering a free woman whereas a free woman cannot be killed in retribution for murdering a slave. The Mālikī jurist, al-Māziri, also identifies this *qiyās* as an argument for those who permit women to lead men in prayer.<sup>41</sup>

It would be easy for al-Māwardī to refute Abū Thawr's argument by pointing out, as he does elsewhere in *al-Ḥāwī al-Kabīr*, that the ruling of compensation for killing a slave legally resembles other cases of property destruction as well as a crime against a person, and since the loss is mainly financial, the murderer pays the slave's market value to the owner but does not pay blood money to the slave's next of kin.<sup>42</sup> By contrast, in the event of a free victim, the victim's next of kin has a choice between having the murderer's life in retribution or receiving blood money, since the surviving family members' right to justice is not mainly financial in nature. This makes the difference in entitlement to retribution independent of the question of deficiency, since it has to do with the legal affect the murder has on the surviving claimants. Therefore, it cannot be used to argue that the slave is more deficient than the woman.

This would be a strong refutation, since it shows that the original case is fundamentally different from the new case, which is one of the most effective ways to falsify an analogy. However, neither al-Māwardī nor al-Māziri choose to argue along these lines. Instead, they take the comparatively weaker approach of suggesting ways in which a woman is more deficient than a slave. They give different reasons. Al-Māwardī says it is because the slave can become free whereas a woman will always be a woman, and also that a male slave does not cause temptation with his voice. Al-Māziri says that the woman is more deficient than a slave because she is attributed with deficiency in intellect and religion while a male slave is not. Both of their suggestions work by categorically privileging maleness over being female, to the extent that slavery does not

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<sup>40</sup> al-Māwardī, *al-Ḥāwī al-Kabīr*, 2:309-10.

<sup>41</sup> al-Māziri, *Sharḥ al-Talqīn*, 2:670-1.

<sup>42</sup> al-Māwardī, *al-Ḥāwī al-Kabīr*, 16:95.

entail a comparable deficiency. This is how they resolve the tension between competing hierarchies: one of gender and one of class.

It is significant that they do not have to appeal to deficiency at all, since they could easily debunk Abū Thawr's argument by saying that a slave is property and the destruction of property is different than the need for justice felt by a free victim's kinsfolk, so Abū Thawr's comparison between women and slaves is inexact. However, they find it more compelling to come up with ways in which a woman is more deficient than a slave. Since they find this approach more convincing, they betray the underlying assumptions operating behind their legal reasoning.

Another thing to note is the subtle role that deficiency plays in the argument attributed to Abū Thawr. Even though Abū Thawr is trying to prove that a woman can lead men in prayers, the argument does not assert her completeness, but depends upon comparing her deficiency relative to that of a slave. This does not necessarily mean that Abū Thawr thought women were deficient, especially since we do not have the argument from him directly, but it does mean that deficiency was the issue of contention for why women could or could not lead men in prayer.

## **5. Gender Bias**

In all of the works surveyed, three instances of juristic analogy (*qiyās*) are cited as arguments to prohibit women from leading men in prayer. Only one argument from *qiyās* is cited consistently by the jurists of its school, being the Ḥanbalī *qiyās* of comparing women to the insane, introduced by Ibn Qudāmah in *al-Mughnī*. Nevertheless, it seems for the later scholars who take it up to be nothing more than a reiteration of Ibn Qudāmah's words, since they do not affirm the rationale he gives for it. As observed in the works surveyed, Ḥanbalī books have a higher tendency than works of other schools for repeating their predecessors' arguments verbatim. What is most telling in this case is how Ibn Qudāmah himself seems to dismiss this *qiyās* elsewhere in *al-Mughnī*.

The second is a comparison between women leading prayer and their saying, "Glory be to God," while praying in congregation behind an erring imām. This was suggested by the early Shāfi'ī jurist, al-Māwardī, but not mentioned by later jurists of that school, probably due to the problems inherent in its analogical method (like discrepancies in the original case and the effective cause) as well as the fact that it clashes with several other rulings in the Shāfi'ī school.

The third is suggested in two early Mālikī works and alluded to by one much later one, this being the *qiyās* attempted by al-Māzirī and al-Rajrājī to prohibit women from leading prayer based on their not being qualified for political leadership. However, the analogy only makes sense when understood in the context of the “principle that everyone who is characterized by deficiency and lowliness has no share in positions of high status,” which is explicitly stated in this context by al-Rajrājī. This supports the observation made by Umar Abd-Allah that most cases of Mālikī *qiyās* are, in actual practice, based on general precepts instead of specific established rulings. It must be observed that the precept identified here relies on a negative value judgement about women.

A fourth instance of *qiyās* encountered in the surveyed texts supports women leading men in prayer. However, it does not represent the legal reasoning of any of the jurists in the survey but is merely brought up to debunk it. The two jurists who attempt to refute this analogy, which compares women to slaves, could easily have done so by pointing out that since slaves are property, the compensation for killing a slave is unrelated to the compensation for killing a free woman. However, they do not take advantage of this. Instead, they prefer to suggest ways in which women are more deficient than slaves.

All four instances of *qiyās* exhibit structural shortcomings and can only operate against the backdrop of presupposed negative attitudes about women and their perceived worth which contribute to the very structure of the jurists’ arguments, including the woman as temptress, women’s perceived deficiency, and the presence of gender hierarchies. This is true even for the *qiyās* which argues that women can lead men in prayer. Since the argument is that a slave’s deficiency is “greater” than a woman’s, it assumes the woman is deficient. It affirms a gender hierarchy and a class hierarchy but resolves the tension between the two in favour of the woman over the slave.

## Conclusion

The methodology this paper showcases is a legal-hermeneutical analysis that identifies gender biases by how they function within legal reasoning. Complex legal arguments operate with assumptions that are indispensable for their cohesion, and when these are brought to the fore by a close reading, they provide a picture of the cultural context within which the jurists work and the set of influences that affect their judgements. Consequently, the legal texts are read with a fresh eye, not to critique the laws and their supporting evidence, but rather to draw from the texts the underlying beliefs and motivations of their authors. Also,

since the values and biases are drawn from the arguments in the texts for which they are functionally indispensable, it reduces the researcher's risk of falling into the error of anachronism, which happens when we project our own values on the texts of another culture and time.

This methodology has been applied in this paper to instances of juristic analogy (*qiyās*). It could be applied with equal success to any other source of law, like the use of Qur'anic verses, the citation of ḥadīth, or claims of consensus (*ijmā'*). It can likewise be applied to any legal ruling or set of rulings where the influence of a particular bias is suspected. In any case, a large survey of legal texts is required to provide a robust and representative sample of arguments. Also, an understanding of the thought processes, hermeneutical approaches, and legal mechanisms that the jurists purport to use is indispensable for this kind of analysis. In the case of Islamic Law, this is provided by works in the separate genre of legal theory (*usūl al-fiqh*). Though this discipline was developed after the initial codification of the laws, it preceded the corpus of written legal literature and determined how legal arguments were framed, presented, and understood.

Research of this kind is not normative. It does not seek to place a value judgement on the rulings, nor is it concerned with determining whether those rulings are "right" or "wrong." Likewise, in evaluating the methodological approaches employed by the jurists in their legal texts as well as those outlined in their works of juristic theory, the purpose is not to determine the inherent soundness or strength of those methods, but rather how those methods interacted with other influences to bring about their effects.

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