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# French Influence on a 20th Century *'Ālim*: 'Allāl al-Fāsī and His Ideas Toward Legal Reform in Morocco

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# ABSTRACT


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| Author: | Sara J. Mogilski |
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| Department: | Institute of Islamic Studies, McGill University |
| Degree: | Master of Arts |


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This thesis is a study of a 20th Century Moroccan *'ālim,* 'Allāl al-Fāsī, and his ideas toward legal reform. The aim of this study is to understand the influence French colonialism had on a traditional scholar and nationalist. This thesis attempts to unearth the way al-Fāsī assimilated and advocated many French notions of how a legal system ought to operate.

It begins with a discussion of the French colonial discourse surrounding the Moroccan legal system and their subsequent reforms. This is followed by a biographical account of al-Fāsī, discussing his role as both nationalist and *'ālim.* Subsequently, an examination will be offered on al-Fāsī's ideology as an *'ālim* seeking to reconcile the traditional Islamic legal system with modern concepts of justice. Its final section will attempt to show the contradictions in al-Fāsī as a nationalist and as an *'ālim.* This will help to understand how French legal discourse became incorporated into al-Fāsī's thought.

# RÉSUMÉ


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| Auteur: | Sara J. Mogilski |
| Titre: | L'influence de la France sur l'*'ālim* du 20ième siècle : 'Allāl al-Fāsī et ses idées relatives à la réforme légale au Maroc |
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Cette thèse est une étude du *'ālim* Marocain du 20ième siècle 'Allāl al-Fāsī et de ces idées concernant la réforme légale. L'objet de cette étude est de comprendre l'influence de la colonisation française sur les penseurs traditionnels ainsi que les nationalistes. Cette thèse essaye de déterrer de la façon par laquelle al-Fāsī a assimilé et a défendu les notions française du fonctionnement du système légal.

Cela commence par une discussion du discours colonial français entourant le système légal marocain et de ces réformes subséquentes. Ceci sera suivie d'une revue de la biographie d'al-Fāsī, discutant de sont rôle en tant que nationaliste et d'*ālim*. Subséquemment, un examen de l'idéologie d'al-Fāsī qui, en tant qu'un *'ālim* qui a essayé de concilier le système légal islamique traditionnel avec les concepts modernes de la justice. La dernière section essayera de montrer les contradictions d'al-Fāsī en tant que nationaliste et en tant que *'ālim*. Il sera plus facile de comprendre comment le discours légal français est incorporé dans la pensée d'al-Fāsī.

## ACKNOWLEDGEMENTS

I would like to take this opportunity to thank the individuals who have assisted in making this thesis complete. First and foremost, I would like to express my sincerest appreciation to the faculty, staff, and students at the Institute of Islamic Studies for their assistance and encouragement during the course of my studies at McGill University. I would especially like to thank Professor Wael Hallaq for bestowing his insight and wisdom upon me and challenging me as a scholar; my thesis supervisor, Professor Laila Parsons, to whom I owe a great deal of gratitude for her suggestions and support, and also for her clemency in ensuring the completion of this thesis in a timely manner; and the staff at the Islamic Studies Library to whom I am very grateful, especially Wayne St. Thomas, for making my stay here more enjoyable through his comic relief, and Salwa Ferahian, whose encouragement, understanding, and kindness has been indispensable and helped me every step of the way. I would also like to thank Bchira Dhouib and Sami Oueslati for the time they have devoted toward helping me. I am truly appreciative for it.

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I owe a great deal of gratitude to Saif Ullah Johar, who has been entirely understanding and patient with me. I thank him for the joy and sweetness he has brought to my life. Finally, I would like to thank my family including my brother, Jon Mogilski, and especially my parents, Carol and Edward Mogilski, to whom I am forever indebted for their guidance, encouragement, patience, and support. I am very lucky to have such a loving and generous family.

## A Technical Note on Transliteration

The system of transliteration adhered to throughout this study is that of the Library on Congress as described in *ALA-LC Romanization Tables: Transliteration Schemes for Non-Roman Script* (Washington: Cataloging Distribution Service, Library of Congress, 1991). Arabic terms that appear in this study have been italicized.

The short vowels *fatḥa, kasra,* and *ḍamma* are respectively translated as "a," "i," and "u." The long vowels, *alif* and *alif maqsūra, yā* and *wāw* are respectively rendered as "ā," "ī," and "ū." The *hamza* at the end of a word is represented by an apostrophe ( ' ). The *tā' marbūta* is transliterated as "a" in the pause form and "at" in construct form.

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|---|---|---|---|---|---|---|---|---|
| b | = | ب | z | = | ز | f | = | ف |
| t | = | ت | s | = | س | q | = | ق |
| th | = | ث | sh | = | ش | k | = | ك |
| j | = | ج | ṣ | = | ص | l | = | ل |
| ḥ | = | ح | ḍ | = | ض | m | = | م |
| kh | = | خ | ṭ | = | ط | n | = | ن |
| d | = | د | ẓ | = | ظ | h | = | ه |
| dh | = | ذ | ' | = | ع | w | = | و |
| r | = | ر | gh | = | غ | y | = | ي |

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# Introduction

## *Historical Background*

From 1930 until his death in 1974, 'Allāl al-Fāsī stood at the forefront of Moroccan nationalism, politics, and reforms. A large majority of scholars have written on al-Fāsī's contributions to the nationalist movement as well as his contributions in the making of postcolonial Morocco.[1] He is remembered primarily for his resistance to French colonialism and also for his ability to mobilize Moroccan society against the French by employing a discourse rooted in the Salafīya movement.[2] While al-Fāsī is considered by many as the 'father of Moroccan nationalism' due to his role as a politician and social reformer, there is relatively little written about al-Fāsī as an *'ālim* who sought to initiate legal reforms in light of European hegemony which set a new precedent throughout the colonized world in the 20th century.[3] The case of al-Fāsī as a legal reformer is of particular interest because he was among the last group of scholars to have entered the traditional Islamic educational system before its 'collapse,' which had reached

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[1] An example of such scholars include Amnon Cohen, "'Allāl al-Fāsī: His Ideas and His Contribution Towards Morocco's Independence," *Asian and African Studies* 3, (1967): 121-164, Attilio Gaudio, *Allal el Fassi ou L'Histoire de L'Istiqlal* (Paris: Éditions Alain Moreau, 1972), Douglas Ashford, *Political Change in Morocco* (Princeton: Princeton University Press, 1961), Mohamed el Alami, *M. Allal el Fassi: Patriarche du Nationalisme Marocain* (Casablanca: Dar el Kitab, 1975) and Leon Blair *Western Window in the Arab World* (Austin: University of Texas Press, 1970).

[2] Ian Shaw, author of *Islam and the Political, Economic, and Social Thought of Allāl al-Fāsī*, suggests the reason scholars have focused on al-Fāsī's political activities rather than his ideological contribution is because he wrote in Arabic rather than French. While this may in part be true, I would argue that another reason for the unbalanced scholarship on al-Fāsī is because his political contribution is much clearer than his ideological contribution, as will be discussed later in the thesis. Ian Shaw, *Islam and the Political, Economic, and Social Thought of Allāl al-Fāsī*, Master's Thesis, McGill University, 1984.

[3] While this is true for sources written in English and French, I do however make a reservation about this comment, as I am not familiar with the Arabic sources on al-Fāsī.

its zenith by 1930.[4] Additionally, his ideas were formulated and consolidated during the colonial period and exemplify the borrowing of colonial discourse into his own legal discourse. The primary concern, then, is to place al-Fāsī within a colonial historical framework where the exchange of ideas between colonizer and colonized had a significant impact on shaping his own views when answering the question of how to reconcile Islamic law with the challenges of modernity. The situation faced by al-Fāsī is comparable to that of other scholars like Muḥammad 'Abduh, Muḥammad Rashīd Riḍā', and Jamāl al-Dīn al-Afghanī.

Historians writing on the 20th century Maghrib, and particularly on Morocco, have produced volumes on the French colonial project, including its aims, its historical developments, the effects it had on colonized populations, and the reaction felt by individuals or groups who were objects of the colonial endeavor. Within this genre of literature, a large number of works have been published on al-Fāsī, giving considerable attention to his career as a nationalist and his participation in the Moroccan socio-political scene. Much of this work however is overshadowed by praises of al-Fāsī which have given an inaccurate, one-sided, and uncontested depiction of his character. I would like to suggest an alternative reading of al-Fāsī whereby he is not portrayed as the glorified national hero (as many scholars contend), but where his role as a Moroccan leader, and specifically as an *'ālim* is critically examined in light of the colonial context. More specifically, I would like to examine the way French colonialism shaped his

[4] By 'collapse,' Dale Eickelman means that by 1930, the traditional educational system in Morocco had a.) lacked the financial resources needed to sustain itself b.) lacked public confidence in its ability to produce competent scholars and c.) lost a great deal of its intellectual prestige as a result of the growth of European, more "modern" universities. Dale Eickelman, *Knowledge and Power in Morocco* (Princeton: Princeton University Press, 1985).

ideology as a nationalism and *'ālim,* and the way he appropriated many aspects of French legal culture into his own ideology when proposing legal reforms.

***Literature Review***

As the title suggests, Ian Shaw's Master's thesis entitled *Islam and the Political, Economic, and Social Thought of 'Allal al-Fasi* is important for understanding al-Fāsī's intellectualism. This work is not primarily concerned with his contribution to the Moroccan nationalist movement *per se*, but rather, it attempts to highlight the dynamic role al-Fāsī played in contemporary Moroccan history. The author focuses on the political theories that shaped al-Fāsī's thought, his views on capitalism and socialism, as well as his ideas as a social reformer, centering on his views on women's rights and the role of the *sharī'a* in modern legislation. The central argument of his thesis, that Islam was the driving force in all of al-Fāsī's intellectual endeavors, is not unconventional, however the work does attempt to challenge the current scholarship on al-Fāsī which essentially portrays him as a national leader, oftentimes quixotically glorifying him as *the* national hero in the independence movement. Shaw additionally tries to offer a presentation to a largely Western audience, unfamiliar with Islamic concepts, of the fundamental role religion played in Muslim political life. As he states in his introduction,

> In the present study, we intend to render accessible the ideological work of this thinker in a concise and coherent manner to Western students of Moroccan history and political thought. It is our hypothesis that in every aspect of this nationalist's intellectual endeavors, Islam was the moving force. Moreover, unlike many other political figures in the Muslim world, al-Fasi had an excellent grasp of Islamic thought and openly disdained the manipulation of religion to gain the support of the masses. Despite its political consequences, al-Fasi condemned popular misconceptions and abuses practiced in the name of Islam, and sought to educate the Moroccan people in the spirit of a pristine Islam modeled on the teachings of the Qur'an, the hadiths, and the lives of the early Muslims. It was in this Islamic

> framework that al-Fasi as a nationalist politician and political ideologue sought to build a new Morocco.[5]

Shaw uses extremely valuable primary and secondary sources, which makes his study very thorough. Indeed, his thesis stands as one of the most authoritative works on al-Fāsī precisely due to the wide range of resources used throughout the study.

While Shaw's thesis is useful in assessing al-Fāsī's ideology, it lacks critical analysis of the context in which al-Fāsī's ideology was formed. Shaw accepts many of al-Fāsī's ideas at face value without taking into consideration the interaction between colonizer and colonized and the exchange of ideas that influenced al-Fāsī's thought. Furthermore Shaw, like other scholars, does not discuss al-Fāsī's ideology as a *legal reformer* and the framework he worked within to modernize Moroccan society by instigating legal changes. This is a major gap in not just Shaw's scholarship, but in nearly all scholarship on al-Fāsī. It is in this vein that the current study attempts to fill a gap, which will lead to a better understanding of the subject.

Attilio Gaudio's book *Allal El Fassi ou L'histoire de L'Istiqlal* traces the role of al-Fāsī within the Moroccan nationalist movement and its developments through time by examining his thought. While this book does offer substantial historical background on al-Fāsī, it is a prime example of the scholarly portrayal of al-Fāsī as a glorified national hero. In reference to his work, Shaw claims that the book does not meet North American scholastic standards for two reasons. Shaw states that Gaudio fails to use objective criteria to portray the role al-Fāsī

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[5] Ian Shaw, *Islam and the Political, Economic, and Social Thought,* 1-2.

had in Moroccan politics: "Gaudio appears intent on building al-Fāsī into mythical proportions. This hero-worship approach renders Gaudio's work at best suspect."[6] Such work that depicts al-Fāsī as a glorified national hero not only creates a distorted image of him, but fails to critically question the role al-Fāsī had in Moroccan politics as well as colonial resistance. Another shortcoming of Gaudio's work, according to Shaw, relates to his methodological approach. Gaudio fails to offer a critical analysis of the thought of al-Fāsī. He merely provides an abundance of excerpts from al-Fāsī's writings without sufficiently discussing the relevance of such statements. In effect, this insufficiently familiarizes the reader with al-Fāsī's thought. The book does however offer a good introduction to al-Fāsī's thought and the appendices, many of which are letters, statements and charters written in part or entirely by al-Fāsī, are valuable resources.

Much of the same criticisms apply to Mohamed El Alami's book *Allal El Fassi: Partiache de Nationalisme Marocain* (1972). Unlike Gaudio's book, which is an attempt to describe al-Fāsī's thought, El Alami offers a biographical survey on al-Fāsī's political career. This is yet another work that exalts al-Fāsī, for as the title indicates, the author claims al-Fāsī to be the "father of Moroccan nationalism." In the same vein, El Alami praises al-Fāsī, stating,

> The President, Allal El Fassi is closely connected to about half a century of Moroccan history. From 1925 until today, his name does not cease to be evoked in all great events that have marked our nation during this period. This remarkable personality, in our contemporary history, has played very important roles, and he

[6] *ibid.*, 7.

> is still called upon today at the age of 62, to assume important ideological responsibilities in national, Arab and Islamic life.[7]

El Alami later adds,

> Allal El Fassi, who comes from the people, attained leadership not by riches, authority, or ability, but with the grace of his lively spirit, his remarkable gifts, his self-sacrifice, his perseverance, his incessant fight and the incessant efforts he provided, to make the nationalist ideas that he espoused since his tender childhood triumph. This strengthened his bond with the homeland and the citizens who he thinks of everywhere, always, in all circumstances.[8]

The book offers an important overview of al-Fāsī's political history, however it does not offer a critical analysis of his career.

Another valuable source for the study of al-Fāsī, and significantly more objective than the latter two books, is Amnon Cohen's article "'Allāl al-Fāsī: His Ideas and His Contribution towards Morocco's Independence." This article gives a short but rather detailed introduction to al-Fāsī's life and his ideas in relation to Islam, nationalism, North Africa and the Middle East, the monarchy, democracy, and economic and social problems. The importance of the work stems from the author's ability to critically assess al-Fāsī in light of the historical context. The article additionally discusses al-Fāsī's dynamic character, not entirely focusing on his nationalist or political career, but discussing all the facets of his personality. One setback however is that the scope of the study is limited to the year of independence (1956). While this is the author's intention, it would help to show al-Fāsī's behavior in the post-colonial period to give a more complete account of his life.

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[7] Mohamed El Alami, *Allal El Fassi*, 11. This excerpt was translated from French by the author of this thesis. In fact, all translations of French sources into English which appear in this thesis have been provided by the author.
[8] *ibid.*, 180.

An insightful article dealing with the French scholarly endeavor, or the colonization of the Islamic legal system, is Léon Buskens' article, "Islamic Commentaries and French Codes." Buskens discusses the way French scholars studied Islamic law in Morocco as part of a greater colonial mission to control the native population. He also discusses the French criticisms on the legal system and the reforms they sought to initiate, as well the codification of personal status laws following independence. Scholarship such as Buskens' is extremely useful for understanding how colonialism affected legal "knowledge" in Morocco. One criticism of Buskens' work, however, is that he does not adequately assess how codification altered the Islamic legal system as a whole. This is yet another gap which this thesis attempts to fill.

Another author who has contributed immensely toward the study of Islamic law, especially Islamic law and modernity is Wael B. Hallaq. Hallaq's work, especially *A History of Islamic Legal Theories* is resourceful for understanding legal theory and its evolution through time. This work also offers an interesting discussion of the way contemporary scholars, including al-Fāsī, have attempted to reconcile traditional Islamic legal theory with the demands of modernity. His articles "Can the Shari'a be Restored?" and "Was the Gate of Ijtihad Closed?" are additionally insightful with regards to legal developments through time.

***Thesis Objectives***

The aim of this thesis is to better understand al-Fāsī's vision for legal reforms as well as the actual legal reforms he participated in, in light of the

colonial and postcolonial environments, which surrounded him throughout his entire life. At the crux of this investigation is the assimilation of French cultural and legal assumptions into Moroccan legal reforms. While al-Fāsī stood firmly in his opposition to colonialism and the encroaching European hegemony, it seems that he was, to a great extent, informed by colonial discourse on how a legal system ought to operate. This discourse shaped the direction of legal reforms in the postcolonial context and seriously altered the traditional legal system. The aim of this thesis is to shed light on the dichotomy of al-Fāsī as a nationalist whose aim was to emancipate Morocco from French rule and cultural domination, and al-Fāsī as an *'ālim* who sustained many of the legal reforms introduced by the French. In doing so, al-Fāsī perpetuated elements of colonial legal discourse into his own ideology for legal reform.

***Methodology***

In addition to many of the secondary sources already mentioned, this study will look at a number of works by 'Allāl al-Fāsī in an attempt to understand his position on French colonialism in Moroccan and more specifically, his views on the French initiated legal reforms from 1912-1956 as well as European cultural hegemony. The works that will be examined include *Défense de la Loi Islamique* (1977), and *The Independence Movements in Arab North Africa* (1970). *Défense de la Loi Islamique* is central to the thesis as al-Fāsī argues that the *sharī'a* does in fact have a place in a modern society and attempts to locate that place. Al-Fāsī additionally discusses a number of issues such as colonial legislation, codification of the law, and changes in the traditional Islamic educational system – all of

which significantly altered the traditional legal system and set a new precedent for Moroccan law. Articles written by al-Fāsī will also be used to assess his thought. These include "Mission of the Islamic 'Ulama," "The Mediterranean Civilization," and "Comment Nous Motiver Scientifique dans le Cadre de la Charia?"

***Outline***

This thesis will be composed of two main sections. The first section will discuss French colonialism and French initiated reforms in Morocco. The second section will discuss the life and thought of al-Fāsī, as they related to colonialism and the influence colonialism had on his ideas for legal reform.

The first chapter will form the backbone of the thesis. The primary concern of this chapter is to offer a discussion on French colonial discourse surrounding the Moroccan legal system and the subsequent reforms initiated by the French.[9] I will first discuss what I term the French scholarly endeavor, the process by which colonial officials sought to understand and control the Moroccan legal system by translating and editing select Moroccan legal texts that they perceived to represent *the law* of Morocco. Out of this study evolved an entirely new genre of Moroccan legal education based largely on European legal norms. This invasion of epistemological space which accompanied the colonial endeavor affected the way Moroccans studied and understood their own law. The work of

[9] For future reference, I would like to state that when I refer to the Moroccan legal system, I am working under the assumption that Islamic law is a major component that this legal system is built upon. As expressed in the Moroccan constitution, Morocco claims to be an Islamic state. The King bears the title *Āmīr al-Mu'minīn,* Commander of the Faithful, and Defender of the Faith, which testifies to the safeguarded place of religion in society. Article 106 of the Constitution states, "Neither the State system of monarchy nor the prescriptions related to the religion of Islam may be subject to a constitutional revision."

Dale Eickelman, who discusses the changes in the traditional Moroccan legal educational system throughout the 20th century and the work of Léon Buskens, who writes on the French methods for studying Moroccan law as a means to control and order Moroccan society, will be especially useful in this discussion. In addition to discussing the legal educational reforms, I will also discuss a number of reforms initiated by the French such as the introduction of separate legislative systems for Arabs and Berbers, an appellate court system, and the gradual introduction of colonial officials into Moroccan courts. All of these reforms were an expression of a highly centralized government (another feature of colonization) and drastically changed the face of the Moroccan legal system.

Chronologically structured, the second chapter deals with the life of 'Allāl al-Fāsī. Because biographical information on al-Fāsī is available in a number of secondary sources, this chapter will serve only as a reference for the remaining chapters. The chapter will offer a short biography of al-Fāsī, discussing al-Fāsī's role as a nationalist, however it will focus more on his career as an *'ālim*, because this is the aspect of his life which is of concern to the thesis. By studying his role as *'ālim,* we can better understand the way the Moroccan legal system was reformed. This will be useful because it will place him within a specific context and will help us to understand his role as an *'ālim* who participated in the colonial government, the resistance movement against colonial domination, as well as in the making of independent Morocco.

Based on al-Fāsī's writings, especially his book *Défense de la Loi Islamique*, the third chapter will discuss the legal reforms suggested by him as well as the legal reforms

he partook in. For example, al-Fāsī found it crucial to reinterpret the existing body of Islamic jurisprudence to meet the needs of a modern nation. His methods to achieve this goal and his vision of how the Moroccan legal system ought to take shape, either by implementing legal codes or by changing the structure of the court system, will be discussed. Taking into consideration his vehemence for rejecting European culture, the crucial question of why he adopted and maintained certain colonial reforms will additionally be addressed. This will help in understanding the influence French colonialism had on al-Fāsī's ideas toward legal reform.

The concluding chapter of the thesis will analyze al-Fāsī's reforms as they relate to the reforms instigated by the French. This chapter is crucial to tie the entire thesis together largely because it critically analyzes a number of reforms he either proposed or participated in, for example, the codification of personal status laws, which takes on a distinctly European form, the methodology he employed for introducing legal reforms, as well as his suggestions for legal educational reforms. The primary concern of this chapter, then, is to discuss how al-Fāsī sought to create an environment that would allow Islamic law to be sustained, but employed, consciously or not, European methods to do so. In doing so, the contradiction in his role as a nationalist and *'ālim* shall become apparent. I argue that the career of al-Fāsī represents a major shift in the Islamic legal system, wherein the legal authority of the *'ulamā'* was displaced by the power of the state and also wherein the assimilation of European legal culture into Islamic legal systems was legitimized by the need for modernizing society. The way this shift affected the traditional Islamic legal system as a whole will also be dealt with.

# Chapter One
## Living Colonial Legacy: Codification of Personal Status Laws in Morocco

Throughout the 20th century, a number of Islamic countries initiated legal reforms by adopting European legal codes or by putting existing Islamic law into codified form. This was done partly out of the desire to modernize society, and partly as a response to colonial experiences, which challenged the traditional legal system. The codification of the *sharī'a* represents a major transition in Islamic law and is loaded with implications of how Islamic law changed throughout the 20th century as a result of colonialism. In order to fully understand the implications of codification and how it represents a major change for the entire Islamic legal system, it is necessary to explore the context in which codification took place. This chapter will look at the process by which codification of personal status laws came to be conceived of in Morocco. More specifically, this chapter will consider the colonial discourse surrounding Moroccan law, the reforms – both legal and administrative – initiated by the French, as well as the assimilation of colonial discourse into the thought of Moroccan legal reformers. This chapter will show how the creation of the Personal Status Code, known as the *Mudawwana,* is by and large a colonial legacy made feasible by the foundations laid out by the French during their 44 year-long reign in Morocco. The reforms initiated by the French had a great impact on Moroccan reformers in the post-colonial context.

### *Authority in Islamic Society*

Perhaps one of the greatest differences between law as it is conceived today in the Muslim world and law as it was practiced in the pre-colonial period

relates to the issue of who held the reigns of legal power. Whereas in pre-colonial times, the *sharī'a* had the capacity to set limits on government, today parliaments are setting bounds on the s*harī'a*.[10] Codified law can be seen, then, as an expression of the transition of the *sharī'a* from jurists' law to statutory law, as well as the transfer of legislative powers from the *'ulamā'* (legal scholars) to the State. The rise of highly centralized governments exacerbated the loss of power felt by the *'ulamā'* in controlling legal matters, thereby cutting the *sharī'a* off from its traditional locus in society. Ultimately, this resulted in the fall of the *'ulamā'* as an essential regulatory body in Islamic society. To be more precise, the changes which have transpired throughout the past two centuries have resulted in a significant loss of power for the *'ulamā'* – so much so that they have become subordinate and submissive to the State.[11] To understand the changing relationship between law, the ruler, and the *fuqahā'* (jurists) we shall first consider the foundations and objectives of the Islamic legal system as it was before colonization.

*Foundations of Islamic Law*

By the beginning of the third century of Islam, the major foundations of the Islamic legal system had been laid out, allowing it to function as a self-sufficient system, developed and run by the *'ulamā'*.[12] Prior to the 19th century, the legal system ran as a completely separate entity from the governing body. In

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[10] Aharon Layish., "The Transformation of the *Sharī'a* from Jurists' Law to Statutory Law in the Contemporary Muslim World." *Die Welt des Islams* 44, no. 1 (2004): 98.

[11] To read more about how the *'ulamā'* has been affected by and reacted to colonialism, see Muhammad Qasim Zaman, *The Ulama in Contemporary Islam* (Princeton: Princeton University Press, 2002).

[12] Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005), 122.

fact, the state had restricted legal ability due to the fact that the only legislative power the state exercised was in appointing *qāḍī*s to local courts and in promulgating administrative decrees which worked in conjunction with, but not derived from Islamic law. While the king or ruler had the right to enact administrative decrees, these laws could never run contrary to the *sharī'a* . Historically, this was the only avenue for rulers to make legal changes. All other legal power was vested in the *fuqahā'*. As Lawrence Rosen notes, "The state was seen not as an instrument for the application of law, nor were the courts, either through religious doctrine or a concept of the social good, envisioned as vehicles for economic redistribution or the construction of a particular political order."[13] The distinction of the legal system and the political system as two independent entities is markedly different from contemporary legal systems, which are tightly controlled by the State. Colonial influence, as we shall soon see, severely jeopardized this relationship.

*Law and Polity in Pre-colonial Morocco*

Until the middle of the 20th century Morocco was not unified under a centralized government. The larger towns and cities were governed by a centralized government, the *makhzan,* headed by the *sulṭān* and his entourage. In the predominately Berber rural areas, known as the *bilād al-sibā*, tribal leaders governed everyday affairs. Within the bounds of the *makhzan,* the *sharī'a* was applied while in rural areas Berber customary law, *'urf*, prevailed. There were occasions in the *bilād al-sibā*, however, when *qāḍīs* were consulted in legal

[13] Lawrence Rosen, *The Anthropology of Justice* (Cambridge: Cambridge University Press, 1989), 61.

matters. Islamic law therefore was not entirely neglected in tribal areas. [14] This distinction will become important in the following pages.

***Legal Functions***

To understand the evolution of Islamic law in Morocco during the 20th century, one must first consider how laws were derived and how the legal system functioned prior to colonization. According to Léon Buskens, "Law-finding was a highly skilled act of interpretation, of knowing texts by heart and knowing how to argue."[15] Elements of the law could be found in a number of texts including the Qur'ān, *hadīth*, and legal manuals, which were memorized at an early age in a scholar's life and from which all further study emanated. These texts were considered authoritative, however they existed as a point of reference for jurists.[16] Judges were informed on legal precedent not only from manuals, but from *'amal*, judicial practice. *'Amal,* as a source of law was used to modify and adapt the *sharī'a* to the practical needs of society. It also allowed for customary practices to become streamlined into the *sharī'a.*[17] Therefore, the legal system was able to

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[14] Eric Audet, *The Moroccan Islamic Legal Reforms, 1912-1925* (Master's Thesis, McGill University, 1991), 37.

[15] Léon Buskens, "Islamic Commentaries and French Codes," Chapter in *The Politics of Ethnographic Reading and Writing,* edited by Henk Driessen (Saarbrücken: Verlag breitenback Publishers, 1993), 73.

[16] A number of these legal manuals such as Khalīl bin Isḥāq's *Al-Mukhtasar*, Ibn Abī Zayd al-Qayrawānī's *al-Risāla*, Sijilmāsī's *al-'Amal al-Muṭlaq* were used by judges and many of them were part of the curriculum of Islamic schools, for memorization at an early age. In fact, these texts were deliberately written in rhymed verse to assist the scholar in the memorizing task. These manuals, however did not necessarily simplify the law, they were an abridgement of Mālikī *fiqh* including commentaries and glosses. I should also add that these texts differ from legal codes, as they are not necessarily binding on the judge, but serve to summarize the *sharī'a.* Moreover, legal manuals were a product of legal scholarship developed within the Islamic legal tradition, as opposed to being sponsored by the state. For more information see Brinkley Messick, *The Calligraphic State* (Berkeley: University of California Press, 1993), 3.

[17] Henry Toledano, *Judicial Practice and Family Law in Morocco* (New York: Columbia University Press, 1981), 18-20.

adapt to societal changes. The precolonial legal system then can be considered most similar to a case-law system where legal precedents have a regulatory effect.

To fully understand the nature of the Islamic legal system prior to its modernization, the way it functioned within society must be considered. Islamic law first and foremost is a legal system that strives to enact the law of God, as dictated in the Qur'ān and *sunna.* The *sharī'a* then is a legal system whose primary concern is to encourage society to function righteously in an effort to maintain social harmony. As Rosen states, "The aim of the qadi is to put people back in the position of being able to negotiate their own permissible relationships without predetermining just what the outcome of those negotiations ought to be."[18] Judges used their discretion to gauge a litigant's socially expected behavior and based his decisions on a person's social position within society. In doing so, Islamic law took into account an individual's case and strove to keep people connected with their community. For this reason justice was, to a large extent, a community affair.[19]

The way in which justice operates in the West is considerably different from the way the Islamic legal system traditionally operated. In terms of legal knowledge, comprehension of the *sharī'a* is limited to a particular body of scholars who have learned much of their knowledge through oral transmission . Historically, these scholars were responsible for interpreting, making, and executing the law. In Western society legal precedents are set by a state

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[18] Rosen, *The Anthropology of Justice*, 17.
[19] Lawrence Rosen, "Equity and Discrimination in a Modern Islamic Legal System," *Law & Society Review* 15, no. 2 (1980-81): 217; Paul Rabinow, *Symbolic Domination* (Chicago: University of Chicago Press, 1975), 50.

legislature - a politico-legal body that is totally alien to Islamic legal theory. Due to separation of powers in Western political systems, courts are prevented from creating legal rules and are informed on legal precedent by legal codes.[20] Because in Western legal systems only the State can create laws, the concept of *'amal* is rejected because it lacks legal basis. This differs considerably from the Moroccan legal system, where judicial practice sets the legal precedent.

Western legal standards additionally dictate that law should be 'known' – written in a clear manner so that it is available to a wide audience.[21] Colonists brought this attitude with them to colonies overseas by urging local governments to "Bring forth your code; let us see it and make it known to our subjects."[22] In time, the majority of colonies made this request a reality through the creation of legal codes. The use of codes is important in Western law because they ensure that the law is carried out in a systematic, uniform, and often times, predictable manner. These characteristics are frequently used as a way to measure how just a legal system is.

The Western legal system formed the basis of French cultural assumptions of how a legal system ought to operate. These assumptions became part of the colonial discourse surrounding Moroccan law and are telling of the direction legal reforms took in Morocco under colonial rule. Western legal assumptions, moreover, were assimilated into the Moroccan legal system in the postcolonial context.

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[20] Herbet J. Liebesny, *The Law of the Near and Middle East* (Albany: State University of New York Press, 1975), 61-62.
[21] Messick, *The Calligraphic State,* 55.
[22] Niyazi Berkes, *Developments of Secularism in Turkey* (Montréal: McGill University Press, 1964), cited in Messick, *The Calligraphic State,* 54.

## *Colonial Morocco*

### *The Nature of a Protectorate*

In order to understand how colonialism functioned in Morocco, it is important to consider the role France was to play in Morocco. This role was expressed in the Treaty of Fās, which officiated the Protectorate regime. The Treaty of Fās, enacted on March 30, 1912 by Eugène Regnault, a French representative, and the Sulṭān 'Abd al-Ḥafīz, was signed under the pretext that Morocco would be a *protectorate* and not a colony of France.[23] This afforded Morocco its sovereignty, while giving France the freedom to make use of their military and economic power to both protect the Sulṭān from foreign invasion and to make the necessary changes that would allow Morocco to merge into the modern world. This relationship, then, was intended to be a sort of tutelage built on a paternal relationship where the colonizing power guided the weaker power and weaned it until it reached a level of self-sufficiency. This would, in theory, allow Morocco to progress politically, economically and socially. Furthermore, the protectorate system allowed Morocco to maintain a part of its sovereignty by keeping all preexisting institutions intact. Describing his vision of a protectorate, the first Resident-General of Morocco, Marshall Lyautey, wrote, "The design of a Protectorate is that a country keeps its institutions, its government and its administration the same, with its own bodies, under the simple control of a European power...what dominates and characterizes this design is the formula of

[23] Mark I. Cohen and Lorna Hahn, *Morocco: Old Land, New Nation* (New York: Frederick A. Praeger, Publishers, 1966), 21-22.

*supervision*, opposed to the formula of direct administration."[24] While this was the original intention of the Protectorate, over time the French mission in Morocco looked less like tutelage and more similar to a directly ruled colony. The nature of the Protectorate, by and large, served to guarantee the advancement of France's own interests, especially economically, in North Africa.[25] This was accomplished by using pre-existing governmental structures as a tool to assist with conquering Morocco. While the Protectorate was in theory designed to safeguard Moroccan institutions from being overpowered by French control, in reality the French had drained these institutions of their power.

***Colonial Discourse and Legal Change***

In an attempt to gain a stronghold over Morocco, it was necessary for the French to order and control Moroccan society. This was done by creating a highly centralized government that controlled essentially all levels of public life. The process of directing colonial affairs in Morocco began with a survey of pre-colonial life, especially in the field of law. The French claimed the objective of this project was to protect *'le maroc disparu'*, the Morocco that was, prior to the Protectorate. While the French claimed this would allow them to preserve and even 'enhance the positive features of pre-Protectorate Morocco', what seems to have been the actual case was that by studying pre-colonial society, the French would learn how to manipulate the system to serve their needs without dismantling the already existing structures and without inciting a negative reaction

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[24] Lyautey, Pierre, *Lyautey L'Africain: Textes et Lettres du Maréchal Lyautey, 1912 – 1913* (Paris: Librairie Plon, 1953), 171. Cited in Robin Leonard Bidwell, *Morocco Under Colonial Rule: French Administration of Tribal Areas, 1912 –1 925,* (London: Frank Cass, 1973), 16.
[25] Jamil M. Abun-Nasr, *A History of the Maghrib* (Cambridge: Cambridge University Press, 1971), 361.

from Moroccans.[26] This is reflected in the way French colonial officials studied Islamic law and in the changes they introduced to the legal system.

To control the Moroccan legal system, the French sponsored a number of scholars to study how the legal system operated.[27] Primarily this took shape by French scholars identifying the sources of law. These scholars tended to study Islamic law on their own terms based on their own cultural assumptions of what shape they believed a legal system ought to take. Therefore, scholars dedicated most of their academic career to the study of written texts, and not the oral transmission of knowledge, which was the primary method of acquiring legal knowledge.[28] Because much of legal knowledge was transmitted orally, this resulted in a large gap in French scholarship. French scholars found the *sharī'a* obscure and difficult to work with and sought to simplify and clarify it. Perhaps this was due to the fact that they were informed by their own legal tradition, which placed emphasis on codified law, which is presented in an orderly and concise fashion.[29] As part of their scholarly endeavor, French scholars began not by

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[26] Dale Eickelman, "Islam and the Impact of the French Colonial System in Morocco," *Humaniora Islamica* II, (1974): 222.

[27] Louis Milliot, Jacques Berque, Octave Pesle, Maurice Borrmans, Léon Bercher, and Georges Surdon were a few of the leading French scholars of Islamic law in North Africa during the colonial period.

[28] Buskens, "Islamic Commentaries and French Codes," 76.

[29]The act of "ordering" society was characteristic of both French and British colonialism. In Morocco, as Janet Abu-Lughod details, the construction of new cities, inhabited by Europeans, (especially French entrepreneurs and civil servants) closely resembled a European city. These cities were built beside the "old city," which was inhabited largely by natives. Effectively, this served as a "social and physical barrier" for native and European populations. This allowed colonial officials to distance themselves from the colonized, preventing them from integrating into native culture, while maintaining some proximity so that native affairs could be observed. The main objective of building European cities alongside native cities was twofold; first, by creating their own space, the French avoided directly changing Moroccan lifestyle. This also allowed Europeans to live in an environment that closely resembled their own. In this vein, they claimed to have "respect for their [Moroccan] cultural integrity." At the same time, the establishment of new cities, which were architecturally more grandiose and "dominant" than the old cities, gave the impression of an established hierarchy of power, whereby Europeans dominated Moroccans. A

studying the curriculum of local Islamic universities or the practice of the courts, but by studying some of the legal manuals that were *part* of the curriculum.[30] As the French understood, these legal manuals represented *the law* of Morocco, when they were really used as a point of departure for further developments in Islamic law. One of the biggest shortcomings of this field of study was the failure of French scholars to understand how legal manuals were actually used to solve legal problems by decontextualizing their functional role within the Moroccan legal system.[31] Speaking of the way legal manuals were used as a source of law throughout Islamic history, Qasim Zaman states,

> Medieval works of law were 'open texts,' the very 'internal discursive construction' of which required constant interpretation and commentary. The discursive form of the commentary was, in fact, one of the principal means (the other was the fatwa) through which the law was not only elaborated but also expanded and modified to meet the exigencies of changing times. Commentaries allowed scholars to preserve the identity and authority of their school of law, their legal tradition, while simultaneously providing them with the means to make sometimes important adjustments in that tradition.[32]

The flexibility of these texts in responding to changing times, or the ability for interpretations of these text to be evolutionary, was one characteristic of the Moroccan legal system the French failed to comprehend. This was especially true considering that the oldest of these manuals dated back to the 10th century. For

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reordering of space, similar to that which was witnessed in Morocco was accomplished in Egypt by the British. In what Timothy Mitchell describes as a process of "enframing," the British rebuilt entire villages to give the impression of an "ordered society," which was accomplished by "dividing up and containing" village inhabitants. The process of enframing provided the opportunity for natives to be observed. Much like the Moroccan case, the new cities built by the British gave the impression of European economic and commercial power within Egypt. By ordering Egyptian society, the British were able to establish their authority over Egyptians, granting them political power. For a more detailed account of each case see, Janet L. Abu-Lughod, *Rabat: Urban Apartheid in Morocco* (Princeton: Princeton University Press, 1980) and Timothy Mitchell, *Colonising Egypt* (Berkeley: University of California Press, 1988).

[30] For reference, there are two major Islamic universities in Morocco: Al-Qarawiyīn in Fās and Yūsufiya in Marrakash.

[31] Buskens, "Islamic Commentaries and French Codes," 82-83.

[32] Zaman, *The Ulama in Contemporary Islam,* 38.

this reason, the French criticized the Moroccan legal system for adhering to a law that was virtually unassailable and stagnate.[33] This contrasted with French law, which in their view, responded to the changing societal and economic conditions.[34] Despite the fact that Moroccan scholars relied on centuries old law books, the French began to translate and edit them.[35] This effort too was flawed as they failed to accurately understand the "subtleties, all the double meanings and ellipses" embedded in the language of the texts.[36] Out of this endeavor, the French introduced their own scholarly techniques and scientific knowledge, which reformers used as part of their own discourse in years to come. In effect, the French had decontextualized the use of the legal manuals in relation to the entire legal system and failed to study the entire curriculum of Islamic universities. It was these misconceptions, based on the ability for the French to reduce the Islamic legal system to something much simpler than it actually was, which became the target of legal reforms throughout the colonial period. Furthermore, these misconceptions had serious implications for many Moroccan scholars of Islamic law, including 'Allāl al-Fāsī as we shall see in the following pages.

Out of the initial study of translating and editing legal manuals developed major reforms in the legal educational system. Buskens highlights the way these reforms took shape. For example, handbooks and textbooks on Mālikī law for

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[33] Ibn Abī Zayd al-Qayrawānī's *al-Risāla* originated in the 10th century. Khalīl bin Isḥāq's *al-Mukhtasar* dates back to the 14th century.
[34] Messick, *The Calligraphic State,* 159.
[35] In an article by Léon Buskens, the process by which the French studied and created their own category of study, is discussed. He describes how the French study of Moroccan law centered on the translation of legal manuals from which an entire area of literature developed. For greater depth on this issue, refer to Buskens' chapter "Islamic Commentaries and French Codes," in *The Politics of Ethnographic Reading and Writing,* edited by Henk Driessen (Saarbrücken: Verlag breitenback Publishers, 1993).
[36] Messick, *The Calligraphic State,* 67.

'practical use' by students of Islamic law, lawyers, and military and civil servants, proliferated not just in Morocco, but throughout North Africa.[37] Furthermore, the French began to write monographs and articles on specific legal issues such as family law, real estate laws, agricultural contracts, charitable foundations, and legal methods.[38] Many of these articles appeared in newly circulated journals.[39] The presentation of Islamic law in such a way was quite revolutionary, opening the door for the study of Islamic law, however limited it may have been, to a wide audience in Morocco and in the metropole. Moreover, the French scholarly endeavor lead to a simplified, almost inflexible presentation of Islamic law, completely removed from the society in which it was practiced. This had significant effects on traditional legal education.

While an analysis of the decline in traditional Islamic education is beyond the scope of this paper, it is important to understand a part of what happened, in order to appreciate the effects the French scholarly endeavor had on Moroccan scholars of law. It is noted by Dale Eickelman that by 1930 the traditional Moroccan educational institutions had collapsed.[40] This was largely due to two factors. Firstly, as all traditional educational institutions were sustained by *awqāf* (charitable donations) revenues, and considering no major endowments had been made since the mid-19th century, the traditional educational system suffered immensely. Eickelman argues that this was largely a result of the "economic disruption that accompanied growing European intervention in Morocco" which

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[37] *ibid.*, 78.
[38] *ibid.*, 80.
[39] *Revue Marocaine de Droit* and *Archives Marocaines* are two examples of the journals the French began to circulate during the colonial period.
[40] Eickelman, *Knowledge and Power in Morocco*, 6.

consequently had a negative effect upon pious foundation revenues.[41] While traditional education suffered, the French school system, followed by the Free School movement expanded throughout the country in the 20th century. [42] This too had a negative effect on Islamic education. Sons of notables began to attend these school systems, rather than traditional institutions because they had a more modern curriculum that would make students more marketable in the workforce. In effect, these educational reforms lead to a decline in the competence of the *'ulamā'* as well as producing a limited the number of scholars adequately trained to maintain the traditional legal system. According to Buskens, the incompetency of the *'ulamā'* had become evident by the time of Morocco's independence from France, as he asserts that an overwhelmingly large majority of Moroccan lawyers had, by then, become incapable of even consulting classic *fiqh* works simply because they did not possess the language skills necessary to read the books.[43]

The study of Islamic law informed the French on how to orient their task of creating public order. It was through this scholarly endeavor that the French became familiar with the areas of law that were crucial to gaining a stronghold over Morocco so that they might better control the country. The handbooks and textbooks that circulated during the colonial period enabled colonial officials to

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[41] *ibid.*, 82.

[42] The Free School movement was initiated in the 1920's in a number of large cities throughout Morocco. Spearheaded by Salafī activists, these schools were completely independent from French control. Their curriculum covered traditional Islamic learning but incorporated modern subjects such as mathematics, science, and geography. One of the most important features of these schools was the implementation of Arabic as the language of instruction. By this time, the French had taken control over most the Morocco's schools and had restructured curriculums to meet the demands of French education. French had become the language of instruction. While the Free Schools were not nationalist *per se* they produced some of the most powerful nationalist leaders in later years. For more information on the Free School movement, see C. R. Pennell, *Morocco Since 1830: A History* (New York: New York University Press, 2000), 186.

[43] Buskens, "Islamic Commentaries and French Codes," 92.

quickly refer to parts of law that would either become integrated into or challenged by these officials. As a result of the decline of the traditional legal education system, an increasing number of Moroccan scholars were informed on Islamic law not from their own schools, but from the colonial discourse on Moroccan law.

*Controlling the System*

While the French did not have the authority to make actual changes to personal status laws, they did seek to exert a large degree of control over Moroccan institutions. This was accomplished in a number of ways. For example, all communication between the sulṭān and his appointed officials had to be channeled through the French. Governmental decrees were also subject to scrutiny by the Resident-General. The French additionally began to supervise the courts and its personnel by placing a French official in each court to oversee its functioning. This was done partly in response to the belief that the legal system was wrought with corruption, but more so, to control who was making and executing the law. Appointments of court personnel made by the sulṭān had to be approved by the Resident-General. Furthermore, starting in 1913, the French kept inventory and supervised all *waqf* revenues. These actions allowed the French to gain control over the legal system – a matter that had become imperative to guaranteeing French success in Morocco.[44]

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[44] Eickelman, *Knowledge and Power in Morocco*, 137; Herbert J. Liebesny, *The Government of French North Africa* (Philadelphia: University of Pennsylvania Press, 1943), 31; Audet, *The Moroccan Islamic Legal Reforms,* 39; Eickelman, "Islam and the Impact," 223. What is interesting is the process by which government officials determined the competence of an *'ālim* to serve in the court. Eickelman describes this in his book *Knowledge and Power in Morocco,* which details the story of one *'ālim* who was examined by the Moroccan minister of justice and the

The reorganization of the legal system is an example of one of the innovations introduced by the French. It was during the Protectorate period that appellate courts were instituted. The *sharī'a* courts were included in the appellate judicial system, which operated under the control of the Ministry of Justice.[45] By establishing a court of appeals, this would drive the Moroccan legal system to develop the notion of legal uniformity similar to legal systems in the West.[46] Implicit in the notion of uniform legal rules is the idea of specifically defined legal rules that can be applied to all litigants in an efficient, consistent and rational manner. The appellate court system however ran counter to classical Islamic legal tradition which posits that no court can be higher than another because "...such a hierarchy would imply that the highest court actually knew the truth when in fact no such claim for absolute judgment is properly supportable."[47] Despite falling outside the Islamic legal tradition, the imposition of the appellate court system was justified by the French because they felt it would allow them to exert a greater degree of control over the country. In effect this gave the court system a centrality and strength that it had never had before.[48]

The introduction of appellate *sharī'a* courts was only the beginning of changes initiated in the legal system during the colonial period. The plurality of court systems that flourished under the French significantly altered the face of the Moroccan justice system. In the final years of the Protectorate, there were five

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French delegate to the ministry, who tested his comprehension of law. It is interesting that a French delegate, with relatively little training in Islamic law, was able to render such a judgment.

[45] Rosen, *The Anthropology of Justice,* 63.

[46] Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 201.

[47] Rosen, *The Anthropology of Justice*, 63.

[48] Rabinow, *Symbolic Domination,* 48.

different legal systems operating in French-ruled Morocco. These included (1) the *sharī'a* courts, which dealt with religious justice and operated under the jurisdiction of the *qāḍī*, (2) the civil courts of the *makhzan*, which administered criminal and civil justice and operated under the jurisdiction of the *makhzan,* and its appointed *qā'id*s, local administrators, *pasha*s, and officers of the administration, (3) the mixed courts, which handled all cases involving non-Moroccans and were controlled by French colonial officials, (4) the Berber *jamā'a*s, customary courts, which applied customary law and operated under the authority of tribal leaders, and (5) the Jewish courts which were administered by Rabbis. Within all these court systems, the French exerted a degree of control by appointing officials to preside over the courts' functioning. This allowed them to supervise and make necessary changes that would assist in their colonial mission.

One of the most contested innovations introduced by the French was the Berber *ẓahīr* of 1930.[49] The Berber *zahīr* stipulated that the Berber population would be subjugated to customary law while the Arab population remained subject to Islamic law.[50] In doing so, the *ẓahīr* prohibited the sulṭān from exerting his authority over his Berber subjects. By promulgating this decree the French believed they were protecting the precolonial legal system of both the Berbers and

[49] It should be noted here that the process of distinguishing between Berbers and Arabs as separate communities had always been an integral part of the colonial mission. In fact, in September 1914 the French declared that Berber customary laws were to be honored as a legitimate legal source. While this guaranteed that Berber customs would be protected, it was not as extreme as the Berber *ẓahīr* of 1930, which stipulated that Berber customary law would be the sole source of law amongst the Berber population. The process for introducing the 1930 Berber *ẓahīr* may have began in 1915 when Resident-General Marshall Lyautey created the "Commission of Berber Studies" which was charged with the task of identifying tribes which were in the areas governed by customary law. Once this identification was made, judiciary *jamā'a*s were created, which would apply customary law within the region. Ahmed Ktiouet, *Allal El Fassi: Le Reformateur* (Rabart: Arrissala, 1996), 33.

[50] Lorna Hahn, *North Africa: Nationalism to Nationhood* (Washington, D. C.: Public Affairs Press, 1960), 66.

Arabs, however as Lorna Hahn argues, Moroccans had, in truth, never lived with such a distinction that *disallowed* the *sharī'a* from being resorted to by Berbers.[51]

'Allāl al-Fāsī himself argued that throughout the entire history of the Maghrib, there had never been a precedent for instituting Berber customary courts.[52] According to al-Fāsī, Islam has been an integral part of North African identity, serving as a cohesive force binding nearly all Moroccans together throughout history. The French however saw this as a "stumbling block" to effectively colonizing Morocco. Al-Fāsī considered the effects of the Berber *ẓahīr* to be so damaging that he believed it prevented the Berber population from obtaining religious education, making them ignorant of the tenets of their religion. This came as a result of Qur'anic schools and mosques which were closed down following the promulgation of the *ẓahīr*.[53] This event, as we will see shortly, was a driving force in al-Fāsī's nationalist career.

Furthermore, the Berber *ẓahīr* came to be seen as a divide and rule tactic that did not sit well with Moroccans – Berber and Arab alike. It additionally was seen as a means to facilitate the assimilation of the Berbers into French culture by using French language, politics, and the judiciary to manipulate Berber identity.

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[51] It has been noted by Hahn (p. 66-69) and Pennell (p. 159 & 212) that the Berber *ẓahīr* was implemented as a way of de-Islamicizing the Berbers, who the French believed could be easily incorporated into European economic structures and society. In the de-Islamicizing process, the Berbers often fell victim to Christian Missionaries who hoped to convert Berbers to Christianity. France's intention here was to instigate disunity among Moroccans however their efforts were vain. Shortly after the enactment of the Berber *zahīr,* the nationalist movement gained momentum and in fact united Arabs and Berbers against the French.

[52] 'Allal al-Fāsī, *The Independence Movements of Arab North Africa,* translated by Hazem Zaki Nuseibeh, (New York: Octagon Books, 1970), 121.

[53] *ibid.,* 118-123. It should be mentioned here that 1930 was simultaneously the year 'Allal al-Fāsī's career as a nationalist gained momentum. The Berber *ẓahīr* not only provoked negative emotions in al-Fāsī, but it also guided his career as a nationalist and legal reformer. This is witnessed in many of his writings as well as his ideas for legal reform. This will be discussed in greater depth in forthcoming chapters.

While the Berber *ẓahīr* fell under the pretext of protecting *le maroc disparu* it also gave the French the opportunity to directly control Berber affairs. In theory, only Berber judges held authority in the courts however a French representative from the Public Ministry took part in the proceedings. In this way, as G. H. Bousquet claims, the French were able "exercise very great influence" over Berber justice.[54] This was a turning point in colonial history and Moroccan nationalism where, for the first time since 1912, Moroccans found their Islamic institutions directly assaulted. In response to this event, widespread national awareness and the nationalist movement gained considerable momentum instantaneously throughout the country. Objections to the *ẓahīr* were manifested through a number of events. Throughout the country and abroad, a series of demonstrations broke out, demanding that the *ẓahīr* be revoked. In fact, tension and violence had escalated to such a height that a state of emergency was declared in the country. More formally, a delegation of twenty-four men from various spheres drafted a memorandum demanding the abrogation of the *ẓahīr* as well as the unification of the judiciary for all Moroccans. The memorandum, however, was dismissed by French officials. [55]

The colonial period was a time of massive legal reforms. It was also a period when ideas and concepts of how a legal system should operate in relation to the governing body were exchanged between France and Morocco. French

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[54] G.H. Bousquet, "Islamic Law and Customary Law in French North Africa," *Journal of Comparative Legislation and International Law* 57, no.3 (1950): 61-62.

[55] Al-Fāsī, *The Independence Movements,* 121-123. For further evidence of Moroccan reaction to the Berber *ẓahīr* and how it spawned national awareness, see Hahn, *North Africa,* John P. Halstead, *Rebirth of a Nation: The Origins and Rise of Moroccan Nationalism, 1912-1944* (Cambridge: Harvard University Press, 1967), and Douglas E. Ashford, *Political Change in Morocco* (Princeton: Princeton University Press, 1961).

notions of legal uniformity, separation of powers, and the presentation of law in an orderly and concise fashion were some of the most important elements for justifying legal reform. The codification of the law, then, can be seen as a direct response to the changes enacted by the French.

***Codified Law***

To understand how the Islamic legal system changed as a result of codification, it is necessary to clarify what exactly it means to codify law, and the implicit or explicit objectives of codifying law. S. A. Bayitch, in his article "Codification in Modern Times," attempts to define the precise meaning of codified law.[56] He identifies a number of elements which make codified law distinct from other forms of law. In a very general sense a legal code is a book that can easily be consulted, without necessarily possessing any prior knowledge of that law. This relates to what Buskens calls 'reference culture,' where law becomes both widely accessible and easily understood.[57] Legal codes take a form similar to a reference book, which is systematically arranged and comprehensive, dealing with large areas of life in society. Furthermore, legal codes contain abstract and general rules which are intended to be applied to all individuals of a society in a uniform manner. In this sense, legal codes tend to be rather impersonal and rigid, as they do not take into account individual situations or cases.

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[56] For a very useful article on defining codification and all that is entailed in codification, see S. A. Bayitch's chapter entitled "Codification in Modern Times," in *Civil Law in the Muslim World,* edited by Athanassios N. Yiannopoulos, Kingsport, TN: Louisiana State University Press, 1965.
[57] Buskens, "Islamic Commentaries and French Codes," 70.

What is of particular interest to this study are the finer details of codification. Buskens states that codified law is characteristic of a highly centralized government.[58] The stipulations of legal codes are not produced by jurists or judges, but stem from the legislative, and sometimes executive branches of the government. Legal codes, then are legislative acts of sovereign parliaments. Codified law becomes a stabilizing force whereby legal changes must take place within the bounds of the state legislature, not within the courts themselves. Bayitch further adds, "The legislator may feel the need to defend the perennial integrity of his *opus magnum* against the unruly sources of change – the judiciary, the legal science, and the bar."[59] In the case of Morocco, the *'ulamā'* may additionally be considered a source of change. The codification of the *sharī'a*, then, represents a major transition where the *'ulamā'* is stripped of its legal authority which is then subsumed under the political body.

Another fact of particular interest especially in the context of Morocco is that codified law is distinctly different from customary law. Legal codes in fact served to eliminate customary law. Martin Shapiro, for example, posits that the Napoleonic laws were enacted as a result of the French Revolution which dethroned the French monarchy. The Napoleonic laws, displacing customary law, therefore, served to take away the legal status and privileges accorded to the French aristocracy, which were deeply entrenched in customary law.[60] While the independence movement in Morocco was not targeted against the monarchy, the codification of personal status laws similarly erased the customary law of the

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[58] *ibid.*, 70.
[59] Bayitch, "Codification in Modern Times," 187.
[60] Shapiro, *Courts*, 133.

Berber population as a legitimate source of law. In doing so, Berbers were subjugated to a new set of laws not alien to them, but rather untraditional.

***Nation-Building and Codified Law***

Codification of the law can be understood as being a direct result of nationalist movements and their constructs of what a sovereign nation ought to look like. Bayitch argues that codification is a symbol of sovereignty, becoming part of a political agenda in order to achieve specific ends. For example, many countries that drafted legal codes shortly following independence did so as an effort to achieve national unification.[61] In the case of Morocco, one of the top priorities for nationalist leaders was to erase the devastating effects of colonialism especially the disunity that arose as a consequence of the enactment of the Berber *ẓahīr* and the borders created by both the Spanish and French-administered zones. The *Mudawwana* of 1958, promulgated just two years following independence, placed all Moroccan citizens, Berber and Arab, urban and rural alike, under one legal system.

Layish takes the connection between nation-building and codified law a step further by asserting that codification is in fact *nationalization* of the *sharī'a.*[62] By this he means that in the process of constructing a nation, the *sharī'a* is manipulated in such a way to fit a particular image the state seeks to put forth. Particularly in the Middle East, legal codes have been used as a tool for reformers to modernize society. The Tunisian Code of Personal Law, for example, is

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[61] For example, Tunisia gained independence in 1956 and in the same year a personal status legal code emerged. Bayitch (p. 176) also gives the examples of Yugoslavia, Poland, Iraq, Israel, and Egypt - all of which drafted legal codes shortly after achieving independence.
[62] Layish, "The Transformation of the *Sharī'a,*" 96.

considered by scholars to be one of the "most radical documents of modern Islamic legislation."[63] In attempting to emerge as a modern country, the Tunisian Code forbade polygamy and made it a criminal offense. Furthermore, it stipulated that all divorces must be initiated through the judiciary. These laws resemble less of *sharī'a* norms and more of Western societal values. In this manner, Tunisia has used its code book to assert an image of a modern nation. While the Moroccan *Mudawwana* is considered conservative in nature, the production of a legal code has been seen as a step toward modernizing the legal system.

In light of these reforms, the following question must be asked: What is the relationship between codified law, the state, and the *'ulamā'* in the context of postcolonial Morocco? The impetus for codifying elements of the *sharī'a* came from a Royal Decree in 1957.[64] The preparations of the *Mudawwana* were completed by a government appointed Moroccan Judicial Commission.[65] The state assumed responsibility for initiating action toward the production of a legal code as well as selecting who became a member of the Moroccan Judicial Commission. This significantly ostracized the *'ulamā'*, whose role in the codification process was only to determine whether the laws of the *Mudawwana* were in line with the tenets of Mālikī law. Because the authority in making legal reforms was allocated to and by the state, the *Mudawwana* became an avenue for the state to ensure its hegemony over its citizens.

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[63] Joseph Schacht, "Problems of Modern Islamic Legislation," *Stvdia Islamica* XII (1960): 108.
[64] *ibid.*, 128.
[65] Charles F. Gallagher, "New Laws for Old: The Moroccan Code of Personal Status," *American Universities Field Staff Report Series, North Africa Series* V, no. 1 (1959): 5.

Codification significantly displaced the *'ulamā'* and its legal authority in Morocco. By enacting a legal code, the interpretive function of the *'ulamā'* has no longer been required in formulating legal decisions. Moreover, a legal code decreases the role of the *qāḍī* as a 'moral arbiter and standard setter' and increased the possibility for the state to have greater control over everyday affairs.[66] In doing so, the power of the *qāḍī* has been restricted.[67] Morocco has adopted the Western notion of separation of power introduced by the French, by distancing the *qāḍī* from being able to control and make the law. Codification represents an uprooting of the legal system and its traditional sources of authority.

One cannot claim that French colonialism was the sole cause for the creation of the *Mudawwana*, but they certainly laid down the foundations that made codification conceivable. The nature of colonial discourse surrounding Moroccan law and the way that discourse took shape had significant effects on how Moroccans came to view their own law as being outdated and in need of modernization. The circulation of law handbooks intended for quick reference and the introduction of law journals summarizing points of law became part of the 'reference culture,' which made law finding easily accessible. This 'reference culture' is reflected by the aim of codified law which strives to present the law in a uniform and concise manner, setting a new precedent in studying Islamic law by simplifying legal matters, however nuanced that simplification may have been by language and educational barriers of the emerging legal "experts." The decline of Mālikī legal literature was exacerbated by the influx of French and Free Schools,

[66] Rosen, *The Anthropology of Justice*, 63.
[67] Schacht, "Problems of Modern Islamic Legislation," 102-103.

challenging the traditional educational system and ultimately leading to a lack of competent and authoritative *'ulamā'*. The decline in the role of the *'ulamā'* in legal matters was worsened as the French organized a highly centralized government which controlled essentially all institutions throughout Morocco. In doing so, remnants of French colonialism continue to exist in the Moroccan legal system.

The codification of the law, by and large, can be considered a French colonial legacy. Moroccans perpetuated the reforms made by the French in the aftermath of colonialism. While the substance of the *Mudawwana* was Islamic in nature, it took a distinctly European form. Moreover, Moroccans maintained many of the institutions created by the French such as the appellate court system. And as the French sought to control the legal system by creating a highly centralized state, there was no attempt to re-allocate legal authority to the *'ulamā'* once the French withdrew. The codification of family law represents a major transition of the *sharī'a* from jurists' law to statutory law as well as the transfer of power for the *'ulamā'* to the state. As Sami Zubaida states,

> Codification as civil law practiced in civil courts denudes the *shari'a* of all its institutional religious garb, it is 'dis-embedded' and de-ritualized. The content in the new form is a different and entirely profane creature. Crucially, codified law in its modern form is the law of the state, and the judge is a functionary of the state who has to arrive at a judgment from the codes and procedures determined by it, rather than by autonomous judgment through reference to sacred sources and the principles derived from them by authoritative ancestors.[68]

As a result of codifying the *sharī'a,* the law in Morocco has become rather rigid and impersonal, for the sake of ensuring that legal decisions are administered in a uniform manner. An analysis of how criminal laws in Morocco have changed

[68] Sami Zubaida, *Law and Power in the Islamic World* (London: I.B. Tauris, 2003), 134.

during and following the colonial period would also be invaluable in assessing how the legal system as a whole has changed and how Western notions of justice have become assimilated into Moroccan law.[69] Additionally, a study on the personal status legal reforms taking place in contemporary Morocco would also inform us in more depth on how codification has affected Islamic law.

Taking into account what has just been argued with respect to the codification of Islamic law, especially in regards to the repercussions it has had on the relationship between law and society, and having established the context in which many of the legal reforms took place in Morocco during the early and mid-20th century under colonial rule, we can now discuss in more depth the subject of this thesis: 'Allāl al-Fāsī. By looking at the career and ideology of al-Fāsī, the individual who spearheaded the codification of the personal status laws in Morocco, we might be able to better understand a.) the process by which codification came to be conceived of b.) the influence French colonialism had on Moroccan scholars, and c.) the contradictions in al-Fāsī's career as both nationalist and *'ālim* within the reform movement. This will serve to better understand, in a general sense, legal reforms throughout the 20th century Islamic world.

[69] The Moroccan Penal Code was introduced in 1954. John P. Halstead, *Rebirth of a Nation: The Origins and Rise of Moroccan Nationalism, 1912-1944* (Cambridge: Harvard University Press, 1967), 52.

# Chapter Two
## 'Allāl al-Fāsī: A Biography

Whereas the previous chapter laid out some of the historical events witnessed during al-Fāsī's lifetime, this chapter will examine the life of al-Fāsī in an effort to place him within this context. By contextualizing al-Fāsī, we might be able to better understand how these historical events shaped his thought. Al-Fāsī lived through an important period of Moroccan history; he witnessed the colonial years and the challenges brought to Morocco as a result of French imperialism and the ensuing reforms, was a product of the declining traditional legal education system, and participated, along with other intellectuals, in the making of post-colonial Morocco. Without repeating the already extensive biographical material available on al-Fāsī, this chapter will discuss some of the key events of his life in order to better understand his role within the nationalist-independence movement as well as his contribution in the making of post-colonial Morocco. While inevitably much of this chapter will be dedicated to his role as a nationalist, particular emphasis will be placed on his role as an *'ālim* within and following the colonial period.[70]

According to Ian Shaw, Islam was the driving force behind all of al-Fāsī's motives and ideology.[71] This is true in so far as that Islam was an ideal which al-Fāsī sought to incorporate into his ideology. While Islam was central to his identity, his character and career can be defined by two interconnected elements:

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[70] In discussing al-Fāsī's life, the works of Amnon Cohen and Ian Shaw will be relied upon heavily throughout this chapter, as they offer the most concise yet comprehensive presentation of his life.
[71] What Shaw does not discuss, and what is crucial to understanding al-Fāsī is the impact French colonialism had on his career. This is a major drawback in Shaw's scholarship and this thesis attempts to fill in that gap.

his conviction as a Muslim and his identity as a Moroccan. These characteristics were a constant variable throughout al-Fāsī's life, which he was never willing to compromise. As a Muslim, al-Fāsī was deeply rooted in Muslim orthodoxy, drawing heavily from the ideology of the Salafīya Movement. His family and educational background, as well as his position as an *'ālim*, all served to reinforce this identity. This background formed the foundations of his character, which explains why he often times took a defensive stance against threats to his Islamic identity. As a Moroccan, al-Fāsī was conflicted by the challenges that emerged as a result of French colonialism and modernity and strove to reconcile these challenges with the evolving Moroccan national identity. In attempting to negotiate new terms for a more modern, yet authentically Islamic Morocco, al-Fāsī took measures as both an individual scholar and as part of a collective movement. In doing so, al-Fāsī renounced colonialism and neo-colonialism in all its forms. Perhaps it was due to his extreme stance against foreign political, economic and cultural dominance that he gained an international reputation as the "father of Moroccan nationalism,"[72] as well as the most 'redoubtable' nationalist leader,[73] and 'the most famous Islamic reformer and Moroccan nationalist of the 20th century.'[74] To understand how he was conceived as such, I shall examine the key events in al-Fāsī's life.

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[72] Gaudio, *Allal el Fassi ou L'histoire de L'Istiqlal.* It is interesting to remark here that Abdessalam Bennouna, who worked closely with al-Fāsī from the earlier years of the nationalist movement is also referred to as the "father of Moroccan nationalism." This is noted by Lorna Hahn in *North Africa: Nationalism to Nationhood* (Washington, D.C.: Public Affairs Press, 1960), 71.

[73] Rom Landau, *Moroccan Drama, 1900-1955* (San Francisco: American Academy of Asian Studies, 1956), 140

[74] Munson, *Religion and Power in Morocco,* 27.

***Family Background***

Born in January 1910, at the dawn of the colonial era, al-Fāsī was part of a family of intellects and merchants that enjoyed great influence in the thriving city of Fās.[75] His maternal side, the Ma'safirine family, was a famed mercantile family while his paternal side, a religious and literary family, enjoyed great prestige within both the Moroccan political scene as well as the educational scene at al-Qarawiyīn University in Fās. His family also earned a reputation within the ṣufi community as they had controlled one of the most influential ṣūfī *zāwīya*s (lodge) in Fās for centuries.[76] This social class, the Moroccan bourgeois, Shaw argues, was most seriously affected by colonialism and Westernization.[77] It was within this social class that the children would either be sent to Europe to pursue higher studies or attend the newly established French schools throughout the country. The Moroccan bourgeois was also most intimately involved with French colonialism as it was members of this class who tended to either collaborate with this mission or express opposition to it.

From his family's historical position in Morocco, it seemed only natural for al-Fāsī to follow in his forefathers' footsteps. Both al-Fāsī's grandfather and father were ambassadors and magistrates for the Moroccan government. His family was also heavily invested in al-Qarawiyīn University. 'Abd al-Wāḥid al-Fāsī, 'Allāl's father, served as an *'ālim* and secretary of the supervisory board at

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[75] It should, however, be noted here that there is a discrepancy in literature regarding the year of al-Fāsī's birth. Both Mohamed El Alami and Ian Shaw claim he was born in 1910 while Amnon Cohen states he was born in 1907. Laurence O. Mīchalak contends that he was born in 1906. Suffice it to say that his year of birth was around 1910.

[76] Henry Munson, Jr., *Religion and Power in Morocco* (New Haven: Yale University Press, 1993), 114.

[77] Shaw, *Islam and the Political, Economic, and Social Thought*, 14.

the University, and was the curator of the University's library. He was additionally the *'imām* at the Royal Mosque in Fās.[78] His father was also the *muftī* (jurisconsultant) of Fās.[79] Al-Fāsī's anti-colonial sentiment may have been influenced by his father, who stood firmly against French imperialism. 'Abd al-Wāḥid was, for example, among a group of intellects who founded the Nāṣirīya Free School in Fās. What was characteristic of this school was that it offered an alternative curriculum, placing emphasis on class instruction in Arabic rather than French, which was the language of instruction in the newly established French schools, which enjoyed popularity among many sons of notables.[80] The creation of alternative schools was in fact one of the earliest forms of resistance to French imperialism.

***The Early Years – Education to Exile***

Al-Fāsī matured as a scholar at a relatively young age and at an opportune time, entering the public sphere at approximately the same time as the birth of the Moroccan nationalist movement. In fact, al-Fāsī was among the first leaders of this movement. To a large extent, the seeds of nationalism were sowed by those who had been a product of traditional educational institutions. This will become clear shortly.

Al-Fāsī started his career as a scholar at the early age of five when he began to study the *Qur'ān.*[81] Two years later he attended the Nāṣirīya free school,

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[78] Gaudio, *Allal el Fassi ou L'histoire de L'Istiqlal*, 19.
[79] Laurence O. Mīchalak, "Muḥammad 'Allāl al-Fāsī" *The Oxford Encyclopedia of the Modern Islamic World,* edited by John L. Esposito, volume 2 (New York: Oxford University Press, 1995), 4.
[80] El Alami, *Allal El Fassi*, 32-33.
[81] *ibid.*, 30.

founded by his father and other intellects.[82] At the age of fourteen, al-Fāsī began his studies at al-Qarawiyīn University in Fās. His educational background within the traditional schooling system formed a foundation which oriented his career in later years.

It was within the folds of al-Qarawiyīn that al-Fāsī's thought developed and was crystallized at a young age.[83] In the late 1920s, this institution was one of the powerhouses for early organized nationalist activity. In fact, of the 41 leading Moroccan nationalists identified by John Halstead, nearly half had received some or all of their education at al-Qarawiyīn between 1921 and 1944.[84] It was also within this environment that al-Fāsī's nationalistic orientation was molded and his role as an activist took shape. This was evident considering the fact that by the age of twelve al-Fāsī felt the need to introduce reforms to Islam.[85] Three years later, he began to write poetry to serve as an outlet for expressing his thought. One of his earliest and well noted poems entitled "My people will know me" states, "How is it that after fifteen years I am still a child and playing, while my people, with their hands bound, cannot find the way to their desire?"[86] His poetry, a clear expression of his concern for the Moroccan nation, was only the initial phase of his career as an activist. The following year, at the age of sixteen, al-Fāsī joined a politico-religious discussion group with his fellow classmates at al-Qarawiyīn. The group came together to renounce one of al-Qarawiyīn's *faqīh*s

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[82] Shaw, *Islam and the Political, Economic, and Social Thought,* 16.
[83] *ibid.,* 3.
[84] Halstead, *Rebirth of a Nation,* 278-280.
[85] Cohen, "'Allāl al-Fāsī," 122.
[86] Cited in Nevill Barbour, "Nationalism in Morocco," *Middle Eastern Affairs* 4 (November, 1953): 362.

and lecturers, 'Abd al-Ḥayy al-Kittānī, a prominent ṣūfī known for his support of the French police. The group made allegations that al-Kittānī lacked intellectual rigor and taught 'subversive doctrines', which, according to al-Fāsī, resulted in the degradation of Islam.[87] Again in 1927, al-Fāsī, along with a number of his classmates founded the Students' Union, a clandestine group, which sought the purification of Islam and to devise a scheme for reforming the teaching methods of the University.[88] Perhaps the desire to reform the curriculum came as a result of the perceived inadequacy and outdated nature of the program – a belief that was propagated by the French and maintained by the younger and more Westernized Moroccan generation. In 1929, the Students' Union became 'The Moroccan League' after joining forces with Supporters of Truth, a student group in Rabāṭ, headed by Aḥmad Balafrij.[89]

Al-Fāsī's experience at al-Qarawiyīn not only gave him the training needed to serve as an *'ālim,* but it gave him the opportunity to build and expand a network of colleagues who held similar nationalistic sentiments. The founding of the underground reformist publication *Umm al-Banīn,* published by al-Fāsī from 1926-1930, allowed nationalists in major cities such as Fās, Marrakash, Rabāṭ, Tangiers, and Tetuan to network together and generate ideas regarding colonization and reforms, as well as initiating action toward the building of the

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[87] Landau, *Moroccan Drama,* 151.
[88] Cohen, "'Allāl al-Fāsī," 123.
[89] Blair, *Western Window in the Arab World,* 22. Aḥmad Balafrij, educated in French schools, is typically juxtaposed with al-Fāsī in literature. Balafrij was a contemporary of al-Fāsī, but he employed a much different discourse, grounded in a more pro-Western orientation. In fact, Lorna Hahn states, "Balafrej wished to adopt as much as possible from the West and desired to have close contacts with France." Lorna Hahn, *North Africa: Nationalism to Nationhood* (Washington, D.C.: Public Affairs Press, 1960). 72.

Moroccan nationalist movement.[90] In doing so, the early nationalists began to organize themselves and generate ideas of how to resist French colonialism as well as how to defend and define the Moroccan nation.

In 1930 al-Fāsī graduated from al-Qarawiyīn with a degree in jurisprudence. This degree awarded him the status of an *'ālim*.[91] Incidentally, this was the same year as the promulgation of the Berber *ẓahīr*. Perhaps it was a result of this event that al-Fāsī's career gained considerable momentum, for it was in reaction to this that al-Fāsī began a number of initiatives in opposition to French discriminatory action. In his book *The Independence Movements in Arab North Africa,* al-Fāsī describes the *ẓahīr* as 'barbaric' and sees it as an 'attempt at the annihilation of native people' by suppressing Islamic and Arab culture and replacing it with pre-Islamic Berber customs. At the same time, the Berber *zahīr* was seen as an attempt to 'Francicize' the Berbers, who were believed by the French, to be culturally more similar to Europeans than Arabs.[92] Theoretically, it was believed that the Berbers were easier to pacify and easier to incorporate into the French colonial mission. Al-Fāsī's vehemence for the *ẓahīr* led him to arouse public protest throughout Morocco. At the same time, other nationalist leaders, such as Aḥmad Balafrij and Muḥammad Ibn al-Hassān al-Wazzānī traveled to Paris to try to gain French support for its opposition.[93] In fact, the *ẓahīr* was considered so offensive that it was protested to by left wing activists in France, the *'ulamā'* at al-Azhar University in Cairo, Muslims in India, and as far as

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[90] Halstead, *Rebirth of a Nation,* 55.
[91] Shaw, *Islam and the Political, Economic, and Social Thought,* 17.
[92] 'Allāl al-Fāsī, *The Independence Movements in Arab North Africa*, translated by Hazem Zaki Nuseibeh, (New York: Octagon Books, 1970), 109 &118-121.
[93] Cohen, "*'Allāl al-Fāsī,*" 123.

Indonesia.[94] Despite the international outcry against the *ẓahīr*, it remained a driving force in French colonial policy for the remaining years of the Protectorate. In effect, the embitterment al-Fāsī felt toward the *ẓahīr* was to a large extent the focal point of his career, for it was this decree that he continually sought to dismantle, and in fact, this was one of the first actions taken after independence was granted. From this point, al-Fāsī's influence and activism developed to such an extent that he would become one of the most influential political leaders throughout the mid-20th century in Morocco.

In an effort to consolidate resistance against French colonialism and in response to the growing national awakening which emerged largely as a result of the Berber *ẓahīr* a number of young nationalist leaders established the *Kutlat al-'Amal al-Waṭanī*, the National Action Bloc. This group was founded primarily to criticize French colonial policies, especially the newly introduced policy that divided Berbers and Arabs, to raise awareness surrounding the detrimental consequences that could arise as a result of the *ẓahīr*, such as the de-Islamization of Berbers and consequent national disunity, and also to mobilize Moroccans into action by forming a collective movement, with the common goal of defending and improving Islamic and Moroccan identity – by both reinforcing the role of religion in community and private life, and by adapting Islamic principles to meet the needs of a modern society. The National Action Bloc was not founded as an independence movement but as a nationalist movement however it evolved into the former as French intervention intensified. Members of the group also advocated the importance of defending Muslim identity, educating fellow

[94] Al-Fāsī, *The Independence Movements,* 126.

Moroccans on Berber history and their important contributions to Islam, inciting a sense of national consciousness amongst the masses, and boycotting French goods.

While the seeds of nationalism were sown by the National Action Bloc, starting in 1933, al-Fāsī began to offer a course on the life of the Prophet Muḥammad at al-Qarawiyīn. In doing so, he was able to assert his own political ideals while teaching his fellow Moroccans how to apply lessons from the Prophet's life to approach modern challenges. This assisted him in demonstrating the importance of integrating an Islamic framework into reformist discourse in discussing the contemporary condition of the Moroccan nation.[95] He also gave public lectures where he freely expressed his disdain for imperial domination, especially as it was manifested in the Berber *ẓahīr*.[96] While his lectures allowed him to disseminate his own views, they also stirred a lot of emotion in those who attended, and were seen to be greatly successful in appealing to a widespread group of people. His lectures, however, did not go without criticism. Several ṣūfī shaikhs described al-Fāsī's lectures as comprising "an offence against hallowed dogmas of religious faith."[97] As Shaw states, "Often the contents of these lectures

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[95] The use of Islam was the focal point in al-Fāsī's ideology and is central to his identity as a nationalist leader and Islamic scholar. This will be discussed in more detail in the following chapter, which will examine al-Fāsī's thought.

[96] It should be noted here that al-Fāsī's *'ālim* degree was revoked on 14 December 1932 as a result of his opposition to the Berber *ẓahīr*. 'Abd al-'Azīz Bin Drīs and Ibrāhīm al-Kittānī also had their *'ālim* degrees invalidated for the same reason. Robert Rézette states that this came as a result of the refusal to sign a statement of remorse for instigating demonstrations against the *ẓahīr*. Robert Rézette, *Les Partis Politiques Marocains* (Paris: A. Colin, 1955), 33. Cited in Cohen, "*'Allāl al-Fāsī*", 126. While Cohen notes that from this day, al-Fāsī lacked authority as an *'ālim*, I would argue that in light of the extenuating circumstances surrounding this event, al-Fāsī should still be treated with the rank of an *'ālim*, as he fulfilled the requirements to become one. Furthermore, despite his degree being revoked, al-Fāsī continued to teach at al-Qarawiyīn as a volunteer professor.

[97] Cohen, "*'Allāl al-Fāsī,*" 126.

were thinly veiled criticism of the French administration."[98] It is not surprising then, that this voice of dissent came to be perceived as a threat to French political stability in Morocco.

By 10 May 1933, the Resident-General issued a *ẓahīr* forbidding three al-Qarawiyīni lecturers from publicly speaking; al-Fāsī was among the three named in the *ẓahīr*.[99] In theory, this action ran counter to the terms stipulated in the Treaty of Fās, which guaranteed the safeguarding of religious life. By restricting who could and could not speak within the University, which was considered a religious environment, it was felt by many that the French had overstepped the bounds of the Treaty. Restrictions set on al-Fāsī were justified by the French as they felt he had become one of the most vocal sources of dissent within the country. In fact, the French not only sought the cessation of al-Fāsī's lectures but they thought of detaining him as a way of silencing him. In light of the circulating rumors of his arrest, al-Fāsī fled to Paris, where he stayed for seven months, working to gain support for the Moroccan nationalist movement from North African students studying in France. He worked alongside his compatriot, Balafrij, on a weekly French-language magazine entitled *Al-Maghrib*.[100] By March 1934, al-Fāsī was allowed to return back to Morocco without the risk of arrest by the newly appointed Resident-General, Henri Ponsot, whose strategy for controlling dissent within the Protectorate was to co-opt those who posed a threat

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[98] Shaw, *Islam and the Political, Economic, and Social Thought,* 18.
[99] Cohen, "*'Allāl al-Fāsī,*" 126.
[100] *Al-Maghrib* was a weekly French-language magazine, published in Paris. The magazine was largely contributed to by Moroccan nationalists and French leftists. The initiative to start this magazine came from the early Moroccan nationalist party, *Kutlat al-'Amal al-Waṭanī,* the National Action Bloc, which was founded in 1932. For more details on the National Action Bloc, see 'Allāl al-Fāsī's book, *The Independence Movements in Arab North Africa.*

into the colonial mission. Under these terms, 'Abd al-Wāḥid al-Fāsī, 'Allāl's father, was appointed judge for the colonial government, while al-Fāsī was offered the position as the Minister of Justice. Al-Fāsī rejected this position however, claiming that he refused to work for a puppet government which merely fulfilled French orders.[101]

Douglas Ashford, a political historian of Morocco, claims that until 1933, the French had not used force to intervene in nationalist activities. The most drastic measure they had taken up till then, according to Ashford, was the banning of the National Action Bloc's magazine, *'Amal al-Sha'b,* in addition to prohibiting the circulation of a number of other nationalist newspapers and magazines, such as *Al-Maghrib, Al-Salām,* and *Al-Ḥayāh.*[102] Colonial policy however, began to take a more aggressive stance against opposition by 1934 when King Muḥammad V arrived in Fās to visit the city. According to Ashford, due to the 'spectacular ovation' which the King was received by, the French felt 'serious concern' and abruptly ended his trip, rerouting him back to Rabāṭ just before his scheduled visit to al-Qarawiyīn mosque. Riots broke out throughout the city and the nationalist press took to the issue. Shortly following this event, the *Moroccan Plan of Reforms* was prepared by ten members of the National Action Bloc, including al-Fāsī. This may be considered as the Moroccan nationalist movement's first major political initiative. The main presupposition of the Plan was that French officials had abrogated the Protectorate Treaty and deprived Morocco the right to self-

[101] El Alami, *Allal El Fassi,* 55; Cohen, "*'Allāl al-Fāsī,*" 127.
[102] *Al-Maghrib,* as previously noted, was a Moroccan nationalist magazine published in Paris. *Al-Salām* and *Al-Ḥayāh* were publications from the National Action Bloc's members in Northern Morocco, in the Spanish zone. Al-Fāsi, *The Independence Movements,* 135.

government. The plan called for a number of changes which would allow Morocco to maintain its sovereignty and guarantee that France would respect the terms of the Protectorate Treaty and embody its self-designated role as a 'protector' of all pre-colonial Moroccan institutions. Detailing the Plan, Ashford notes that it restated the stipulations of the Treaty of Fās and exemplified how the Treaty had been breached by the French. Along similar lines, the Plan also requested changes in political procedures and the judiciary system, as well as in the fields of health, social welfare, and economics. Finally, the Plan demanded the eradication of the Berber *ẓahīr* and the promotion of Arabic as the official State language. Here, al-Fāsī's role as an *'ālim* is exemplified.

The document was presented to the King, the French Premier Laval, and the Resident-General, Charles André Julien.[103] While the Plan was completely rejected by French officials, it did raise a sense of awareness of the threat coming from nationalist circles and their growing displeasure with colonial policy. At the same time, it also demonstrated to nationalists the difficulty they would face when attempting to instigate reforms under the Protectorate structure. The lack of compromise between French officials and Moroccans leaders was a consistent theme in the 44 yearlong colonial period.

The late 1930s was marked by what Ashford calls 'increasing awakening of national consciousness' and increased nationalist activity.[104] This was partly due to an increase in proselytism and activism by nationalist groups throughout the country, and partly due to a growing dissatisfaction with the course of events

[103] Ashford, *Political Change in Morocco,* 36-37.
[104] Cohen, "'Allāl al-Fāsī," 132.

under the protectorate government, which was perceived to have become more oppressive. On 1 September 1937, what began as a demonstration against French efforts to reroute part of the water supply for the Meknès region to irrigate the farms of French colonists, essentially ended with the exile of three nationalists, including al-Fāsī. The exact reason for his exile remains obscure mainly due to one document in which the French accused al-Fāsī of conspiring to overthrow the protectorate government and to establish himself as king. This, Cohen argues, is highly improbable because at that time al-Fāsī had not made demands for independence, but only for colonial policy reforms. Furthermore, according to Cohen, the actualization of this goal would have been realistically impossible, first because he lacked the tools to guarantee its success and second because it would assume the overthrow of the Moroccan throne, which he did not exhibit contempt for. On the contrary, al-Fāsī was fully supportive of the monarchy throughout his life.[105] What seems more reasonable is to posit that his exile came as a result of his unyielding firmness and militancy against the French, which was perceived to be a serious threat to their political stability. Shortly following the September riots, al-Fāsī was detained and sent to Gabon where he would remain for nine years. During his nine-year exile al-Fāsī remained isolated from the outside world. His communication was strictly restricted as his only correspondent was his father – even this was highly censored by French authorities. Despite being physically removed from the nationalist movement, his influence remained an integral part of

[105] *ibid.*, 133.

the nationalist movement. As Shaw states, "His years of exile had given him the mystique of political martyrdom."[106]

In 1946, one year following his homecoming from Gabon, al-Fāsī was appointed head of the *Istiqlāl* party.[107] His role as head of the party was, however, short-lived. Al-Fāsī felt compelled to resign from this position as a result of the suspicion that his appointment was merely symbolic, because by that time he had been likened to that of a national hero. Without any real power and excluded from essentially all decision-making positions, al-Fāsī decided his appointment as head was a tactic for the party to gain publicity.[108] Feeling that his efforts within the *Istiqlāl* were futile, and vowing not to return to his country until the French withdrew, al-Fāsī left for Cairo for what would amount to a ten-year residency abroad. Until his return from Cairo in 1955, al-Fāsī remained removed from the *Istiqlāl* leadership, yet in the eyes of Moroccans he remained a recognized leader of the *Istiqlāl*, despite his physical absence.

While in Cairo, al-Fāsī networked with leaders from throughout the Muslim world, especially members of the Arab League, gave lectures at al-Azhar University, and wrote numerous articles and books on the pressing problems facing Muslims in the Maghrib and specifically in Morocco.[109] This was done in

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[106] Shaw, *Islam and the Political, Economic, and Social Thought,* 22.
[107] While a detailed discussion of the evolution of nationalist and political parties is beyond the scope of this thesis, it is necessary to provide a brief discussion on the founding of the *Istiqlāl* party. On March 18, 1937, a *ẓahīr* was issued by the Resident-General Noguès ordering the dissolution of the National Action Bloc. Shortly following this *ẓahīr*, the *Istiqlāl* party was established. This party differed from the National Action Bloc, as they called for independence, whereas the latter was merely a nationalist movement. For a thorough discussion on both the National Action Bloc and the *Istiqlāl* party, see al-Fāsī, *The Independence Movements*, chapters IV and V.
[108] Cohen, "'Allāl al-Fāsī," 135.
[109] *ibid.*, 136.

an effort to gain international support for the Moroccan cause. In 1947, al-Fāsī collaborated with other Moroccan nationalists in Cairo, such as Ḥabīb Bourguiba, 'Abd al-Karīm al-Khaṭṭābī, and 'Abd al-Khāliq al-Ṭarrīs, to form the Committee for the Liberation of the Arab Maghrib.[110] As Moroccan demands for independence became increasingly insistent, Al-Fāsī left for a world tour in 1952 in an effort to gain international support. He visited countries throughout Europe and South America, trying to get their support before visiting the United Nations where he would plea the case for Moroccan independence.[111] His appeal to the United Nations put immense pressure on France to begin negotiations with Moroccan leadership to take actions toward independence, or, at least, to ensure the safeguarding of the rights guaranteed in the Treaty of Fās. Despite al-Fāsī's requests for giving Morocco greater authority in choosing its own government, the French agreed to introduce only minor changes. Al-Fāsī's attempt to negotiate reforms with the French was unsuccessful, however his world tour did raise awareness around the globe on the gravity of the problems encountered by Moroccans due to French colonialism.

Meanwhile in Morocco, the nationalist movement enjoyed widespread appeal among the masses. Muḥammad V also expressed his allegiance with the nationalist movement as well as his displeasure with the colonial regime. This allegiance was perceived by the French as a direct threat to the Protectorate, as such a system depended on the monarch's cooperation and support. Therefore, in an attempt to preserve order and control in Morocco, the King was exiled to

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[110] Shaw, *Islam and the Political, Economic, and Social Thought,* 23.
[111] Ashford, *Political Change in Morocco,* 71.

Madagascar in 1953. The King's exile was the subject of scrutiny among nationalists, who ardently fought for his return. In fact, al-Fāsī felt so strongly about the issue that he refused any negotiations with the French until the King was permitted to return.[112] These demands were met on the dawn of independence in 1956 when the Muḥammad V, along with a number of other exiled leaders including al-Fāsī, returned to Morocco.

***Post-Colonial Period***

One of the most striking features of al-Fāsī's life was his continual outward vehemence toward French cultural, political, and economic imperialism and neo-imperialism. This attitude may have been beneficial in contributing toward the Moroccan nationalist movement and the struggle for independence, however its place in building post-colonial Morocco did not hold such a prioritized place. In fact, Douglas Ashford argues that al-Fāsī had difficulty adapting to national political life, especially in the post-colonial setting. This was largely due to two reasons. First, al-Fāsī's thought did not seem to have evolved over time as the circumstances in Morocco changed. Even after Morocco had gained independence, al-Fāsī maintained the same rhetoric of condemning French influence within the country. While this rhetoric may have had an integral place in the formation of Moroccan national identity, over time it disadvantaged al-Fāsī as the political system grew without him. Moreover, Ashford criticizes al-Fāsī's ideological orientation which "made him difficult to work with, particularly for the young party leaders who thought in more specific and concrete terms." Perhaps this came as a result of ideological differences between al-Fāsī, who was

[112] Shaw, *Islam and the Political, Economic, and Social Thought,* 23.

a product of traditional education shortly before its "fall," and younger generations, who were products of modern education, and perhaps more Westernized. This is evident by Shaw's claim that al-Fāsī found it challenging to work as a politician in the post-colonial context because he felt that the newly independent state was not respecting Islamic principles.[113] Ashford also argues that al-Fāsī's charisma isolated him and made it difficult for him to deal with "the day-to-day details of the government."[114] While it is questionable whether his charisma was an impediment to his political success, it may have been, once again, his ideological orientation that prevented him from integrating into post-independence political life.

Whereas during the protectorate period al-Fāsī dedicated his career to defending Moroccans' rights and identity, al-Fāsī focused his attention in the post-colonial context on political action. Upon independence, he was appointed secretary-general, then president for life of the *Istiqlāl* party. At the same time, he was also appointed professor of law at the newly established University of Rabāṭ. In 1958, al-Fāsī, as part of the Moroccan Judicial Commission, spearheaded the drafting of the Personal Status Code.[115] Al-Fāsī began his career as an official statesman in June 1961 when he was appointed Minister of State for Islamic Affairs. By this time however, the role of the Ministry within Moroccan politics was marginal. Its sole purpose for survival was to oversee the administration of *waqf* lands. Recognizing that the Ministry had become rather ineffective and deficient of authority, al-Fāsī used this position to promote the institution of a new

[113] Shaw, *Islam and the Political, Economic, and Social Thought*, 26.
[114] Ashford, *Political Change in Morocco,* 415.
[115] Buskens, "Islamic Commentaries and French Codes," 90.

constitution which guaranteed a constitutional monarchy and a parliament. This was accomplished in December 1962. Shortly following the adoption of the new constitution, al-Fāsī resigned from his Ministerial position.[116]

It was within the post-colonial period that al-Fāsī's career matured considerably. His career as an intellectual gained rapid momentum following 1956 when a vast majority of his work was published. In total, he wrote more than forty-five books and articles, most of which responded to the political and social changes that were occurring at that time in Morocco and throughout the Islamic world.[117] As Shaw notes, "His works should be seen not only as the product of his political activities, but also as tools for this activity. As such, his ideological writings were primarily of an educational nature. In them, he sought to lift Morocco out of an age of decadence and ignorance and into a new era of progress and democracy."[118]

Al-Fāsī has been accredited with leading the Moroccan nationalist movement. While he was a main actor within this movement, and while it provided a platform for him to express his ideology as an *'ālim*, there seem to be inconsistencies with his role as nationalist and *'ālim*; on the one hand, he seemed rooted in his drive to overcome imperial domination, yet on the other hand, he compromised that resistance in an effort to create a more "modern" nation. In order to understand how this was manifested, let us consider his ideology for reforming the Moroccan legal system.

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[116] Shaw, *Islam and the Political, Economic, and Social Thought,* 25.
[117] For a list of these publications, please refer to Appendix A.
[118] Shaw, *Islam and the Political, Economic, and Social Thought,* 28.

# Chapter Three
## Al-Fāsī as 'Ālim

### *Educational and Intellectual Background*

As stated in the previous chapter, the ideological background of al-Fāsī was rooted in his education at al-Qarawiyīn as well as from the discourse of the Salafīya reform movement and certain individuals within that movement. Briefly, the Salafīya movement emerged in Egypt at the end of the 19th century. Among its early founders were Muḥammad Rashīd Riḍā, Muḥammad 'Abduh, and Jamāl al-Dīn al-Afghanī. The basic ideology of the movement centered on nostalgia for the early Muslim community - those who lived amongst the Prophet Muḥammad, and who the Salafīs sought to emulate, for it was the members of this community who truly understood the meaning of the Islamic principles espoused in the Qur'ān and *Sunna.*[119] The founders of the Salafīya movement also maintained, as did al-Fāsī, that the problem facing the contemporary Islamic world was a result of the prevailing ignorance of the true meaning of Islam. This was in part due to the fact that Muslims, and more specifically, members of the *'ulamā'*, had blindly accepted and given judicial precedence to earlier scholars' rulings, which may or may not any longer be appropriate in light of the changing societal circumstances.[120] According to Salafī ideology, ignorance of the 'true religion'

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[119] Majid Khadduri, *Political Trends in the Arab World* (Baltimore: The Johns Hopkins Press, 1970), 67. The name Salafīya comes from al-Salaf al-Ṣāliḥ (the pious ancestors).

[120] D. Commins, *Political and Social Change in Late Ottoman Syria* (New York: Oxford University Press, 1990), 141. Cited in Muneer Goolam Fareed, *Legal Reform in the Muslim World* (San Francisco: Austin & Winfield, Publishers, 1996), 80. This 'blind acceptance' is referred to in Islamic law as *taqlīd.* The Salafīs in fact condemned *taqlīd*, as it gave priority to the authority of the *'ulamā'* rather than looking to the Qur'ān and Sunna to derive legal decisions. This, they

also came as a result of bad rulers who, "in an effort to secure their subjects' submission to despotic rule, encouraged their ignorance of the true meaning of Islam."[121] The Salafīs, therefore, found recourse in turning directly toward the sources of law (Qur'ān and Sunna) via *ijtihād* (a jurist's exertion of knowledge and reasoning to interpret legal sources) in order to produce legislation suitable for modern times. In doing so, Muslim intellectuals could return to practicing the genuine Islam, prior to its period of decadence. In the worldview of al-Fāsī and other reformers like him, by turning *within* its own traditions rather than adopting Western culture, the Muslim community could empower itself. It was within this framework that al-Fāsī formed much of his intellectual thought. In fact, al-Fāsī relied on Salafī ideology to provide answers to all of society's concerns.[122]

***Toward Defining an Ideology***

In his book *A History of Islamic Legal Theories,* Wael Hallaq places al-Fāsī within a group of legal reformists who he refers to as 'utilitarianists.'[123] On the spectrum of modern legal reformers, these scholars aim to stay within the limits of traditional Islamic legal theories and methodologies, but take into

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argued, amounted to heresy. In turn, they favored the use of *ijtihād,* independent interpretation of legal sources, to derive legal decisions.

[121] Khadduri, *Political Trends,* 67.

[122] John Ruedy, ed., *Islamism and Secularism in North Africa* (New York: St. Martin's Press, 1994), 63.

[123] In his discussion on modern trends in Islamic law and modernity, Hallaq juxtaposes 'utilitarians' with 'liberalists'. Liberalists, such as Fazlur Rahman, Muḥammad Shaḥrūr, and Muḥammad Sa'īd 'Ashmāwī, are those scholars who take into consideration the *spirit* of Islamic law, rather than the *letter* of the law and are more willing to depart from traditional hermeneutics to allow the law to adapt to particular times and places. These scholars posit that while religion is divine and cannot be altered by human intervention, religious thought is derived through the human intellectual endeavor and is therefore susceptible to change. As religious thought is an integral part of society, it "can never be isolated from the particular reality and history of that society." (Hallaq, 232) Furthermore, liberalists criticize the utilitarian approach of utilizing the principles of need and necessity, which they claim are "narrow and deceptively Islamic". (Hallaq, 231) For a more thorough discussion on legal reform and modernity, see chapter 6 in Wael B. Hallaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1997).

consideration the need to modernize the legal system. Scholars such as Muḥammad 'Abduh, Rashīd Riḍā', and 'Abd al-Wahhāb, Khallāf, according to Hallaq, may also be classified as such. In attempting to create new legal theories to meet the demands of modern times, these scholars utilized the principles of need, necessity, and *maṣlaḥa,* common good, while failing to define "in any precise and convincing manner how such principles derive from the religious tradition."[124] In doing so, this group of intellectuals had a tendency to assert "a concept of natural law that is paradoxically constrained by the intervention of both the revealed texts and medieval legal methodologies."[125]

This legal theory, whereby traditional texts are utilized or manipulated to answer to the challenges of a particular time rather than maintaining the *status quo* is not concerned with using legal texts to derive God's law *per se,* but to ensure that the needs of the evolving society are adequately met. This is to say that legal reformers have as a preconceived notion, what the law ought to be and manipulate the sources in order to yield a more favorable legal doctrine suitable for modern needs. If a legal principle is not suitable for contemporary times, it is simply discarded and replaced by another principle deemed more appropriate. According to Hallaq, what emerges then is a new legal tradition grounded in *maṣlaḥa* for the sake of preventing excess hardship on the Muslim community.

Whereas the early Muslim community used the methods of *qiyās,* analogy, and *ijmā'*, consensus, to guarantee that justice was upheld, contemporary Muslim scholars, specifically those classified as utilitarianists resorted to alternative

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[124] Hallaq, *A History of Islamic Legal Theories*, 224.
[125] *ibid.*, 224.

methods such as *maṣlaḥa* in an effort to obtain the same goal. These scholars justify the precedence for *maṣlaḥa* as the foundation for legal reforms, as they contend that it is the best tool to render justice and defend public interest and human welfare – concepts that are "universal and general norms" and are "immutable, for no amount of interpretation of textual manipulation can affect or diminish their pervasive presence in the Sharī'a."[126]

Speaking of al-Fāsī's legal theory for law reforms, Hallaq states,

> It is difficult to make sense of Fāsī's thought in light of his hesitant and selective appropriations from traditional legal theory. He clearly appreciates the necessity to remold legal theory so as to render it responsive to modern exigencies. Yet, he is reluctant to abandon the conventional hermeneutic as expressed in *qiyās* [analytical reasoning], *istiḥsān* [juristic preference] and the literalist approach to legal language. More important, while he hovers over a renewed notion of *istiṣlāḥ* [public interest] to justify, if nothing else, the modern reforms in the law, he proves himself unable to embrace a legal philosophy that relegates the texts of revelation to a place subservient to the imperatives of modern social change.

The methodologies of *qiyās, istiḥsān and istiṣlāḥ* are typically resorted to when jurists cannot find a legal ruling within the Qur'ān or Sunna. Theoretically, this gives jurists an opportunity to take into account the conditions of a particular time and place. The fact that al-Fāsī could not "relegate the texts of revelation to a place subservient to the imperatives of modern social change" bears testimony to the fact that a.) he did not have a sound legal theory to adequately answer to the challenges of modernity and that b.) he was not willing to depart from traditional legal theories or diverge from the Salafī doctrine which emphasized reinterpreting the Qur'ān and Sunna.

Hallaq later adds,

> It would be safe to state that in Fāsī's discourse a concept of natural law has been entirely frustrated; at the same time, his reproduction of conventional legal theory

[126] *ibid.*, 224.

> was rendered deficient by the constraints and qualifications he imposed on it due to his realization of the need to adapt this theory to the dramatic changes of modernity. In short, Fāsī could neither accept nor reject the structures of conventional legal theory, with the attendant consequence that he was never able to make any advance toward pinning down a modern theory of law.[127]

What becomes apparent about al-Fāsī from Hallaq's argument is that his role as an *'ālim* was complicated by both his foundation in the Islamic legal tradition and by his concern for creating a new and more modern Moroccan national identity. The influence of French cultural, political, and economic imperialism further aggravated this role.

In order to better understand this, let me examine in more detail, al-Fāsī's thought on the legal system in Morocco, as expressed in his writings. To do so, I shall consider his views on the following issues: the place of the sharī'a in modern times, the impact of French colonialism and French legal reforms on the Moroccan legal system, codification of Islamic law, modern forms of legislation, legal education, and the reconstruction of legal methodology in the post-colonial context.

***The Sharī'a in Modernity – Proposed Goals for Modern Islamic Legislation***

Shortly following the introduction of French colonial domination in Morocco, a number of changes were introduced to the legal system, as previously mentioned in the first chapter. In many respects, these changes posed a serious threat, directly or indirectly, to the role of Islamic law in society. In the case of the Berber *ẓahīr,* Islamic law was directly assaulted as it was no longer allowed as a source of law. Subtler changes were introduced which indirectly challenged the status of the *sharī'a.* The introduction of mixed-courts, for example, was a way of

[127] *ibid.,* 225-226.

weakening the authority of the *sharī'a*. The way in which the French assumed authority over certain legal matters rather than allowing them to be tried within Moroccans courts also reduced the role of Islamic law within society.[128]

In general, scholars reacted to these challenges in two ways. On the one hand, many scholars, such as Muḥammad Ibn al-Hassān al-Wazzānī believed it was better to dispose of the *sharī'a* in many areas and to concede to European legal culture.[129] Others reacted by becoming defensive of the *sharī'a* in an attempt to keep what remained of it intact. It was within this context that al-Fāsī's thought was formulated. Al-Fāsī had to reason with the prevailing societal changes to understand how Islamic law could operate under modern legislation. In doing so, he had to determine what place the *sharī'a* would hold in a modern society.

In his book *Défense de la Loi Islamique,* al-Fāsī attempted to demonstrate the distinctiveness of the *sharī'a* so as to argue that not only did the *sharī'a* have a superior place in Moroccan society, but that Moroccans, because they profess their Islamic faith, are compelled to abide by the tenets of the *sharī'a* in all affairs, private or public. In al-Fāsī's opinion, following Islamic law was an integral part of spiritual and devotional life, and denouncing the *sharī'a* was equivalent to apostasy. For him, only when the *sharī'a* was fully implemented could Muslims live in an atmosphere of security and stability under laws based on justice and benevolence.[130] It was therefore impossible for al-Fāsī to imagine abandoning the

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[128] Allal El-Fassi, *Défense de la Loi Islamique,* translated by Charles Samara (Casablanca: L'Imprimerie Eddar el Beida, 1977), 19.
[129] Ktiouet, *Allal El Fassi*, 8.
[130] El Fassi, *Défense de la Loi Islamique,* 165.

*sharī'a* in order to bring about a more modern Morocco. For him, the choice of implementing the *sharī'a* or abandoning it was synonymous with being a Muslim or a non-believer.

To show the invaluable role of the *sharī'a* in Islamic society and culture, al-Fāsī identified a number of its distinctive characteristics. This was an attempt not only to indicate the sanctity of the law, but to compel his countrymen to defend its implementation. He claimed that 1) because the *sharī'a* descended as God's revelation and was not created by a legislature, it is ultimately a perfect law. From this viewpoint, Allah is the supreme legislator and those who apply His law are working in the service of Allah. 2) Because the *sharī'a* came from God, it is based on perfect justice and equity. 3) the *sharī'a* protects morality and prevents society from the collapse of morality, which amounts to atheism. 4) Islamic laws are easy to apply and do not impose a heavy burden on anyone 5) Islamic law is intended for Muslims and non-Muslims alike 6) The *sharī'a* is a part of faith that is integrated into Muslim daily life 7) Islamic law is compatible with nature and is not beyond human understanding 8) The sharī'a is concerned with balancing spiritual and material matters. This is to say that if one stays within the boundaries established by Islamic law, they will reap the benefits in the afterlife. 9) the sharī'a is eternal and ensures legislative and juridical stability in the community. Within Islamic law the fundamental elements and the sources do not change according to time and place.[131] It is only the *interpretation* of these sources that change in accordance with the changing circumstances. Therefore, Islamic law is responsive to the demands of particular times.

[131] *ibid.*, 87 - 119.

Having reinforced the reasons for Muslims to adhere to the *sharī'a*, al-Fāsī then attempted to show how the application of Islamic law is compatible with the demands of modern life. Al-Fāsī maintained that the role of the *sharī'a* and traditional legal theories were inseparable from modern legal reforms. He did not seek to dismantle the pre-existing legal structures, but to build upon them to create a system of law that was suitable for modern times. In doing so, al-Fāsī believed that the borrowing of foreign legal elements could be legitimized within an Islamic framework, so long as these foreign elements did not contradict or challenge the supremacy of the *sharī'a*. What al-Fāsī seemed to be arguing for was not the elimination of foreign-inspired legislation, or to be more precise, legislation that was modeled after foreign legislation, such as a legal code, but for the removal of *colonial* legislation and foreign control over Moroccan legislation. In other words, al-Fāsī did not object to codifying the *sharī'a* (the idea of a code here being a distinctly European legal device), but he objected many laws which were created under the colonial regime as a way of gaining control over the native population. Customary law, which Berbers were governed by, may be an example of "colonial legislation." This is exemplified when he stated, "And us, now, after having objectively examined the colonialists' considerations, we can only be of the opinion that it is necessary to repeal the legislation inspired by these considerations [those of the colonialists] and not to simply amend it; then to enact a Moroccan legislation in conformity with Islamic law."[132] Under this pretext, therefore, the adoption of legal codes, with some foreign elements, is legitimized, as long as the content of these codes is derived mainly from Islamic legal sources.

[132] *ibid.*, 231.

The ultimate goal for legal reform, in al-Fāsī's view, was not to return to the pre-colonial legal system because that legal system did not address many of the issues that emerged as a result of colonization. Furthermore, according to Shaw, al-Fāsī's position was that the pre-colonial legal system was tainted as a result of a long period of "decadence," during which local customs and legal corruption became accepted as the norm.[133] Al-Fāsī aruged that the goal for jurists was to revise the current legislation, either by unifying the texts that were inspired by Islamic law or by consolidating the law into a legal code while taking into consideration the requirements of society.[134] Only by doing this could the ultimate goal of justice be rendered into reality. This belief seems to have been influenced by colonial discourse, which emphasized a more simplistic and easily-approachable presentation of law, what Léon Buskens terms "reference culture." In essence, this refers to way in which French scholars refashioned Islamic legal manuals to look more similar to that of an authoritative law manual – like one that might be found in a French court.

While al-Fāsī acknowledged that reforms needed to introduced in the Islamic legal system, he did not seek to divorce the traditional bearers of Islamic knowledge from the reform movement, regardless of the prevailing criticisms about the *'ulamā'* and their traditional education. Indeed, he believed it was the duty of the *'ulamā'* to transmit and defend their knowledge by using different and innovative means.[135] To do so, the *'ulamā'* needed to resort to new tools, such as

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[133] Shaw, *Islam and the Political, Economic, and Social,* 112.
[134] El Fassi, *Défense de la Loi Islamique,* 24.
[135] 'Allal al-Fassi, "Mission of the Islamic 'Ulema" Chapter in *Man, State and Society in the Contemporary Maghrib,* edited by William I. Zartman (London: Pall Mall, 1973), 151.

*ijtihād* and *maṣlaḥa* in order to derive new juridical rulings. Only when these concepts were resorted to, could the *'ulamā'* instigate legal reforms which would meet the needs of society.

Defending the *'ulamā'*, al-Fāsī maintained that as bearers of knowledge, the *'ulamā'* had a responsibility to their community to protect and broaden Islamic knowledge. In fact, the duties of the *'ulamā'* extended beyond the introduction of legal reforms, reaching into the social field. Al-Fāsī believed the *'ulamā'* was largely responsible for the revival of the Muslim *umma*, community, as well as Islamic faith. Only when the entire Moroccan society had been revived could legal reforms suitable for society be introduced. Al-Fāsī made this clear in a speech he delivered to the Moroccan *'ulamā'* in September 1959. He proclaimed "The reformers can only sow the seeds of reform that will not come to fruition without the involvement and participation of the whole nation; collective efforts will undoubtedly enforce individual efforts, and reform can take place only when corruption in society has reached a point beyond which reform becomes and urgent need."[136]

It was through this discussion that his position became most clear, for it was here that the influence of the Salafīya movement, as well as his role as a nationalist and *'ālim* converged. Al-Fāsī contended that the role of the *'ulamā'* was to initiate the necessary societal revival, however the process of reform required the collective effort of the entire nation. According to al-Fāsī, the greatest problem with the Moroccan and Muslim community at large was that society was suffering from an intellectual dormancy. The reason for this is

[136] *ibid.*, 154.

country is because the young people were cultivated within the language and legislation of the foreigner under the pretext that these were the means to progress."[140]

Within the legal sphere, the French actively sought to decrease the power of the Moroccan tribunals. According to al-Fāsī, this was done in an effort to incite distrust in Moroccans with respect to their courts, thereby making foreign jurisdictions more appealing. This was done by a.) ignoring Moroccan tribunals out of disinterest, in an effort to abstain from introducing reforms b.) removing from its [Moroccan tribunals] jurisdiction a part of its competence and reallocating that competence to French jurisdiction c.) consolidating the Jewish courts d.) creating customary tribunals and progressively enlarging the domain of their competence e.) giving preference to the competence of Makhzan tribunals, which judge without texts, to the detriment of common law jurisdictions which apply the dispositions of Islamic law.[141] In doing so, the French were able to gain a degree of control over Moroccans courts and implement changes as they wished. Moreover, Moroccan courts were portrayed by the French, and perhaps by many Moroccans, as ineffective and outdated.

As al-Fāsī argued, the epistemological hegemony, or the perceived superiority of colonial "knowledge" subsumed under colonial rule and propagated by those who sympathized with colonial rule was been one of the most, if not *the* most damaging aspects of colonial rule. Al-Fāsī stated,

> Apart from its role of economic exploitation, which has always been resented and resisted by the colonized, colonialism succeeded in idealizing and perpetuating the

[140] El-Fassi, *Défense de la Loi Islamique,* 261.
[141] *ibid.,* 19.

> image of the West. Western experiences have become - or rather have been made - a standard according to which things and ideas of the East [Orient] should be evaluated. This is an intellectual slavery, which to many Islamic thinkers is even worse than the Crusades.[142]

This was especially true within the legal sphere, where colonial discourse gained hegemonic rights over Moroccan scholarship, setting a new precedent for both legal education and the practice of law. Al-Fāsī later added,

> Unfortunately, there was hardly enough time for the Islamic peoples to rethink their situation. Western colonialism, with its material resources, industrial capabilities, and subtle rhetoric devastated the Islamic world; the latter was faced with the problem of defending its independence and resisting colonial attacks on its spiritual values. The social institutions of colonialism were by far more destructive than the military and political institutions.[143]

Al-Fāsī argued that although foreign and specifically French power assumed and propagated a hegemonic attitude over the Muslim world by imposing its culture and traditions, the Muslim world, or those who were not engulfed by the colonial mission, refused to comply. He did however admit that certain elements found in foreign legislation that were in concordance with Islamic faith could and have been adopted.[144] Islamic reformers would not erase their history or traditions, but merely supplement it when it was suitable. By doing so, foreign culture was not being imposed onto Muslims, which was precisely what al-Fāsī resented, but they chose, on their own volition, to adopt foreign legal principles in order to improve their own legal systems.

### *Al-Fāsī's Views on Codification*

Codification of the law can be seen as a compromise between traditionalists, who sought to preserve traditional Islamic legal theories and

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[142] Al-Fassi, "Mission of the Islamic 'Ulema," 155.
[143] *ibid.*, 155.
[144] Allal el-Fassi, "Comment Nous Motiver Scientifiquement dans le Cadre de la Charia?" *Al-Qods:Revue Internationale Arabo-Islamique* 32/33, (1993): 77.

methodology, and modernists who believed that the codification of the *sharī'a* was impossible for the modernization of Islamic society. The latter believed that only by setting aside the *sharī'a* and replacing it with European legal codes, would the nation become modern. With respect to codification, al-Fāsī seemed to have stood in the median of such opinions, for he advocated the introduction of legal codes, yet he believed this should be done within an Islamic framework. By producing a new legal code based on Islamic jurisprudence, the country was able to cleanse itself of the colonial legislation it inherited during the Protectorate period and safeguard its Muslim identity.[145] While the first personal status code that was promulgated in independent Morocco was considered one of the most conservative legal codes produced in the Arab world at the time, it can be viewed as a compromise between the choice of maintaining the *status quo* and taking an initiative to modernize Morocco.[146]

Taking into consideration the ramifications of codification of the law in relation to the manner in which Islamic legal institutions operated, especially in the pre-modern world, it is worth noting that although al-Fāsī defended many aspects of traditional Islamic legal theories and methodology, he did not seem concerned with the effects these changes had on the Islamic legal system, especially as it related to the status and authority of the *'ulamā'*. The question, then, is just how did al-Fāsī conceive of codifying Islamic law and what were the influencing factors in making this decision? In an effort to make sense of al-Fāsī's position on the issue, let us examine what he said about it.

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[145] El Fassi, *Défense de la Loi Islamique,* 112.
[146] Buskens, "Islamic Commentaries and French Codes," 89.

In his book *Défense de la Loi Islamique,* al-Fāsī discussed the disadvantages and advantages of codifying Islamic law. Among the negative aspects of codification, the greatest was that it abandons *ijtihād,* the very legal tool supported by Salafīs. He acknowledged that codified law eliminated much of the written work, opinions, commentaries, and glosses that appear in *fiqh* books. This written work, al-Fāsī argued, allowed for a large degree of freedom for *mujtahidūn* (those who practice *ijtihād*) and Muslim judges to apply a broad spectrum of opinions, taking into consideration individual circumstances and local customs.[147] Effectively, this resulted in a rigidity of the law as well as a certain degree of stagnation in legal developments. In a sense, codification can be seen as a form of neo-*taqlīd* where judges do not imitate previous judges, but strictly adhere to books of positive law.

Despite his hesitations about the codification of Islamic law, he was very much part of the process of codifying the personal status laws in Morocco in the post-colonial context. In defense of the codification of the *sharī'a*, al-Fāsī quoted Professor Al Mahmassānī, who asserted that there were certain advantages of codifying Islamic law. For instance, legal codes offer a presentation of *sharī'a* dispositions in a clear manner. Legal codes also facilitate the application of these dispositions by governments and guarantee that magistrates will conform to the identified dispositions.[148] What surfaces then in this scientific approach, is standardization and stabilization of the law as well as a certain degree of predictability in the outcome of legal cases.

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[147] El Fassi, *Défense de la Loi Islamique,* 275-277.
[148] *ibid.*, 277.

In his advocacy for the creation of legal codes in Morocco, al-Fāsī suggested that great principles, and norms and rules that relate to new social conditions be codified. In the areas where gaps exist in the *sharī'a*, he suggested that Moroccan jurists use theories of modern comparative law to create a more complete legal code. If, however, foreign legal principles were not in accordance with the Qur'ān, they may not be adopted.[149] Defending his position on the matter, he stated,

> I must declare that it is in the interest of our country to work out a Moroccan code which would be applicable in all tribunals to all inhabitants, a code which would have as its essential legal bases Islamic law and French and foreign codes. After this code has been approved by His Majesty, and the religious scholars have confirmed that all its provisions are in absolute agreement with the general principles of Islamic law, it will be called the Islamic Code of Morocco. Many people who think themselves clever, will believe that such a code is mere regression because the civilized countries have adopted a purely secular legislation. Certain partisans of immobility, on the other hand, will charge me with wishing, by my suggestions, to undermine the bases of Islamic law. To all of them I say that a law based on transcendent principles cannot be put into the shadow by any other. To take it as the essential basis of our future legislation, means helping to safeguard it, and means giving to our country a code which is adapted to our secular interests without contradicting our religion nor the needs, taken in their widest sense, of modern progressive spirit in the most highly civilized countries.[150]

As for the question of what relationship should exist between the judiciary and the State, al-Fāsī advocated the traditional stance that the *sharī'a* was independent of the State. On the other hand, the State depended on the *sharī'a* and was responsible for ensuring that the law was enforced.[151] Speaking on al-Fāsī, Shaw notes that he believed the *sharī'a,* "cannot depend on the conscience of those in power."[152] While Shaw accepts al-Fāsī's assertion without question, it

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[149] *ibid.,* 281-282.
[150] 'Allāl Al-Fāsī, "Risālat al-Maghrib" (Rabat) (7 November 1949); French translation in *Échanges* (Rabat), French Series, no. 8 (25 December 1949). Cited in Schacht, "Problems of Modern Islamic Legislation," 126.
[151] El-Fassi, *Défense de la Loi Islamique,* 160.
[152] Shaw, *Islam and the Political, Economic, and Social,* 116.

seems rather troubling that al-Fāsī supported a judiciary separate from, and independent of the State, while also advocating the codification of the law. Taking into consideration Léon Buskens' argument that legal codes are a characteristic of a highly centralized government, and following S. A. Bayitch's claim that codified law functions as part of the state legislature, the contradiction or gap in al-Fāsī's thought becomes clear, for it is essentially impossible to enact a legal code without the State's control.[153] Within al-Fāsī's framework, it is unclear by which body - the *'ulamā'* or the State, the legal code would be enacted. This is yet another gap in his thought.

***Al-Fāsī's Grievances with Legal Education***

Al-Fāsī maintained that one of the greatest challenges facing traditional legal scholars in the post-colonial context was defending their education in light of the prevailing belief that traditional education was outdated. This notion originated from colonial discourse, which found the teaching methods deplete of analytic reasoning and the subject matter inadequate for modern times. Moroccans, especially those who had enjoyed a modern education abroad or at a newly established university at home, perpetuated this attitude. Al-Fāsī defended al-Qarawiyīn for the many leading scholars it produced, however he did not deny the dire need for the university to revamp and modernize its curriculum to better address the needs of a changing society. To do so would assist in integrating Islamic legal scholars into the evolving legislative process which they have been largely excluded from due to the prevailing lack of trust by members of the

[153] Buskens, "Islamic Commentaries and French Codes," 70; Bayitch, "Codification in Modern Times," 187.

Ministry of Education and the State, who had relegated al-Qarawiyīn graduates as having an inferior education compared to students who attended Muḥammad V University, for example.[154] This exclusion was apparent, as al-Fāsī stated, when one considered the narrow point of view of lawyers and the Ministry of Justice, who refused to honor the licenses administered by al-Qarawiyīn. He claimed that this had prohibited graduates from the University from entering the bar and therefore, from holding a place within the Moroccan legal system.[155] Those who held positions within the legal system, who filled in the spaces where the *'ulamā'* once stood, were often graduates from the faculty of law at the modern universities and did not possess the knowledge of Islamic law to practice it.[156] This demonstrates the struggle faced by many traditional scholars who found themselves ostracized from the legal scene in the post-colonial context

The marginalization of traditional scholars from the legal sphere symbolized the state of affairs in Morocco at the time in which al-Fāsī wrote. Al-Fāsī considered the lack of confidence in the *'ulamā'* symbolic of a divorce from traditional society, in which religion played an imperative role, to be replaced by more modern, European-inspired conventions. For al-Fāsī, scholars from al-Qarawiyīn represented the permanence of Islamic culture and their exclusion exemplified a departure, at least in part, from this culture. He explained that if Morocco was an Islamic monarchy, as it says in the Constitution, "it would care for religious studies and would not condemn the Faculty of Islamic law [at al-

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[154] El Fassi, *Défense de la Loi Islamique,* 325.
[155] *ibid.,* 326.
[156] For a more detailed discussion on the educational quandary, especially the prevailing criticisms of traditional education, and al-Fāsī's response to these criticisms, see El-Fassi, *Défense de la Loi Islamique,* 323-331.

Qarawiyīn] to be abandoned, for the sole reason that it refused to set aside the ideology of al-Qarawiyīn and join the Faculties of Muḥammad V University."[157] To curb this schism, and also to prepare lawyers for future success, al-Fāsī suggested that the universities make improvements, especially within the field of comparative law. This would allow for scholars to make use of other legal systems when filling in the gaps where Islamic law does not provide adequate legal rulings. He also suggested that since Morocco was adopting positive law, the programs of modern law, especially modern Islamic law, should be reinforced.[158] Measures such as these would assist in building a more competent group of legal scholars.

***Reconstructing a Legal Methodology in the Post-Colonial Context***

Al-Fāsī believed that before Moroccans could introduce legal reforms, they needed to first overcome all the legal changes introduced by the French.[159] For example, al-Fāsī believed that one of the most harmful changes instituted by the French was the promulgation of the Berber *zahīr*. The *zahīr* served to divide the country, as did the five separate court systems that operated during colonial rule. Therefore it is understandable that in the aftermath of colonialism, the unification of the judicial system was given top priority, for it was believed that this was the best way for the divided country to heal and unify itself. Under such a system all Moroccans would be subject to the same law which would be applied under one comprehensive court system. To do this however, not just a new legal system had to be created, but the laws to be applied had to be renegotiated

[157] El Fassi, *Défense de la Loi Islamique,* 328.
[158] *ibid.*, 330.
[159] *ibid.*, 28.

amongst scholars and government officials. A new legal methodology was necessary for the creation of the Personal Status Code and penal code, which were believed to unify the nation. In attempting to locate that legal methodology, al-Fāsī advocated reliance on a number of legal tools to derive an equitable legal code.

Central to his methodology for legal reform was the notion of *ijtihād.* In fact, al-Fāsī maintained that *ijtihād* had given jurists the freedom and independence to apply Islamic norms while taking into consideration societal circumstances. He stated,

> The fact that the legislation has allowed people who are able, to elaborate doctrine [*ijtihād*], has guaranteed that the shari'a is adapted to the requirements issued from new problems, which are innumerable and infinite. Ijtihad sheds a light on legal statutes from the subsidiary means which present us with problems. That is to say that the use of new intelligence [interpretation] of a Qur'anic verse or a prophetic hadith...is not foreign to the shari'a.[160]

In his advocacy of *ijtihād*, it becomes apparent that within the realm of modern application of Islamic law, al-Fāsī's thought seemed most contradictory. *Ijtihād* was valuable for legal reform as it allowed for the possibility for Islamic law, based on Qur'ānic principles, to meet the needs of society.[161] Futhermore, resorting to *ijtihād* would allow Moroccans to initiate legal reforms in their own terms, rather than adopting foreign codes. Within this construction, *ijtihād* would be used to derive legal principles which would then be made into positive law. While al-Fāsī established a framework for scholars to work within to modernize the law, it is unclear whether he considered its future ramifications. First, while he advocated *ijtihād* on principle, it cannot be qualified as the same *ijtihād*

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[160] *ibid.*, 127-128.
[161] *ibid.*, 175.

practiced by pre-modern jurists, largely because it was used as a device to merely establish what the law was. After legal principles had been derived from this method, they were put into codified form, wherein judges conform to the notion of *taqlīd* by applying the stipulated points of positive law. *Ijtihād* then was not an ongoing process, but rather a legal tool resorted to only when parliaments determined that a law no longer applied to or suited the needs of society and sought to make amendments. Second, al-Fāsī acknowledged that throughout Islamic history the separation of law and politics gave jurists the independence to derive legal opinions without having to satisfy the interests of government officials. This gave the *'ulamā'* the freedom to act as an autonomous body, working to derive legal imperatives for the sake of obtaining and defending the Truth, as opposed to answering to a superior power.[162] Yet al-Fāsī asserted a program of modern legislation, where the power to legislate was assumed under a parliamentary body through the means of *shūrā,* consultation, rather than within the traditional legal institutions. In effect, this alienated the *'ulamā'* from the legislative process by allocating legal authority to the State rather than with traditional Islamic legal scholars.

***Conclusion***

To summarize al-Fāsī's thought is a rather difficult task. His character as an intellectual and his role as a nationalist are strikingly different, at times laden with contradictions. On the one hand, he represented the quintessential nationalist, striving to liberate Morocco from all forms of foreign domination. Yet

[162] By "superior power" I am referring to the government. This relates to what was discussed in Chapter One which argues that in Morocco, in recent years, Islamic law has become state law, and legal authority has been allocated to the state, rather than the *'ulamā'*.

on the other hand, he succumbed to the same domination which he tried to overcome. This took shape in many ways. For example, after independence, al-Fāsī became a professor at Muḥammad V University, rather than at al-Qarawiyīn. In doing so, it seems that al-Fāsī perpetuated the attitude that al-Qarawiyīn lacked intellectual vigor and prestige – notions which can be found in colonial discourse. Moreover, although al-Fāsī defended Islamic history and Islamic law - and even sought to emulate the behavior of the early Muslim community, he very easily conceded to the adoption of European legal structures by advocating the use of legal codes in Morocco. Effectively, al-Fāsī maintained European legal structures but emptied them of their European content and replaced them with tenets of Islamic law. To a large extent, this prevented the *'ulamā'*, who he frequently defended, from possessing legal authority.

Perhaps the gap in scholarship, which highlights his nationalist activity but lacks discussion on his role as an *'ālim*, is symbolic of this predicament. As a nationalist, al-Fāsī clearly had a succinct theory and methodology, which was demonstrated in history and therefore can easily be understood. Yet as an *'ālim*, al-Fāsī does not seem to share these qualities. Perhaps scholarship fails to discuss al-Fāsī the *'ālim*, precisely because it is difficult to make sense of what he stood for and what his vision was for legal reforms. To produce such a work would assist in understanding this scholar in a more accurate way.

As an ideologue, what can be said of al-Fāsī is that his intellectualism centered on ideals without always producing a convincing theory in which to ground his ideology. This is exemplified in his advocacy for the codification of

the law. Despite the fact that the introduction of codified law is, to a large extent, devastating for the Islamic legal tradition, in that codification results in both a loss of *ijtihād* and freedom for a judge to interpret the law, and also a loss in authoritative power for the *'ulamā'*, al-Fāsī was a major actor in producing the first personal status code in Morocco. He advocated the *idea* of codification as a means to modernize the legal system yet he did not seem to have conceptualized how this would alter the entire legal system. Ideally, al-Fāsī resisted French colonialism and all forms of colonial domination over Morocco, yet he perpetuated many of the changes initiated by the French. Furthermore, al-Fāsī defended traditional education, but at the same time he conceded to the notion that modern education was superior, or at least more practical. Instead of devoting his time at al-Qarawiyīn where he could have implemented the educational reforms he sought to initiate, and could have potentially improved traditional education, he taught at Muḥammad V University.

## Conclusion

A number of issues deserve discussion in order to critically analyze the role al-Fāsī had in the Moroccan legal reform movement as well as to better understand the ideological approach he applied within that process. By considering his role as an *'ālim,* rather than as a nationalist (but still taking it into consideration) we can cast more light on the tension between nationalism as anti-colonialism and nationalism as part of what it meant to be "modern" and "progressive." What can be said definitively of al-Fāsī is that there exists a discrepancy between his nationalist and legal reformist ideologies. These discrepancies are not unique to him, but represent a crisis for Moroccan, perhaps even for the greater Islamic community. The crisis of how to integrate Islamic concepts into modernity was most pronounced in the 20th century largely as a result of colonialism and the reforms that accompanied it. As Muḥammad Qasim Zaman argues in his book *The Ulama in Contemporary Islam,* "It was only with the impact of colonial rule that the dead weight of the shari'a was gradually dislodged to make room for the emergence of new legal systems in the Muslim world."[163] Such "new" legal systems were both imposed on Muslim populations by imperial powers in order to achieve their desired goals, namely economic growth, but were also perceived by the colonized as a necessary element of the nation-building process in order to create a more progressive nation which would fit the image its leaders sought to portray.[164] The increased perception of the need

[163] Zaman, *The Ulama in Contemporary Islam*, 17.

[164] It is interesting to note here that Zaman claims that the recent legal reforms have produced a "new" legal system. To a large extent I would have to agree with him. The legal reforms that

for society to modernize and meet international demands added to this crisis. Muslim leaders were forced to respond to the question of what shape reforms ought to take, and what elements from the pre-colonial and colonial periods were to be retained in constructing an alternative, more modern society. To a large extent, the majority of independent Islamic states in the 20th century maintained some elements of Islamic law, especially those relating to personal status, as these laws relate most closely to Islamic faith. Laws relating to crime or commerce, on the other hand, were typically reproductions of European laws, because it was in these areas where most of the challenges were met as a result of increased pressure to protect human rights and become part of international trade. This demonstrates the desire for Islamic countries to preserve Islamic culture and traditions, particularly within the private sphere, while taking the initiative to modernize many other aspects of the legal system that would allow themselves to be more compatible when interacting with other nations. Furthermore, this shows both an apprehension toward completely assimilating Western concepts into Islamic society, as well as an unwillingness to break away from the past or to abandon cultural traditions and norms for the sake of modernization. At times, however, Islamic traditions have been totally disregarded in the reformation process.

Relating legal reforms to the nation-building process, Hallaq argues that "the demise of the sharī'a was ushered in by the material internalization of the

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emerged in the 20th century, especially the codification of the law and the transformation of legal authority from the *'ulamā'* to the state, have indeed produced a legal system unlike any other in Islamic history. Thus, to claim it as new and wholly unique, I would argue, is an accurate statement.

concept of nationalism in Muslim countries, mainly by the creation of the nation-state."[165] Surely legal reforms were important in the creation of the nation-state and while nationalism provided a platform for intellectuals to create new boundaries for society, the need for reforming the *sharī'a* was initially felt under, and instigated by colonial rule – or to use Hallaq's words, "ushered in" by colonialism. It was largely in reaction to the changes introduced by colonial domination that the interest in reforming the legal system arose. These reforms were visualized under the pretext of the nationalist movement, and actualized in the decolonization or independence period. It was during the process of nation-building, especially in the post-colonial context, that actual legal reforms spearheaded by native populations were initiated. This was part of a greater mission to produce a nation whose characteristics were more often than not, predetermined by leaders with a specific vision of how the nation should be molded. In the case of Islamic countries, this would determine how markedly liberal or conservative its' inhabitants were by projecting a specific image of how closely the State followed Islamic precepts. Saudi Arabia, for example is considered to be one of the most conservative Muslim countries, precisely because it has essentially refused to both a.) part with traditional elements of Islamic culture and b.) concede with European culture. At the other end of the spectrum, countries such as Tunisia or Turkey may be considered among the most liberal

[165] Wael B. Hallaq, "Can the Shari'a Be Restored?" in *Islamic Law and the Challenges of Modernity,* eds. Yvonne Yazbeck Haddad and Barbara Freyer Stowasser (Walnut Creek, CA: Altamira Press, 2004), 24.

Muslim countries, as a result of their adoption of European laws and codes, coupled with their significant divergence from the *sharī'a*.[166]

Similarly, just as Islamic countries were forced to negotiate new terms for how their societies should be molded without compromising Islamic history and identity, the career of 'Allāl al-Fāsī exhibits these same tensions. This is most clear when we compare his ideas surrounding the nationalist movement with his ideas for legal reform. By doing so, this might help us to understand how 20th century legal reforms developed and how the Islamic legal system was altered as a result of both colonialism and the modernization project.

***A New Legal Framework***

For al-Fāsī, it is unquestionable to set aside the *sharī'a* as a source of law because it is so closely connected with Moroccan and Muslim identity. Ideologically al-Fāsī seemed torn between the need to improve and modernize the legal system and his nostalgia for the early Muslim community, whose lives were centered on and driven by Islamic ideals and principles. It was this community which he sought to emulate, for he believed it was these people who truly understood what it meant to be Muslim and how to apply Islamic principles to everyday life. Realizing however, that societies have evolved as a result of time, technological advancements, scientific developments, and vast increases in human

[166] Both Tunisia and Turkey have retained very little of Islamic law, which has been displaced with the introduction of European-inspired law. This is especially true within the realm of economic, commercial, and penal law. Elements of Islamic law have however, been maintained with respect to personal status, but this too is quite limited. In Tunisia for example, women are permitted to initiate divorce. Additionally, mens' rights to polygamy have been forbidden by the state. Furthermore it should be added that both countries have taken certain measures to restrict their citizens from exercising some religious practices. The *ḥijab*, headscarf, for example, has, at certain times in history been prohibited in the public sphere.

mobility, al-Fāsī reckoned with the fact that certain reforms needed to be introduced to allow Muslims to flourish in the rapidly evolving global scene.

In an attempt to create a legal framework which was suitable for modern needs, al-Fāsī found recourse in *ijtihād* as the primary legal tool for reconsidering points of the *sharī'a*. His justification for this was based on the fact that Muslim scholars have adhered to *taqlīd* without exerting the effort to adapt legal norms to the changing societal circumstances.[167] This has left Islamic developments stagnate and has left the Muslim *umma* in what al-Fāsī insinuates to be a state of decadence.[168] Therefore, the reinterpretation of sources of law is absolutely fundamental to the revival of Islamic life and society. In fact, many contemporary scholars, including Muḥammad 'Abduh, Jamāl al-Dīn Afghānī, Rashīd Riḍā', and Muḥammad Iqbāl, have advocated the implementation of *ijtihād* to introduce legal reforms.[169] Remarking on recent interest in *ijtihād,* Muneer Goolam Fareed states,

> The colonial experience, in this regard, was particularly portentous, for it created, so to speak, the need for ijtihad. The latter was perceived by many in the Islamic world as the preeminent intellectual tool for the development of Islamic thought within the framework of the libertarian values touted by the European colonialists. Given that, in early Islam it was ijtihad, no less, that spawned the intellectual efflorescence of the Muslim community, it could, this group maintained, be called upon to serve as the catalyst for Islam's renaissance. But, as I attempt to show, ijtihad so construed, as synonymous with revival and reform, is indeed a novel idea in Islam, one crystallized by the peculiarities of such social and political changes as were on the whole, unprecedented in Muslim history. During the genesis of the sacred Law this concept was, in fact, no more than an ancillary tool in the repertoire of the legal scholar.[170]

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[167] This was a common debate for early legal reformers throughout the Islamic world in the 19th and 20th centuries. Many reformers, especially those who sought to modernize the legal system, discredited the use of *taqlīd* as it did not allow Islamic law to respond to changing times. Within this debate, *taqlīd* was juxtaposed with *ijtihād* which was seen as a necessary tool to reform the law. For a thorough discussion on this debate, see Fareed, *Legal Reform in the Muslim World.*
[168] AL-Fassi, "Mission of the Islamic 'Ulema," 154-155.
[169] Fareed, *Legal Reform in the Muslim World,* 51.
[170] *ibid.,* iii.

The contradiction in al-Fāsī's thought, however, stemmed from his reasoning for resorting to *ijtihād* as a means for legal reform. Al-Fāsī argued that legal texts needed to be reinterpreted in order to produce a law more appropriate for current times. This was an effort to escape from the tendency for jurists to rely on *taqlīd* in establishing legal precedence. Once alternative legal principles had been derived, they were put into codified form. This process, however, limited the freedom for the law to naturally evolve in response to society's demands because once a legal code is enacted, its amendments must be made within the formal setting of a parliamentary system. This differs greatly from pre-colonial law, which was rather flexible by taking into consideration individual cases and circumstances and where legal principles *guided*, but did not necessarily *compel* a judge to take specified action.

Moreover, the use of *ijtihād* as part of the legal reform and codification process is contradicted when one considers the way it is used as a catalyst for legal reform, but only on a temporary basis. Once the legal sources have been reinterpreted they are codified and implemented in the courts. Under this premise, the legal system of a country is unified and systematized by treating all litigants under the same legal code. The main problem with using *ijtihād* as a method to overcome *taqlīd* becomes confounded by the *neo-taqlīd* that comes as a result of applying legal codes. In such a situation, a considerable amount of time can lapse before any real changes are introduced to a legal code. In the case of Morocco for example, despite vast societal changes as a result of globalization and internal social and economic developments, the *Mudawwana* did not receive any

substantial revisions until 1993, thirty five years after its promulgation.[171] One could argue that once a legal code is enacted, jurists and judges imitate that code, or adhere to *taqlīd*, without interpretation until a need for reform is expressed, either by the State or by society at large. Only then do jurists return to *ijtihād*. To be more precise, within this framework *ijtihād* and *taqlīd* share a cyclical relationship; *ijtihād* is used temporarily in the process of codifying Islamic law. When the codified law is no longer suitable for society, *ijtihād* is once again relied upon. The contradiction in al-Fāsī's thought then is clear when he argues against *taqlīd*, but uses a different device (*ijtihād*), which ultimately returns him to that which he contested.

***Nationalist vs. 'Ālim***

'Allāl al-Fāsī represents a particular group of scholars who emerged in the late 19th and 20th century, who, for the sake of modernizing society by creating a more modern legal system, diverged greatly from the pre-existing Islamic legal tradition. As a leader of the nationalist movement in Morocco, al-Fāsī employed a discourse grounded in anti-European, and specifically anti-French sentiment. This becomes clear when his actions as a nationalist are taken into consideration. His public speeches at al-Qarawiyīn where he openly protested colonial policies, and his participation in the anti-French riots held on 1 September 1937 exemplify this sentiment. These feelings are also apparent in his writings. This discourse, however, is contradictory because on the one hand, al-Fāsī believed that the

[171] To read more on reforming the *Mudawanna,* see Léon Buskens, "Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere," *Islamic Law and Society* 10, no. 1 (2003): 70-131 and Laurie A. Brand, *Women, the State, and Political Liberalization: Middle Eastern and North African Experiences* (New York: Columbia University Press, 1998).

adoption of European cultural norms was tantamount to apostasy. This is clear in his book *Défense de la Loi Islamique,* when he defended the *sharī'a* for being a divinely revealed legislation, incumbent upon all Muslims for guidance and protection against demoralization. He added that those who sympathized with the French or adopted elements of French or European culture are apostates, responsible for the degradation of Islamic society.[172] On the other hand, he posits that European civilization is in fact derived partly from Muslim achievements and culture, as a result of the historical interactions between European and Islamic empires.[173] This reveals a fissure in his thought – because rationally, if he defended European civilization because of its shared history with Islamic intellectual thought, it would only make sense that he would have accepted that civilization, at least partially. Al-Fāsī however seemed adamant about his rejection for Western political, economic, and cultural domination. This is especially true with respect to legal institutions.

Al-Fāsī was suspicious of French legal interventions. He believed that the changes introduced by colonial officials were part of a greater scheme to divide and rule the country, as well as to retard local legal developments so that Moroccans could be more easily assimilated into French culture, and perhaps become supportive of the French colonial project.[174] This was partially the reason al-Fāsī refused to adopt Western laws – in addition to his conviction that Islamic law ought to be a driving force in Moroccan society. Despite his rejection of

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[172] El-Fassi, *Défense de la Loi Islamique,* 65–69.
[173] To read more on al-Fāsī's argument of how European and Muslim civilizations share a similar cultural heritage, see el Fassi, "The Mediterranean Civilization," 43-45.
[174] El-Fassi, *Défense de la Loi Islamique,* 19-20.

French legal interventions, upon closer examination of the actions al-Fāsī partook on, it seems that he actually perpetuated many of the changes introduced by the French.

***Epistemological Hegemony – Changes under the French***

One of the greatest alterations in the field of Moroccan law introduced by the French was not the restructuring of the legal system (i.e. the creation of appellate courts and the Berber *ẓahīr*), because these changes could be relatively easily reversed in the process of decolonization. The most lasting affect of colonization was the epistemological hegemony that the French exerted over Morocco. Not only did this domination of 'knowledge' give France an upper-hand in controlling native matters, but it came to be seen by Moroccans as a gateway toward improving society, superseding local pedagogical techniques. This was particularly true for those who had been educated within the French schooling system, who, Lorna Hahn refers to as the *occidentalizés* (Occidentalized), such as Aḥmad Balafrij and Muḥammad Wazzānī.[175] These epistemological changes took shape in many ways.

Epistemological changes, especially in the way law was perceived, studied, and discussed by Moroccans emerged as a result of colonial discourse which imposed French legal cultural norms onto the understanding of Moroccan legal traditions. Origins of this can be traced to the French scholarly endeavor, which aimed to study how the legal system, including the way legal education operated and the legal sources used by jurists, operated in Morocco. This study,

[175] Hahn, *North Africa: Nationalism to Nationhood*, 76. Both Balafrij and Wazzānī were Moroccan nationalists. Their discourse varied greatly from that of al-Fāsī because they advocated the adoption of Western concepts and institutions as a necessary part of the modernization project.

however, was significantly flawed because French scholars employed their own educational tools rather than objectively studying how legal concepts were derived in Morocco. Cultural assumptions - for example, the supposition that juridical principles could be found in legal texts rather than transmitted orally from scholar to student, significantly impinged on colonialists' ability to accurately understand how the legal system operated. French scholars had placed too great an emphasis on the written work rather than assessing how legal information was transmitted and how legal norms were derived. Once the "authoritative" legal texts were located, they were translated, often times inaccurately or with much of the complexities that made the text rich in material edited out, to yield a simple, straight-forward text that could be easily approached by any colonial official for quick reference.[176] These texts often looked more similar to French law manuals rather than Arabic legal manuscripts. The subjective translation of legal texts was not peculiar to the French; it was in fact a priority for all colonialists to study and control colonized populations. As Brinkley Messick states,

> Translations produced under the auspices of colonial administrations were informed by reigning philological methods and understandings about the nature of texts. An initial task was to sift and select among extant manuscripts to identify, or reconstruct, a sound original text. A recognized contribution of many such translations was to publish and, in a new sense, *to create* an authoritative Arabic text. Together with the possible variant readings, the additions, omissions, and alternative formulations found in other manuscripts would be relegated to footnotes. However enigmatic or convoluted the original texts appeared to Westerners in arguments and style, in translation they could be made to reveal bodies of discrete and objective meanings. Despite the apparent cacophony of its texts, the shari'a could be shown to be 'saying something.'[177]

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[176] In his book *The Calligraphic State,* Brinkley Messick posits that translation was an extremely important task for Orientalists in their attempt to control and rule over native populations. Bernard Cohn posits a similar argument in his book *Colonialism and its Forms of Knowledge* (Princeton: Princeton University Press, 1996).

[177] Messick, *The Calligraphic State,* 66.

It is therefore clear how the colonial scholarly endeavor might have misunderstood or misinterpreted the way Islamic legal systems functioned.

The entire process of translating and reorganizing legal texts by Orientalists, which Léon Buskens refers to as 'reference culture,' was one of the most lasting aspects of the colonial study of Islamic law. Its longevity was sustained by Moroccans in the post-colonial era as they perpetuated the same standards set by the French when studying and organizing legal principles. As a result of the precedent set by French scholars, the legal system was altered significantly. These changes were manifested in educational institutions, the standardization of the legal system, and the production of a legal code.

Traditional institutions of Islamic learning in Morocco faced serious threats throughout the 20th century. These threats arose from two major events – one which Dale Eickelman describes as the "fall" of traditional learning. Early signs of this collapse were evident since the mid 19th century when the *awqāf* revenues that sustained institutions of Islamic learning nearly came to a halt as a result of economic hardships due to European presence in Morocco.[178] With limited resources, the universities suffered from major cutbacks. The second event which lead to the decline of traditional learning was the flourishing of modern universities, which was exaggerated by the perception that traditional schools lacked intellectual vigor and did not adequately train their students for the workplace. Criticisms of traditional educational institutions initially came from French scholars who were part of the colonial scholarly endeavor to study Islamic

[178] Eickelman, *Knowledge and Power in Morocco,* 82.

law. Lévi Provençal, for example, claimed that traditional learning "deadened the students' sense of inquiry to the point that the knowledge and comportment of 20th - Century men of learning could be assumed 'without fear or anachronism' to be exact replicas of their predecessors of four centuries earlier." L.C. Brown complained that Islamic universities suffered from "stifling dullness," and Jacques Berque asserted that traditional learning "defies all pedagogical technique."[179] Dissatisfaction with traditional methods of learning as a point of contention for Moroccan scholars reached its zenith by the 1920s and onward when a number of initiatives to reform the curriculum began to surface.[180] Whereas these institutions were gradually abandoned by Moroccans, modern universities gained considerable appeal as they were believed to hold more prestige. It was within these institutions that many of the contemporary lawyers were educated – within the faculty of law. The problem, however, was that the modern universities could no better train students to practice Islamic law than the traditional universities – in fact, the educational program of these institutions closely mimicked that which could be found in a faculty of law in Paris.

As previously stated, al-Fāsī was a product of traditional Islamic education. By 1927, al-Fāsī had become an activist for educational reforms at al-Qarawiyīn. Beginning in 1933, for a short time, al-Fāsī served as a professor of Islamic history within that University. His role as a teacher and activist within al-

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[179] E. Lévy-Provençal, *Les Historiens des chorfa* (Paris: Librairie Orientaliste Paul Geuthner, 1922), 11; Leon Carl Brown, "The Religious Establishment in Husainid Tunisia," in *Scholars, Saints, and Sufis,* edited by Nikki R. Keddie, pp. 47-91 (Berkeley: University of California Press, 1972), 71; Jacques Berque, "Lieux et moments du réformisme Islamique," in *Maghreb: Histoire et sociétés* pp. 162 – 188 (Paris: Éditions J. Duculot, 1974), 167. Cited in Eickelman, *Knowledge and Power in Morocco,* 58.

[180] Eickelman, *Knowledge and Power in Morocco,* 97.

Qarawiyīn demonstrated his dedication and interest in reviving Islamic learning. This interest was also clear in his writings, as he defended traditional education and those reared within that setting. This was exemplified when he urged the State and the Ministry of Justice to treat students of al-Qarawiyīn in the same manner as students of modern universities when practicing law.[181]

The problem however, is that despite the considerable amount of importance he placed on improving traditional education, by 1956 al-Fāsī had accepted a position as professor of law at the University of Rabāṭ. By doing so, he had conceded to the notion that Islamic law could and should be taught within a modern university and that lawyers who were a product of that education possessed the knowledge and skills to make them competent in practicing Islamic law. This contradicts Buskens' assertion that contemporary Moroccan lawyers do not have the language skills and concepts to even *approach* classic works of *fiqh.*[182] If traditional institutions of learning, as guardians of Islamic knowledge, are failing to produce competent scholars, it is unclear how a modern university, which mimics the French educational system, would be able to fare better with respect to educating students in Islamic law.

Al-Fāsī's investment in modern education is indicative of his overall vision for legal reforms, for within his framework for legal reforms, al-Fāsī advocated the study of comparative law as a means to make the Islamic legal system more complete. It was in this vein that he condoned the adoption of European laws, in an attempt to close any gaps present in the existing law, so long

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[181] El Fassi, *Défense de la Loi Islamique,* 325.
[182] Buskens, "Islamic Commentaries and French Codes," 92.

as they did not contradict or challenge the supremacy of the *sharī'a.* It was for this reasons that modern education might be able to provide an avenue for these goals to be accomplished, for it was within modern educational institutions that the subject of comparative law was taught.

Al-Fāsī's advocacy of modern education was further justified by the belief that interpreting the sources of law was not exclusive to one particular class, but open for all to participate in. Therefore it would make sense that scholars of Islamic law could theoretically be educated outside the traditional institutions.[183] In fact, based on this argument, a person would not even need formal education to practice *ijtihād.* The problem, however, comes about when those who were educated within the traditional setting are not qualified to practice Islamic law. If those who are supposed to be receiving the proper education to become qualified to practice Islamic law are not obtaining the necessary skills, then how can someone who attends a modern university be any more qualified to do such a task?

Effectively, the contradiction in al-Fāsī's thought rests in the fact that while he expressed concern for improving traditional education in order to uphold its prestige, through his actions, he actually seemed to have supported the position that traditional education was no longer adequate and that modern education was more valuable.

***Codification***

The issue of codification of the law is perhaps one of the most interesting

[183] El Fassi, *Défense de la Loi Islamique,* 128.

areas to consider when assessing al-Fāsī's thought, for it is here that he seems most contradictory. Al-Fāsī was consistent in his defense of the implementation of the *sharī'a*, yet he fully supported the production of legal codes, for he believed that it was an indispensable part of the modernization process. For him, a legal code based on Islamic jurisprudence was a device that could be used to systematize and modernize the legal system, while preserving Islamic principles. Al-Fāsī gave such a prioritized place to the emergence of a "modern" society that in his advocacy of the production of a legal code, he divorced himself from many defining characteristics of the Islamic legal tradition. The issue of codification is nuanced when it is adopted as part of Islamic law, because, by codifying Islamic principles, the entire field of Islamic law is completely transformed. This is due to the fact that the idea of using legal codes as an authoritative legal text has no origins in the Islamic legal tradition; it is a distinctly European and its introduction in Moroccan can be considered a French colonial legacy.

French scholarly discourse, which emphasized its own textual tradition significantly influenced the way Moroccans viewed their own legal system. French scholars set specific standards based on their own legal culture for what was acceptable in the field of law. These standards included 1.) the ability for a country to have its laws clearly defined and readily available for reference by any individual 2.) a certain degree of consistency in the laws which were applied, as well as a certain degree of predictability regarding the outcome of a case. Under these premises, the use of codified law guarantees that these objectives are achieved, and 3.) in an attempt to guarantee that laws were applied fairly, the

judicial process should be subsumed under the supervision of a superior power, namely the State. By setting these standards, the French laid down the foundations for Moroccan scholars to conceptualize the promulgation of a legal code.

Furthermore, as was argued in the first chapter, codification of the law significantly altered the way in which the Islamic legal system operated. In fact, codification is symbolic of a complete loss of autonomy for the *'ulamā'*, as juridical authority is allocated to the State – a change unprecedented in Islamic history. This is not to say that the State should not be allowed to exercise legislative power, but in the case of the *sharī'a,* the State does not possess the skills nor the expertise to extract legal principles from traditional legal sources and to apply these principles to its citizens. Therefore, this power shift can be considered a direct threat to the life of the *sharī'a.* [184]

It seems most accurate to conclude that al-Fāsī sought to maintain the prevailing Islamic legal norms, but did not hesitate to remove these norms from the traditional Islamic legal system. This is to say that al-Fāsī supported the codification of the *sharī'a* but was ambivalent about upholding the legal tradition which sustained Islamic legal developments throughout history. In other words, in an effort to modernize the Moroccan legal system, al-Fāsī completely divorced himself from the traditional Islamic legal system by advocating a system wherein

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[20] It is unclear whether al-Fāsī considered these factors in his advocacy of codification. Certainly he did not see it as a threat to codify the law, but he did not seem to take into account how this would change the entire Islamic legal system. The only thing that we are sure of is that al-Fāsī believed that the sources of Islamic law could be interpreted by anyone, not only the *'ulamā'*. This is rather troubling, considering that after the first half of the 20th century, the majority of *'ulamā'* did not possess even the *language skills* that were required to read classical Arabic texts. If those who were specialized in the field of Islamic law were not capable of turning to these sources, than how could a layman do any better?

the legal contents were Islamic, yet presented in a European form. Effectively, this resulted in unprecedented changes to the legal system, which he was willing to accept in order to make Morocco a more modern nation.

By studying al-Fāsī as an *'ālim* within the colonial context, in conjunction with his nationalistic orientation, we are enabled to better understand two important phenomena that emerged in Morocco in the 20th century: The nationalist movement and the legal reform movement. While both movements are interrelated – nationalism as a movement driven by the desire to create a national identity, and legal reform as a movement to *shape* that national identity, al-Fāsī's appropriation of anti-colonial and anti-French discourse seemed to have fueled his debate for debasing French domination in Morocco. When it came time to actually implementing reforms, however, he seemed to have conceded to many aspects of French legal culture. Thus the career of al-Fāsī exemplifies the tension between nationalism as an anti-colonial movement and nationalism as a platform for becoming "modern" and "progressive." The way in which al-Fāsī approached the issue of legal reform is, therefore, representative of a larger picture where Muslim countries struggled to modernize society while remaining true to their Islamic traditions. The career of al-Fāsī can be considered a window on this struggle.

# Appendix A

**The following is a list of the literature produced by 'Allāl al-Fāsī.**

"Al-'Alāqah bayn al-Falsafah wa bayn al-Dīn Hasab Kutub al-Tahāfut al-Thalathah." (The relationship between philosphy and religion based on the books *Al-Tahāfut al-Thalathah*) *Da'wat al-Ḥaqq* 1 (January 1958): 4-11.

"Al-'Amal fī al-Islām." (Work in Islam) *Al-Īmām* 1 (February 1964): 23-29.

*'Aqīdah wa Jihād.* (Faith and struggle) Rabat: Al-Maṭba'ah al-Iqtiṣādiyyah, 1960.

*Badīl al-Badīl.* (The alternative of the alternative) Casablanca: Dār al-Kitāb, n.d.

*Dā'iman ma'a al-Sha'b.* (Always with the people) Rabat: Maṭba'at al-Umniyyah, n.d.

"Al-Da'wat al-Islāmiyyah." (Islamic missionary work) *Al-Īmām* 2 (June 1965): 6-11.

*Défense de la Loi Islamique.* Translated by Charles Samara. Casablanca: L'Imprimerie Eddar el Beida, 1977.

*Difā'an 'an al-Aṣālah.* (Defending authenticity) Rabat: Maṭba'at al-'Umniyyah, n.d.

"Al-Dīmuqrāṭiyyah Khulq." (Democracy is a moral) *Al-Bayyinah* 1 (December 1962): i-iii.

"Fa'āliyyat al-Lughah al-'Arabiyyah. (The effectiveness of the Arabic language) *Al-Lisān al-'Arabī* 3 (August 1965): 8-26.

"Fī al-Bad' kānat al-Kalimah." ("In the Beginning it was Words") *Al-Bayyinah* 1 (June 1962): 3-6.

*Ḥadīth al-Maghrib fī al-Mashriq.* (The Story of East and West) Cairo: al-Maṭba'ah al-Ālamiyyah, 1956.

"Hal al-Islām fī Ḥājah 'ilā Falsafah?" (Does Islam need philosophy?) Part 1. *Al-Īmām* 1 (December 1963): 8-12; Part 2. *Al-Īmām* 1 (January 1964): 21-28.

"Ḥasanatayn." (Two good deeds) *Al-Īmām* 1 (June-July 1964): 24-29.

*The Independence Movements in Arab North Africa.* Translated by Hazem Zaki Nuseibeh. New York: Octagon Books, 1970.

"Insāniyyah al-Muslimīn." (Muslim humanity) *Al-Bayyinah* 2 (January 1963): 3-5.

"Al-Islām wa Nazariyyat Jaysil (Gesell)." (Islam and Gesell's Theory) *Da'wat al-Ḥaqq* 3 (April 1959): 6-8.

"Al-Isti'mār al-Lughawī." (Linguistic colonization) *Al-Bayyinah* 1 (October 1962): 3-5.

"Kasr al-Ḥājiz." (Breaking the barrier) *Al-Bayyinah* 2 (February 1963): 3-5.

"Al-Khuṭūṭ al-Shar'iyyah." (The legal ways) *Al-Bayyinah* 1 (October 1962): 77-101.

"Lā Shuyū'iyyah wa lā Ra'smāliyyah." (Neither communism nor capitalism) *Da'wat al-Ḥaqq* 1 (August 1957): 7 + 24.

*Ma'rakat Wādī al-Makhāzin.* (Fight of the Makhāzin River) Rabat: Maṭa'at al-Risālah, 1978.

*Ma'rakat al-Yawm wa al-Ghad.* (Fight of today and tomorrow) Rabat: n.p., 1965.

*Manhaj al-Istiqlāliyyah.* (Ideology of the Istiqlāl) Rabat: Maṭba'at al-Risālah, 1962.

*Maqāṣid al-Sharī'a al-Islāmiyyah wa Makārimuhā.* (Objectives of the sharī'a and its noble characteristics) Casablanca: Maṭba'at al-Waḥdah Al-'Arabiyyah, n.d.

"Le Mariage Mixte." In *Ecrivains Marocains. Du Protectorate à 1965. Anthologie.* Translated by Mohammed Ben-Jelloun. Paris: Sinbad, 1974, p.66-69.

"The Mediterranean Civilization." *New Outlook* 2 (November 1958): 43-45.

"Mission of the Islamic 'Ulema." Translated by Hassan Abdin Mohammed. In I. Zartman. *Man, State, and Society in the Contemporary Maghrib.* London: Pall Mall, 1973, p. 151-158.

*Al-Muḥāḍarāt fī al-Maghrib al-'Arabī.* (The independence movements in Arab North Africa) Cairo: Maṭba'at Nahḍat Miṣr, 1955.

"Muqadimāt lī Dirāsat Ta'rikh al-Tashrī' al-Islāmī" (Introduction to the studies of the history of Islamic principles) Part 1. *Al-Bayyinah* 1 (September 1962): 60-86; Part 2. *Al-Bayyinah* 2 (February 1963): 74-97.

"Mustaqbal al-Lughah al-'Arabiyyah." (The future of the Arabic language) Part 1. *Al-Bayyinah* 2 (January 1963): 109-121; Part 2, *Al-Bayyinah* 2 (February 1963): 74-97.

*Al-Naqd al-Dhātī.* (The Self-Criticism) Beirut: Dār al-Kashshāf li-l-Nashr wa al-Ṭibā'ah wa al-Tawzi', 1996.

"Nash'at al-Fikr al-Islāmī al-Ḥadīth." (Birth of modern Islamic thought) *Al-Īmān* 2 (April 1965): 7-17.

*Nidā' al-Qāhirah.* (Voice of Cairo) Rabat: Al-Maṭba'ah al-Iqtiṣādiyyah, n.d.

"Al-Nizām al-Qaḍā'ī." (The judiciary system) *Al-Bayyinah* 1 (November 1962): 103-123.

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"Problématique d'une pensée contemporaine." (translated excerpt of *al-Naqd al-Dhātī*, pp. 81-91) in A. Abdel-Malek, *Anthologie de la literature arabe contemporaine: les essays.* Paris: Seuil, 1965.

"Al-Qaḍā ba'd al-Istiqlāl." (Justice after independence) *Al-Bayyinah* 1 (December 1962): 82-106.

"Qaḍāyā al-Ḥurriyyah al-Dīniyyah." (The question of religious freedom) *Al-Īmān* 1 (April 1964): 33-41.

"Qaḍīyyat al-Muslimīn al-'Ūlā." (The paramount issues of Muslims) *Al-Bayyinah* 1 (September 1962): i – iii.

"Quwwat al-Ḥaqq." (Power of truth) *Al-Bayyinah* 1 (November 1962): i – iii.

"Al-Ṣawm." (Fasting) *Al-Īmān* 2 (March 1965): 51-54.

"Al-Shaykh Muḥammad 'Abduh." (Shaikh Muḥammad 'Abduh) Part 1. *Da'wat al-Ḥaqq* 1 (March 1958): 1-9; Part 2. *Da'wat al-Ḥaqq* 1 (April 1958): 1-8.

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