NATURAL JUSTICE UNDER THE SCOPE OF RHETORIC:
THE WRITTEN AND THE UNWRITTEN LAWS IN IBN RUSHD’S POLITICAL AND LEGAL PHILOSOPHY

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To the memory of M. Chaker Bouhafa


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ABSTRACT

This dissertation explores the works of Ibn Rushd and identifies an appropriation of Aristotle’s concept of natural justice, paying attention to the distinction he makes between the written laws (al-sunan al-maktūba) and the unwritten laws (al-sunan ghayr al-maktūba) in his Middle Commentary on Aristotle’s Rhetoric (Talkhīṣ al-khaṭāba), and parallel views in his legal works. My study argues that Ibn Rushd’s legal and political philosophy advances a concrete view of Aristotle’s natural justice, which anchors ethic in the normative framework of sharī‘a. Ibn Rushd’s conception of natural justice, I propose, is best evidenced in his view on the political and epistemological value of rhetoric and its relation to law. I further argue that Ibn Rushd asserts the necessity of rhetoric to ensure justice—which he considers key to political stability. Ibn Rushd, therefore, constructs his conception of natural justice under the epistemological scope of rhetoric, through the prism of the unexamined opinion (bādi’ al-ra’y al-mustārak), a quasi-rational view of instinct opinion shared among people. I locate this discussion within Ibn Rushd’s views of the written laws and the unwritten laws and their relation to natural justice.

The thesis proposes that Ibn Rushd identifies two modes for natural justice: in potentiality, based on natural human inclination, accessible to the masses; and in actuality, linked to the elite, and only accessible to qualified jurists, through ijtihād. Ibn
Rushd successfully bridges this proposed divide between the masses and the elite, through setting public approval as a condition: he grounds the concept of natural justice in the unexamined opinion, thus providing the epistemological criteria for the qualified jurist to frame arguments curated to garner public approval. Finally, I show how Ibn Rushd contextualizes his conception of the Stagirite’s natural justice within sharī‘a, which, he contends, encompasses both the written laws and the unwritten laws: the written, such as the hudūd punishment; and the unwritten associated with the Qur’anic ethical concepts and the objectives of the law grounded in the different legal precepts (al-qawā‘id al-fiqhiyya). The importance of my contribution lies in challenging the dominant position, which has long held that Ibn Rushd equates sharī‘a with truth, instead I underline how Ibn Rushd presents the practical efficiency of sharī‘a as the sole ground to its evidence. In advancing novel discussions and unfolding unexamined connections, the thesis of my work revisits this correlation to underline the connection between sharī‘a and practical philosophy.
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INTRODUCTION

In the early orientalist legal scholarship, Islamic law was understood as an imposed, ethical code of behavior. The common perception was that the Prophet Muhammad did not originate a new legal system but rather came to teach the new community how to act based on ethical and religious standards.¹ This meant that Islamic law had as its foundation a religious taxonomy based on textual references to morality rather than juridical categories.² Hence, the primacy of scripture in Islamic law led many to ascribe a conclusive and immutable character to God’s law and preclude practical ethics in relation to Islamic law, a verdict that is declared by several orientalists. This can be seen in Brunschvig and Arnaldez’s holding that the revealed datum was *a priori* absolved of any notion of natural law, as well as seen in Gibb who asserts that Muslim philosophy “never appreciated the fundamental idea of justice in Greek philosophy.”³

Reading the Andalusian philosopher and jurist Ibn Rushd (d. 1198), a commentator of Aristotle, in his *Middle Commentary on Aristotle’s Rhetoric (MCAR)*, known in Arabic as

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² For a thorough discussion of early orientalists’ views on *fiqh*, see Johansen’s introduction in his book *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden: Brill, 1999), 45-72. There he explains how some orientalist scholars such as Schacht and Goldziher argued that the sacred law of Islam did not establish any formal distinctions between the spheres of law: no differentiation between law, religion, cult, and ethics.
Talkhīṣ al-khaṭāba, challenges this assumption. In this commentary, Ibn Rushd appropriates Aristotle’s concept of natural justice, which endorses a rectification of the written law against deficiencies stemming from changing circumstances. In his voluminous translation of and commentary on MCAR, Maroun Aouad is the first to put the spotlight on the peculiarity of Ibn Rushd’s appropriation of Aristotle’s ethical view in the MCAR, formulated under the mantle of the written laws (al-sunan al-maktūba) and the unwritten laws (al-sunan ghayr al-maktūba). Most importantly, Aouad shows that Ibn Rushd attributes a rectifying function to the unwritten laws, through their ability to adjust the written laws to either mitigate their severity or amend their laxity; likewise, he underscores the relevance of Ibn Rushd’s discussion in this couplet of the written and the unwritten laws in the Islamic legal context. Specifically Aouad draws attention to how Ibn Rushd juxtaposes the unwritten laws’ capacity to maintain an infinite accretion of value of good and bad to qualify the infinite possible array of human acts with the tension in the written laws between the determined value of good and bad and the infinite .

4 MCAR is the central text for my study. All references in this study rely on Aouad’s edition and some of his interpretations, but I provide my own translation for all the quoted passages. Averroès, Commentaire Moyen à la Rhetorique d’Aristote, ed. and trans. Maroun Aouad (Paris : Vrin, 2002), three volumes.

5 In his Rhetoric, Aristotle talks about a general law (or laws of nature) and a particular positive law (Rhetoric I.13 1373b1-18). Similarly, in his Nichomachean Ethic, Aristotle divided political justice into natural justice and positive legal justice. (See Nichomachean Ethic V. 7, 1134b18-15a3). In both treatises, Aristotle argues that while the content of the laws of nature or natural justice is determined by nature, which makes it universally valid and immutable to all humans, particular law or legal justice consists of rules (or a contract) set within each community to serve its own purpose. This division was often discussed in literature under the notion of either natural justice or natural law theory. For all Aristotle’s references my study uses The Complete Works of Aristotle, the Revised Oxford Translation, ed. Jonthan Barnes (Princeton: Princeton University Press, 1984). I adopt Gisela Striker’s position on taking Aristotle’s as a conception of natural justice, a point I discuss in my first chapter.

6 I shall mention that as Ibn Rushd uses interchangeably the singular and plural forms when referring to the written and unwritten law. For the sake of consistency I chose to use the plural form when referring to the written laws and the unwritten laws. See Aouad’s discussion of the written laws and the written laws in his chapter two (Aouad, “Introduction générale,” in Averroès, Commentaire, Volume 1, 120-126); cf. Aouad’s analytical synthesis of the passages MCAR 1.12.42-1.14.12 (ibid., 137-142). Cf. also Aouad’s own commentary of Ibn Rushd’s text that includes a synopsis of Aristotle’s Rhetoric and the Arabic translation of Rhetoric that Ibn Rushd had at his disposal (Aouad, “Commentaire du Commentaire,” in Averroès, Commentaire Volume 3, 186-205).

character of human action. To put it differently, unlike the written laws, in which the quantity of good and bad does not always correspond to the infinite character of human actions, in the unwritten laws, the value of good and bad is infinite and therefore is always in harmony with the contingency of human actions. Thus, Ibn Rushd assigns to the unwritten laws the task of supplementing the written laws with addition or subtraction of the value of good and bad. As Ibn Rushd draws examples from Islamic law to illustrate this rectification, Aouad suggests that the rectification of the unwritten laws is applicable to Islamic law. Aouad’s contribution to reading Ibn Rushd’s MCAR goes beyond highlighting the pertinence of this rectifying function of the unwritten laws and their validity to Islamic legal context and extends to grasping Ibn Rushd’s view of the epistemological and political character of rhetoric, which, as Aouad also suggests, has some large bearing on his conception of the written and the unwritten laws. In this vein Aouad categorizes Ibn Rushd’s expansion of rhetoric as a logical art and discloses how this expansion is delineated under the parameters of the unexamined opinion, bādi’ al-ra’y al-mushtarak. Exploring the unexamined opinion, Aouad argues that this peculiar notion allows for the expansion of rhetoric, but still carves out the boundaries between rhetoric and other logical arts. Such an outlook will be also central to understand Ibn Rushd’s view on legal arguments in relation to the written and the unwritten laws.

Building upon Aouad’s findings, I hope to explore Ibn Rushd’s appropriation of Aristotle’s natural justice under the mantle of the written and the unwritten laws in order

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10 Ibid., 121.
11 Ibid., 88 -95.
to grasp its nature, function, and epistemological basis and finally explain how Ibn Rushd contextualizes sharī‘a. Ibn Rushd’s endorsement of Aristotle’s conception of natural justice is not only found in *MCAR* but also in his *Middle Commentary to Nichomachean Ethic (MCNE)*\(^\text{13}\) as well as, as I discovered, in his legal and religious works like *Bidāyat al-mujtahid wa nihāyat al-muqtaṣid (BM, The Distinguished Jurist Primer)*\(^\text{14}\) and his treatise *Faṣl al-maqāl wa taqārīr mā bayna al-sharī‘a wa al-ḥikma min al-ittiṣāl (FM, The Decisive Treatise on Establishing the Connection between the Revealed Law and Philosophy in Terms of Connection).*\(^\text{15}\) Yet, I shall note that Ibn Rushd’s discussion of natural justice is absent from his early treatises such as *Kitāb al-ḍarūrī fī al-manṭiq or jawāma‘ (SCR, Short Commentary on Rhetoric)*\(^\text{16}\) in 1159 and *Ḍarūrī fī Uṣūl al-Fiqh (DFF, The abridgement of Principles of Jurisprudence)*\(^\text{17}\) both of which belong to an early stage of the commentator’s career. Be that as it may, my study argues that on the basis of a selection of passages in these references, Ibn Rushd can be seen to endorse Aristotle conception of natural justice under the written and the unwritten laws. While I

\(^{13}\) Ibn Rushd’s *MCNE* was lost except for a few fragments in Arabic, but survived in the Hebrew and Latin traditions. I would like to thank Maroun Aouad for sharing with me his unpublished translation of the Latin version. Also I would like to extend my thank to Noah Feldman to sharing a copy of his dissertation which has some translation based on the Hebrew version. In my study I shall refer to both Aouad and Feldman’s translation. Noah Feldman’s Translations of Ibn Rushd. Feldman, “Reading the Nichomachean Ethics with Ibn Rushd” [PhD. diss., Oxford University, 1994].


\(^{16}\) In using *SCR*, I refer to Ibn Rushd’s treatise *Short commentary on Rhetoric*. All of my references will be based on Averroes, *Three Short Commentaries on Aristotle’s Topics Rhetoric and Poetics*, ed. and trans. Butterworth (Albany: State university of New York Press). I shall also base my translations on Butterworth with some modifications.

buttress Aouad’s suggestion of the correlation to rhetoric and specifically to the unexamined opinion, I shall also highlight a significant position on the relation between natural justice and Islamic law that Aouad did not take account of. Specifically, I argue that Ibn Rushd sets this conception of natural justice within the normative framework of sharī‘a. In referring to cases of application of the rectifying notion to Islamic law, we should not assume that the unwritten laws are outside of the scope of sharī‘a; rather, I show that sharī‘a displays cases of rectification as it encompasses both the written and the unwritten laws. Finally, I hope to contextualize this view of natural justice in relation to sharī‘a, which will further inform us on Ibn Rushd’s conception of sharī‘a.

Findings

In order to grasp Ibn Rushd’s conception of natural justice, I focus on his view of rhetoric both to disentangle the basis of the corrective view of natural justice under the written and unwritten laws and to understand its relation to sharī‘a. Thus I argue that rhetoric as a logical art serves as both the political and epistemological framework for his view of law and ethics. To this end, Ibn Rushd insists on the necessary function of rhetoric to maintain justice as the main guarantee for political stability. To be more specific, Ibn Rushd conveys his concern over justice by outlining three factors: First, the contingency of matter related to human actions, which leads to deficiency of the written regulations; second, the undue universalization of certain opinions of the lawgiver; and, finally, his mistrust of judges’ justice, which justifies the need for natural justice.

To outline his conception of natural justice, Ibn Rushd divides it into two dimensions. (1) He associates the first dimension to the infinite value of good and bad associated to acts under the unwritten laws, such as thanking the benefactor and filial
piety, which often lead to praise or blame. (2) The second dimension is linked to the corrective view, which admits written justice and supplements it with the needed value of good and bad. While the first part is universal and shared by all people, the rectifying notion which pertains to the value of good and bad remains under the prerogative of the qualified jurist, who can discern it while the masses can still approve of it also through praise and blame. To be more specific, I conclude that Ibn Rushd ascribes two modes to natural justice. One exists in potentiality and is associated to the masses who can recognize natural justice but have no capacity to discern it. A second mode exists in actuality and is associated with the mujtahid who can grasp universal matters of justice and apply it to particular cases.\textsuperscript{18} To bind these two modes together, I argue, Ibn Rushd anchors natural justice under the epistemological view of rhetoric, specifically the unexamined opinion, bādi‘ al-ra’y al-mushtarak. Given that the unexamined opinion is quasi-rational opinion accessible to all people, Ibn Rushd uses it as a basis for the praiseworthy premises of natural justice to the unexamined opinion. Therefore, he requires that jurists formulate their arguments to fulfill natural justice by using topics based on the unexamined opinion. More importantly, as Aouad shows, the use of the unexamined opinion allows for the rhetorician to admit both what is truly a widely accepted argument and what people suppose to be a truly widely accepted argument. This allows for the introduction of new arguments under the guise of truly widely accepted opinions.

Accordingly, I conclude that through the use of the unexamined opinion, the jurist can both use true and praiseworthy accepted opinion or include his individual legal

\textsuperscript{18} My use of the terms in actuality and potentiality is not meant in the technical peripatetic sense. For more see chapter 3.
judgment under the guise of what people assume as truly widely accepted argument to ensure people’s approval. Such an outlook offers a peculiar view of Aristotle’s natural justice, one that is clearly informed by the Islamic legal context. My exploration of Ibn Rushd’s natural justice also shall contribute to a better understanding of his conception of sharī‘a. My main contention here is to show how he contextualizes natural justice within the normative scope of sharī‘a. Thus I underline how he admits that sharī‘a encompasses both the written laws, such as the determined written regulations, and the unwritten laws associated to Qur’anic universal ethic and the objectives of the law, *maqāṣid al-sharī‘a*, through the use of legal maxims, *qawā‘id fiqhiyya*. This view is even more pronounced in *BM*, where Ibn Rushd cements the first dimension of natural justice in Islamic contexts. Thus he shows that this human inclination toward natural justice does not only rest on praiseworthy premises such as *maḥmūdāt*, but is also linked to religious rituals and again affirms the role of the *mujtahid*, who is responsible for governance in the city (*ri‘āsa*) to discern the necessity for addition and subtraction and to rectify any deficiency (*khalal*) in the law. Such a view is also affirmed in *FM*, where he calls on the jurist to use practical excellences.

Finally, my study asserts that his view of natural justice within sharī‘a and its reliance on rhetoric’s epistemological framework corresponds to his understanding of sharī‘a in his legal writings. Unlike the dominant position on the harmony between sharī‘a and philosophy built in his *FM*, I shall contend that Ibn Rushd does not equate sharī‘a with truth. On the contrary, he remains consistent in admitting the reliance of Muslim jurists on doxatic opinion but also underscores the practical value of opinion in eliminating justice. This acknowledgment is not intended to advance a conflict between
shari’a and philosophy; rather, I suggest that it might be necessary to revisit this view in term of the relation to rhetoric as a logical art and its practical view in the realm of human actions. To this end, I underscore how Ibn Rushd positions the validity of the whole epistemological basis of the divine discourse within the practical basis of shari’a. This view seems to rupture with the theological basis for adhering to Islamic law and admits its practical efficiency as the only basis for assenting to the divine discourse. To buttress this practical and efficient conception of shari’a as the only basis for adherence, Ibn Rushd draws from some development he makes in *MCAR*, mainly in adopting his expansively conceived scope of both rhetoric and natural justice. Ibn Rushd uses this framework to also expand the scope of assent under shari’a, and anchors natural justice in this framework in both his *FM* and *BM*. Such an outlook leads me to also conclude that Ibn Rushd’s view of the connection between shari’a and philosophy is meant to highlight the relation between shari’a and practical philosophy. Such a reading of Ibn Rushd’s view on the relation between shari’a and practical philosophy shall challenge the harmony thesis which, I would argue, helped eclipse Ibn Rushd’s conception of natural justice.

**Summary of chapters**

My chapter one will first provide an overview of Aristotle’s ethics and then account for the different approaches to Rushd’s political philosophy by focusing on the influence of the Straussian theory in the study of his political philosophy. As I question the premises of the Straussian approach, I underline that reading Ibn Rushd shall benefit from the perspectives in Islamic jurisprudence and therefore I hope to draw a link between his political philosophy and legal views to better grasp Ibn Rushd’s construal of Aristotle’s ethical view in relation to Islamic jurisprudence.
In chapter two, I first explore Ibn Rushd’s discussion of the role of rhetoric in politics and law to show how such a conception is informed by the Islamic context and the necessity of establishing legal opinions that are binding despite their reliance on the preponderance of opinion (*ghalabat al-ẓann*). To be specific, I demonstrate how the political role of Islamic jurisprudence is intertwined in his view of the epistemological scope of rhetoric, which clearly reflects the influence of Islamic modes of divine discourse, asserting how he draws from Islamic sciences such as *fiqh* and *balāgha*. Finally, the chapter underlines how despite the expansion of rhetoric, which allows for using other logical arts, Ibn Rushd still demarcates its boundaries within the unexamined opinion and therefore sustains a practical view of rhetoric.

In chapter three I assert the importance of rhetoric in political stability, mainly in terms of justice. This shall be best illustrated in the influence of the epistemological scope of rhetoric in Ibn Rushd’s view of natural justice. As I identify the property of the written and the unwritten laws, I prove that Ibn Rushd view of natural justice rests on the epistemological and practical domain of rhetoric and his conception of the masses and the elite embedded in his political view. While the masses can assent to the unwritten laws and recognize them on potentiality, the elite can bring these laws to life through a process of argumentation regulated under the criteria of the unexamined opinion.

In chapter four, I shall affirm that such a political presentation of the role of rhetoric and natural justice corresponds to his conception of sharī‘a and its modes of argumentation. In delineating this kinship between rhetoric and law, I argue that Ibn Rushd is consistent in both his philosophical and legal works. Thus he submits divine revelation and its modes of argumentation under the concept of testimony. Such a
position asserts that the basis for adherence to divine discourse rests on both practical and argumentative views of rhetoric. This view positions sharī’a within the practical realm where consensus on practical matters related to ethic is possible.

Finally in the last chapter I explore how Ibn Rushd anchors this conception of natural justice within the normative view of sharī’a, which embraces both the written laws and the unwritten laws. While he admits revealed legal commandments under the written laws he associates the unwritten laws to the Qur’anic ethics and the various objectives of the law articulated in legal precepts (al-qawā‘id al-fiqhiyya).
CHAPTER ONE
REVISING THE APPROPRIATION OF ARISTOTLE’S NATURAL JUSTICE IN IBN RUSHD’S THOUGHT

The ethical inquiry into the natural standards of justice has long concerned the fields of ethics and philosophy. This inquiry centers around whether one can presume the existence of a conception of rights grounded in a system of natural justice as a higher standard of adjudication or some sort of immutable universal set of rules rooted in nature.\(^{19}\) The debate on whether one can talk about the existence of single body based on nature, binding all human societies, often focuses on the writing of Greek philosophers, mainly on Aristotle.\(^{20}\) While tackling Aristotle’s ethical view, scholars have pondered about the basis of the Stagirite’s ethic and offered different labels to depict it, such as natural right or natural law and natural justice.\(^{21}\) The question is often debated based on a number of scattered statements made by the Stagirite in his *Rhetoric*, *Nichomachean Ethics* (NE), and *Politics*. As I noted earlier, Ibn Rushd, who engages with Aristotle’s

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\(^{21}\) Here I should note that natural right and natural law fall under within the same understanding as they are both used to refer to an immutable universal set rooted in nature. Strauss however prefers to use natural right over natural law therefore I shall stick to natural right as I am going to focus my discussion on his ideas. As for natural justice it is used to underline the corrective notion in Aristotle’s ethic and is sometimes discussed under the concept of equity. To present both views, I shall base my discussion for natural right mainly on Strauss, *Natural Right and History* (Chicago: Chicago University Press, 1953) and for natural justice Striker, *Essays*. For more supporters of a view of natural law or natural right Bernard Yack, “Natural Rights and Aristotle’s Understanding of Justice” *Political Theory* 18, no. 2 (1990); Fred Miller, “Natural Law,” in *the Encyclopedia of Libertarianism*, edited by Ronald Hamowy (Thousand Oaks, CA: Sage Publications Inc., 2008); Pierre Destriée, “Aristote et la question du droit naturel,” *Phronesis. A Journal for Ancient Philosophy* 45, no. 3 (2000), 220-239; Tony Burns, *Aristotle and Natural Law*, (London: Continuum, 2011).
political teachings, states a position on the topic, both in his commentaries and legal treatises. In his discussion of natural right, Leo Strauss, identifies Ibn Rushd’s appropriation of Aristotle’s conception of natural justice in Ibn Rushd’s MCNE composed in 1177. Likewise, Charles Butterworth notes Ibn Rushd’s discussion in the couplet of the written and the unwritten laws in his early study of MCAR. Yet, both scholars undermine the validity of Ibn Rushd’s appropriation of Aristotelian ethics due to its incompatibility with Islamic law. Ibn Rushd’s views on Aristotle’s ethical views remained unexplored, until Aouad’s study of MCAR.

In this chapter, I first set the general framework for discussing Aristotelian ethical views, and explain how these are tackled under notions of natural right or natural justice in the related literature. I then outline few passages, which affirms Ibn Rushd’s engagement with Aristotle’s ethic. Also I look at earlier approaches to Ibn Rushd’s appropriation of Aristotelian ethical views with the focus on Straussian approach in order to fathom the reasons why Ibn Rushd’s original view of the written and the unwritten laws in MCAR and his other articulations in his legal treatises were dismissed. Specifically, I argue that the Straussian approach was steeped in an assumption of sharī’a’s immutable and conclusive nature, which rendered the notion of rectifying Islamic law oxymoronic at best. Still, I explain, that this view which is premised on

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22 Strauss, *Natural Right*, 158.  
23 This point will be later discussed based on Charles Butterworth, “Rhetoric and Reason: a Study of Averroes’ Commentary on Aristotle’s Rhetoric” [PhD. diss., Chicago University, 1966], 163 and 168.  
24 Here the “Straussian approach” refers to some of the ideas of the German philosopher Leo Strauss and his followers in their approach to the Arabic reception of Aristotle and Plato’s political philosophy. Strauss viewed Islam as antagonistic to Greek philosophical thought, as there is no separation between cannon and civil law. For him, Arabic philosophers both Muslim and Jewish were bound by the divine law (sharī’a) or Torah and therefore had to conceal their philosophical reflection. I will discuss some of these ideas based on the works of Strauss and Charles Butterworth in his work on Ibn Rushd’s MCAR and his political teachings on the rhetoric. For Strauss’ views on Arabic philosophy see Strauss, *Natural Right*, as well as some of the works of Charles Butterworth who also adopted the Straussian approach in his study of Ibn
To outline my approach, I show how revisiting Ibn Rushd’s political views on rhetoric and the written and the unwritten laws using the new perspective of studies on Islamic jurisprudence, particularly on fiqh’s epistemology, places the relation between rhetoric and Islamic law in a new light. The present study hopes to explore how Ibn Rushd’s articulation of the role of rhetoric in his political philosophy is shaped by his view on both the doxatic basis of Islamic law when compared to demonstrative truth, as well as a desire to ensure political stability through the socio-epistemological value of rhetoric. Such a framework allows for discerning Ibn Rushd’s appropriation of Aristotle’s ethical view, which paves the ground to grasp a conception of Aristotelian natural justice within Islamic law.

I. Overview of Aristotle’s ethical views

The debate about Aristotle’s ethical views is based on scattered references in Aristotle’s treatises. In book one of his Rhetoric he discusses a universal law, which he

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identifies with “laws of nature.” In book seven of NE, he alludes to natural justice (1134b 18-1135a 25-25), and finally one can find some reflections in his Politics (1325b7-10) where he notes the natural basis of the state and his remark on how perverted regimes run counter to natural law. These references formed the ground for the inception of a discussion on natural right or natural justice in Aristotelian thought. As the Stagirite says very little on the concept of natural right or natural justice per se, the door was left open for divergent interpretations. After briefly sketching some of the statements in the Aristotelian corpus, mainly Rhetoric, NE, and Politics, I discuss some of the main arguments that support an Aristotelian basis for a doctrine of natural right or natural justice.

A. Aristotle’s ethical views in Rhetoric, Nicomachean Ethics, and Politics

Given the importance of Aristotle’s Rhetoric to my study, as it forms the basis of my main textual source, Ibn Rushd’s MCAR, I shall start with the exposition of the division of laws into particular and general law in Rhetoric, which would be the linchpin for the Andalusian commentator’s conception of the written laws and the unwritten laws. But I shall provide some background on the relevance of rhetoric to the question of law and justice in the Greek context. Rhetoric, in ancient Greece, was defined broadly

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26 Cf. Burns, Aristotle, 8.
27 Strauss, Natural Right, 2.
as the civic art of public speaking used in assemblies and courts. Aristotle’s treatise emphasizes the political role of rhetoric in generating persuasion in public matters and was very much informed by the direct democracy that characterized the Athenian political system. In legal practice in Aristotle’s time, the litigants were responsible for giving a convincing speech in support of their case to an audience of non-legal specialists.

In other words, in the absence of a real court official or prosecutor, it is incumbent upon litigants to turn to forensic oratory. Performing a rhetorical exercise, litigants had recourse to laws that can be provided along with witnesses, contracts, and torture as forms of evidence, Aristotle considered these to be non-technical proofs. In this vein, James P. Sickinger admits that law and justice went hand-in-hand in the rhetoric of the courts in Athens. With this context in mind, Aristotle in chapter ten of book I of Rhetoric discusses judicial or forensic justice as the basis for accusation or defense as well as the ends of justice and injustice in Greek court cases. First Aristotle defines wrong doings as “injury voluntarily inflicted contrary to law.” Then, taking wrong

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33 Cf. ibid., 288.
34 Cf. ibid., 290.
36 Aristotle, Rhetoric I, 10. 1368b 7-8.
doings as an offense against the law, Aristotle proceeds to explain that laws are of two kinds: “Law is either special or general. By special law I mean that written law, which regulated the life of a particular community, by general law, all those unwritten principles, which are supposed to be acknowledged everywhere.”37 Herein, Aristotle frames a distinction between the particular (nomos idios) and the general or universal law (nomos koinos).38 Under this division, he distinguishes between a particular written law, which is laid down to regulate a particular community that is a positive law, and the general law pertaining to unchanging universally accepted principles.39 While this reference to universally accepted principles is crucial, this pithy statement does not divulge much. Thankfully, Aristotle comes back to elucidate this division further in chapter thirteen, which deserves some attention.

Taking the context of a pleader in a court of law, Aristotle again refers to the above-mentioned division of laws. Hence, he frames his view in relation to just and unjust actions and their relation to laws. This division admits (1) special, both written and unwritten law and (2) universal and natural law.

It will now be well to make a complete classification of just and unjust actions. By the two kinds of law, I mean particular and universal law. Particular law is that which each community lays down and applies to its own members: this is partly written and partly unwritten. Universal law is the law of nature. For there really is, as everyone to some extent divines, a natural justice and injustice that is common to all, even to those who have no association or covenant with each other. It is this that Sophocles’ Antigone clearly means when she says that the burial of Polyneices was a just act in spite of prohibition: she means that it was just by nature.

Not of to-day or yesterday it is,

37 Ibid., 10. 1368b 9-11.
39 Cf. ibid., 108.
But lives eternal: none can date its birth.

And so Empedocles, when he bids us kill no living creatures, says that doing this is not just for some people while unjust or others,

Nay, but, an all-embracing law, though the realms of the sky.

Unbroken it stretcheth, and over the earth’s immensity.\textsuperscript{40}

More importantly, Aristotle confers on general law a universal status and relates it to natural justice and injustice that is common to all people. Specifically, he associates the general law to the law of nature.\textsuperscript{41} What deserves some attention here is the link he makes between the law of nature and his reference to Antigone. This alludes to Sophocles’ Antigone who in an act of defiance challenged the King Creon, calling for the right to burial for her brother Polyneices based on natural law.\textsuperscript{42} More specifically, Antigone refused to leave her slaughtered brother’s body unburied, appealing to the sublime laws, which are eternal divine laws. These laws are immutable and beyond the scope of influence of human institutions.\textsuperscript{43} Cope explains this reference to Antigone in relation to these unwritten laws as:

...the great fundamental conceptions and duties of morality, derived and having their sanction from heaven, antecedent and superior to all the conventional enactments of human societies, and common alike to all mankind. On this ‘Natural law’ to which all ‘positive laws’ should conform, ‘the law of man’s nature.’\textsuperscript{44}

This view suggests the superiority of natural universal law over human conventional law that organizes a particular human society.\textsuperscript{45} Before drawing any conclusion, one shall also consider the rest of the chapter where Aristotle continues to

\textsuperscript{40} Aristotle, \textit{Rhetoric I}, 13.1373b1-18.
\textsuperscript{41} Burns, \textit{Aristotle}, 108.
\textsuperscript{43} Cf. Cope, \textit{An Introduction}, 240.
\textsuperscript{44} Ibid., 240.
\textsuperscript{45} Destrée, “Aristote et la question du droit naturel,” 226.
dwell on justice and injustice under the notion of equity as some sort of natural justice that is beyond the reach of the written positive law.

In the same chapter (13) Aristotle continues to discuss human actions, based on what is right or wrong conduct, and divides them into actions toward an individual and actions toward the whole community. 46 This view is also grounded in the distinction in Greek Attic law that is between civil and criminal procedures. 47 While civil offenses or their opposites are committed against an individual, public offense or its opposites are committed against the state or a community. 48 Hence Aristotle defines human conduct within the framework of this distinction between cases of legal offenses against individuals or the community.

We saw that there are two kinds of right and wrong conduct towards others, one provided for by written ordinances, the other by unwritten. We have now discussed the kind about which the laws have something to say. The other kind has itself two varieties. First, there is the conduct that springs from exceptional goodness or badness, and is visited accordingly with censure and loss of honour, or with praise and increase of honour and decorations: for instance, gratitude to, or requital of, our benefactors, readiness to help our friends, and the like. The second kind makes up for the defects of a community’s written code of law. For equity is regarded as just; it is, in fact, the sort of justice, which goes beyond the written law. Its existence partly is and partly is not intended by legislators; not intended, where they have noticed no defect in the law; intended, where they find themselves unable to define things exactly, and are obliged to legislate universally where matters hold only for the most part; or where it is not easy to be complete owing to the endless possible cases presented, such as the kinds and sizes of weapons that may be used to inflict wounds—a lifetime would be too short to make out a complete list of these. If, then, a precise statement is impossible and yet legislation is necessary, the law must be expressed in wide terms;

48 Cf. ibid.
and so, if a man has no more than a finger-ring on his hand when he lifts it to strike or actually
strikes another man, he is guilty of a criminal act according to the written words of the law; but he
is innocent really, and it is equity that declares him to be so.\(^\text{49}\)

Aristotle roots the basis of justice in relation to either the written or unwritten
ordinances. For the unwritten, he refers to two dimensions. While the first one is linked to
exceptional goodness that which comes with praise and honor such as gratitude or
requital of benefactors, goodness towards friends or exceptional badness which is met
with censure and blame. The second dimension of the unwritten law is what makes up for
the defects in a community’s written codes. In this sense, he discloses that the law of the
community is liable to be defective as it can only supply general rules. These rules,
granted, will need modification to rectify any deficiencies and generate adaptation to new
circumstances. This corrective notion is linked to what Aristotle calls equity, which he
defines thusly: “For equity is regarded as just; it is, in fact, the sort of justice, which goes
beyond the written law."\(^\text{50}\) In other words, the rigor of the written law and its inability to
address all potentialities needs mitigation or relaxation using the unwritten law to fulfill
equity.\(^\text{51}\) Such a view implies the superiority of the unwritten principles, which come to
rectify the written law to fulfill equity, and supports the view that there is a universal
basis for justice in Aristotle’s *Rhetoric*. Divinding the conception of equity into two
categories one associated to the value of human actions and another to the process of
rectification provides a coherent view to Aristotle’s commitment to universal justice.

Furthermore, this discussion of justice and injustice on the basis of the law in
Aristotle’s *Rhetoric* bears strong resonance with *NE*, where he links justice to the concept


\(^{50}\) Ibid.

of equity. More precisely, he distinguishes between political justice as partly natural and partly legal and identifies the natural part with a universal standard for justice that is everywhere the same:

Of political justice (*politikon dikaion*) part is natural (*phusikon*), and part is legal (*nomikon*), natural, that which everywhere has the same force and does not exist by people’s thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent, e.g. that a prisoner’s ransom shall be a mina, or that a goat and not two sheep shall be sacrificed, and again all the laws that are passed for particular cases, e.g. that sacrifice shall be made in honour of Brasidas and the provisions of decrees.  

Aristotle divides political justice into a natural justice (*phusikon*) and conventional or legal justice (*nomikon*). In this elucidation, natural justice is delineated as having the same force everywhere. Legal justice, however, is perceived as “that which is originally indifferent, but when it has been laid down is not indifferent.” The allusion to the universality of natural justice underpins its invariable dimension, in contrast to positive laws, which are created in time and are variable. This formulation could serve as a ground to support an immutable and universal view of justice. However, this assertion of the universal view of natural justice stands in opposition to a later statement, which held that some principles can be natural without being invariable as they are in physics. In fact, the latter is often used by detractors of Aristotle’s natural right as the basis for countering the thesis of the immutability of universal natural norms in his theory. While resolving this tension is beyond the scope of my study, I assert that Aristotle did advance

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53 Ibid.
55 Cf. ibid., 204.
a rectifying notion for justice, which can be realized in a political context.\textsuperscript{56} This stance can be corroborated by a reading of \textit{Politics}.

An important clue in \textit{Politics} is the central value of Aristotle’s theory of human nature as being that of a socio-political animal. More importantly, for Aristotle a gregarious view of human nature forms the basis of the idea of the \textit{polis} as illustrated in this statement:

Hence it is evident that the state is a creation of nature, and that man is by nature a political animal. And he who by nature and not by mere accident is without a state, is either a bad man or above humanity; he is like the tribeless, lawless, hearthless one, whom Homer denounces – the natural outcast is forwith a lover of war; he may be compared to an isolated piece of draughts. Now, that man is more of a political animal than bees or any other gregarious animals, is evident. Nature, as we often say, makes nothing in vain, and man is the only animal who has the gift of speech. And whereas mere voice is but an indication of pleasure or pain, and is therefore found in other animals (for their nature attains to the perception of pleasure and pain and the intimation of them to one another, and no further), the power of speech is intended to set forth the expedient and inexpedient, and therefore likewise the just and the unjust. And it is a characteristic of man that he alone has any sense of good and evil, of just and unjust, and the like, and the association of living beings who have this sense makes a family and a state.\textsuperscript{57}

As expounded upon here, the gregarious nature of human being is not unique to them but is shared by bees and other animals. What sets human beings apart from other creatures is the gift of speech. This endowment is not arbitrary for nature makes nothing in vain. In fact the gift of speech has an aim to articulate a political view on what is beneficial, as well as what is just and unjust. Hence humans are political animals bestowed with \textit{logos} in order to reveal the advantageous and the harmful as well as the

\textsuperscript{56} See also Francis Sparshott, \textit{Taking Life Seriously: A Study of the Argument of the Nichomachean Ethics} (Toronto: University of Toronto, 1994), 180.

\textsuperscript{57} Aristotle, \textit{Politics I}, 2.1235a1-18.
just and unjust.58 Therefore the natural view of the state is already rooted in a gregarious view of human beings, mostly in the gift of speech.59 On this basis, human beings are naturally inclined to form a political partnership, which will teleologically lead to the polis. This view can be better seen in the statement “the polis, or political association, is the crown: it completes and fulfills the nature of man: it is thus natural to him, and he is himself ‘naturally a polis animal’; it is also prior to him, in the sense that it is the presupposition of his true and full life.”60 The state as a product of nature comes to bring about the conditions of the self-fulfillment of human beings. Thus, Aristotle regarded natural justice as a standard by which different constitutions can be evaluated. In so doing he admits injustice as contrary to nature (see Politics I, 1325b 7-10). To sum it up, Aristotle argues that the natural basis of the state accounts for the natural basis for justice in his view of the polis as a natural institution within which justice is the standard by which a political regime is judged.

Having in mind these various references, one can deduce that in Rhetoric Aristotle considers parts of law to be universal, based on the laws of nature, which carries a rectifying function as part of the universal law to fulfill equity. Then, in the NE he advances a political notion of justice that is based on natural justice and civic law. Finally, in Politics he advocates that the natural realization of the human telos happens in the polis. This natural development toward the polis is judged based on the standard of natural justice.61 Aristotle advances a clear commitment to necessity of the concept of

59 I would like to thank Prof Baber Johansen for the fruitful discussion we had on the natural view of the state and its relation to Aristotle’s view of natural justice, in his Seminar “Does fiqh know of a concept of natural law” in Spring 2013 at Harvard University.
justice and highlights its importance in fulfilling equity but also towards the realization of the *polis*. A common denominator among these references is a conception of natural universal justice that is central to Aristotle’s political philosophy, as it is grounded in a given political context.

**B. Natural right or natural justice?**

Several scholars have debated Aristotle’s cryptic statements to ascertain whether they reflect a view of nature as a rational basis for ethic tantamount to a natural right doctrine, while others have argued that Aristotle is a proponent of a concept of natural justice along the line of the realization of a virtuous political order as the sole guarantee for the realization of justice as the basis for a common good. To illustrate these trends, I shall focus my attention on some of the conclusions advanced by Leo Strauss and Gisela Striker.

In *The History of Natural Right*, Strauss tackles some of Aristotle’s ideas under what he calls the classical Greek view of natural right.⁶² Strauss traces the inception of the doctrine of natural right in Socrates’ teachings in the work of Plato, Aristotle, the Stoics, and Thomas Aquinas. Defining natural right based on a view of justice as a right that is ingrained in nature,⁶³ Strauss says that medieval philosophers approaches natural right by discerning things that are ‘by nature just.’⁶⁴ Specifically, he insists that the discovery of a doctrine of natural right requires a philosophical investigation to distinguish between customs and natural norms.⁶⁵ In other words he holds that the

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⁶³ Cf. ibid., 82.
⁶⁵ Strauss, *Natural Right*, 82-83.
investigation of the nature of political things leads to the investigation of natural right. Taking a close look at Aristotelian teaching, Strauss sees that what is important is not the existence of *ius naturae* but the manner of its existence, and traces the origin of the Aristotelian view of natural right in the Stagirite’s view of the *polis*. Along this line, Strauss argues that an understanding of the classical natural right doctrine has to be addressed in a discussion of virtuous rule and the necessary conditions to fulfill human happiness, stating that “the classical natural right doctrine in its original form, if fully developed, is identical with the doctrine of the best regime.” In this sense, he suggests that the basis of natural right is to be fulfilled under the virtuous political order or the *polis*. Thus Strauss maintains that the question of natural right in what he calls classic doctrine is closely linked to the natural basis of the state as the firm path for human development, akin to Aristotle’s conception.

Another reading of Aristotelian ethics is presented by Striker in *Essays on Hellenistic epistemology and ethics*. Although Striker agrees with Strauss in rooting the realization of the Aristotelian concept of justice in a political order, she refuses to admit it as a natural right or natural law doctrine, which she attributes to the Stoic’s contribution. Striker outlines a basic understanding of natural law as a set of rules of morality serving as standards for positive law:

The term “natural law” refers, it would seem, to the rules of morality conceived of as a kind of

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68 Ibid., 144; In explaining the origin of the idea of natural right, Strauss (ibid., 81) claimed “It means merely that political life in all its forms necessarily points toward natural right as an inevitable problem. Awareness of this problem is not older than political science but coeval with it. Hence, a political life that does not know of the idea of natural right is necessarily unaware of the possibility of political science and, indeed, of the possibility of science as such, just as a political life that is aware of the possibility of science necessarily knows natural right as a problem.”
69 Ibid., 81.
legal system, but one that has not been enacted by any human legislator. By contrast to human legal codes, the natural law is supposed to be valid independently of any formal procedures, and such that it cannot be changed. Besides, this law is supposed to provide the standards by which human legislation is to be judged - laws will be just or unjust depending on whether they do or do not conform to natural law. ⁷⁰

Striker considers natural law as a concept of morality rooted in a system of rules. To this end, she argues that Aristotle’s conception of justice does not rest on a specific contention that could be a basis for a system of rules.⁷¹ She deems the terms “just” and “unjust” to be in relation to a certain state of affairs that safeguards the political stability of a community revolving around “a correct distribution of wealth and offices, or respect for one’s fellow citizens, it is not clear that those must necessarily be captured by a set of unchanging rules.”⁷² For Striker, Aristotle advances a teleological view of law as having “the common good” as the main political aim.⁷³ This teleological view that aims for a common good is not regulated by the observance of fixed moral rules. Striker acknowledges the Aristotelian understanding of justice as a basis for a concept of “natural justice” rather than as a coherent doctrine of natural law. She even goes on to argue that both Plato and Aristotle would reject the idea of morality as a natural law doctrine with specific rules.⁷⁴ In taking nature as a perfect rational order, Striker explains that the Stoics linked the knowledge of the good to the knowledge of the rational order of nature.⁷⁵ She mostly credits Chrysippus for bestowing on us a good answer of how to determine the

⁷⁰ Striker, Essays, 209.
⁷¹ Ibid., 210.
⁷² Ibid.
⁷³ Ibid.
⁷⁴ Ibid.
⁷⁵ Ibid., 217.
content of nature’s law.\textsuperscript{76} Chrysippus determines a virtuous conduct based on two natural impulses for human beings, self-preservation and sociability.\textsuperscript{77} In other words, self-preservation and sociability could serve as concrete grounds on which to appraise the validity of norms. Consequently, one can assert that Striker construes natural law as a body of norms with universal and immutable validity, which presupposes a set of autonomous teachings, as made clear in the writings of the Stoics, and concludes that both Plato and Aristotle do not endorse a doctrine of natural law.\textsuperscript{78}

Despite the divergence between Strauss and Striker’s viewpoints, they both argue that Aristotle’s ethical views, or what Striker called natural justice and Strauss labeled natural right, can only be grasped within a political order. Herein I shall emphasize that my study does not aim to offer a conclusive answer on whether we can define Aristotle’s position as pertaining to natural justice or natural right, rather my main task is to discern how Ibn Rushd understood Aristotelian ethical views framed under the written and the unwritten laws in \textit{MCAR} and to draw parallels with some of his other works. This being said, I would still argue that on the basis of my discussion of Aristotle’s statements quoted above, the Stagirite has a robust view of the necessity of a rectifying notion to correct deficiencies of the particular law to fulfill justice but does not provide a theory of universal set of rules of morality. This pushes me to veer toward espousing Striker’s position. Adopting this minimalistic definition of Aristotle’s view, I hope to capture the perspective of the Andalusian commentator Ibn Rushd to grasp how he conceived of this Aristotelian ethical view within his own political and legal context. Furthermore, Ibn Rushd’s conception of this corrective function of justice under the written and the

\textsuperscript{76} Ibid., 218.
\textsuperscript{77} Cf. ibid., 219.
\textsuperscript{78} Cf. ibid., 210.
unwritten laws is also grounded within a political order to guarantee the common good and stability of a political community. On this account, I consider Striker’s conception of Aristotle’s view as an articulation of natural justice theory aiming at a common good for the political stability of the community to be more adequate in locating Ibn Rushd’s appropriation of Aristotle’s natural justice in Islamic law.

C. Ibn Rushd’s appropriation of Aristotelian ethical views

Abū al-Walīd Muḥammad ibn Aḥmad ibn Muḥammad Ibn Rushd was an eminent Muslim scholar and commentator on Aristotle, born in 1126 to a prominent Andalusian family in Cordova. Ibn Rushd was a polymath, versed in Islamic jurisprudence, grammar, theology, astrology, medicine, and philosophy. As a philosopher he devoted most of his efforts to expounding natural philosophy, psychology, logic, and the metaphysics of Aristotle. His interest in philosophy received some patronage from the emir Ya‘qūb Yūsuf (1163-1184), who commissioned him to comment on the Aristotelian corpus in 1153. Ibn Rushd served also as the Qādī of Cordova and produced important legal works such as his BM and DFF. He also composed what came to be known as a trilogy of short treatises, Ḍamīma, (Epistle of the Question of Divine Knowledge), FM and Kashf ‘an Manāḥij al-Adilla fī ‘Aqā‘id al-Milla, KM (Uncovering the Methods of Proofs with Respect to the Beliefs of the Religious Community) in 1169 and 1182, respectively, which discuss both legal and theological questions.

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81 Cf. Qanawātī, Mū‘allafāt, 1; Leaman, Averroes, 2-3.
83 Cf. ibid., 49-50; Muhsin Mahdi is the first to establish the decisive treatise as part of a trilogy. See
Ibn Rushd’s philosophy gained prominence in the Latin west, and he became known as a notable commentator on Aristotle, with his works translated into Latin and having prominent readers like Albert the Great and Thomas Aquinas. Ibn Rushd’s contribution to readings of the Aristotelian corpus seems to be attached mainly to his natural philosophy, psychology, and metaphysics. Seldom has his contribution to the question of Aristotelian ethics attracted scholarly interest. In his early work on Ibn Rushd, the French Arabist Ernest Renan (1823-1892) explains that when compared to physics, logic, and metaphysics, Aristotelian ethics, given its Hellenistic component, did not attract much interest among Arabic Peripatetics including Ibn Rushd:

La morale occupe très-peu de place dans la philosophie d’ibn Roschd. En général, les Ethiques d’Aristote, sans doute parce qu’elles portent un cachet beaucoup plus hellénique, n’eurent pas chez les Arabes une fortune comparable à celle des œuvres logiques, physiques et métaphysiques.85

In other words, Ibn Rushd’s contribution to the understanding of Aristotle’s ethic has been perceived as meager compared to his contribution to other fields like metaphysics, physics, and logic.86 While this is in some way true it does not necessarily imply a lack of engagement with the question of ethics on the part of Ibn Rushd both in his philosophical and legal works. I shall first discuss Ibn Rushd’s elaborate view on ethical justice in his MCAR and some parallel view in his MCNE.87 Then, I look into

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86 Cf. Renan, Averroes, 159.

87 Aristotle’s Nichomachean Ethics was translated into Arabic and in fact was commented on by both Fārābī and Ibn Rushd. The Arabic translation of it was he ethics attributed to Ḥunain Ibn Ishāq as mentioned in the Fihrist. The text has survived in the unique Fez manuscript. Fārābī’s commentary was lost and Ibn Rushd’s commentary was only preserved in Latin and Hebrew. Cf. Anna Akosay, “Arabic and Islamic Reception of the Nichomachean Ethics,” in The Reception of Aristotle’s Ethics ed. by Jon Miller (Cambridge: Cambridge University Press, 2012), 85-106: 89, 90 and 98. Similarly Ibn Rushd’s commentary was lost except for a few fragments in Arabic but survived in the Hebrew and Latin traditions.
some references in Ibn Rushd’s legal corpus.

The most elaborate discussion of Aristotle’s ethical justice is found in Ibn Rushd’s MCAR. Specifically he appropriates Aristotle’s division under the written laws (al-sunan al-maktūba) and the unwritten laws (al-sunan ghayr al-maktūba).\(^88\)

And laws [al-sunna] are of two kinds: some are particular [khāṣṣa] and others are general ['āmma]. Particular laws are written laws [al-sunan al-maktūba], which we fear would be forgotten unless they were written down; and these [particular laws] are specific to each people [qawm] or each community [umma]. As for the general laws, they are unwritten laws [al-sunan ghayr al-maktūba], which are acknowledged by [yaʿtarif bihā] all people such as filial piety [birr al-wālidayn] and thanking the benefactor [shukr al-munʿim].\(^89\)

This definition admits two kinds of laws, particular and general. The particular laws are written and specific to a particular community, the general laws are unwritten and acknowledged by all people such as respecting one’s parents and thanking the benefactor.\(^90\) In addition to pointing out this distinction Ibn Rushd ascribes a rectifying function to the unwritten laws to alleviate or harshen the written laws in order to make them more just:

He [Aristotle] said: There are laws for what are inflicted injustices [al-ẓalamāt] and for those that are not inflicted injustices, while for others there are no laws. As for those that have laws, some are written laws and others are unwritten. Each of these [laws] gives a definition to what is just.

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\(^88\) MCAR 1.10.6, 1.13.2, and 1.15.4, Averroës, Commentaire 2, 85, 113, and 124.

\(^89\) MCAR 1.10.6, Ibid., 85.

[al-ʿadl] and unjust [al-jūr], good [al-khayr] and bad [al-sharr]. In fact the good according to unwritten laws are the acts that the more man adds of these to infinity, the more glorification [ḥamd], praise [madḥ], honor [karāma], and noble standing [rifʿa], attaches to him such as the cases of helping one’s friends and rewarding good-doers. The bad according to unwritten laws is the act that the more a man adds of it, the more blame [al-madhamma] and more shame [al-hawān] attaches to him, and that also adds to infinity such as the cases of ingratitude toward good deeds and harming one’s friends. As for good and bad in written laws, they are determined [muqaddar] one can neither add to nor subtract from it. ⁹¹

He deems the written laws to be prescribed to one nation at a specific time, making the principles of bad and good fixed and unable to be added or subtracted when judging human acts prone to constantly changing circumstances. ⁹² More importantly, Ibn Rushd draws on the theory and practice of Islamic jurisprudence to bestow concrete examples. To mention but a few examples, he links the unwritten laws to the notion of ḥisba (the duty to promote good and forbid evil), and other articulations from maqāṣid al-shariʿa, or the purposes of the law. ⁹³ While the universal value and the rectifying notion of the unwritten laws resonates with Aristotle’s natural justice, Ibn Rushd gives argument for and against both the written and the unwritten laws, which I shall argue is to be contextualized in the practice of Islamic jurisprudence, specifically of legal maxims (al-qawāʿid al-fiṣḥiyya). ⁹⁴

As I show later, this link to legal maxims also reveals an argumentative function of both the written and the unwritten laws, which affirms a relationship between legal argumentation and rhetoric. As a matter of fact, the affinity between both the written and

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⁹¹ MCAR 1.13.8, Ibid., 117.
⁹² MCAR 1.13.8-1.13.9, ibid., 116-117.
⁹³ MCAR 1.13.9, ibid. and MCAR 1.15.3-1.15.18 ibid., 124-127.
the unwritten laws and the scope of rhetorical argumentation is a central thread in my study of Ibn Rushd’s law and ethics. Therefore, in order to grasp his conception of ethics, I will focus on disclosing the basis of the relationship between law and rhetoric as the domain of opinion and its function to fulfill justice in the political realm.

Ibn Rushd’s articulation of the written and the unwritten laws in the *MCAR* has strong resonance with the parallel formulation in his *MCNE*, where he discusses a notion of political justice that is partly legal and partly natural and then associates this notion with rectification, which reads as follows:

[Aristotle] said: Part of political justice is natural legal, and part legal only; he means to say, conventional. As for natural justice, it is that whose power is one in every place and at every time, and in which no change occurs. Whereas the legal, which is not natural, truly with regard to class is quasi-natural [Hebrew: as if it were natural] and there is no difference [Arabic khilaf] in it, except in quantity [Arabic qadr] it differs from nation to nation, like the conventional justice on the quantity of sacrifices and offerings and prayers laid down by religions and [revealed] Laws.\(^{95}\)

Here Ibn Rushd divided political justice into natural justice and legal justice. Natural justice is universal and immutable, legal justice is quasi-natural and relies on quantities that are mutable from one nation to another. This division clearly resonates with his division between the written particular laws in one community and the unwritten laws that are universal. *MCNE* includes passages that elucidate further this view in relation to Islamic jurisprudence, which I will address in chapter three in a discussion of the necessity to rectify the general rule of *jihād* in *fiqh* as an undue generalization of the

\(^{95}\) This is based on the Hebrew text according to Noah Feldman’s Translations of Ibn Rushd. Feldman, “Reading the *Nichomachean Ethics* with Ibn Rushd” [PhD. diss., Oxford University, 1994], 262.
Lawgiver.\textsuperscript{96} I take this reference to mean that Ibn Rushd’s appropriation of Aristotelian references needs to be understood in relation to his view of Islamic jurisprudence.

Finally, the last analogous formulations of ethical justice are found in his legal work, \textit{BM}, and religious treatise, \textit{FM}. In the last book of \textit{BM} under \textit{Kitāb al-aqdiya} (the book of judges), and after he discusses the doctrine of proof and the basis for Qādīs’ adjudication, Ibn Rushd closes his discussion by underlining the importance of applying practical legitimate law \textit{al-sunna al-mashrū’a al-‘amaliyya}.

It is necessary, before this, to know that the practical legitimate laws \textit{[al-sunna al-mashrū’a al-‘amaliyya]} pertaining to conduct have as their purpose the virtues of the believer. Some of them refer to respect, to whom it is due, and to the expression of gratitude, to whom that is due. The rituals \textit{[‘ibādāt]} are included in this category. These are the laws relating to ethical values.\textsuperscript{97}

In discussing \textit{al-sunna al-mashrū’a al-‘amaliyya}, Ibn Rushd outlines different excellences such as \textit{‘iffa} (abstinence)\textit{’adl} (justice), \textit{shajā’a} (courage), and \textit{sakhā’} (generosity).\textsuperscript{98} He also refers to the thanking of the benefactor and ritual acts as an expression for these excellences. His mention of the thanking the benefactor and the four excellences intersects with his discussion of the written and the unwritten laws in \textit{MCAR}.

Furthermore, in drawing examples from Islamic law to explain how to apply the different excellences under \textit{al-sunna al-mashrū’a al-‘amaliyya}, he brings in the application of criminal offenses in Islamic law and refers to parallel views from \textit{MCAR} such as his reference to commanding right and forbidding evil, \textit{(ḥisba)}, among other

\textsuperscript{96} Cf. ibid., 238.
\textsuperscript{98} \textit{BM} ed. 6, 238-239.
things. Finally, one last reference is found in FM, where he reminds the jurist of the importance of taking into account practical excellences. In fact he levels criticism against jurists of his own time for ignoring practical excellences: “(To how many jurists has jurisprudence been a cause of diminished devoutness and immersion in this world. Indeed, we find most jurists to be like this, what their art requires in essence is practical excellence [al-faḍīla al-‘amaliyya].” Thus he underscores the importance of the practical reality of law as process for regulating human actions, something he seemed to deplore for it was lacking among the jurists of his own time. Both renditions allude to a view of practical ethical justice discussed in relation to Islamic jurisprudence.

Taking these scattered references outlined in the following table, I hope to comprehend Ibn Rushd’s appropriation of Aristotle’s natural justice. My aim is not to claim that one can construct a holistic and comprehensive view. Rather, I believe that understanding Ibn Rushd’s ethical view requires a clear grasp of both his philosophical and legal works.

Table 1: References to natural justice in Ibn Rushd’s texts

<table>
<thead>
<tr>
<th>Ibn Rushd’s texts</th>
<th>References in relation to natural justice</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>MCAR</strong> written in 1175</td>
<td>Written laws and unwritten laws: al-sunan al-maktūba and al-sunan gayr al-maktūba</td>
</tr>
<tr>
<td><strong>MCNE</strong> written in 1177</td>
<td>Political natural justice: legal and political</td>
</tr>
<tr>
<td><strong>BM</strong> (date unknown)</td>
<td>The practical legitimate law: al-sunna al-‘amaliyya al-mashrū’a</td>
</tr>
<tr>
<td><strong>FM</strong> written in 1189 (uncertain)</td>
<td>The practical excellences: al-faḍā‘il’ il’ amaliyya</td>
</tr>
</tbody>
</table>

99 BM ed. 6: 238-239; MCAR 1.13.9, Averroës, Commentaire 2: 116-117.
102 Qanawātī, Mū‘allafāt, 85-86.
II. Earlier approaches to Ibn Rushd’s ethical view in his political philosophy

Ibn Rushd’s views on Aristotle’s political teachings have been the topic of scholarly debate, which succeeded in underlining the importance of Islamic law in his view of political order, but rarely accounted for his appropriation of Aristotle’s natural justice. Taking the divine nature of the law, some scholars tended to presume the perfect nature of Islamic law, which made the concept of corrective notion such as natural justice unthinkable because at some level it would have presupposed a deficiency in God’s law. This assumption is corroborated by a fixation on his short treatise *FM*. This treatise, which tackles the relation between law and truth prompted a lot of controversy over its genre and aim. While some studies perceived *FM* as a synthesis to show the harmony between divine law and rational inquiry, others regarded it as an apologia for philosophical inquiry from a legal religious ground.\(^{103}\) The assumption on the immutable view of Islamic law and its juxtaposition to truth presents a theoretical obstacle to uncovering the above outlined ethical views in Ibn Rushd’s works. To show the influence of this assumption, the present research surveys the main remarks made about Ibn Rushd’s appropriation of Aristotle’s ethical views in *MCNE* and *MCAR*. The Straussian approach will receive special emphasis in the discussion. I argue that overstating the Platonic view of Ibn Rushd’s understanding of shari‘a as the perfect immutable law, in the works of Strauss and Butterworth, proved to be a stumbling block to discerning his reading of Aristotelian ethical views.

A. The Straussian Platonic view on sharī‘a in Ibn Rushd’s political views

In my discussion of Aristotle’s ethical views, I outline some of the standpoints of Leo Strauss, focusing on his endorsement of the doctrine of natural right in Aristotle’s thought. Specifically, he underlines that the condition for the discovery of natural law requires an investigation of the nature of political things along the lines of virtuous rule and the necessary condition to fulfill human happiness. For our purpose, looking at Arabic political philosophy, the doctrine of the best political regime captivated the interest of falāsifa, as can be found in the writings of Ibn Rushd as well as his predecessors Fārābī, and Ibn Sīnā among others. Still, Strauss argues that reflecting on politics in Islam where there is no separation between religion and politics, philosophers had to conceal their ideas and conceded to theoretical Platonic views of politics. For Strauss, Ibn Rushd illustrates how sharī‘a placed bondage within his political view, leading him to conclude the impossibility of an inception of natural right in Ibn Rushd’s view.

In tackling the question of ancient and medieval political philosophy, Strauss draws a comparison between Greek philosophers, who were able to philosophize about the nature of political order within a pagan context, and Arabic Peripatetics who lived under the revealed law. So, unlike the Greek tradition, which was not bound by a revealed sacred text and whose philosophers were able to explore a natural viewpoint, philosophy in the context of a revealed text (the Qur’an) had to accommodate the tenets

104 Strauss, Natural Right, 134.
108 Strauss, Philosophy and Law, 57-58.
of the revealed law. More specifically Strauss points out that Islamic and Jewish philosophers had to recognize the authority of shari’a or Torah as the revealed law.

Strauss takes Ibn Rushd’s thinking as a basis for this verdict on Arabic political philosophy, focusing on Ibn Rushd’s short treatise *FM*. Strauss claims that Ibn Rushd in this treatise puts forth the legal duty to study Aristotelian logic as a duty imposed by the law. In this sense Ibn Rushd equates the end goal of law, which is to attain happiness, with the end goal of philosophy.

Now since these (viz the religious) laws are truth and since they summon to speculation, which leads to knowledge of the truth, we Muslims know positively that speculation proceeding by means of demonstration does not lead to the contrary of what is revealed in the law; for truth does not disagree with truth, but is in harmony with it and testifies to it (7,6-9).

While Strauss admits that in this statement Ibn Rushd excludes a priori any conflict between philosophy and law, he still contends that the Andalusian commentator subjugates philosophy to law, in other words philosophy has to bend to orthodoxy to have the right to exist: “the right of philosophizing is established only by the express commandment of the law.” More specifically, he holds that there are conditions stipulated by the law: “(1) to philosophize; (2) in case of a conflict between philosophy and the literal sense of the law, to interpret the law; and (3) to keep this interpretation secret from all the unqualified.” Such stipulations meant that philosophy is not free to set the criteria for what is permissible or not in terms of errors and therefore formed an

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110 Ibid.
112 Ibid., 84.
113 Ibid.
114 Ibid., 85.
obstacle to rational activity and subjugated philosophy under law.\textsuperscript{115} By placing such limits on rational investigation into the nature of things, Strauss contends that philosophy is bound by what he calls a pre-philosophical tribunal.\textsuperscript{116} Confined under the authority of the revealed law, Jewish and Muslim philosophers had no choice but to endorse the ideal Platonic state and accept the prophet as philosopher-king as the only option to introduce philosophy into their community.\textsuperscript{117}

Thus, Strauss explains the Arabic philosophers or \textit{falāsifa} accepted the prophet as the proclaimer of the law that aims toward a perfect life, as a philosopher and legislator. As the founder of a community around the purpose of the law, the prophet is the equivalent of the founder of Plato’s ideal state. “Plato’s requirement that philosophy and political rule must coincide, Plato’s idea of the philosopher-king, set up the outline whose completion in the light of the actual revelation produces the concept of the prophet.”\textsuperscript{118} Yet Strauss also adds that while Plato’s philosophy of the ideal state remained something to be fulfilled, in the Islamic context this ideal state is not even to be sought, but is something fulfilled in the past by the Philosopher-king prophet.\textsuperscript{119} This fact makes

\begin{itemize}
\item \textsuperscript{115} Ibid., 82.
\item \textsuperscript{116} Ibid., 81.
\item \textsuperscript{117} Strauss states that communities governed by philosopher-kings were the theme of Platonic politics and not Aristotelian politics. Cf. Strauss, \textit{Persecution}, 10.
\item \textsuperscript{118} Strauss, \textit{Philosophy and Law}, 73-7.
\item \textsuperscript{119} Strauss (ibid., 74) stated, “[U]ltimately they differ from Plato only in this, though decisively in this: for them the founder of the ideal state is not a possible philosopher-king to be awaited in the future, but an actual prophet who existed in the past. That is, they modify Plato’s answer in the light of the revelation that has now actually occurred. It is on this basis that one must answer the question that we previously identified as the central difficulty in the interpretation of medieval Islamic and Jewish rationalism, the question, that is, why the philosophic foundation of the law, which is in fact the philosophic discussion of the presupposition of philosophizing itself, is for these medieval philosophers only one theme among others, and even the last theme of their philosophy. This specific disproportion arises from the fact that the ideal law, since it is given through revelation, no longer needs to be sought by them, as by Plato, but needs only to be understood from the principles of the disciplines (metaphysics and psychology) that precede it. Since, therefore, for them the law was not truly open to question, their philosophy of law does not have the sharpness, originality, depth, and ambiguity of Platonic politics. Since Plato’s requirement is now satisfied, Plato’s questioning inquiry about this requirement is blunted.”
\end{itemize}
Islamic Platonism less predisposed to discover what is good governance without the restraint of an already established perfect and immutable law of the prophet.\textsuperscript{120}

This perception of the relation between philosophy and Islamic law in Arabic philosophy influenced Strauss’s reading of Ibn Rushd’s appropriation of Aristotle’s natural justice in the \textit{MCNE}. In fact, Strauss notes this appropriation but provides a reading of Ibn Rushd’s understanding of natural law through the lens of Marsilius of Padua’s. In so doing he argues Ibn Rushd’s allusion to natural law seems to be metaphorical, calling it “\textit{ius naturale legal}”\textsuperscript{121}, meaning natural law is legal and conventional.

According to Averroes, Aristotle understands by natural right “legal natural right.” Or, as Marsilius puts it, natural right is only quasi-natural; actually, it depends on human institution or convention; but it is distinguished from merely positive right by the fact that it is based on ubiquitous convention.\textsuperscript{122}

Strauss deems Ibn Rushd’s appropriation of Aristotle’s natural right as a mere reference to conventional or common law, which excludes its universal dimension. Few problems arise here. First, in this reading, Strauss does not rely on Ibn Rushd’s text but on Marsilius of Padua’s reading.\textsuperscript{123} Second, as advanced by Feldman, Strauss’s translation of Ibn Rushd’s statement in natural justice to ‘\textit{uis naturale conventionale}’ is inaccurate. In fact, Feldman shows that Ibn Rushd distinguishes a natural legal justice from a purely legal justice, which is conventional.\textsuperscript{124} Be that as it may, Strauss argues that these conventional laws are seen as immutable and should be observed regardless of the changing

\begin{footnotesize}
\begin{enumerate}
\item Cf. ibid., 97, footnote 5.
\item Strauss, \textit{Natural Right}, 158.
\item Feldman, “Reading,” 258.
\item Feldman (ibid.) explains that, “[T]hus Ibn Rushd’s main point is that “natural legal justice” is not conventional, but rather “has the same strength in every place and at every time, and no change occurs in it. Conventional justice, on the other hand, changes in details from place to place and time to time.”
\end{enumerate}
\end{footnotesize}
condition, which he links to the pedagogical role of laws to govern the masses in an orderly fashion.\textsuperscript{125} So, for the sake of controlling the masses, people are taught to only comply with these laws and to accept their absolute and unchanging character.\textsuperscript{126} He concludes that linking morality to philosophy seems to have a disastrous ramification for Muslim and Jewish thinkers, which forces conventional rights on morality, meaning rules are taught without qualification.\textsuperscript{127} Thus he judges Arabic philosophers’ view of law to be primitive, saying that they were clearly not guided by an idea of natural right, and rather adhered to an “ancient idea of law as unified total regimen of human life.”\textsuperscript{128} While he condemns both Muslim and Jewish philosophy for the impossibility of developing a doctrine of natural law in the context of revealed religions, Strauss exalts the success of Christian theology to develop a doctrine of natural law through theology.\textsuperscript{129}

To conclude, Strauss can be credited for being one of the early philosophers to draw attention to Arabic philosophers’ engagement with Greek thought. However, his assumptions on Ibn Rushd’s philosophy remain problematic. First, Strauss takes \textit{FM} as emblematic of Ibn Rushd’s philosophy and of Arabic philosophy in general. Also his reading of the treatise overlooks some subtle position in the treatise such as the superiority of the demonstrative approach over the presumptive nature of the legal approach.\textsuperscript{130} Furthermore, as I show in the course of this study, this treatise needs to be revisited in light of Ibn Rushd’s view on Islamic jurisprudence as articulated in his \textit{MCAR}, \textit{SCR} and his early legal treatise \textit{DFF}. Finally, although one could acknowledge

\textsuperscript{125} Strauss, \textit{Natural Right}, 158.
\textsuperscript{126} Cf. ibid; also see Strauss, \textit{Persecution}, 95-141; Feldman,”Reading,” 260.
\textsuperscript{127} Strauss, \textit{Natural Right}, 158.
\textsuperscript{128} Strauss, \textit{Philosophy and Law}, 73.
\textsuperscript{129} Strauss, \textit{Natural Right}, 164.
that Ibn Rushd’s ethical views do not necessarily fit within the terms proposed by Strauss’s definition of natural right, his construal of Ibn Rushd’s statement is inaccurate and relies on Marsilius of Padua’s view on the subject matter.

**B. Claims on Ibn Rushd’s “Platonization” of Aristotle’s *Rhetoric***

The Straussian approach continued to have some bearing on Islamic political philosophy, mainly in the emphasis on the theoretical Platonic view of Ibn Rushd’s thought. This also impacted the reading of Ibn Rushd’s *MCAR*, which led to undermining of Ibn Rushd’s corrective view of the justice around the notion of the written and the unwritten laws in *MCAR*. This theoretical Platonic view is mostly rooted in the relation between rhetoric and Islamic law as shown in the writings of Charles Butterworth. Butterworth is one of the early scholars who made several contributions to our understanding of the political and logical role of rhetoric in Ibn Rushd’s political philosophy. Yet in his reading of Ibn Rushd’s political role of rhetoric, Butterworth also advances a Platonic view of Islamic political governance under shari’a as an immutable truthful opinion that uses rhetoric as merely a tool to transmit truthful opinion to the masses. Such reading leads him to suggest that Ibn Rushd had to compromise a

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131 In English scholarship Butterworth is the main scholar to write extensively on the question of rhetoric and Islamic political philosophy with a focus on Averroes. For more references to his works see footnote 6 in this chapter. For other studies see Michael Blaustein, “The Scope and Methods of Rhetoric in Averroës’ Middle Commentary on Aristotle’s Rhetoric,” in *The Political Aspects of Islamic Philosophy: Essays in Honor of Muhsin S. Mahdi*, ed. Charles E. Butterworth (Cambridge, MA: Distributed for the Center for Middle Eastern Studies of Harvard University by Harvard University Press, 1992), 262-303; Shane Borrowman “The Islamization of Rhetoric: Ibn Rushd and the Reintroduction of Aristotle Into Medieval Europe,” *Rhetoric Review* 27, no. 4 (2008), 341-360; Butterworth, “Rhetoric and Islamic Political Philosophy.”

132 I base my reading of Butterworth's approach on his early study of Ibn Rushd’s, See his “Rhetoric and Reason” and some of his later articles in which he reiterated similar positions: “Rhetoric and Islamic political philosophy”; “Ethics in Medieval Islamic philosophy,” *The Journal of Religious Ethics* 11, no. 2 (1983), 224-239.
practical outlook on Aristotle’s rhetoric and adopt a Platonic theoretical view of rhetoric more befitting an Islamic tenet that presumes God’s law to be conclusive truth. Given the centrality of rhetoric and its relation to Islamic law in my study, I shall give a short comparison between what is often admitted as a Platonic view of rhetoric and what is considered an Aristotelian view of it, and then outline the argument advanced by Butterworth to support this Platonic view and expose its underpinnings in Ibn Rushd’s views on the written and the unwritten laws.

1. On Plato’s and Aristotle’s views on Rhetoric

In a litigious Athenian society where citizens are required to make their own cases in the court, rhetoric was a powerful instrument of self-defense, as well as a tool for personal glorification, which was an important part of public life.\(^\text{133}\) Despite the importance of rhetoric in political life in Athens, Plato in the Gorgias refuses to admit rhetoric as an art that is worthy of the attention of the philosopher and condemns its deceptive role and insouciance to justice, calling for the rehabilitation of rhetoric under philosophy. On the contrary, Aristotle endorses rhetoric as an art that can produce deliberation without necessarily being deceptive and could even help the cause of justice.\(^\text{134}\) The difference between Plato and Aristotle’s positions provide an understanding of why Ibn Rushd was charged with the Platonization of Aristotle’s rhetoric.

\(^\text{133}\) Cf. Cope, An Introduction, 2.
Any reader of Plato’s *Gorgias* would discern the bitter quarrel in the Socratic
dialogue between philosophy and rhetoric.\(^ {135}\) In fact, Plato criticizes the Sophists, who
are known as early teachers of rhetoric and were notorious for their deceptive
maneuvering and abuse of rhetoric.\(^ {136}\) Plato argues in *Gorgias* that rhetoric cannot be an
art (*technê*) and cannot convey knowledge. He claims that rhetoricians merely display a
knack (*empeiria*, or experience).\(^ {137}\) Plato’s position against considering rhetoric an art is
not merely based on rhetoric’s lack of a specific subject but also in his mistrust of the
rhetorical approach because of its indifference to justice.\(^ {138}\) He ascribes to the rhetorician
the skill of using persuasive discourse without any consideration for truth or justice and
of using flattery and deception to appeal to his audience.\(^ {139}\) Plato’s attack is on the
sophist’s practice of rhetoric for its harmful use and detrimental impact. “Like flattery,
it caters to irrational desires and deters people from their true interests.”\(^ {140}\) To that end, he
calls for the development of a proper rhetoric that could serve the ends of philosophy.\(^ {141}\) This call is perceived by some historians of philosophy as a rehabilitation of rhetoric to
philosophical discourse, where a clear distinction is made between rhetoric that induces

(last accessed March 19, 2016).
\(^ {137}\) Cf. Griswold, “Plato.”
\(^ {138}\) Cf. ibid.
\(^ {140}\) Harvey Yunis, “Literary and Philosophical Rhetoric in Plato,” in *Literary and Philosophical Rhetoric*,
bases his condemnation of rhetoric on the proposition that the rhetorician does not know the things about
which he persuades, e.g., the just and the unjust. Since the rhetorician does not concern himself with the
better and the worse or the just and the unjust (he could not concern himself with such things, for he is
ignorant of them), he only attempts to gratify the souls of his hearers by pleasing them. Such gratification is
the goal proper to flattery but not to art.”
belief and rhetoric that generates knowledge, alluding to some form of noble rhetoric.\textsuperscript{142} This rehabilitation becomes more pronounced in the \textit{Phaedrus}, which suggests some sort of totalitarian project to control society with philosophy using literary rhetorical possibilities.\textsuperscript{143}

Aristotle’s \textit{Rhetoric} is thought to have been composed during one of his residences in Athens (between B.C 367 and 347 and again between B.C 335 and 322).\textsuperscript{144} In the treatise, Aristotle also targets a dominant practice of the sophistical school of rhetoricians.\textsuperscript{145} Although the Stagirite also criticizes the sophistical school of rhetoricians, as expressed in several passages that commented on how rhetoric was practiced among his predecessors, he does not share his teacher’s mistrust of rhetoric.\textsuperscript{146} Like Plato, he accuses Sophists of focusing exclusively on the forensic branch of rhetoric and undermining the deliberative part of parliamentary speaking and accuses them of failing to provide a theory of proof and restricting their task to speaking to the emotions of the audience.\textsuperscript{147} Still, Aristotle’s treatise underpins the validity of rhetoric as a \textit{technē} and defines it as the art of discovering all the available means of persuasion: “Rhetoric may be defined as the faculty of observing in any given case the available means of persuasion.”\textsuperscript{148} This plea for rhetoric as an art in its own right is often perceived as a clear criticism against Plato’s distrust of rhetoric. Aristotle also shows that argumentative rhetoric is a method that can aid the goals of truth and justice.\textsuperscript{149} This is demonstrated in his discussion of natural justice in his \textit{Rhetoric}. He exposes a systematic theory of

\textsuperscript{142} Cf. ibid., 26.
\textsuperscript{143} Cf. Ibid.
\textsuperscript{144} Cf. Cope, \textit{An Introduction}, 37.
\textsuperscript{145} Cf. ibid., 3.
\textsuperscript{146} Cf. ibid., 3; on Aristotle’s critique of his predecessors see for example \textit{Rhetoric} I, 1354b, 19-21.
\textsuperscript{147} Cf. ibid., 3-4.
\textsuperscript{148} Aristotle, \textit{Rhetoric} I, 1.1355b 26-27.
\textsuperscript{149} See Aristotle \textit{Rhetoric} I, 1, 1355a, 37-38; de Alvarenga Gontijo and Sousa Alves, “The Ethic Ground.”
persuasion employing arguments and concepts from his logical, ethical, and psychological writings. Given the political and ethical content of Aristotle’s treatise, it came to be viewed as a theory of civic discourse. Consequently some scholars held that contrary to Plato Aristotle sought to convey the practical utility of rhetoric as a channel to yield the most possible political deliberations without striving for certainty. The political content of rhetoric is conveyed through a pragmatic approach to using argumentation while deliberating at assembly, defending in a court of law, and as a way of giving praise or blame in public life. Plato’s proposal to develop a proper true rhetoric by submitting it to philosophy cannot yield to a similar practical outcome in the political scope. Instead of considering rhetoric to be a civic discourse on the most plausible situation linking it to truth, Plato restricted its capacity to attain truth and definitive knowledge on political subjects.

2. The ground for Ibn Rushd’s “Platonization” of Aristotle’s Rhetoric and its ramifications of his view of ethics

The Arabic reception of Aristotle’s treatise the rhetoric occurred under the philosophical interest in the stagirite’s logical corpus. Thus rhetoric was translated into

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152 The reception of Aristotle’s Rhetoric happened in the context of the entire logical corpus of Aristotle known as the Organon. The Organon, or “instrument”, is a reference to logical classificatory systems of the Aristotelian logical corpus including the six treatises, Categories, On Interpretation, Prior Analytics, Posterior Analytics, Topics, and On Sophistical Refutation. The sequencing of these treatises was perceived as Aristotle’s contribution to erecting a syllogistic method as an instrument of philosophy. While this sequence did not necessarily include rhetoric, Arab Philosophers added rhetoric and dialectic to the five treatises, expanding the Organon to eight treatises. As explained in Black’s study on Arabic rhetoric, this
khaṭāba to mean logical art and was associated with the study of Aristotle’s logical theory of argumentations (demonstration, dialectic, rhetoric). This association of Aristotle’s Rhetoric in the Arabic tradition with logic as the domain of the study of philosophy was seen as analogous to Plato’s proposal to place rhetoric within philosophy so as to seek definite knowledge on political things, veering away from Aristotle’s practical outcome. This view is best explained in Butterworth’s study of Ibn Rushd’s MCAR.

While Butterworth admits the political role of rhetoric in Ibn Rushd’s views, he argues that the Andalusian commentator rehabilitates rhetoric as a logical art to truth to fit Islamic tenets of sharīʿa as the divine law, which lead to the Platonization of Aristotle’s Rhetoric. I shall present the main arguments Butterworth uses to corroborate this position in the following: (1) Rehabilitation of rhetoric to logic as the realm of truth is motivated by Islamic consideration. (2) The prophet-lawgiver is equal to the rhetorician. (3) This reading of Ibn Rushd’s political view of rhetoric, which is submitted to a Platonic truth undermines his rectifying notion under the written and the unwritten laws which Butterworth deems exoteric and only applicable to the prophet –

expansion was common practice among Arabic philosophers: “In the Arabic milieu, on which the present study focuses, this arrangement of the Organon is evident in the earliest philosophical writings, both in general discussions of the divisions of sciences, and in commentaries on the logical works of Aristotle. To name just a few examples, we find al-Kindī (806-866) discussion of the Organon in his introductory treatise on the Aristotelian corpus, in several of Fārābī’s (870-950) discussions of logic, most notably that contained in his Iḥṣāʾ al-ʿulūm (catalogue of the sciences), in Avicenna’s (Ibn Sīnā 980-1037) discussions of logic in his major works, the Shifāʾ (Healing) and the Najāh (Deliverance), in the commentaries of Averroes (Ibn Rushd 1126-1198) on Aristotelian logic, and in Maimonides’ (Mūsā ibn Maymūn, 1135-1204) early Maqālah fi ʿināʾ ath al-maṭniq (treatise on the art of logic). The widespread acceptance of this arrangement within the scholarly circles of the medieval Arabic world is further attested to by its appearance in general discussions such as those of Ibn al-Nadīm’s bio-biographical Kitāb al-fihrist (Book of Lists) and Al-Khwārizmī’s encyclopedic Mafāṭīḥ al-ʿulūm (Keys to the Sciences).” Deborah Black, Logic and Aristotle’s "Rhetoric" and "Poetics" in Medieval Arabic Philosophy (Brill: Leiden, 1990), 2. I will discuss the expansion of Aristotle’s Organon in chapter 2.

lawgiver.

(1) Butterworth underlines that Ibn Rushd values the political utility of rhetoric as a device to persuade the masses in political matters, but this utility, he adds, could only be framed in terms that are compatible with sharī'a.\textsuperscript{155} For God instructed the Prophet to enjoin people through rhetorical speech in the Qur’an, and it is accepted that rhetoric is a method to exhort the masses in order to teach and persuade them about the revealed law to incite them to good beliefs.\textsuperscript{156} Thus, rhetoric plays a political role as a tool to transmit truth to people through rhetorical images. More importantly, Butterworth emphasizes an important shift by Ibn Rushd to Aristotle’s text, in which he admits the logical status of rhetoric. In so doing, Ibn Rushd sets a high standard for the political role of rhetoric and submits it to logic: philosophy.\textsuperscript{157} This implied a Platonic view of the role of the rhetorician, which required classifying rhetoric as a part of philosophy. Thus he presumes that Ibn Rushd attaches rhetoric to logic, enjoining the rhetorician to meet the procedural prerequisite used in syllogistic demonstration.\textsuperscript{158} To this purpose, he argues that Ibn Rushd requires stringent apodictic criteria like that used by demonstrative argumentation in rhetorical argumentation.\textsuperscript{159} Specifically, Butterworth claims that Ibn Rushd uses the notion of \textit{tathbīt},\textsuperscript{160} which means to establish, as referring to demonstrative argument:

\begin{quote}
He argues that persuasion takes place only by demonstrating the thing to the one who
\end{quote}

\textsuperscript{155} Ibid., 4 and 26-27.
\textsuperscript{156} Ibid., 190.
\textsuperscript{157} Butterworth emphasizes that the main deviation from Aristotle’s outlook can be grounded in Ibn Rushd’s link between rhetoric and dialectic and his insistence on relating rhetoric to logic the realm of truth. Cf. his “Rhetoric and Reason”, 40. Ibn Rushd’s reference to the link between rhetoric and dialectic and the syllogistic character of rhetoric can be found in Aouad’s edition in \textit{MCAR} 1.1.1 and \textit{MCAR} 1.1.12 in Averroës, \textit{Commentaire} 2, 1-2 and 7-8.
\textsuperscript{158} Butterworth, “Rhetoric and Reason,” 58.
\textsuperscript{159} Ibid., 59.
\textsuperscript{160} I will discuss this point in chapter two. It shall suffice here to say that equating \textit{tathbīt} with apodictic demonstration has no basis in Ibn Rushd’s text and I prefer Aouad’s translation to mean “to establish an argument.” For a comprehensive overview of the use of \textit{tathbīt} see Aouad’s index in Aouad, “Introduction générale,” 288 and 289.
acknowledges it, because we only acknowledge something when we are aware that it has been demonstrated. Averroes then argues that since the rhetorical syllogism is the source and pillar of rhetorical conviction, it alone demonstrates matters in a rhetorical manner. In this discussion he never once attempts to mitigate the effect of the term “demonstration”, tathbīt.  

While here I would adhere to Aouad’s translation of tathbīt as merely “establishing an argument,” Butterworth takes it to mean apodeixis, or ‘demonstration’.

On this basis, Butterworth views this association of the art of rhetoric with demonstrative logic in the realm of truth as a clear departure from Aristotle’s pragmatic political outlook and veers toward a “Platonization” of the Stagirite’s rhetoric. This view lends itself to an ideal theoretical view of politics.

(2) Another ground for the rehabilitation of rhetoric, Butterworth argues, is the high expectations of rhetorician’s skills. A true rhetorician had to master the whole corpus of logic, which means that rhetoric is not in the public domain of civic discourse and is only meant for the elite. This meant that Ibn Rushd has the prophet in mind. For

162 A similar view on the Arabic platonization of Aristotle’s rhetoric can also be found in John Watt’s article (“Aristotle’s Rhetoric,” 17-18), “Aristotle’s rhetoric is primarily concerned with the requirements of citizens engaged in public life. Aristotle envisaged the needs of those deliberating in the assembly about the best course of action for the state (deliberative rhetoric), of those prosecuting or defending in the law courts (judicial rhetoric), and of those speaking in praise or blame of some person or entity on ceremonial or other occasions (epideictic rhetoric). His treatise is therefore a “theory of civic discourse,” and, being concerned with issues of public life, it can in a broad sense be characterized as political; in the treatise itself rhetoric is declared to be an offshoot of dialectic and of ethical studies, which it is just to call politics.” It was not written, however, for a political or intellectual elite, but for the general citizenry, nor was it written to enable that elite to bring about the best possible state on earth, but to come to grips with the problems confronting citizens in the state and circumstance known to him. For the medieval Muslim philosophers, however, the treatise belonged in the armory of the wise who, conscious of the needs of the masses to live the good life despite their weak intellects and their deficient knowledge of the good, sought to impart to them a measure of knowledge appropriate to their intellectual attainment and to persuade them to lead the good life to the extent possible for them. This transformation has been aptly characterized as the “Platonization” of Aristotle’s Art of Rhetoric. Also Blaustein (“The Scope,” 262) asserted that “Averroes, following the paths of his Aristotelian predecessors within the Islamic tradition, sees rhetoric primarily as a mode of discourse used by the philosophic elite in addressing the multitude about theoretical and theological subjects.”
Butterworth, the correlation between rhetorical logical status and political role fits with Ibn Rushd’s view of philosopher-king, which he equates with the prophet. In other words, the rhetorician is to be guided by theoretical wisdom.  

Butterworth claims that the legislator-philosopher uses prudence or practical wisdom, saying that: “ultimately this means that prudence is subordinate to the control of theoretical wisdom. By subordinating prudence to theoretical wisdom, Averroes enables his master rhetorician to transcend the limits of prudence.” Butterworth is quick to conclude that Ibn Rushd equated the prophet-philosopher to the rhetorician.

The identification of the philosopher, the legislator, and the Prophet means that all share in the same mental and moral faculties and have the same view about the end of man. Thus, the highest form of rhetoric presented in the treatise does not need to include a detailed explanation of the role of the prophet. Once it is ascertained that the master rhetorician is identical with the philosopher and the legislator, the vague references to the Prophet are sufficient to establish the connection. The references indicate the direction such an argument must take in order to validate the rhetoric of Muhammad as leading to man’s ultimate happiness.  

While Butterworth himself acknowledges that Ibn Rushd did not mention the prophet in *MCAR*, he is still adamant to draw his conclusion.

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164 On this point Butterworth (“Rhetoric and Reason,” 76) specifically asserted, “The significance of the classification is due to the theoretical consequences for political discourse associated with the ultimate disposition of rhetoric. If it is classed as a logical art, the true master of rhetoric would be the master of logic. But since the master of logic is identical with the philosopher, rhetoric – and thereby political discourse – would be ultimately guided by the philosopher. Practically this kind of reasoning set the stage for the view of the philosopher-king. The other alternative is to classify rhetoric as part of civil philosophy, thus establishing prudence as its guiding light.”


166 Ibid., 242.

167 As acknowledged here by Butterworth (ibid., 243), this conclusion is not really based on the text “Finally, the student of Averroes, having followed all these suggestions, is still left with an uneasy feeling that the problem has not been resolved. In the first place, the identity of the philosopher, the legislator, and the Prophet is based on a very tenuous argument. Secondly, the vagueness of the references to the Prophet also suggests the possibility that the happiness of man could be attained without the guidance of the Prophet. But it is precisely this uneasiness on which an inquiry into the relation between philosophy, rhetoric, and religion must be based. By not pointing to a definite solution, Averroes makes it incumbent upon those who study him to resolve the issue for themselves. By drawing the upper and the lower limits of
(3) The most consequential conclusion made in Butterworth’s reading of Ibn Rushd’s understanding of the *Rhetoric* undermines the important distinction made between the written and the unwritten laws. First, Butterworth contends that this couplet cannot be comparable to the Aristotelian separation of the particular and the universal. Thus he concludes that the main divergence of Averroes’ discussion in forensic rhetoric is related to the question of injustice, which he links to law.

These explanations of the law define injustice from the point of view of particular, i.e., conventional or revealed, law and universal, i.e. natural, law. To the extent that the revealed law of the Islamic community differs from the conventional law of Athens, one must expect some difference between Aristotle and Averroes; but it is not on such limited points that Averroes differs from Aristotle. The difference resides more in the posture of the rhetorician towards the laws.\(^{168}\)

This statement conveys two main ideas. First that one cannot admit Aristotle’s division within the context of revealed law given the difference between a Hellenistic and Islamic context. The second claim is that this main difference relied on the rhetorician’s view of the law. As the rhetorician is supposed to be the philosopher-king, endowed with theoretical wisdom, this implies that he is the only person to discern the distinction between the written and the unwritten laws. Butterworth articulates this position in one of his earlier works, but his view of the written and the unwritten laws remains unchanged as he expresses in this article “Rhetoric in Islamic political philosophy.” In fact, he reiterates that Ibn Rushd places a heavy moral burden on the rhetorician:

Finally, Averroes explained some of the tensions between the written and the unwritten law of the discussion, he urges his student to stay within the confines of political life and to heed the basic distinction between the few and the many. This means that for all practical, political purposes his final teaching must be an endorsement of the kind of rhetoric set forth by Muhammad as investigated and interpreted by men with an awareness of the wisdom of the ancient philosopher—an endorsement that is so qualified as to leave the problem open for further investigation.”

\(^{168}\) Butterworth, “Rhetoric and Reason,” 162.
which the rhetorician would have to be aware and related the discussion to practices in the Islamic community. By linking rhetoric more closely with dialectic, Averroes thus elevated the concerns of rhetoric and placed heavier responsibility upon the rhetorician who would seek to learn about rhetoric by reading the *Talkhiš*.

Again, this affirms his view that the rhetorician-prophet is endowed with theoretical wisdom and is the only one who can conceive of this distinction between the written and the unwritten laws.

While Butterworth contributes to our understanding of Ibn Rushd’s rhetoric as he pinpoints to the relationship between rhetoric and Islamic law, as well as the logical and political value of rhetoric, some of his conclusions, however, hinge on assumptions and lack solid textual grounds. Although, he is right to point that Ibn Rushd’s reading of the role of rhetoric is shaped by his Islamic legal context, this should not presuppose that it places constraints on Ibn Rushd’s political teachings. Butterworth’s construal of the platonic view of the Islamic political order led him to mistakenly link *tathbīt* to apodeictic or demonstrative approaches, and equate the rhetorician with the prophet. My work strongly endorses, and benefits from, the perspectives presented in recent studies of Ibn Rushd’s rhetoric and law. Deborah Black’s study on the aim of rhetoric in relation to the concept of assent (*taṣdīq*), and Aouad’s emphasis on the primacy of the practical utility of rhetoric over the theoretical view, as well as his discussion of Ibn Rushd’s association of the Islamic system of knowledge under the concept of testimony

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170 Butterworth, “Ethics in Medieval Islamic philosophy,” 236.
171 The practical utility has been noted by Aouad, “Introduction générale,” 63-65.
(shahāda), stand as major examples, as does Bou Akl’s study of the legal treatise of Ibn Rushd DFF.172

III. My approach

The assumption of sharī’a’s immutability is not peculiar to the Straussian approach to Islamic political philosophy. A similar view on the bookishness of Islamic law framed for a while the approach to Islamic law, under the contention of the literal view of Islamic ruling, which assumes that ethics is rooted in the literal word of the scripture, thus hindering any conception of the rectification of the law.173 Prescribing an ideal view of God’s law, or sharī’a, often implied that human agency has no role but to abide by its rules. This approach to sharī’a is in decline, and a new perspective in Islamic legal studies is starting to gain ground, opening new venues for research to expose the complexity of Islamic jurisprudence and its method of argumentation. This will recognize the complexity in how Muslim jurists conceived the epistemological ground and nature of their hermeneutical enterprise.174 The contribution of the present study lies in bringing

173 Johansen explains how Schacht and Goldziher argued that the sacred law of Islam did not establish any formal distinctions between the spheres of law: no differentiation between law, religion, cult, and ethics. Baber Johansen’s Introduction in his Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh (Leiden: Brill, 1999), 45-72.
174 New scholarship has developed a different approach to discerning the complexity of the nature of Islamic jurisprudence. Here I hope to mention the several contributions of Baber Johansen. For a short list of his work see footnote 157 in this chapter, which will be the basis of my discussion. For more see Wael B. Hallaq, A History of Islamic Legal Theories (Cambridge: Cambridge University Press, 1997). Ali Yunis, Medieval Islamic Pragmatics (Richmond: Curzon, 2000); Felicitas Opwis, Maslaha and the Purpose of the Law (Leiden: Brill, 2011); David Vishanoff, The Formation of Islamic Hermeneutic. How Sunni Legal Theorists Imagined a Revealed Law (New Haven, CT: American Oriental Society, 2011); Robert Gleave, Islam and Literalism (Edinburgh: Edinburgh University Press, 2012); Aron Zysow, The Economy of Certainty. An Introduction to the Typology of Islamic Legal Theory (Atlanta: Lockwood Press, 2013); Bou Akl, Averroès, and many others.
this new perspective on Islamic jurisprudence and its relation to *fiqh* into the study of Islamic political philosophy. As a philosopher and jurist, I propose, Ibn Rushd is the perfect candidate, as his views on political philosophy intersect with his understanding of Islamic jurisprudence. In what follows I outline some new perspective on epistemological views of Islamic jurisprudence. Endorsing this perspective, I explain how revisiting Ibn Rushd’s political and legal view articulated in his *MCAR* —, mainly on the relation between law and opinion—will bring his political philosophy into new light. More importantly, this shall help us to grasp Ibn Rushd’s conception of Aristotle’s justice within sharī’a.

In Islamic legal discourse, the use of sharī’a is often attached to the divine rules and regulations as prescribed in both the Qur’an and the prophetic tradition. Yet, sharī’a, as comprised in God’s revelation, could not mean much without the interpretive enterprise of *fiqh*. Characterized by a human hermeneutical effort, this process gave rise to complex formal rules and epistemological discussions about the regulation and validation of the methods of jurists in discerning the divine intent. While the use of the term sharī’a might preserve the divine sacred view of the revelation, *fiqh* remains the ultimate course of human activity to reach the divine norms intended by the Lawgiver. This tension between the sacred interpretation of the scripture and the human effort to discern the divine intent yielded various epistemological and methodological discussions in jurists’ literature. Taking this tension into consideration, recent scholarship has

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176 Ibid.
challenged the early conceptions of sharī'a as an immutable truth, and has explored how jurists conceived of the fallibility of this enterprise, and recognized the skeptical epistemology of Islamic jurisprudence. Primary among these views is the contribution of Baber Johansen, who identifies the contingent nature of the sacred law by focusing on Islamic epistemological skepticism, which is grounded in the jurists’ articulation of a theory of law, as well as in the development of discretionary practices in the judiciary procedures.

Etymologically, the root of the word *fiqh* (*f-q-h*), denotes comprehension of discourse, and as such, at the heart of the practice lies the hermeneutical value of the jurists or *fuqaha*’s enterprise. *Fiqh*, as the science of Islamic jurisprudence, denotes a particular expertise in the religious sciences, which corresponds to a Qur’anic reference: [9:122] “to gaining understanding of religion” (*li yatafaqqahū fi-l-dīn*), and to a ḥadīth attributed to the Prophet, stating, “To him to whom God wishes to show favor, He gives understanding of religion (*yufaqqihū fi-l-dīn*).” *Fiqh*, then, marks both the meaning of “understanding”, as well as the aptitude linked to deriving legal norms from the revealed text. In more precise terms, *fiqh* stands for the system of rules and methods used to discern normative understanding of the revelation in order to define human actions.

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181 Ibid.
Discerning legal norms relied on a formalistic process grounded in the principles of law in the scripture, on the normative praxis of the prophet, on consensus, and on analogy. While these principles generated formalistic rules needed to ensure the stability of the system, jurists admitted the doxatic nature of their effort to discern legal norms in new cases. Discussing the theory of law as expounded by *usūlis*, Johansen challenges the deontological view of Islamic law in early Orientalist legal studies. More significantly, Johansen discloses the skeptical basis of Islamic jurisprudence: This skepticism, he argues, is reflected in the division between absolute knowledge, which is based on the revelation, and the contingency of human interpretation, and which can only claim probable validity. The coherence of this enterprise hinges upon the claim that while norms are to be derived from the text, human interpretation cannot claim access to truth and has to content with the preponderance of opinion (*ghalabat al-ẓann*) as a basis for persuasion. Admitting the probable nature of rulings made dissent among jurists within the framework of different schools of law possible.

Furthermore, Johansen also shows how this skeptical approach is embedded in the judiciary judgment in the doctrine of proof used by judges. Thus he argues that when adjudicating a court case, a Qādī is aware of the limits of his decision. Such a decision cannot profess truth as it relies on a linguistic basis presented by the witness and is liable

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184 Cf. Johansen, “Changing Limits,” 39. This method is often linked to ash-Shāfiʿī’s effort to erect a hierarchy of principles for legal norms, which set first the Qurʾān, then (2) the *sunna* of the Prophet, (3) consensus (*ijmāʿ*), and (4) analogical reasoning (*qiyās*). See Johansen’s “Dissent and Uncertainty,” 128-129.
185 Johansen *Contingency*, 45.
186 Ibid., 36-39.
187 Ibid., 36.
188 Ibid., 36-37.
to deception.\textsuperscript{190} Thus the judicial authority is aimed primarily at an application of the prescribed procedure of Islamic law without claiming conclusive knowledge.\textsuperscript{191} In this sense, the judge puts forth an effort to construct the facts surrounding the case at hand based on the linguistic possibility of evidence. He, however, can only base his judgment on what is provided to him, and not on people’s intentions, since these only God can access.\textsuperscript{192} This affirms that jurists recognized the hermeneutical basis of their method, and its reliance on the preponderance of opinion (\textit{ghalabat al-ẓann}), which led to a plurality of schools and the possibility of dissent under the realm of interpretation (\textit{ijtihād}).\textsuperscript{193} Still, this contingency requires that jurists articulate robust arguments for the validity of legal norms. The epistemological and argumentative basis for Islamic jurisprudence, as discussed here, is central to understanding Ibn Rushd’s view of Islamic jurisprudence and its relation to rhetoric.

This study takes Johansen’s argument on the epistemological skepticism of Islamic law as the perspective to tackle the nature of the relation between law and rhetoric to grasp Ibn Rushd’s political and legal philosophy. Considering that jurists admitted the presumptive nature of their tasks in discerning the divine intent, how did Ibn Rushd, as a jurist and a philosopher, understand the epistemological basis of Islamic law as well as the system of knowledge on which the whole revelation rests in relation to rhetoric? In this sense I shall explore how does Ibn Rushd understand Islamic sciences and concepts associated to the revealed discourse and Islamic modes of argumentation in the scope of rhetoric as a logical art. Furthermore, against the logical view of rhetoric as

\textsuperscript{190} Ibid., 40; See also Johansen, “Signs as Evidence,” 169.
\textsuperscript{191} Cf. Johansen, “Changing Limits,” 40.
\textsuperscript{192} Cf. ibid.
the realm of doxastic opinions, I seek to delineate the nature of the relation between law and opinion and its impact on the role of rhetoric in the political and ethical realm.

Finally, my main aim is to explore Ibn Rushd’s appropriation of Aristotle’s natural justice to understand its nature function and put it in the context of his understanding of sharī’a. Building up on Aouad’s observations discussed in my introduction, I shall further define the correlation between Ibn Rushd’s view of the written and the unwritten laws within the epistemological scope of rhetoric and focus on the divide between the masses and elite embedded in his conception of natural justice. More importantly, I shall inquire how does this conception fit within the scope of sharī’a in terms of its legal theory, practice and institutions. Contextualizing Ibn Rushd’s appropriation of Aristotle’s natural justice within his view of sharī’a shall not only help us to fathom his conception of natural justice but also decipher his own conception of sharī’a at large.
CHAPTER TWO
RHETORIC AS A META-DISCOURSE ON LAW, OPINION, AND ISLAMIC MODES OF ARGUMENTATION

In order to grasp Ibn Rushd’s political and legal philosophy, in this chapter, I focus on his conception of rhetoric both in its political and epistemological value in *MCAR*. A close scrutiny of Ibn Rushd’s view of the scope of rhetoric reveals how both its political and epistemological functions are intertwined with the framework of Islamic jurisprudence and modes of argumentation associated to Islamic sciences. To put it differently, both the political and hermeneutical context of Islamic jurisprudence shapes Ibn Rushd’s view on the epistemological scope of rhetoric, which pushed the commentator to make consequential departures from Aristotle’s text. While I argue such entanglement between Islamic jurisprudence and the epistemological scope of rhetoric aims at stabilizing the political scope, mainly in its hermeneutical nature, it also leads to the expansion of the epistemological scope of rhetoric. Under this prism, Ibn Rushd allows for encroaching on the domain of other logical arts such as dialectic and sophistical arts but is adamant at demarcating the boundaries of the logical scope of rhetoric under a peculiar concept to Arabic philosophy, which is the unexamined opinion. In what follows, I first contextualize the reception of Aristotle’s rhetoric in the Arabic tradition and Islamic sciences. Then, I discuss Ibn Rushd’s political conception of rhetoric and its relevance to the Islamic legal context to highlight some of his clear departures from Aristotle’s text. Finally, I expose the ramifications of these political
views on the logical characteristic of rhetoric, leading to the expansion of its epistemological domain. Unlike the Platonist reading, I conclude that this expansion rather comes to buttress the practical value of rhetoric as the common denominator among human under the limit of the unexamined opinion.

I. Overview of rhetoric in the Arabic context

For a scrutiny of Ibn Rushd’s theory of rhetoric, few features should be taken into account to allow a better grasp of his political and epistemological view of rhetoric. The term rhetoric in the Arabic tradition denotes two different trends, one logical, known as ḥaṭṭāba, and another indigenous trend, called balāgha, related to the Arabic linguistic sciences that developed around the Qur’an. Thus one needs some background on the context of Aristotle’s Rhetoric’s reception in the Arabic tradition under the scope of Aristotle’s logical art. Second this reception shall be contextualized within the Islamic scientific context of Arabic hermeneutical and linguistic sciences. Finally, Ibn Rushd produced two commentaries on the matter: SCR in 1159 MCAR in 1175. As these two treatises serve as the basis of my study, I will sketch some of the differences in their scope while I maintain that both display, for the most part, consistent positions.

A. The reception of Aristotle’s Rhetoric under the Organon

Aristotle’s Rhetoric attracted a great deal of attention among Arab philosophers, who produced a plethora of commentaries about it, as mentioned in al-Nadīm’s Fihrist. While a great number of these commentaries were lost, some have been recovered, including those by Fārābī, Ibn Sīnā and Ibn Rushd. Specifically, the reception of Aristotle’s rhetoric via the Syriac tradition occurred under the efforts of the translation of the logical corpus of Aristotle known as the Organon, which term literally means “the instrument,” but is also used to refer to the classificatory scheme of the Aristotelian logical treatises. While in modern philosophy the Organon includes six treatises, The Categories, On Interpretation, Prior Analytics, Posterior Analytics, Topics, and On Sophistical Refutation the medieval tradition expanded the Organon, adding the two treatises of Rhetoric and Poetics.

As Black has shown in her important study, Logic and Aristotle’s Rhetoric and Poetics in Medieval Arabic Philosophy, this expansion of the Organon was transmitted to

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196 As provided by Aouad’s account on the history of rhetoric in the Arabic tradition, the early interest in rhetoric can be traced to Kindī’s circle. As a matter of fact, Kindī himself was reported to have composed a short commentary on Aristotle’s Rhetoric and another on Alexander of Aphrodisias’ Commentary of the rhetoric, as identified by Ibn ‘Uṣayba (d.1270) who attributed to Kindī this title: Risāla fī sifāt al-balāgha. This treatise was lost. As for the corpus on rhetoric that was recovered in manuscripts, reference is made to ‘Āmirī (d. 992) in his Kitāb al-sa‘āda wa al-is‘ād (On Seeking and Causing Happiness) that has accurate citations from the Rhetoric and the philosophical corpus on rhetoric found in Fārābī, Ibn Sīnā and Ibn Rushd’s commentaries on Aristotle’s Rhetoric. The Fihrist identifies 20 volumes of al-Fārābī’s Kitāb al-khaṭāba, but only a segment is recovered in the Latin Didascalia in Rhetoricam Aristotelis ex Glosa Alpharabi, established as a translation by Herman the German between 1243-1256. Ibn Sīnā wrote Ḥikmat al-ʿArūḍiya or Kitāb al-Majmūʿ, which includes a treatise on logic: Fī maʿanī kitāb rīṭūrīqa ‘ay al-balāgha fi-l-ḥukuma wa al-khaṭāba and Fī al-akhlāq wa al-infiʿāl fīl-nafsāniyya. Ibn Sīnā also composed a treatise on khaṭāba in book four of Shifāʾ. Ibn Rushd produced two treatises, a short commentary (jawāma’) in 1159 and a Middle Commentary (talkhīṣ) in 1175. Cf. Aouad, “La Rhéthorique. Tradition Syriaque et Arabe,” 463-470.

197 Cf. ibid.


Arabic philosophy through the Alexandrian school. Unlike early historians of philosophy who deemed the Arabic adherence to the medieval arrangement of the *Organon* as mere imitation of the Alexandrian school, Black, demonstrates that Arabic philosophers erected an epistemological coherent position on the scope and nature of logic. In adopting this classificatory scheme, Black explains, the *falāsifa* constructed a firm epistemological ground to account for the validity of rhetoric alongside poetics to produce logical arguments. In so doing, the *falāsifa* admitted a syllogistic dimension to arguments based on rhetoric, dialectic, and even poetics expanding the *Organon* into eight treatises. More precisely, Black explains that Arabic philosophers attested to the logical view of rhetoric on the basis of its capacity to fulfill persuasion, which they attached to its communicative value in generating public belief. The basis of this account rests on central concepts related to the aim of logic, conception (*tašawwur*), and assent (*tašdiq*). The concepts of *tašdiq* and *tašawwur* form the basis of the aim of logic in Arabic philosophy. While *tašawwur* is defined as “the act of the mind by which concepts are quite central for an understanding of the Arabic philosophers usually

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200 Ibid., 12. Black also notes that this stance is shared among most Arab philosophers and is evident from the early writing of Kindī, Fārābī, Ibn Sīna, Ibn Maymūn, and Ibn Rushd. See ibid., 2.
202 Black (Logic, 3) underlines: “As has been suggested already, it is our view that there is in fact much of philosophy interest implicit within the medieval arrangement of the *Organon*. More than a mere historical curiosity, the very acceptance of this broadening of the contents of the *Organon* entails the adoption of a certain view of the scope and nature of logic itself and of the role that logic is deemed to play within philosophical pursuits.”
203 Ibid., 52; Black (ibid., 79) also points to the fact that Aristotle’s broad characterization of inferential reasoning in his *Prior Analytics* (68b 7-13) allows for admitting both dialectical and rhetoric can produce syllogistic argument.
204 Ibid., 79-80.
205 Ibid., 66-67.
206 Ibid., 14.
207 Ibid., 71.
identify the primary object of \textit{taṣawwur} as an essence or quiddity,\textsuperscript{208} \textit{taṣdīq}, which is often translated as assent or judgment, or into Latin as \textit{verificatio}, \textit{credulitas}, or \textit{fides},\textsuperscript{209} is linked to the act of ‘affirmation or denial of the thing conceived, or to the judgment that it exists in a certain state, with certain properties.’\textsuperscript{210} Taking the case of rhetoric, the philosophers admitted its capacity to produce assent. Persuasion is viewed as a capacity to produce belief and is therefore incorporated under the scope of assent as a logical aim.\textsuperscript{211} While demonstrative logic produces a rigorous assent on certain premises, dialectic and rhetoric may produce valid knowledge based on uncertain or possible premises, but can only yield probable knowledge.\textsuperscript{212} In other words, despite the probable nature of its premises, rhetoric can fulfill the logical aim of assent. This reveals the communicative value of rhetoric, as it underscores the validity of assent based on the popularity of belief rather than its truthfulness and uses premises that are shared by the public to produce persuasion.\textsuperscript{213} While distinguishing between the different logical arts on the basis of the value of their premises, the philosophers believed that all logical arts could still fulfill the aim of logic, which is assent (as seen in Table 2).

\textsuperscript{208} Ibid. For more general definition of these two concepts, see Harry A. Wolfson, “The Terms \textit{taṣawwur} and \textit{taṣdīq} in Arabic Philosophy and their Greek, Latin and Hebrew Equivalents,” \textit{The Moslem World} 33 (1943), 1-15; reprint in H. A. Wolfson, \textit{Studies in the History of Philosophy and Religion}, ed. Isadore Twersky and George H. Williams, 2 volumes (Cambridge: Harvard University Press, 1973) 1, 478-42.
\textsuperscript{209} Black, \textit{Logic}, 73.
\textsuperscript{210} Ibid.
\textsuperscript{211} Ibid., 75-76.
\textsuperscript{212} Cf. ibid., 86.
\textsuperscript{213} Cf. ibid., 99-100.
Table 2: The aim of logical arts

<table>
<thead>
<tr>
<th>Aim of Logic</th>
<th>Logical arts</th>
<th>Premises</th>
</tr>
</thead>
<tbody>
<tr>
<td>taṣawwur / taṣdīq</td>
<td>Demonstration</td>
<td>True (yaqīniyya)</td>
</tr>
<tr>
<td></td>
<td>Dialectic</td>
<td>Widely accepted in reality (al-mashhūrāt fī al-ḥaqīqa)</td>
</tr>
<tr>
<td></td>
<td>Rhetoric</td>
<td>Widely accepted according to the unexamined opinion (al-mashhūrāt fī bādi’ al-ra’y)</td>
</tr>
<tr>
<td></td>
<td>Sophistical</td>
<td>Widely accepted only apparently (al-mashhūrāt fī al-ẓāhir faqaṭ)</td>
</tr>
<tr>
<td></td>
<td>Poetics</td>
<td>Imaginative (al-mukhayyilāt)</td>
</tr>
</tbody>
</table>

As it will become clear in my discussion of Ibn Rushd’s view, this capacity of rhetoric to fulfill the need for assent serves as the ground to admit the indispensable social role of rhetoric in politics and, more specifically, to be of service to the administration of justice. Such a position as I will show is also triggered by the influence of Islamic law and sciences that developed around the hermeneutical approach of Islamic law. This entails a contextualization of the ideas of Aristotle’s rhetoric within the Arabic epistemological context, which will be in order.

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214 This table is based on Black’s discussion of logical premises in Arabic philosophy: Black, *Logic*, 139.
B. Khaṭāba and Arabic sciences

Parallel to the philosophical trend associated to khaṭāba, an Islamic rhetorical tradition known as balāgha developed. The beginnings of balāgha emerged around the study of the Arabic language (‘ulūm al-lisān al-‘arabī) and the different linguistics and hermeneutical sciences, which focused on the study of the Qur’an. According to Heinrichs, balāgha can be defined as the science of eloquence, which consists of syntactical stylistics, a theory of imagery, and rhetorical figures. While this science is believed to have reached its mature formulation in the later Middle-ages (seventh/thirteenth century onward), its early inception is difficult to trace. For this reason, Larcher suggests to study the emergence of balāgha in an anachronistic fashion starting with the post-classical period, which he mainly associates to the contributions of Sakkākī’s (d. 1229) Miftāḥ al-‘ulūm, an encyclopedic work in grammar, rhetoric, logic and poetic and Qazwīnī’s (d. 1338) Talkhīṣ al-miftāḥ which is based on Jurjānī’s (d. 1078) works Asrār al-‘arabiyya and Dalā’il al-iʿjāz. Overall, Sakkākī is often acknowledged for being the first to provide a systematic approach to rhetoric which he

215 Balāgha is defined as: “Abstract noun, from balīgh effective, eloquent (from balagh “to attain something”) eloquence. It presupposes fasāha, purity and euphony of language, but goes beyond it in requiring, according to some of the early definitions, the knowledge of the proper connection and separation of the phrase, clarity, and appropriateness to the occasion. Even though those definitions are not infrequently attributed to foreign nations such as Persia, Greece, or India, the demand for skill in improvisation and the recurring references to the Khatīb (or orator) in connection with the discussion of the concept make it abundantly clear that it originated in the Arabian milieu.” In A. Schaade and Gustave E. von Grunebaum, “Balāgha,” in Encyclopaedia of Islam. Second Edition (EI2), ed. Peri J. Bearman, Thierry Bianquis et al. Leiden: Brill Online, 2012; Wollhart Heinrichs, “Rhetoric and Poetics,” in Encyclopedia of Arabic literature, ed. Julie Scott Meisami and Paul Starkey (London: Routledge, 1998), 651-656: 651.


218 Ibid.

divided into three parts: ‘ilm al-maʿānī (science of meanings or semantics), ‘ilm al-bayān (stylistics), and ilm al-badīʿ (embellishment of speech). This systematic view was not conspicuous during the nascent stage of balāgha. In fact the notion bayān (elucidation), which came to define one part of the science of balāgha, rivaled the term balāgha for the title of the whole discipline. At times, the term bayān was used interchangeably with balāgha. Bayān is a Qur’anic concept, which was also used to define the divine discourse as an elucidation. Furthermore, bayān was one of the early concepts discussed in what is considered one of the very early rhetorical work of al-Jāhiẓ (d. 868) in his Kitāb al-bayān wa-l-tabyīn and was also adopted in Islamic jurisprudence by Shāfiʿī and it was elaborated by later jurists. To our purpose, the notion of bayān will be discussed in Ibn Rushd’s thought in his view on the nature of the divine discourse and the method to discern it, which will have some bearings on his view on the relation between law and rhetoric.

Furthermore, the nascent origin of balāgha is also associated to the early theological debates over the status of the Qur’anic text mainly the question of the inimitability of the Qur’an iʿjāz al-Qurʾān. In fact, some of the early theological debates focused on the rhetorical features of the Qur’an as well as its intrinsic uniqueness in terms of content and form. These discussions prompted some doctrines such as al-

221 Ibid.
223 Al-Shāfiʿī defined bayān as “A noun comprising several convergent basic meanings which are, however, divergent in their ramifications. The lowest common denominator among those convergent and yet divergent meanings is that a bayān is directed to whosoever is addressed thereby among those persons in whose language the Qurʾān was revealed.” Quoted in Joseph Lowry, “Some Preliminary Observations on al-Shāfiʿī and Later uṣūl al-fiqh: the Case of the Term bayān,” Arabica 55, no. 5/6 (2008), 505-527: 505. See the same article for a full account of the notion of bayān among other jurists.
224 This position is advanced by Djamel E. Kouloughli in his article “L’influence Muʿtazilite sur la naissance et le développement de la rhétorique Arabe,” Arabic Sciences and Philosophy 12 (2002), 217-239. Larcher (“Arabic Linguistic Tradition II”) traces the emergence of Iʿjāz al-Qurʾān as a dogma to around the 10th century.
taḥaddī and ṣarāfa, which articulate different stances on the rhetorical value of the scripture.\footnote{Cf. Grunebaum, “Iʿdjāz” EI2.} The doctrine of taḥaddī, which means challenge, refers to Qur’anic references addressed to Muhammad’s adversaries challenging them to produce a replica of the scripture. Ṣarāfa means “turning away” refers to the doctrine, which recognizes the aptitude in potentia of Arab rhetoricians during Muhammad’s time to produce a text amounting to the rhetorical challenge of the Qur’an but holds that God prevented them from accomplishing the task.\footnote{Cf. ibid. and Larcher, “Arabic Linguistic Tradition II.”} Again these debates are also exposed in Ibn Rushd’s argument on prophecy, which he discusses under the notion of tahaddī in relation to rhetoric in his SCR and KM.\footnote{Ibn Rushd, “Short Commentary on Rhetoric” (SCR), in Averroes’ Three Short Commentaries on Aristotle’s Topics Rhetoric and Poetics, ed. and trans. Butterworth (Albany: State university of New York Press), [in the following: SCR], 77 (Arabic 19).}

Finally, in addition to the influence of balāgha in early theological debates, one can also trace its impact in juridical hermeneutics. To be specific, given the importance of the Qur’an and the need to decipher the divine discourse especially in the legal sphere, linguistic and hermeneutical questions were at the center stage.\footnote{Cf. Larcher, “Le balâgha”, 209-211.} As demonstrated by Larcher, the uṣūlis approached the Qur’an as a khīṭāb (discourse), which is addressed to someone and not a mere utterance (kalām). Such approach is linked to their focus on determining the legal status of human acts on the basis of the five legal obligations, which triggered interests in issues related to ʿilm al-maʿānī and ʿilm al-bayān mainly the question of signification of expression and the distinction between the proper meaning and the metaphor.\footnote{See ibid., 197-213 and Larcher, “Arabic Linguistic Tradition II.”}

Given this cross-pollination between balāgha and hermeneutical Islamic sciences
mainly Islamic jurisprudence, the question that posit itself can we talk about some points of intersections between balāgha and its impact in jurisprudence and theological debate and khaṭāba. Larcher remains apprehensive to draw any influence between the two disciplines. While this might be true in some cases, Ibn Rushd proves the opposite point. In fact in both treatises on khaṭāba, Ibn Rushd draws extensively upon concepts from Islamic sciences such as taḥaddī and bayān associated to balāgha and from fiqh such as the concept of tawātur (recurrent reports), āḥād (solitary reports), and qarīna (circumstantial indicant) to only name few. Hence this intersection will be taken into account in his view of rhetoric and its relation to Islamic law and its modes of argumentation.

C. A synopsis of Ibn Rushd’s Short Commentary on Rhetoric and Middle Commentary on Aristotle’s Rhetoric

Ibn Rushd produced two commentaries, a short commentary as jawāma and a middle commentary as a talkhīṣ.\textsuperscript{230} In both treatises, Ibn Rushd advances the logical view of rhetoric but also its political function.\textsuperscript{231} The SCR was composed during an early stage of Ibn Rushd’s career, along with his DFF, (written between 1158 and 1160). This early stage of the philosopher’s career is often depicted by scholars as reflecting a Farabian influence on the Andalusian commentator.\textsuperscript{232} The MCAR, on the other hand, was written


\textsuperscript{231} SCR,§45, 78 (Arabic 197-198); MCAR 1.1.1 and 1.3.1, Averroès, Commentaire 2, 1-2.

\textsuperscript{232} In fact, ‘Alawī in his \textit{al-Matn al-Rushdī}, depicted this phase as being characteristic of the influence of Arab peripatetic such as al-Fārābī on the Andalusian philosopher, a fact also reported to us by one of his
at a different stage of Ibn Rushd’s career, during which he composed a series of middle
commentaries dedicated to Aristotle’s Organon.\textsuperscript{233} Also, this commentary was completed
only few years before his composition of \textit{FM} (1179) and \textit{KM} (1179-1180).\textsuperscript{234} This period
of the composition of the middle commentaries is characterized by his commitment to
peripatetic teachings.\textsuperscript{235} Be that as it may, both treatises bear a rather consistent position
on his view of rhetoric but have a varying scope linked to their literary form. I shall
summarize here few remarks on the different aims of the two treatises.\textsuperscript{236}

In \textit{SCR}, Ibn Rushd focuses on the logical status of the art of rhetoric, offering a
systematic outline of the principles specific to the realm of rhetoric based on Chapter
Two of Book One of Aristotle’s \textit{Rhetoric}.\textsuperscript{237} Ibn Rushd’s main aim in his short
commentaries on rhetoric, dialectic, and poetics is primarily to assess the capacity of
these logical arts to fulfill the logical aim of producing assent (\textit{taṣdīq}).\textsuperscript{238} In discussing
rhetoric, Ibn Rushd accounts for technical procedures such as the enthymeme and
example and also nontechnical procedures for their ability to produce this assent.\textsuperscript{239}

Under the nontechnical procedures, Ibn Rushd tackles Islamic modes of argumentation
providing an assessment of their capacity to generate assent.²⁴⁰ Under the extensive list of nontechnical procedures in SCR, Ibn Rushd also points to the written laws, but with no mention of the unwritten laws.

Unlike the SCR, which is a summary, the MCAR is a full-length paraphrase of the Stagirite’s text.²⁴¹ As I already noted, this middle commentary, or talkhīṣ, survived along with a series of commentaries of the same type examining the works of Aristotle’s Organon.²⁴² As a talkhīṣ or an add sensum, the MCAR was guided by the very requirement of textual interpretation.²⁴³ Hence, Ibn Rushd systematically follows the text of Aristotle except for the case of Rhetoric, Book Two (chapters 15-17).²⁴⁴ This being said, one should not presuppose from this following a slavish reading of Aristotle’s Rhetoric. As has been already established by Aouad, Ibn Rushd depended on Ibn Samḥ’s translation, notorious for its obscure and imprecise nature.²⁴⁵ To this end, Aouad notes that the elliptic nature of the Arabic translation of the Rhetoric led Ibn Rushd to make some modifications and departures in order to resolve inconsistencies in the translation.²⁴⁶ And in taking these departures from the Stagirite’s text, Ibn Rushd introduces some interesting ideas that draw from his concrete legal contexts. Still, as I shall elaborate here, the influence of Islamic legal context is identified in both treatises,

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²⁴⁰ SCR,§33, 73 (Arabic 187).
²⁴⁶ Ibid., 7-8; Similarly, Blaustein (“The Scope,” 263) asserts that the “Talkhīṣ exempts the text from the obscurities of the Arabic.”
keeping in mind that in comparison to the *SCR*, the *MCAR* takes larger perspective and exposes a more concrete view of the political legal domain.

II. The politico-legal role of rhetoric

Ibn Rushd’s takes the capacity of the art of rhetoric to produce persuasion as an important political tool in the realm of human organization. Consequently, Ibn Rushd underlines the valuable role of rhetoric in the political domain, he goes instead to the extent of blaming the ruler who does not resort to rhetoric. Specifically, Ibn Rushd attaches a great deal of importance to rhetoric’s contribution in the administration of justice. Exploring these views, I aim to pinpoint his conception of the political role of rhetoric shaped by his Islamic legal context, which leads to make some deviation from Aristotle’s treatises.

A. Ibn Rushd’s definition of rhetoric

Rhetoric is often depicted as a logical art, which produces persuasion.\(^{247}\) This persuasive capacity led Arabic philosophers to underline the political role of rhetoric. In order to understand this political aspect of rhetoric and its relation to the Islamic context I shall outline what is meant by persuasion and how it could relate to Islamic law.

Ibn Rushd defines rhetoric as an art (ṣinā‘a) relating it to persuasion or, more specifically, persuasive things (*al-ashyā‘ al-muqni‘a*).\(^{248}\) As noted by Black, characterizing rhetoric as an art, which aims at inducing persuasion, *iqnā‘*, is evincive in

\(^{247}\) *MCAR* 1.1.1 Averroës, *Commentaire* 2, 1; *SCR*, §1, 63 (Arabic 169).

\(^{248}\) Ibid.
the Arabic philosophers’ commentaries on the *Rhetoric.* To be specific, *iqnā’* as the *maṣdar* of the verb *aqna’a* is employed to mean generating persuasion in the ‘active sense of causing someone to accept a position.’ The term *iqnā’* is sometimes interchangeably used with *qanā’a,* which also conveys the meaning of persuasion. Still, there is a subtle difference between these terms, as *qanā’a* denotes some sort of satisfaction or contentment and is often used to convey the state of being persuaded.

This interchangeable reference to persuasion, relating it either to causing someone to accept a belief or to a sense of contentment can be both detected in Ibn Rushd’s texts.

First, the Andalusian commentator, in his *SCR,* identifies rhetoric with persuasion (*qanā’a*) twice. Yet the resonance with contentment is also conveyed in his definition of the cognitive aspect of rhetorical persuasion in *SCR.* He specifically defines persuasion (*qanā’a*) as a probable supposition, associating rhetoric to opinion (*ẓann*):

> It is apparent that persuasion [*al-qanā’a*] is a kind of a preponderant opinion [*ẓann mā ghālib*] which the soul trusts [*taskunu ilayhi al-nufūs*], despite its awareness of an opposing consideration.

In what preceded, we already defined opinion.

On this account, rhetoric is perceived as a mode of argumentation for producing persuasion through generating a preponderance of opinion (*ẓann mā ghālib*). In so doing, rhetoric is able to produce in people an inclination to lean toward trusting one opinion over another while still being aware of an opposition. Depicting this process as an

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249 Black, *Logic,* 104.
250 ibid., 103.
251 ibid., 103-104.
252 *SCR,* §1, 63 (Arabic 169).
254 *SCR,* §1, 63 (trans. with slight modification, Arabic 169).
255 Ibid.; This definition resonates with Fārābī’s definition of persuasion in his *Kitāb al-khatāba* as being some sort of opinion (*ẓann*): “Persuasion is a kind of opinion (*ẓann*). And in general, opinion is to believe that something is or is not the case, but that it is possible that one believes of [the thing] is different from what belongs to the existence of this thing essentially,” quoted in Black, *Logic,* 108.
acquiescence generated by the soul trusting one opinion (sukūn al-nafs) over another, I suggest, alludes to persuasion as a source of contentment. In other words, the semantic view of qanāʿa as contentment can be discerned from this association of the cognitive process to a state of tranquility of the soul (sukūn al-nafs) as it suggests a state of quietude in one’s soul. Such a statement implies a satisfaction of some sort, denoting an operative sense of contentment to rhetorical persuasion.256 This contentment, albeit, is not to be confused with demonstrative certainty, but rather it hints to a form of satisfaction through the preponderance of a belief.257

Ibn Rushd also provides a clear definition of rhetoric in his MCAR. Taking Aristotle’s definition of rhetoric which reads as follows: “the faculty of observing in any given case the available means of persuasion,”258 Ibn Rushd adds some subtleties depicting rhetoric as “a faculty (quwwa) that strives to achieve the possible persuasion (al-iqnāʿ al-mumkin) in each one of the separate matters,”259 meaning that the rhetorician seeks to accomplish an effort to attain as much persuasion as possible.260 This suggests that rhetoric operates within a spectrum within which it strives to reach the most possible degree. Then Ibn Rushd expands his view even further in the next paragraph, which has no correspondence in the Aristotelian text, where he says:

What Aristotle meant by “faculty” [quwwa] is the art that acts upon two opposites and whose end does not necessarily unfold from its act. And what he meant by “striving” [tatakallaf] is to spend all efforts into a close investigation of the possible act of persuasion. And what he meant by "the

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256 Cf. ibid., 105. For more on the subtleties of persuasion as contentment, see ibid., 103-108.
257 Ibid., 106.
259 MCAR 1.2.1, Averroës, Commentaire 2, 13.
260 MCAR 1.2.2, ibid., 14.
possible", is the possible persuasion in the thing that is spoken about, and that is by fulfilling the most possible degree of what is attainable within it…

Herein, Ibn Rushd takes some liberty in reproducing the Stagirite’s definition. As Aouad notes, the central idea in this interpretation discloses Ibn Rushd’s fundamental view on the lack of certainty in rhetoric. First, rhetoric takes effect on two opposite extremes. Second, its aim is not always necessarily fulfilled. Thirdly, it can attain a variable degree of the persuasion possible depending on the various situations of its use, as it strives to reach the highest possible level of persuasion in every separate case. This locates rhetoric under the realm of the possible, as still the aim of the rhetorician is to reach the highest possible degree of persuasion.

Viewing the whole through this prism, I deduce that Ibn Rushd’s definition of rhetoric in both texts discloses a few interesting subtleties. While in SCR he associates rhetoric to opinion (ẓann), he still acknowledges the capacity for rhetorical activity to establish some contentment, which can be elemental in establishing belief among the public. This view is central to assert the political function of rhetoric. Ibn Rushd’s assertion that rhetoric fulfills a preponderance of belief corresponds to the epistemology of methods and practice of Islamic jurisprudence, which also admits the preponderance of opinion as enough ground to generate legal ruling in Islamic jurisprudence as outlined in my discussion of Johansen’s views earlier. Such nuance does not fit well within the platonic view associated with Ibn Rushd’s reading of Rhetoric, which implies that the

\[\text{References}\]

261 Ibid.
262 See Aouad’s commentary on 1.2.2, which stresses the centrality of the uncertainty of rhetoric. Aouad, “Commentaire du Commentaire,” in Averroës, Commentaire 3, 32.
263 Ibid.
264 Ibid.; Black, Logic, 114-120.
265 Johansen, Contingency in a Sacred law Legal and Ethical Norms in Muslim Fiqh (Brill: Leiden, 1999), 36-37.
rhetorician achieves persuasion by transferring truth into an image that gives people access to theoretical wisdom. This acceptance of opinion shall prove practical in the realm of human actions.

B. The political utility of rhetoric

Ibn Rushd endorses Aristotle’s view of the political view of rhetoric, but makes some clear shifts from Aristotle to account for the political function of rhetoric in the Islamic political context. The $SCR$ was mostly written to assess rhetoric’s logical character; still this did not stop Ibn Rushd from dwelling on rhetoric’s political role. At the end of his treatise Ibn Rushd notes the valuable role of rhetorical speech in public discourse:

When Aristotle became aware of the rank of these [arguments and external things] with regard to assent, he saw that these things which bring about assent were valuable because the public used them with one another for particular voluntary things which judges decide are good or bad. Among the voluntary things, which judges decide are good or bad, some are to be found in a man himself and in the present time; these are excellences and vices. Some are to be found in the present time in another person; that is injustice and justice. Some will occur to him in the future; these are useful and harmful matters. Now speech addressed to others about the first kind of things is called contradictory [epideictic]; when it is about the second kind of things, it is called forensic; and when it is about the third kind of things, it is called deliberative. Moreover, to the extent that man is a social being and a citizen, he necessarily uses rhetorical arguments about these three categories of things. [Once he recognized all of this,] Aristotle began for to set forth rules and things which would enable a man to persuade about each and every one of these things in the best possible manner with regard to that thing. Therefore, this art is defined as being the means by
which man is able to effect persuasion about each and every one of the particular matters and to do so in the most complete and most artful manner possible with regard to each thing.\[^{266}\]

Specifically, Ibn Rushd contends that the rhetorical procedures, which he divides into technical procedures and what he calls ‘external things,’ are useful for the public in discoursing with each other on particular matters. While technical procedures denote the use of a rhetorical argument, Ibn Rushd identifies ‘external things’ earlier in the treatise as “the persuasive things which are not arguments” (\textit{al-muqni‘āt allatī laysat bi-aqāwīl}). Ibn Rushd explains the basis of this distinction in the following statement: “After this, we ought to proceed to speak about the persuasive things which do not occur by arguments and about the extent of assent they provide. Altogether, there are thirteen kinds of persuasive things.”\[^{267}\] While rhetorical procedures are based on an argument imparted by the speaker himself, the non-technical procedures do not rely on an argument but rather on what Aristotle considered as preexisting facts or conditions, which include oaths, witnesses, laws, contracts, torture, and testimony.\[^{268}\] Here Ibn Rushd’s list is different from Aristotle’s. In discussing these persuasive things, Ibn Rushd provides a long list, which draw from Islamic modes of argumentation. Thus he enumerates the following types of persuasive things:\[^{269}\]

1. The virtue of a speaker and the defect of his opponent (\textit{faḍīlat al-qā‘il wa naqīṣat khaṣmīhi})

2. The use of passions to bring audience to assent (\textit{al-infi‘ālāt})

\[^{266}\] SCR, §45, 77-78 (Arabic 197-199).
\[^{267}\] SCR, §33, 73 (Arabic 187).
\[^{269}\] SCR, 73 (Arabic 187-189).
3. The use of moral speeches (*al-aqāwīl al-khuluqiyya*)
4. Extolling and belittling (*al-taʿzīm wa al-taṣghīr*)
5. Consensus (*al-ijmāʾ*)
6. Testimonies (*al-shahādāt*)
7. Awakening a desire or apprehension for something (*al-targhīb wa al-tarḥīb*)
8. Challenge and betting (*al-taḥaddī wa al-murāhana*)
9. Oaths (*al-aymān*)
10. The quality of speech (*kayfiyyat al-qawl*)
11. Deceitful speech (*taḥrīf al-aqāwīl*)

Among this extensive list, Ibn Rushd refers to notions used in the Islamic sciences such as *tawātur*, which he considers as testimony. Ibn Rushd defines testimony as reports about past knowledge that is transmitted to us without an empirical basis.  

This included geographical facts or accounts that have been transmitted to us by previous generations. *Tawātur* is specifically used in Islamic sciences to define the recurrent reports on prophetic sayings or deeds transmitted by several reporters. In order to corroborate their validity, these reports are supported by chains of transmission. Importantly, this type of prophetic tradition had a normative value among Muslims and formed the basis for the Islamic system of knowledge, particularly for Islamic legal rulings, which had to have a scriptural basis in either the Qur’an or Prophetic sayings.

Also he refers to the doctrine of *taḥaddī*, “challenge,” and gives the example of

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270 *SCR*, §35, 74 (Arabic 189-190).

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Muhammad’s prophecy. As I noted earlier, Ibn Rushd borrows this concept from a scholarly discussion on the inimitability of the Qur’an found in the early debates of ‘ilm \textit{balāgha}. Specifically this refers to how God challenges people to provide a book like the Qur’an, referring to these passages from the Qur’an known as the challenge verses (Qur’an 17: 88 and Qur’an 11: 13). Also, Ibn Rushd refers to the Islamic legal concept of consensus (\textit{al-ījmā’}), which alludes to unanimous agreement of the community on legal rulings, and is one of the principles of jurisprudence in the classical theory. Here one can note that in trying to assert the political role of rhetoric, Ibn Rushd draws his examples from the modes of argumentation used in the Islamic legal context. This observation deserves further elaboration later but it shall suffice here to highlight the relevance of the divine revelation and Islamic sciences to Ibn Rushd’s political view of rhetoric.

At any rate, Ibn Rushd attributes to Aristotle the idea that both technical procedures and external things are useful for producing assent among the public in matters of voluntary action in relation to the different type of rhetorical speeches: the deliberative, the forensic, and the epideictic. Consequently, Ibn Rushd notes the three different applications of rhetoric found in Aristotle: the deliberative speech (\textit{mashūrī}), the judicial speech (\textit{mushājarī}), and the epideictic speech (\textit{tathbītī}). On this basis, he affirms that man as a social being uses rhetorical arguments, in all these different types of

\footnotesize{274} SCR, §43, 77 (Arabic 196).
\footnotesize{276} Ibid.
\footnotesize{277} Cf. Marie Bernand, “Idjmā’,” \textit{EI2}.
\footnotesize{278} I will come back to discuss this intersection between Ibn Rushd’s rhetoric and Islamic sciences both later in the chapter when I tackle the influence of Islamic modes of argumentation in Ibn Rushd’s epistemological view of rhetoric and in chapter 4 to show his correspondence between his philosophical treatises both SCR and \textit{MCAR} with his legal writings.
\footnotesize{279} SCR, §45, 77-78 (Arabic 197-199).
speeches, in political deliberation. This view of the relation between rhetoric and voluntary action is also confirmed in _MCAR_.

In his discussion of the political aim of rhetoric in _MCAR_, Ibn Rushd identifies rhetoric as within the scope of human voluntary action (*al-umūr al-irādiyya*): ²⁸⁰

There are three types of things that are studied by rhetoric in the domain of voluntary things. Likewise, the number of auditors of the rhetorical speech are three. The reason to this is that speech is composed of three things: a speaker which is the orator, and what is being said- that which is the subject of the speech produced, and those to whom the speech is directed and these are the auditors. The goal of the speech is targeted at the auditors. And auditors are, undoubtedly either the contender, or the judge or he who we aim at persuading. And the judge is either a judge on future matters, on what is beneficial and harmful or in matters that already happened. These latter could be found in human beings of one’s own volition such as the excellences and vices or those that are not based on one's own volition but due to another person like the unjust and just. The judge in future matters is the political leader, as the judge in past things is he who is appointed by the political leader such as the Qādīs in our cities i.e. namely Islamic cities. As for the contender, it is he who contends based on his rhetorical _habitus_. Hence the types of rhetorical speech are three: the deliberative (*mashūrī*), judicial (*mushājarī*), and epideictic (*tathbītī*). ²⁸¹

In this statement, Ibn Rushd follows Aristotle’s outlook, upholding the political role of rhetoric in generating persuasion among the public in all three main discursive practices: ²⁸² the deliberative (*al-mashūrī*), judicial (*al-mushājarī*), and epideictic (*al-tathbītī*). ²⁸³ In establishing the political aim of rhetoric, Ibn Rushd talks about the target audience, which could either be a contender (*munāẓir*) or judge (*ḥākim*) in these three

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²⁸⁰ _MCAR_ 1.3.1, Averroès, _Commentaire_ 2, 27; see also Aouad’s discussion in “Introduction générale,” 120 and 132.
²⁸¹ _MCAR_ 1.3.1 Averroès, _Commentaire_ 2, 27.
²⁸² Aristotle, _Rhetoric I_, 1358b 8.
²⁸³ _MCAR_ 1.3.1, Averroès, _Commentaire_ 2, 27. On the relation of the Islamic context to the scope of rhetoric, see Aouad’s commentary on _MCAR_ 1.3.1 in “Commentaire du Commentaire,” 74-78.
types of speech. As an example of a judge of future-impacting actions, Ibn Rushd mentions the political leader (raʾīs); for the judge of things past, he specifically refers to a person who was appointed by the leader (raʾīs), which he indicates would be the equivalent of the Qādī in the Islamic city. This reference to the Islamic city and its particular political-legal institutions shows that Ibn Rushd has his own political context in mind.

The correlation between rhetoric and voluntary action is a clear articulation of the political role of rhetoric; still Ibn Rushd makes some illuminating statements to ground the necessity of rhetoric in the political realm. Particularly, Ibn Rushd underscores the practical utility of rhetoric in the political realm as it incites citizens to excellent actions:

[Aristotle] said: rhetoric has two utilities. One of them is that it incites citizens to virtuous actions. In fact, people are inclined by nature toward the contrary of just excellences; unless they are subdued by rhetorical speech, people would be conquered by the contrary of just actions. This is condemnable and its perpetrator deserves reprimand and reprehension; I mean he who is inclined toward the contrary of just actions or the leader who does not subdue citizens with rhetorical speech concerning just excellences. By just excellences, I mean those excellences that are between man and others, specifically between himself and he who is partner in anything that implies partnership and not between the person and himself.

To explain rhetoric’s value in inciting people for good actions, Ibn Rushd unravels his line of thinking through some steps. First, Ibn Rushd puts forward a pessimistic view about human nature. Thus, he claims that people are inclined by nature to the opposite of just excellences. Then, based on this pessimistic view, he draws the following conclusion: that unless people are curbed by the use of rhetoric they will be

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284 MCAR 1.3.1, Averroès, *Commentaire* 2, 27.
285 Ibid.
286 MCAR 1.1.14, Ibid., 8.
conquered by the inclination toward performing unjust actions. This human inclination serves as grounds for Ibn Rushd not only to assert the necessity for rhetoric but also to go to the extent of condemning of the ruler [al-mudabbir] who does not make use of rhetorical conviction to curb citizens and incite them to just excellences. Ibn Rushd makes a crucial clarification to expound that what he means by just excellences are those that are shared between people. In particular, he insists that this definition pertains to what is between a person and his partner, in anything that involves a social partnership, and not between the person and himself.288

So here, a few points can be underlined. First Ibn Rushd advances a pessimistic view of human nature and claims a human inclination toward unjust actions. I shall note that this dim view about humans’ inclination toward unjust excellences is mitigated in another statement (MCAR 1.1.12) wherein he holds that people have an inclination to truth or similitude to truth and to act upon it.289 Both positions are coherent and could serve to explain why he stipulates the necessity for rhetoric in political governance. Rhetoric is the common ground that directs human beings to develop good opinions, as their natural inclination is not predisposed toward just actions, but they are still inclined toward truth or what seems a valid substitute to truth, and will act upon it. Thus the utility of rhetoric is rooted in human nature: it is needed to curb people and incline them toward shared just excellences. This idea is also accentuated in his theoretical view of rhetoric, which will be examined next.

Then, Ibn Rushd discloses another dimension of the utility of rhetoric. He grounds this function in its ability to help people who do not have the right aptitude to admit

288 MCAR 1.1.14, Averroës, Commentaire 2, 8; cf. also Aouad, “Introduction générale,” 63-64.
289 Averroës, Commentaire 2, 7.
demonstrative arguments or because of time constraints, which, one might add, are very common in social interaction. Thus he concludes that people have to rely on widely accepted beliefs:

The second utility is: one should not use demonstration with all types of people in theoretical things that we want them to believe. This is either because man is raised under the influence of accepted opinions that deviate from truth (for, when we guide him under the influence of these, he will be easy to persuade) or because his original disposition [fiṭra] is altogether not apt to admit demonstration, or because it is not possible to make the demonstration clear for him in the short span of time during which we want an assent to be produced. For this reason we are sometimes confined to produce assent by means of premises that are shared between us and our interlocutor I mean by means of praiseworthy opinions [al-maḥmūdāt].

Here Ibn Rushd notes the incapacity of some people to apprehend theoretical things. Thus he advances the use of rhetorical argument as a substitute of the demonstrative method for these types of people, mainly on theoretical questions. More specifically, he lists three different grounds that could inhibit people from grasping a complex apodeictic argument.

First, he maintains that some people are accustomed to being persuaded on the basis of what are accepted opinions, which are untrue opinions. For this reason, it is more convenient to use praiseworthy opinions for they are easier to convince people. His second reason is related to the fact that some people lack a natural inclination to grasp demonstrative arguments. The third reasoning is linked to time-constraints that could in some cases inhibit a person from using rigorous demonstrative argument. It is worth noting here that in explaining this notion of the time constraint, which is pertaining to the expediency of using rhetorical argument, Ibn Rushd alludes to the realm of court justice,

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\(^{290}\) MCAR 1.1.15, Ibid., 9.
where a judge has a limited amount of time to make a decision on a universal matter such as the question of justice, something he discusses in *MCAR* 1.1.7. 291

This passage denotes the theoretical value of rhetoric: to produce assent among a public which is either not able to grasp demonstrative argumentation or is subject to restrictive time constraint. Consequently, Ibn Rushd concludes that in these cases we might be obliged to use premises shared between us and the audience we are addressing to produce assent based specifically on what is known in logical arts such as rhetoric and dialectic as the praiseworthy premises or *al-mahmūdāt*. This reference to praiseworthy premises brings in the fundamentally logical purpose of rhetoric, which is to produce assent based on shared reputable opinions. While I will discuss *al-mahmūdāt* in more details later, note that these are widely accepted premises on which philosophers and the public agree. 292 He specifically indicates that these are opinions pertaining to what is shared among people and not what is between a person and himself, which seems to fit well with the shared value of *al-mahmūdāt*.

Another important utility attached to rhetoric is found in this statement, which underlines the argumentative capacity of rhetorical argumentation:

This art can persuade concerning two contraries at the same time like is possible for dialectical syllogism. In fact, we persuade sometimes in the case of the offender that he did commit wrong and that he did not. I do not mean by this that one does the two things together at the same time, rather that he does one at one time and the other at another time based on what is more beneficial and that is because often times one thing is beneficial at one time and its contrary is beneficial at another time. Also, when things that are used to establish a matter and its contrary are well-primed

291 Ibid., 4.
and then one hears the speaker who persuades according to the contrary to what is not just, one is capable to revoking this speaker’s speech. These two utilities are found in the power of persuading the thing and its contrary in this art.293

Here he expounds on how rhetoric has the capacity to persuade on pairs of contrary positions, a characteristic which is shared with dialectical argumentation.294 What is most striking here is that, to illustrate this point, he opts for a judicial question on the cases wherein one had to decide whether someone was guilty on the basis that he did wrong or that he did not. Here he alerts us that this does not mean that one can do the two things at the same time, which would conflict with the central tenet of Aristotelian logic: the principle of non-contradiction.295 Thus he explains that the decision is made based on what is most useful. For what can be useful at one time can be harmful in another. This link between the principle of non-contradiction and matter of justice is revealing later.

In a nutshell, in discussing the political utility of rhetoric, Ibn Rushd emphasizes its logical nature. In articulating rhetoric’s practical and theoretical role, Ibn Rushd is clear about its utility to incite people to cement their shared, just excellences, while he also admits rhetoric’s reliance on praiseworthy opinion, maḥmūdāt. Specifically, he notes the ability of the art of rhetoric to produce the most widely accepted arguments specifically in relation to just excellences while also praising its ability to use both an argument and its contrary. This utility of rhetoric shall become more manifest through his concrete examples of Islamic legal practice discussed next.

293 MCAR 1.1.17, Averroès, Commentaire 2, 9.
C. The necessity of rhetoric for the purpose of justice

In his discussion of the utility of rhetoric, Ibn Rushd underscores its public value, making some interesting remarks on its logical nature, particularly on its reliance on praiseworthy propositions shared among the public. Ibn Rushd emphasizes the necessity of establishing shared views on justice among social partners, a value that is specific to rhetoric as the proper domain for voluntary actions. In what follows, I explore Ibn Rushd’s work in the MCAR to consolidate the political necessity of rhetoric to accomplish the complex task of justice, focusing on his refinement of the modality of assent, which seems to be informed by his own conception of the political role of rhetoric in the Islamic legal context. Specifically, I identify consequential shifts by Ibn Rushd in relation to the Stagirite’s view of the political role of rhetoric, whereby I unravel how the Andalusian commentator theorized about the political role of rhetoric in relation to the Islamic context of fiqh.

Discussing the political role of rhetoric, Aristotle expresses his approval of a policy in some well-governed cities which prohibits the practices of any speaker who seeks to corrupt the listeners’ judgment from employing external things as a means to manipulate their passions, and emphasizes that even if this policy is not always followed, it is still valued by most.296 Commenting on Aristotle’s view on the use of external things, Ibn Rushd explains that there are two opinions regarding to the validity of the use of such external elements. While some deem the use of external things proper, others reject it:

[Aristotle] said: If there existed of the parts of rhetoric what is only found currently in some cities then there would be, in what was said by the predecessors about it, no interest or utility even if they spoke well about it. And this is found in cities where the law does not allow speaking in front

of judges using matters that incline judges and implore them toward one of the speakers, but it only allows matters that produce assent. In fact, the inhabitants of cities are divided in two groups: some consider that one should establish [tathbīṭ] laws in the soul of citizens by all means which have any effect on assent [tasdiq] whether they are matters which are meant to produce assent or external matters [al-umūr al-khārija] in order to educate these inhabitants of the city. Others prohibit the mention of things pertaining to external matters, especially in front of the judge, as was the case where judicial decisions were made in Athens in the country of the Greek.²⁹⁷

Ibn Rushd holds a different opinion from Aristotle and accepts the use of external matters. In other words, he admits the use of external things to establish [tathbīṭ] law to educate inhabitants of the city to produce assent. This clearly implies that rhetoric is used to produce assent among people by establishing laws inside of their soul. This could imply that he conceived of rhetoric’s aim to produce assent as some way of cementing a binding view in the people’s soul. He further describes this position as correct, since it pertains, he says in MCAR 1.1.5,²⁹⁸ to practical reasoning. While Aristotle rejects the use of external matters, which he perceives as deceptive, Ibn Rushd endorses them. The question, therefore, is why Ibn Rushd runs counter to Aristotle’s stance, by even arguing for the necessity of using such external matters. Rather than drawing any quick conclusion, I shall sketch out this thought process through (1) how he understands rhetoric’s political role under the notion of tathbīṭ, and (2) what he means by external matters, which should lead to an understanding of why he endorses their use in the realm of law.

First, Ibn Rushd’s view of the political role of rhetoric is grounded in the concept of assent as a means of persuading the inhabitants of a city to support and comply with laws,

²⁹⁷ MCAR 1.1.4, Averroës, Commentaire 2, 3.
²⁹⁸ Ibid.
as expressed in *MCAR* 1.1.4. Ibn Rushd apprehends the persuasive role of rhetoric as its capacity to generate conviction using the logical concept of assent (*taṣdīq*). Here, this concept of assent is used to denote the act of agreement to a particular proposition, which he further explains as follows:

Given that it is known that the things pertaining to this art are aimed at assent or acknowledgement from the addressee of the matter subject to the allegation, and this can only occur when you establish within him [i.e. addressee] the acknowledged matter - for one only acknowledges a matter once he judgea that it has been established in oneself [*thabata ‘indanā*]…

In this statement, Ibn Rushd expounds that rhetoric aims at producing assent (*taṣdīq*) and acknowledgement (*i’tirāf*), then elaborates that the fulfillment of assent is conditioned by the acknowledgement of the addressee of the idea that is subject to the allegation (*da‘wa*). Then, he adds that this aim can only be fulfilled once the matter in question has been established (*tathbūt*) in the addressee – here, he explains that one can only acknowledge something once it has been established within him. In other words, once something is established inside of us, it becomes binding. Only then are we bound to acknowledge it. This particular clarification of the necessity of establishing the matter inside of the person conveys a binding dimension to assent.

In addition, in *MCAR* 1.1.10, Ibn Rushd makes an illuminating distinction between the aim of rhetorical assent in judicial speech compared to deliberative speech which provides evidence to the binding specificity of assent mainly in judicial matters. Unlike Aristotle, who denigrates the great attention given to judicial rhetoric over other

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299 Ibid.
300 *MCAR* 1.1.11, Ibid., 7.
301 Ibid., 6-7.
discursive practices, Ibn Rushd contends that judicial speech requires more rhetorical action to fulfill *tathbīt*. He notes that establishing something as just and unjust is more difficult than creating consensus on other matters, adding that this complexity is not specific to criminal justice but pertains to the question of justice in general. To this end, he explains that in the case of deliberative speech, which aims at establishing something to be beneficial or harmful, political leaders are most likely to be on equal footing with the public on their judgment of what is beneficial or harmful. In judicial matters, however, this easy symmetry between the judge or the political leader and the public in terms of establishing what is just and unjust is unlikely. Furthermore, he expresses his mistrust for judges and urges people to be on their guard, wary of judges’ incapacity to render a just judgment. As a universal matter, as Ibn Rushd sees it, discerning what is just and unjust is too complex for judges, a lapse that underpins how justice is something that can only be discernible to the guardian of law (*al-quwwām ‘alā al-sharī‘a*). The question of the administration of justice, therefore, requires more effort in establishing what is just and unjust to render the matter binding. This priority given to the judicial scope in generating *tathbīt* to bridge the gap between people and judges on matters of what is just and unjust also confirms the subtlety in his view of establishing assent as not merely an act of producing conviction, because, instead, this conviction has to be binding—a condition that is harder to fulfill in the realm of the administration of justice. This leads me to conclude that Ibn Rushd has some concerns about the difficulty of matters of justice and thus calls for more effort in these to generate

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303 *MCAR* 1.1.10, Averroès, *Commentaire* 2, 6-7.
304 Ibid.
305 Ibid.
306 Ibid.
assent. This necessity to have a binding consensus on what is just explains why he underlines the necessity of rhetoric and went so far to berate the political leader who does not make use of rhetoric in the political domain in *MCAR* 1.1.14. Still, this awareness alone does not explain why he endorses the inclusion of external matters in persuasive speech, which will be discussed next.

(2) To understand what Ibn Rushd means by external matters and why he advocates their use as means for establishing assent in relation to law, I first base my explanation in his discussion of how a speaker can establish proofs to support his case in front of a judge in the Islamic context in *MCAR*.

In *MCAR* 1.1.10, after the above-mentioned comparison between judicial and deliberative speech, Ibn Rushd refers to cities that do not allow a speaker or a contender to talk to judges to incline them, but only allow the use of specific proofs which have been sanctioned by the lawgiver (*wādiʿ al-sunna*). The question is: which cities does he mean, and what are these lawful proofs? The answer can be found in *MCAR* 2.18.3. Here, Ibn Rushd explains that, unlike in the Greek court, where there is a speaker and a contender, in the case of lawsuits (*khuṣūmāt*) in the Islamic community (*millat al-Islam*), the lawgiver authorizes the use of the speech of the judge and of external things (*al-ashyāʿ al-latī min al-khārij*) such as testimonies and oaths, which is a reference to the Islamic doctrine of proof. This leads me to conclude that what Ibn Rushd means by external things are the very proofs that are allowed by the lawgiver in Islam, such as testimonies and oaths. In other words, Ibn Rushd is referring to the formalistic procedures stipulated in Islamic jurisprudence regarding the doctrine of proof that is to be used by

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307 Ibid., 8.
308 Ibid., 6-7.
309 Ibid., 216.
judges. In *fiqh*, the doctrine of proof employed by judges relies on the acknowledgement of the defendant, the deposition of testimonies, and the oath of the parties or the refusal to take an oath.\(^{310}\) As explained by Johansen, the doctrine of proofs takes human speech, which makes proofs liable to linguistic ambiguity.\(^{311}\) Johansen explains how the formal legal procedures take into consideration the deceitful nature of speech. Therefore external factors such as a testimony or an oath are required to tip the balance.\(^{312}\) This use of extra-legal factors to provide support in discerning the most possible proof can explain why Ibn Rushd deems the use of external matters a component of practical reasoning and approved it.

Another evidence of Ibn Rushd’s endorsement of these procedures as a basis for establishing assent is found in his legal compendium *BM*, specifically in the book of judges in his discussion of the doctrine of proof. Here we find a corresponding view on the doctrine of proof and the notion of *tathbīt* as that found in *MCAR*.

First, Ibn Rushd’s use of *tathbīt* is pervasive in his *BM*. As an example, one can take his discussion of the position of Islamic jurists on the qualification of witnesses to establish that a certain criminal act has been committed:


\(^{311}\) Johansen, “Signs as Evidence”, 169.

\(^{312}\) Here, Johansen (ibid.) explains how the rationale behind this use of confession is based on the assumption that a rational person is unlikely to confess to an obligation he has not caused. Similarly, a testimony is a credible external factor, as the Qādī is required to check both the social and religious probity of the person.
1. “About the discussion of number and gender, the Muslims agreed that the offence of fornication [zina] cannot be established [lā yuthbbat] with less than four male adl witnesses.”

2. “They agreed that financial claims are established [tuthabbat] through one male ‘adl witness and two female witnesses.”

In the first position he notes that for a judge to establish the criminal act of fornication, he needs four witnesses who are known for their probity. In the second examples he shows how financial claims, on the other hand, require one male and two female witnesses to be established. This conception of establishing a legal proof through witnessing corresponds to his view in MCAR.

Another evidence is also found in his discussion of the validity of oaths as enough ground when the plaintiff cannot provide any evidence; he also discusses the jurist’s disagreement over the validity of the use of oaths to establish the claim of the plaintiff.

They agreed about oath that the claim against the defendant is dismissed because of it, when the plaintiff does not have evidence. They disagreed whether the claim of the plaintiff can be established through it. Malik said that the right of the plaintiff in what was denied by the defendant is established [yuthbbat], and the rights established against him are extinguished if claimed by a person against whom their cancellation stands proved, in a case where the plaintiff has a stronger cause of action a prima facie chance of success. Other jurists said that a claim by the plaintiff cannot succeed on the basis of an oath, whether it is for the denial of a right established against him or for the securing of a right that is denied to him by the defendant.

Here he notes how the acceptance or refusal of the defendant to take an oath of party can serve as a basis of legal judgment. However, the jurists disagreed on whether the claim of a plaintiff can be established on the basis of an oath. Again, Ibn Rushd uses the notion of tathbît to discuss another doctrine of proof, which is the oath.

314 Ibid.
The legal overtones of his elucidation of the notion of *tathbīt* and its relation to the doctrine of proof in his *MCAR*, along with these corresponding usages in his *BM*, serve as enough ground to show the influence of Islamic law in his conception of assent while also supporting his view on the necessity of rhetoric in law. This also confirms why Ibn Rushd values rhetoric’s political utility based on its capacity to establish binding opinion: this value is pivotal to guaranteeing political stability. In carving out his conception of the political role of rhetoric, Ibn Rushd had to make some major departures from his source. As he draws from his legal expertise and the value of opinion in discerning legal opinions in *fiqh*, Ibn Rushd’s political views are entwined with the logical value of rhetoric as the realm of opinion. Such entanglement between Ibn Rushd’s political view of Islamic law and logical aspect of rhetoric will also be seen in his logical discussion of rhetoric and its capacity to fulfill assent.

### III. The logical aim of rhetoric and its expansive scope

Looking at Ibn Rushd’s conception of the necessity of rhetoric in the political realm reveals the value of the logical nature of rhetoric in establishing binding opinions about justice in order to ensure political stability. To this end, I underline how, in endorsing Aristotle’s position on the political role of rhetoric, Ibn Rushd makes clear departures from Aristotle’s theory, mainly to account for his own Islamic legal context. Putting under scrutiny the logical view of rhetoric, particularly its aim and its modalities, I hope to show how, in taking into account the Islamic modes of argumentation used in legal contexts, Ibn Rushd introduces some remodeling to Aristotle’s rhetoric. First I shall focus on how Ibn Rushd admits rhetoric’s logical property based on its capacity to fulfill
the logical aim of assent, but how, at the same time, he also expands its epistemological scope to include Islamic modes of argumentation. I still argue that this expanded scope remains defined by the clear property of rhetoric as being a social epistemological domain for human interaction, which bears a practical value toward action and how its activity is regulated under the widely accepted premises of the unexamined opinion (bādi’ al-ra’y al-mushtarak).

A. The logical aim of rhetoric and its expansion

In his definition of rhetoric, Ibn Rushd emphasizes rhetoric’s capacity to produce ignā’, persuasion, through generating a preponderance of opinion, as an inclination to adhere to a belief. This ability of persuasion is central to qualify rhetoric as a logical art and in fact is equated to the logical aim of assent. As I explained earlier, the concepts of taṣdīq and taṣawwur form the basis of the aim of logic in Arabic philosophy. This couplet, taṣawwur and taṣdīq, are the two cognitive acts associated with the logical art. While taṣawwur denotes how concepts are comprehended as unified entities, taṣdīq, or assent, is rather associated with judgment or the “assertion or denial of something about something.”

In associating rhetoric’s capacity of persuasion with assent, Arabic philosophers were able to make the case of the logical characteristic of rhetoric. To this end, I will show how Ibn Rushd characterizes persuasion as itself a degree of assent in his SCR and similarly lends support to rhetoric’s logical view given this ability to produce persuasion.

316 SCR, §1, 63 (Arabic 169).
317 Cf. Black, Logic, 104.
318 Cf. Black, Logic, 71.
319 Wolfson, “Taṣawwur and tašdīq,” 478-479; Cf. also Black, Logic, 71.
320 Cf. ibid., 104.
as some sort of assent in his *MCAR*. A discussion of his view of assent in both treatises is in order, as is an overview of how he expanded the scope of rhetorical assent to include both technical procedures and non-technical procedures, drawing from Islamic modes of argumentation as used in the Islamic legal context.

1. Ibn Rushd’s conception of assent

Ibn Rushd reveals interesting points about how he understands the capacity of non-apodeictic logical arts such as dialectic and rhetoric to fulfill the logical aim of assent in both treatises.

First, Ibn Rushd shows this view in his *SCR*. In fact, Ibn Rushd’s aim, as I explained earlier in introducing *SCR*, was to assess the persuasive capacity of non-apodeictic logical arts such as rhetoric and dialectic and the degree of assent they can produce. At the outset of his first treatise the short commentary on topics, *SCT*, he states:

> Since we have spoken about things by means of which the certain assent (al-taṣđīq al-yaqīnī) and the complete concept are distinguished and subsequent to that have spoken about the thing which lead to error concerning them, let us speak about dialectical and rhetorical assents (al-taṣđīqāt al-balāghiyya) and the extent (miqdār) each one provides. For our purposes, it is not necessary to speak about what makes these arts complete. Let us begin, then with the dialectical arguments.  

Similarly he announced at the beginning of his *SCR*: “Since we have finished speaking about dialectical syllogisms and the extent [miqdār] of assent they provide, let us speak about persuasive things and the extent of assent they too provide.”

Both quotations show how Ibn Rushd associates assent in dialectic and rhetoric to a degree (miqdār) that

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322 *SCR*, §1, 63 (Arabic 169).
is realizable on the scale of assent. This view was also corroborated in the above-quoted
definition of rhetoric in *MCAR* 1.2.2 as the faculty that seeks to fulfill the *most possible*
persuasion, a phrase also indicative of the spectrum that assent can range along. The
question, then, is how is the most possible degree of assent realized. As I have already
mentioned, Ibn Rushd identifies rhetoric with the capacity to produce persuasive things
and underlines its rapport with opinion (ْزَانَن). Therefore, Ibn Rushd reminds us that
“Persuasion is a kind of opinion (ْزَانَن).”323 Still, admitting the doxatic nature of its
activity does not disqualify rhetoric from being a logical art. In order to grasp the
underpinnings of relating rhetoric to opinion, we will do well to review his definition of
opinion, which he provided in his *SCT*:

…In general, opinion is believing that something exists in a particular kind of way, while it is
possible for it to be different than it is believed to be. Therefore, its peculiar characteristic [of
opinion] is that it may be eliminated through opposition; demonstration differs in that it has the
peculiar characteristic of not being eliminated through opposition. There are two divisions of
opinion. With one, namely dialectical opposition, it is not noticed; if it is noticed, the supposition
can only exist with difficulty. With the other, which is rhetorical, opposition to it is noticed.324

Here both rhetoric and dialectic are characterized as logical arts that can generate
beliefs based on opinion. This elucidation portrays opinion as existing in the realm of the
possible for it rests upon a given view that something could exist in a particular fashion
where in reality it could be different. First, he links opinion to opposability (*مَعَانَادَة*)
and underlines that demonstrative argumentation is immune from disqualification by
opposability. In other words, opposability is intrinsic to un-apodictic arts such dialectic
and rhetoric. Still, he draws a relevant distinction between the two arts of rhetoric and

324 *SCT*,§2, 47 (trans. with slight modification, Arabic 151-152).
dialectic. Unlike rhetoric, where the openness to opposition is more recognized and operative, in dialectical argument opposition is either undetectable or at least hard to detect.\textsuperscript{325} In other words, in the case of rhetorical argument, one is bound to detect an opposition but still operate under it, as I noted earlier, Ibn Rushd defines rhetorical persuasion this way: “it is apparent that persuasion is a kind of preponderance of opinion (\textit{ẓann mā ghālib}) which the soul trusts, despite an awareness of an opposing contradiction.”\textsuperscript{326} This depicts a decisive adherence to one of a contrary pair of possibilities in front of an equal probability,\textsuperscript{327} and shows some clear distinction between different un-apodeictic logical arts rhetoric and dialectic. While rhetorical assent rests on an opposition between two contrary beliefs, it still operates under the governance of opposability, something that sets rhetoric apart from dialectic. Associating \textit{tašdıq} with the designation of a certain degree, \textit{miqdār}, suggests some sort of spectrum linked to the different ability of the logical arts to realize assent. In fact this position is maintained by Ibn Rushd in his \textit{Kitāb al-jadal}, where he discusses the relation between an opinion and an assent (\textit{tašdıq}).\textsuperscript{328} While he asserts that opinion, \textit{ẓann}, is not a genus of \textit{tašdıq}, given that \textit{tašdıq}’s existence precedes \textit{ẓann}, he still holds that, in its early stages, the \textit{tašdıq} is only an opinion (\textit{ẓann}), but if it grows (\textit{namā}) and is fortified (\textit{qawiya}) it becomes a \textit{tašdıq}. This fluid view of the capacity of opinion to turn into \textit{tašdıq}, again affirms a view of assent as a spectrum.

Ibn Rushd’s conception of assent in \textit{MCAR}, where he formulates his view in rather more concrete terms in relation to his own legal context affirms the same view. I

\textsuperscript{326} \textit{SCR}, §1, 63 (trans. with slight modification, Arabic 169).
\textsuperscript{327} Cf. Black, \textit{Logic}, 112.
\textsuperscript{328} \textit{MCAT}, §8-9, 168.
have already alluded to this under the political function of assent, but it should also be outlined here to emphasize how its logical function is intertwined with its practical function.

In order to attest to the syllogistic value of rhetoric, Ibn Rushd not only defines assent in *MCAR* 1.1.11 but also makes further, concrete refinements to how is assent produced. First Ibn Rushd makes an association between assent and acknowledgement in the sense that one comes to assent to a matter through a process of acknowledgement. This subtlety alludes to a voluntary dimension to assent. To be more concrete, Ibn Rushd draws from his legal register and sets this theoretical view in the context of legal disputes in the case of allegation against an addressee. Thus he explains that assent can be produced once the addressee acknowledges the matter that is subject to the allegation (*al-da’wā*). In addition, he expounds that this goal is only attained once the matter in question has been established (*tathbīt*) in the addressee, meaning that it has taken root within his soul.

In other words, people come to voluntarily acknowledge things once a matter has been established within themselves. This voluntary acknowledgement comes to attribute a subtle view to assent. It means that a person is bound to willingly admit a belief once it is established within him. This particular clarification of the necessity to establish the matter inside of the person thus seems to convey a binding dimension to assent. Ibn Rushd’s view resonates with Fārābī’s, who, as noted by Black, explains how rhetoric in the social context generates a sense of contentment among people who come together in social interactions to address practical matters: “In such a context, Fārābī envisions rhetoric as a means for promoting consensus, rather than stirring up dissension and

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329 Averroès, *Commentaire* 2, 7.
disagreement.” While Ibn Rushd seems to convey a similar position, he is, however, clearly drawing from his legal expertise, as explained earlier. As a matter of fact, Ibn Rushd is very adamant about the necessity of attaining this goal, that is, a communal contentment, in matters related to justice. This is particularly evident in his allusion to allegation (al-daʿwā) in legal contexts. To this end, I should note that such subtleties, which imply a socially binding outcome to assent, are undermined in Butterworth’s reading who defined the notion of tathbīt with ‘demonstrative approach’. In assuming that tathbīt bore an apodeictic dimension, Butterworth claims that Ibn Rushd sets stringent criteria for rhetorical persuasion in the realm of law, those of demonstrative reasoning, which leads him to identify Ibn Rushd’s rehabilitation of rhetoric as lying along a Platonic line of approach. Such a move, Butterworth argues, was needed to account for the theological claim that the revealed law is truth. On the contrary, as I explained in my discussion of the political role of assent, I contend that Ibn Rushd’s view bears the practical value of using opinion to achieve the binding view needed for accord in matters of justice. Butterworth’s view ignores the subtleties related to the notion of tathbīt, both in its epistemological and legal functions, which resonates with Ibn Rushd's view of how a judge is supposed to establish the doctrine of proof in his book of judges in BM. This influence of Islamic legal method will further be confirmed in his view of the scope of assent in the realm of rhetoric.

330 Black, Logic, 106.
332 Ibid., 26-27.
2. The expansion of the scope of assent

Ibn Rushd’s view of the capacity of opinion to produce belief reflects a spectrum of various degrees between doxastic opinions and their ability to fulfill the logical aim of assent. Such a view will also be reflected in his outline of the procedures that can produce assent within the scope of rhetoric. Ibn Rushd identifies two types of things that affect persuasion: technical procedures such as enthymeme (\(\text{ḍamīr}\)), example (\(\text{mithāl}\)), and nontechnical procedures, including examples, a already noted, from Islamic modes of argumentation. While these technical procedures find their roots in Aristotle’s treatises, his discussion of nontechnical procedures is Ibn Rushd’s own construction. In SCR, Ibn Rushd pinpoints two types of persuasive things (1) the technical means of assent achieved through the form of rhetorical argument chosen by the speaker and (2) non-technical means of assent, which are extrinsic means from the past.

From scrutiny and inductive investigation, it appears that the things producing persuasion can first be divided into two classes: one of them consists in arguments, and the second is external things which are not arguments – like oaths, testimonies, and other things we will enumerate. Similarly, from scrutiny it also appears that the arguments used in public discourse fall into two classes: example and proof. (In this art, the latter is called enthymeme.)³³³

By technical procedures, he means those that are based on arguments used in rhetoric such the enthymeme (\(\text{ḍamīr}\)) or example (\(\text{al-mithāl}\)). While these are based on an argument produced by the speaker, non-technical means, on the other hand, hinges on preexisting facts such as oaths, witnesses, testimonies, and laws, things that cannot be furnished by the speaker himself.³³⁴ Similarly, in reiterating these two classes of rhetorical procedures, Ibn Rushd explains in his MCAR 1.2.4 that things that produce

³³³ SCR. §2, 63 (Arabic 169-170).
assent can be either technical (al-ṣināʾiyya) or non-technical (ghayr al-ṣināʾiyya). In both texts, Ibn Rushd elucidates Islamic modes of argumentation under the scope of non-technical procedures and illustrates their capacity to produce assent. In order to understand how both produce assent, an overview of these procedures follows.

1) Assent and technical procedures: al-taṣdiqāt al-ṣināʾiyya

In discussing the capacity of rhetorical technical means to produce assent, Ibn Rushd focuses on the enthymeme (damīr) and the example (mithāl). At the outset of his SCR, Ibn Rushd depicts the enthymeme as a proof (ḥujja) and an example as the use of analogy between particular cases. In order to better grasp both rhetorical arguments, I shall relate the definitions of both enthymeme and example to their syllogistic characters and capacity to fulfill assent.

In fact, Ibn Rushd adopts the logical definition of considering the enthymeme to be the equivalent of a syllogism in both treatises and the example or analogy to be an induction (itstigrāʾ). This is how he maintains the first claim: “We say: the enthymeme is a syllogism leading to a conclusion which corresponds to unexamined opinion previously existing among all or most people.” This position is further expanded in his MCAR, where he again characterizes the enthymeme as a syllogism and the example as an induction in MCAR 1.2.16, but more importantly, Ibn Rushd grounds his position in Aristotle’s statement in the Prior Analytics avowing that every belief comes either

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335 SCR, §4, 63-64 (Arabic 169-170); MCAR 1.2.15-1.2.20, Averroès, Commentaire 2, 17-19.
336 As noted by Black, the concept, the example, and the analogy are not equivalent, but in the context of Arabic philosophy this analogy is more fitting to our consideration, as it reads as a kind of particular type of formal inference rather than a mere illustration of an example. For more see Black, Logic, 171 n.f.92.
337 SCR, §4, 63-64 (Arabic 169-170).
through deduction or from induction. On this account, the Stagirite holds that any type of reasoning can be reduced to induction or syllogism, including dialectical and rhetorical arguments. From this Aristotelian basis, the commentator in MCAR 1.2.16 elaborates that in the same way dialectic consists of induction and deduction, in rhetoric, the example is an induction and the enthymeme is deduction. Thus he admits the syllogistic feature of the enthymeme as it fulfills the formal requirement of a valid deduction in which premises and conclusion are, for the most part, true. However, while dialectical and demonstrative syllogisms follow the necessary order of a deduction, a rhetorical syllogism depends on what is common to the public. In fact, as the main purpose of the enthymeme is the assent of the public, it avoids exposing all the involved steps of a complete syllogism, i.e. the premise, the middle term, and the conclusion. An example of an enthymeme given by Ibn Rushd “such a person roams at night, so he is a thief” (hadhā yadūr bi-l-layl fa-huwa liṣṣun). This statement is phrased so that there is no need to reveal that the major premise is “everyone who roams at night is a thief.”

As for the example, mithāl, it is the proper form of rhetorical induction. Ibn Rushd identifies the example as “correspond[ing] to the induction in dialectic, just as the enthymeme here corresponds to the syllogism in dialectic”; as an analogy it can

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340 Averroès, Commentaire 2, 17.
341 Aouad notes in his commentary on MCAR 1.2.16 (“Commentaire du Commentaire,” 39) that, while Aristotle alludes to his analytics (prior and posterior) without any precision, Ibn Rushd precisely refers to specific passages in the prior analytics and specifically the Kitāb al-qiyās, that is Prior Analytics II 23-24, 68b 8-69 a19.
342 MCAR 1.2.21, Averroès, Commentaire 2, 19.
343 SCR,§5, 64-65 (Arabic 170-171); see also MCAR 1.2.22. Averroès, Commentaire 2, 19.
344 MCAR 1.2.22, Averroès, Commentaire 2, 19.
345 Ibid.
346 SCR, §27, 71 (Arabic 184).
proceed from one particular case to another or from a particular to a universal.\textsuperscript{347} Still, he differentiates between an induction and an example on the basis of the judgment they inspire. While for the induction a judgment can be universal, for the example it is only based on a particular case or situation, such as “pleasures are bad because wine is bad.”\textsuperscript{348} To put it differently, unlike the induction, where a judgment can be made to confirm a universal based on a particular, the use of example can affirm ones judgment only based on the likeness between the particular case and another.\textsuperscript{349}

Similarly, Ibn Rushd identifies the enthymeme as the pillar (‘amūd) of the logical aim of rhetoric: assent (\textit{MCAR} 1.1.11).\textsuperscript{350} He characterizes the enthymeme as the main substance of rhetorical persuasion and exalts it over all other rhetorical means of persuasion, both technical and nontechnical. In fact, he asserts that the enthymeme is also suited to being used to support certain nontechnical procedures, such as the testimony (\textit{shahāda}), if they are challenged.\textsuperscript{351} This exaltation of the enthymeme hints again to the way rhetorical assent operates along a range, but within this spectrum the enthymeme seems to reign supreme, both as it is characterized as the pillar and also in its ability to lend support to some nontechnical means of persuasion mainly testimonies.

2) \textit{Assent and the non-technical procedures: al-taṣdiqāt al-ghayr ṣinā‘īyya}

Ibn Rushd identifies the non-technical procedures for achieving persuasion in both of his treatises, attributing to them also a capacity to produce assent and calling them

\textsuperscript{347} Cf. Black, \textit{Logic}, 172.
\textsuperscript{348} \textit{SCR}, §27, 71 (Arabic 184).
\textsuperscript{350} \textit{MCAR} 1.1.11, Averroës, \textit{Commentaire} 2, 8; As noted by Black (\textit{Logic}, 157), the exaltation of the enthymeme is characteristic of all Islamic philosophers.
\textsuperscript{351} \textit{SCR}, §44, 77 (Arabic 196-197).
the persuasive things (al-muqniʿāt) or the external things (al-umūr al-khārija) that are not based on arguments. While he distinguishes them from technical procedures, Ibn Rushd vouches for their capacity to produce a certain degree (miqdār) of assent.\footnote{SCR, §33, 73 (Arabic 187).} A clear correspondence between both the \textit{SCR} and \textit{MCAR} is found in the rapport between these types of means of persuasion that are particularly relevant to Islamic jurisprudence. Still I emphasize some consequential developments, mainly in terms of the components of the lists associated with nontechnical procedures, in both treatises. Therefore, a short sketch of his scheme of nontechnical procedures and how they produce assent, as described in both treatises, is in order.

Ibn Rushd identified both in \textit{SCR} and \textit{MCAR} a list of external things that can be used in realm of law. In his \textit{SCR}, Ibn Rushd calls them “the persuasive things which are not arguments (al-muqniʿāt allatī laysat bi-aqāwil).” While he mentions that there are 13 types, he enumerated only eleven types of persuasive things which I provided already and underlined his reliance on Islamic modes of argumentation such as \textit{tawātur, āḥād, tahaddī} among others.\footnote{SCR, §33, 73-74 (Arabic 187-189).} In his \textit{MCAR}, Ibn Rushed affirms the importance of nontechnical procedures along with the technical ones in producing assent. Still one should note that he makes a few shifts. In the case of nontechnical procedures, Ibn Rushd adopts a different list than in his \textit{SCR}. In his \textit{MCAR}, he remains more in line with Aristotle’s outlook, although he still incorporates Islamic modes of argumentation to his list.

As for things that produce convictions [\textit{taṣdīqāt}] in this art, some are technical and these are those whose existence hinges on our choice and deliberative reflection and of whom we are the agent, and others are nontechnical and these are those whose existence hinges neither on our choice nor
our deliberative reflection such as witnesses, torture, contracts and similar things that will be mentioned later.\(^{354}\)

Here again Ibn Rushd distinguishes between technical and nontechnical means of persuasion. He specifically explains that while technical procedures such as the enthymeme and example are based on deliberation and choice, nontechnical procedures are preexistent things and are not based on our own choice. Here he lists few: testimony \([\textit{shuhūd}]\), torture \([\textit{al-ta’dhīb}]\), and contracts \([\textit{‘uqūd}]\). Another important fact about this list is that, in comparison to \textit{SCR}, Ibn Rushd adds here the unwritten law along with the written law. In fact he identified five types of admissible external things:\(^{355}\)

1- Laws \((\textit{sunan})\) including both the written and unwritten

2- Testimony \((\textit{shuhūd})\)

3- Contracts \((\textit{‘uqūd})\)

4- Torture \((\textit{‘adhāb})^{356}\)

5- Oaths \((\textit{aymān})\)

Another development he makes in \textit{MCAR} is a new focus on the legal influence on his conception of how to assess rhetorical assent, mainly found in his extensive discussion of the written and unwritten laws. In depicting nontechnical procedures as means for conviction, he underlines their opportune function in the legal domain.

We should speak about the convictions \([\textit{taṣdīqāt}]\) that are called non-technical. I mean those, which do not result from a rhetorical syllogism primarily. For the most suitable time to mention

\(^{354}\) \textit{MCAR} 1.2.4, Averroës, \textit{Commentaire} 2, 14.

\(^{355}\) \textit{MCAR} 1.15.2, Ibid., 124.

\(^{356}\) I should note here that although Ibn Rushd remains within Aristotle’s outlook and lists torture, he shuns away from accepting it as an efficient proof and also justifies why it is not applicable in Islamic law. For more see \textit{MCAR} 1.15.45, Ibid., 133-134.
them is here given that convictions are more proper to judicial speech than the two other types of rhetorical speech I mean deliberative and epideictic.357

This emphasis on the role of nontechnical procedures in the legal context is central. Overall, Ibn Rushd’s discussion of the different types of nontechnical procedures reflects the influence of Islamic legal practice, which is also the case for his discussion of testimony, oaths, contracts, and torture.358

Another important dimension to his discussion of the non-technical procedures is his clear attempt to assess the epistemological value of Islamic modes of argumentation under the scope of rhetoric. In SCR Ibn Rushd erects a hierarchy among the non-technical procedures by exalting testimony (shahāda) as the highest ranking in terms of its capacity to produce assent (see excerpt below). Therefore, he provides a basis for this appraisal by defining testimony and how it produces assent. Ibn Rushd defines shahāda, or testimony, as a report (khabar) which holds the most powerful rank among all the persuasive things:

Testimony holds the most powerful rank. In general, testimony is a certain kind of report. Those who bring the report can either be one or more than one. When they are more than one, they may either be a group, which it is possible to count or they may be a group which it is not possible to enumerate. Things reported are either perceived by the senses or intellectually apprehended. Those who report things perceived by the senses are either those who have perceived these things themselves or those who report them from others like, fewer, or more numerous than themselves. Now things perceived by the senses, which are reported either concern past matters that we have not perceived or matters occurring in the present but absent from us.359

To explain testimony, Ibn Rushd makes a distinction between reports on the basis of the number of transmitters, which can either be one or more than one. This distinction

357 MCAR 1.15.1, Ibid., 123.
358 On testimony see MCAR 1.15.2- 1.15.26; on contracts MCAR 1.15. 32, on invalidity of torture in Islamic law see MCAR 1.15.45; and on oaths MCAR 1.15.59 as well as 1.15.60.
359 SCR, §35, 73-74 (Arabic 189-190).
alludes to the two classes of reports used to authenticate prophetic tradition in Islamic jurisprudence, the concurrent tradition (*khabar mutawātir*) based on a recurrent number of transmitters and the solitary tradition (*khabar wāḥid*, pl. *āḥād*) based on one or a few transmitters. As he explains, some reports have between a few and many transmitters, which could possibly be enumerated, while others are impossible to enumerate. Another distinction made is the nature of the thing reported which either can be intelligible (*ma’qūla*) or sensible (*maḥsūsa*). Still, he holds that for things that we can access on the basis of direct observation, there is no need for testimony, and there is even less for intelligible things that can be conveyed through the syllogistic method. In so doing, he directs his attention to those instances of historical or geographical knowledge that are transmitted to us without having an empirical basis.

For this matter he focuses on *tawātur*, the concurrent reports:

Assent to testimonies and reports of sense-perceived matters which have not been witnessed is strengthened and weakened in accordance with the number of reporters and the circumstantial indicant that relates to them. Thus, the most powerful assent resulting from reports is what a group which cannot be enumerated reports it has perceived or what a group reports on the authority of another group which cannot be enumerated but which has perceived it. Now it [powerful assent about the report] is like that, however much the group increases in size, to whatever extent it reaches, if in the beginning, the middle, and the end it remains the same in that determining their number is either impossible or difficult. This class of reports is the one that is called concurrent tradition [*tawātur*].

Certainty with regard to diverse matters- like the sending of the Prophet, the existence of Mecca and Medina, and other things- may result from this. But we should theoretically investigate the

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361 *SCR*, §38, 75 (Arabic 190).
manner in which this results, for there are some things that produce assent essentially and some accidentally."362

So here he notes that the most powerful assent is that which is produced by recurrent reports and explains how these types of reports are characterized by a collection of transmitters – the very quantity of which remains impossible to be determined. For other reports their basis can be strengthened and weakened on the basis of circumstantial indicant. Again, this appraisal of testimony describes the criteria used by Muslim scholars to assess the validity of reports transmitted about the prophetic tradition which considered tawātur as certain while solitary report as probable. As Hallaq explains, the superiority of concurrent reports that is tawātur should not imply that individual instance or reporting known as āḥād have no value.363 For this matter, Muslim jurists, as illustrated by Ibn Rushd, used the circumstantial indicants surrounding these reports to boast the degree of probability.364 Such process served to justify the use of solitary reports in the realm of law. Still Ibn Rushd notes, that the tawātur type of report produces accidental assent. This appraisal of how tawātur produces accidental assent as well as the validity of āḥād will be further investigated in chapter four to note the correspondence between this position in SCR and some of his legal treatises. For now, it suffices to say that in his exploration of the rhetorical scope of assent Ibn Rushd is evaluating what forms the basis for the Islamic system of knowledge under the realm of opinion.

Such evaluative stance is also affirmed in his MCAR. Ibn Rushd’s discussion of testimony resonates strongly with his view in SCR. But his elucidation of testimony in the

362 SCR, §37-38, 75 (trans. with slight modification, Arabic 191-192).
364 Cf. ibid.
legal context focuses more on the practical value of using testimony, both in terms of reports but also relating them to the doctrine of proof used in the court. He also notes the value of reports in producing assent, but distinguishes between convictions that are based on testimonies, by which he clearly means, here, those that are based on tawātur, and those that are based on circumstantial indicants (qarāʾin al-ahwāl al-mushākila), a reference to the solitary report.

And convictions may occur either based on testimonies or the circumstantial indicants [qarāʾin al-ahwāl al-mushākila]. These play the role of testimonies. Basing judgment on the circumstantial indicant is an act for the perspicacious and the skilled judge. For this reason, a judge should not confuse the counterfeit circumstances the way a teller would confuse counterfeit silver. Given that these circumstantial indicants call the judge's attention to the true thing itself even though the false testimonies are contrary to it, they are more proper to call attention to the true thing when there is no testimony or when a testimony accords with them. This is why, to the judge these circumstantial indicants play the role of the witness, for there is no difference between judging based on witnesses or judging based on the circumstances that are associated to speakers. These circumstances are not enthymemes and therefore are deemed as testimonies.365

So here again Ibn Rushd alludes to how solitary reports can be accepted as a basis for legal rulings, but the jurist has to boost their epistemological status through an investigation of the indicants that were associated with the reports. As Ibn Rushd explains here, it is upon the skilled jurist to establish the epistemic status of these reports. In fact, later in MCAR 1.15.26 he also refers to the Islamic science methods known as tajrīḥ and taʿdīl that are used to evaluate the probity of witnesses for reports but also for witnesses in the court.

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365 MCAR 1.15.25, Averroës, Commentaire 2, 129-130.
In both treatises, Ibn Rushd discusses Islamic concepts and puts them under the epistemological scope of opinion (ẓann) linked to rhetoric. In admitting tawātur and āḥād under the scope of testimony as a basis for reports of past human knowledge, taking recurrent transmissions as the highest among reports, as these can produce accidental assent. He also notes how solitary reports can be rehabilitated based on their circumstantial indicants. Still Ibn Rushd sustains the inferior status of shahāda when compared to enthymeme and admits that enthymeme is used to support certain testimonies. For us to better grasp these assessments, I shall contextualize this whole discussion of testimony in its Islamic legal context and comparing this stance in his philosophical writing to his views in his Islamic legal treatises a task, as I already noted that will be undertaken in chapter four. One can still conclude that Ibn Rushd accounts for the Islamic modes of argumentation and their capacity to produce assent under the Aristotelian framework of rhetoric.

B. The social epistemological criteria of the rhetorical material

When tackling the epistemological aim of rhetoric, Ibn Rushd does not require stringent apodeictic criteria to acknowledge fulfillment of assent, which allows him to expand the scope of assent and admit the capacity of both technical and non-technical procedures in achieving some degree of assent. In his scheme, he still exalts the enthymeme among the other technical procedures and tawātur under the non-technical procedures. The question that posits itself thus is what are his epistemological criteria, in terms of the material used in rhetoric, and how much do these criteria accommodate his

366 SCR, §44, 77,(Arabic 196) cf. also in MCAR 1.15.25, Averroës, Commentaire 2, 129-130.
expanded scope to account for Islamic modes of argumentation. To this end, Ibn Rushd
draws upon a central notion specific to the Arabic philosophical tradition the bādi’ al-
r’ay al-mushtarak the unexamined opinion to delineate the boundaries of rhetoric and as
the ultimate criteria for both premises, topics and to demarcate the relation of rhetoric to
other logical arts.367

1. Defining the unexamined opinion (bādi’ al-ra’y al-mushtarak)
Ibn Rushd follows Fārābī and Ibn Sīnā in characterizing rhetorical and dialectical
premises under the mashhūrāt or the widely accepted premises.368 This class of premises
is generic for both rhetoric and dialectic. Still, like his predecessors, Ibn Rushd
underscores that rhetoric uses a specific type of the widely accepted premises that is
mashhūr fī bādi’ al-ra’y al-mushtarak the widely accepted unexamined opinion. As
shown by Aouad this peculiar concept of Arabic philosophy is central to understand the
scope of rhetoric.369 Specifically, Aouad in his exploration of this concept proves how
bādi’ al-ra’y al-mushtarak helped the philosophers to carve a systematic approach to
distinguish between rhetoric and other logical arts.370 The term “fī bādi’ al-ra’y,” or
“bādi’ al-ra’y al-sābiq” is pervasive in most of Fārābī’s, Ibn Sīnā’s, and Ibn Rushd’s

370 Cf. Ibid.
treatises. The etymology of this concept is intriguing. While it could allude to the root \textit{b-d-w}, which means the starting point, it could also be related to \textit{b-d-'} which means to appear. As noted by Aouad the term \textit{bādi’ al-ra’y} is also found in the Qur’an. For our purpose, Ibn Rushd defines the widely accepted according to the unexamined opinion as follows in \textit{SCR}:

We say: the enthymeme is a syllogism leading to a conclusion, which corresponds to the widely accepted according to the unexamined opinion previously existing among all or most people. \textbf{The prior unexamined opinion (bādi’ al-ra’y al-sābiq) is a belief which strikes a person as a preponderant opinion and which he trusts as soon as it occurs to him, even before he has examined it.} Syllogisms become conclusive according to what is the prior unexamined opinion either because of their forms or because of their matters. This happens because of their forms when they are conclusive according to unexamined opinion. It happens because of their matters when their premises are true, once again according to unexamined opinion.

Herein Ibn Rushd admits the doxatic value of premises used for the enthymeme and associates them to the realm of the probable that is the widely accepted based on the unexamined opinion. Ibn Rushd equates this unexamined opinion to a belief, which immediately strikes a person before even submitting this belief into scrutiny. In other words, the unexamined opinion bears an immediate effect on the person who is bound to its trust as soon as it happens. This definition resonates with that of Fārābī’s, which also underlies both the immediate dimension as well as the absence of scrutiny in the process

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373 \textit{SCR}, §4, 63-64 (Arabic 170).
of admitting this belief.\footnote{Cf. Aouad, “Les fondements de la Rhétorique d’Aristote reconsidérés par Fārābī,” 145.} As Aouad explains this reveals a quasi-rational view, which alludes to a common basis admitted by people before putting an opinion into rigorous scrutiny.\footnote{Ibid.} In a similar vein, Black suggested that the \textit{bādi’ al-ra’y} implies a basic rationality, one that should not be confused, however, with self-evident truths.\footnote{Black, \textit{Logic}, 150; on this point Black indicates the philosophers’ critique of the theologians for confusing this type of belief with rationality: “The implication here, and in a similar charge of confusion against the theologians that occurs earlier in the text, is that any attempt to justify laws in terms of what “the intellect requires or rejects, approves or does not approve” is radically circular. For the intellectual sanction to which such an appeal is made is merely customary, conditioned by the beliefs that have become second nature to people living within the tradition that these laws originally established, and now govern. In Fārābī’s view, however, every law is but one particular embodiment of true demonstrative knowledge suited to fit the special circumstances of a limited culture and society, so no set of laws can have any monopoly as a fulfillment of the dictates of reason and practical wisdom. Moreover, since the laws themselves are the source of most common beliefs about what is rational and correct, the theologians are unwittingly using rhetorical methods to establish the self-evident nature and primary character of their laws, a task to which these methods are not all suited.} Thus Black explains that “the underlying suggestion is that these propositions appeal to the inchoate an underdeveloped rationality that is shared by all humans insofar as they are human.”\footnote{Ibid., 151.} In fact Ibn Rushd illustrates his point with a concrete example:

As an example for what produces persuasion in a short time [upon mention] is found in what was said by the ancient: that laws need a law to rectify them in the same way how fish in the sea need salt or how olives need oil even if they have oil. In fact- this although this is not persuasive it can produce persuasion in a short time [upon mention] if we were to add that fish needs salt when one aims to preserve them by means of conservation and give it a different taste; or that one adds to olives oil to preserve them and change their taste. For it will not be persuasive in a short time [upon mention] to say what has salt needs salt and what has oil needs oil.\footnote{MCAR 2.23.20, Averroès, \textit{Commentaire 2}, 248-249.}

In this example, Ibn Rushd makes reference to an ancient saying about the necessity to rectify the law and asserts how one should produce persuasion within an immediate short span of time. This example, which asserts laws need laws to correct
them shows how such argument needs to be supplemented with a clear analogy to produce persuasion immediately upon mentioning the statement. This comes to underline the importance of the immediate characteristic of the unexamined opinion as it seeks to produce persuasion upon mention. Under this prism, the unexamined opinion implies the existence of a quasi-rational type of human reflection, which leads people to admit a belief within a short span of time.  

On this basis one can conclude that Ibn Rushd ties the validity of rhetorical argument to an evocative assent hinging upon a spontaneous belief, which occurs immediately. To put it differently, this implies that the unexamined instinctive dimension of this belief is characteristic of rhetorical assent. Later, Ibn Rushd further elaborates on the modalities of the unexamined opinion in the following statement:

One should here use the premises from things pertaining to opinion and admitted based on the widely accepted according to the unexamined opinion and not from things that do not convince us unless these premises can be admitted and produce persuasion in short time and easily. In fact, things that produce assent are of two types: one is what convinces someone who admits it by himself, and the other is what someone admits once he hears it on the basis of its reputability [shuhra], for it is praised by everyone. The first type produces assent in somebody for he assumes it is of the second type, that it is widely accepted [mashhûr]. Thus doxatic opinions are of two kinds: one produces persuasion because it is widely accepted. The other type produces persuasion because it is believed to be widely accepted. Thus convictions are of three types, either certain or truly widely-accepted or widely accepted according to unexamined opinion –when rhetorical

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379 Aouad, “Les fondements de la Rhétorique d’Aristote reconsidérés par Averroès dans le Commentaire moyen,” fn. 9, 118.
380 Ibid., 148.
381 Cf. ibid.
speech is bare of the last two types and what is used to produce assent in short time after one hears it, then it should not be used in this art.\textsuperscript{382}

First one can note that Ibn Rushd brings a new position, which was not articulated in his \textit{SCR}. To be precise, he divides the widely accepted unexamined opinion into two subcategories. While the first one rests on truly widely accepted views the second hinges on what the public might suppose to be a widely accepted conviction.\textsuperscript{383} In other words, the instinctive adherence to the unexamined opinion is either based on what is truly widely accepted or what the public supposes to be widely accepted. As Aouad argues this explanation allows for integrating individual arguments, which one might suppose to be widely accepted into the unexamined opinion. Hence the basis of the validity of the unexamined opinion is a true or supposed communal authority.\textsuperscript{384} In so doing, Ibn Rushd makes room for the use of truly accepted opinion under the unexamined opinion but still preserves the boundary for rhetoric and its specificity, which leads us to the next point.

2. The acceptance of \textit{maḥmūdāt} under rhetoric

As the unexamined opinion serves to delineate the boundaries of rhetorical scope, Ibn Rushd is able to distinguish between dialectical and rhetorical premises. While dialectical premises rely on being truly widely accepted, rhetoric relies on those widely accepted immediately or according to unexamined opinion. Still he argues rhetoric can appeal to true premises if they are widely accepted.

Thus we say that the premises used in this class of arguments, especially the major premise, are taken here insofar as they are widely accepted according to unexamined opinion. In what

\textsuperscript{383} Aouad, “Les fondements de la Rhétorique d’Aristote reconsidérés par Averroès dans le Commentaire moyen,” 126.
\textsuperscript{384} Cf. ibid., 127.
preceded, we have defined what widely accepted unexamined opinion is and that dialectical
premises are used only insofar as they are truly widely accepted.385

As explained above, Ibn Rushd allows for the use of what is truly widely accepted
that are often used in dialectic but this is not based on the fact that they are true but rather
on the basis of their notoriety.

Now just as generally accepted things may accidentally be true and may not; similarly, premises
which are based on unexamined opinion may accidentally happen to be generally accepted or true
or may not. However, in general, they are taken here insofar as they are generally accepted
according to unexamined opinion, just as dialectical premises are taken solely insofar as they are
truly generally accepted.386

Rhetoric appeals to true premises only if they are widely accepted. So rhetoric is
mostly bound by the reputability of premises, but can use true premises if they pass the
test of reputability. Thus their use does not stem from their certain nature but their being
known among all people or at least most people,387 which discloses the social and public
nature of probable premises as widely accepted among people.388 In fact Ibn Rushd sets a
hierarchy among the different widely accepted premises of what is mashhūrāt in his SCT
on the basis of their reputability (shuhra).389 As already emphasized, rhetoric uses both
widely accepted premises, as based on unexamined opinion (bādiʿ al-rʾay al-mushtarak),
and the truly-widely accepted (al-mashhūr fī al-haqqā) mostly on the basis of their
reputable value. Specifically, Ibn Rushd elucidates a rigorous hierarchy, which rests not

385 SCR,§17, 67 (Arabic 176).
386 Ibid.
387 Cf. Black, Logic, 141.
388 Ibid. This view resonates also with Fārābī who also explains in his Kitāb al-khaṭāba: “The widely-
accepted comprises what is true and what is not true. But if rhetoric uses them, it does not do so because
they are true. For if that were the case, then when rhetoric came upon premises that were true but not
widely-accepted, it would make use of them. But rhetoric does not do this, Instead, it abandons certain
premises if they are not widely accepted.” Quoted in Black, Logic, 141.
389 SCT,§13, 67 (Arabic 158).
upon truth but upon what he calls *sharaf* [or notability], referring to their reputable value among people.\textsuperscript{390} The ones that are accepted among all people are of higher position and are more notable (*al-ashraf*), although the ones that are widely accepted among most [*al-akthar*] come next. Thus he seems to exalt the widely accepted premises that are esteemed among all people, both masses and experts, often referred to as a *maḥmūdāt*.\textsuperscript{391}

These propositions bear a universal status that goes beyond cultural boundaries.

**Table 3: A taxonomy of *maḥmūdāt*\textsuperscript{392}**

<table>
<thead>
<tr>
<th><em>Maḥmūdāt</em></th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Some are widely accepted by everybody, and these premises belong to the most noble class.</td>
<td>An example is [the premise] that it is good to thank a benefactor or that it is necessary to respect one’s parents</td>
</tr>
<tr>
<td><strong>The highest notability [<em>al-ashraf</em>]</strong></td>
<td></td>
</tr>
<tr>
<td>universal among all nations</td>
<td></td>
</tr>
<tr>
<td>B. Some of them are widely accepted by most people, without there being any disagreement among the rest about that.</td>
<td>An example is [the premise] that God is one.</td>
</tr>
<tr>
<td>C. Some of them are widely accepted:</td>
<td></td>
</tr>
<tr>
<td>(i) By learned men and wise men, or by most of them without the rest disagreeing with them,</td>
<td>(i) [the premise] that knowledge is virtuous in itself</td>
</tr>
<tr>
<td>(ii) By most of them</td>
<td>(ii) [the premise] that the heavens are spherical.</td>
</tr>
</tbody>
</table>

\textsuperscript{390} *SCT*,§13, 51-52. (Arabic 158-159).

\textsuperscript{391} Ibid., 52; I should note that, while Butterworth translates *mashhūrāt* to “generally accepted”, I use “widely accepted” (ibid., 51-52, in Arabic 158-160).

\textsuperscript{392} *SCT*,§13, 51 (Arabic 158).
D. Some of them are widely accepted:

(i) By the practitioners of the arts, without the multitude disagreeing with them about that,
(ii) By those renowned for skill in the arts, without the practitioners of the art disagreeing with them,
(iii) By most of them.

(i) [the premise] in the art of medicine that scammony relieves bile that the pulp of colocynth relieves phlegm;
(ii) For example, the argument of Hippocrates that weakness arising without any precedent cause is a warning of sickness;

E. The likeness of what is widely accepted is also widely accepted;

An example, if it were a widely accepted [premise] that the science of the opposites is one in itself, then sense-perception of opposites would be one in itself.

F. A thing opposed to what is widely accepted is also widely accepted.

An example, if it were a generally accepted [premise] that one ought to do good to friends, then one ought to do bad to enemies.

Using this outlook, we note that Ibn Rushd crowns the premises widely accepted among all people under the category of praiseworthy (maḥmūdāt) and grants them a universal acceptance. As the term ‘praiseworthy’ alludes, these premises seem to bear some ethical basis. In particular, Ibn Rushd uses the ethical maxims of thanking the benefactor and respecting one’s parents to illustrate the universal value of the
The value of these premises bears an ethical function, which will be elaborated in my discussion of Ibn Rushd’s view of ethic in relation to rhetoric. It shall suffice to say that Ibn Rushd allows for the use of these widely accepted belief including ethical maxims as long as they fulfill the criteria of notoriety, which is essential for the epistemological scope of rhetoric under the unexamined opinion.

3. **Topics: arguing for contraries**

By tackling the logical scope of rhetoric in terms of its aim and supporting material, Ibn Rushd allows for the expansion of its scope and inscribes a social epistemological value to rhetorical assent and its premises; as long as it remains within the limits of the unexamined opinion. Evidence of one last logical feature that Ibn Rushd highlights to maintain this stance is found in the value he gives to topics. The value of topics is central to rhetoric, not only for the support it lends to the logical nature of rhetoric, but also for its practical utility in granting rhetoric the capacity to argue for both contraries. Although such capacity is shared with dialectic, Ibn Rushd again demarcates the boundaries of the scope of rhetoric through underlining the importance of the unexamined opinion in the use of topics.

Aristotle defined topics as follows: “I call the same thing element and *topos*; for an element or a *topos* is a heading under which many enthymemes fall.” Topics are not to be mistaken for proper parts or premises of the rhetorical syllogism; they are rather the general argumentative form or pattern. In other words, topics can be seen as headings for several rhetorical syllogisms, offering the general guidelines from which various

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393 *SCT*, §13, 51-52 (Arabic 158-160).
394 *MCAR* 1.1.17 Averroës, *Commentaire* 2, 9.
arguments can be formulated. In the Aristotelian view they are key in supporting the technical method of argumentation. As Aouad contends Ibn Rushd’s definition of the topics is more precise than Aristotle’s. To be specific Aouad shows how Ibn Rushd clearly admits that *topoi* are more general than the dialectical or rhetorical syllogism.\(^{397}\) In fact he characterized them as having the power to produce syllogisms (*MCAR* 1.2.37-1.2.40).\(^{398}\) To our purpose, Ibn Rushd explains topics in relation to enthymemes while alluding to their legal function as follows:

One should also talk about topics on the basis of which we deduce enthymemes. Overall, topics are component of the enthymemes. For it is only possible for us to find, through technical methods, the premises of enthymemes, on the basis of our knowledge of topics, which are the prime thing that one needs to acquire in terms of grasping the conditions of premises. In fact, topics are, in general, qualification and general conditions of premises or that which paves the way to the existence of premises. As for what was already said on the condition of premises, these are also qualifications that are more specific than topics. And topics are divided first based on the division of the function of enthymemes. And enthymemes are first of two types: the enthymeme that establishes and the enthymeme that rebukes as is the case for the dialectic syllogisms. As for the enthymeme that establishes, it is the syllogism that reveals whether the thing exists or does not exist based on the recognized premises. As for the enthymeme that rebukes, it is that which produces a thing from the rebutted and reproved premises. Like this saying: “Such is not beneficial, for if it were beneficial then the advisor would have hastened to do it”. In fact it is very likely that the advisor would dispose of something which disposal is reproved. Once we have completely perceived topics on the basis of these two types of enthymemes, and how these topics are well-primed, then we are close to bring about to action all the particular premises beneficial in each particular case, premises that, as we said have as their prerequisite to be accepted among each group. It is from these topics that we construct enthymemes in the deliberations, about the harmful

\(^{397}\) *MCAR* 1.2.37-1.2.40, Averroës, *Commentaire* 2, 24-26.

and beneficial, and in the epideictic, concerning praise and blame, and the judicial, concerning just
and unjust and questions pertaining to passions and ethic. So we say: that topics can be of three
types, either a topic that establishes or one that rebukes, or one that is sophistical. We should
mention each of these types separately.399

In defining topics in relation to enthymeme, Ibn Rushd again supports the logical
nature of rhetoric. But what is important to us is the logical capacity for topics to derive
two contraries. As seen in this passage, he divides topics into three types, those used to
establish, those used to rebuke, and those that are merely sophistical. Here he makes two
consequential explanations of the function of topics in the political context: First he
contends that topics serve as the material that is needed to construct enthymemes: in the
deliberative speech, to establish what is harmful and beneficial; in the epideictic speech,
to establish what is praise and blame; and in the judicial speech, to establish what is just
and unjust, as well as questions linked to passions and ethics. Second, Ibn Rushd makes
an important stipulation to regulate the use of topics. He specifically links their validity to
their acceptability among the community addressed. As noted by Aouad in comparing
this passage to Aristotle, the association of topics to the legal domain and the
consideration of the approval of the target group is characteristic of Ibn Rushd’s view and
has no equivalent in Aristotle’s rendition.400 This reveals that, for Ibn Rushd, a good
rhetorician should know the doctrine of topoi to be able to conceive of their different
instantiations, but, more importantly, for the sake of being effective, he should also know
which ones are more conducive to communal approval. This is also clearly linked to the
scope of rhetoric as the realm of assent based on bādiʿ al-raʾy (MCAR 2.23.19). As

399 MCAR 2.22.9, Averroès, Commentaire 2, 239-240.
400 This is based on Aouad’s commentary on MCAR 2.22.9 in Aouad, “Commentaire du Commentaire,”
Aouad notes, it is not arbitrary that Ibn Rushd defines the concept of bādi’ al-ra’y under the discussion of topics.⁴⁰¹ Again this comes to affirm the requirement of reputability of opinion as a necessary criteria of the topos.⁴⁰² To our purpose, though, such stance also discloses a link between topics and the legal question, which affirms a rapprochement between legal argumentation and rhetorical argumentation. Similarly, in his discussion of the different types of topics, as noted by Aouad, Ibn Rushd draws upon Islamic law, such as in his example of the question of the prohibition of drinking wine and its utility for healing among many different issues in relation to prayers, alms, etc. (MCAR 2.23.3- 2.23.17).⁴⁰³ This link between methods of logical abstraction such as topics and the implementation of Islamic law is compelling and comes again to confirm the link between Islamic law and rhetorical argumentation a view that will be best illustrated in his appropriation of topics in relation to question of justice.

Again, the validity of general topics in rhetorical argumentation accords with the nature of rhetorical premises and comes to corroborate how Ibn Rushd is committed to a social epistemology of rhetoric to determine its material and structure. Thus one can deduce that despite the logical value of rhetoric, the epistemological criterion of rhetoric to achieve assent is not stringent, as it only focuses on attaining a shared epistemology that rests on what is widely accepted according to the unexamined opinion.

⁴⁰¹ Ibid., 108.
⁴⁰² Ibid.
⁴⁰³ Ibid., 160.
4. Relation to logical arts

As Ibn Rushd underlines the logical value of rhetoric, he also admits its relation to other logical arts mainly dialectic and sophistical argument. At the outset of *MCAR*, Ibn Rushd reproduces Aristotle’s view on rhetoric’s kinship to dialectic. Specifically, Aristotle states that “Rhetoric is the counterpart of dialectic.” Aristotle’s view is always seen as an attempt to endorse rhetoric’s status as an art, a claim that comes as a response to Plato’s derogative view of rhetoric, wherein, using the same term, *antistrophos* or analogy, he associated rhetoric with mere cookery in the soul, stripping it of the status of art. Clearly, in reiterating the Stagirite’s position, Ibn Rushd builds upon Aristotle’s outlook on the close affinity between rhetoric and dialectic. In fact, Ibn Rushd buttresses this rapprochement between rhetoric and dialectic, taking some liberty to interpose his own configuration of the relation between both arts and their role in human organization: “[Aristotle] said: the art of rhetoric is analogous to the art of dialectic. In fact they both envision the same aim, which is to address others, in view of the fact that these arts are not to be used by man to address oneself, as is the case of demonstration, rather they are used with others.”

Thus he underlines that beyond their common competence, rhetoric and dialectic have the same communicative purpose, which is to address or discourse with others: “*mukhāṭabat al-ghayr.*” More importantly, he distinguishes between logic, in terms of its solitary dimension, and rhetoric and dialectic for their social role. To put it differently, he differentiates between demonstration (*burhān*) and its impersonal art used to converse

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407 *MCAR* 1.1.1, Averroes, *Commentaire* 2, 1.
with oneself, and the shared features of rhetoric and dialectic that are based on their interpersonal character. Consequently, Ibn Rushd makes a suggestive conclusion, which has no textual basis in Aristotle’s rendition, for using the affinity between rhetoric and dialectic to admit their status in logic. Thus he argues that both rhetoric and dialectic belong to the same art, the art of logic, “ṣināʿat al-manṭiq”\(^{408}\) In endorsing rhetoric as a logical art, Ibn Rushd makes a distinction between communicative logical arts and the apodeictic art. Accordingly, he clearly assigns to human discourse a division between demonstrative discourse and social discourse. Such a view is also reflected in his conception of just excellences, as he notes a distinction between excellences that are associated with social partnership and those that are between the person and him- or herself, in *MCAR* 1.1.14.\(^{409}\)

This consolidation of rhetoric as a social human discourse is rooted in Ibn Rushd’s view of the relation between rhetoric and the demonstration or the science of logic, which also emphasizes the teleological value of rhetoric as a logical art. This point can be developed by a consideration of the following statement, which makes explicit mention of human inclination and the public reliance on the similitude to truth:

> And knowledge of all this belongs only to the art of logic. For knowing the thing that is true and its verisimilitudes pertains to the same faculty, I mean to this art itself. For if the rhetorical convictions are not true they are verisimilar to what is true. Also people are disposed by nature toward the knowledge of what is true and in most cases they envision what is true and act upon it.

And praiseworthy matters, from which enthymemes are derived, are verisimilitudes for they

\(^{408}\) *MCAR* 1.1.1, ibid., 1-2.

\(^{409}\) Averroes, *Commentaire* 2, 8.
substitute for the masses what is true. And verisimilitudes may enter into the science of truth, which is the science of logic.\textsuperscript{410}

Ibn Rushd associates the knowledge of rhetoric to the knowledge of logical art. He acknowledges rhetoric as the verisimilitude to truth. While this notion of the relation between the true and what is a verisimilitude to what is true is found in Aristotle, the latter links them to the same faculty but not to logic.\textsuperscript{411} Ibn Rushd attaches rhetoric to a verisimilitude to truth but asserts that what has a verisimilitude to truth can function as a substitute for truth to people. Thus he advances the idea that rhetorical procedures could be true or similitudes of truth. In so doing, he is able to conclude that rhetoric belongs to the science of truth, which is logic. What is most striking is his view of the human inclination to truth, wherein Ibn Rushd goes further, not only to assert that people seek truth but to add a practical dimension: that people act upon the true. This nuance is very important and suggests a voluntary human inclination to what people conceive as true being conducive to inciting them to action. Furthermore, Ibn Rushd emphasizes reputable premises, \textit{maḥmūdāt}, which characterize the substance of enthymemes [\textit{ḍamāʿir}] to the masses, for these operate as a substitute to truth. In fact this still serves to draw the affinity between rhetoric and dialectic as explained below:

This art does not use persuasive things that are only convincing to one person. For this is undetermined and unknown to the user of these persuasive things. Therefore, this art does not use in terms of praiseworthy premises, I mean the accepted ones, what is accepted by one person, such as the opinions that occur to people by desire and pleasure; rather, it

\textsuperscript{410} \textit{MCAR} 1.1.12, Ibid, 7-8.
\textsuperscript{411} See Aouad’s commentary on \textit{MCAR} 1.1.12 in Aouad, “Commentaire du Commentaire,” 23.
uses only the praiseworthy premises among most or all in the way it is used in dialectical art.\(^{412}\)

While the main purpose here is to reject individual bases of rhetorical argument, Ibn Rushd still uses the communal criteria of rhetoric to create a rapprochement to dialectic. In so doing, Ibn Rushd claims the communal value of rhetoric, a criterion it shares closely with dialectic, to license the use of *maḥmūdāt*, which are more characteristic of the dialectic’s scope than of rhetoric’s. Still Ibn Rushd underlines the practical dimension to rhetoric. In fact, such dimension gives rhetoric also license to use even sophistical methods. Thus Ibn Rushd endorses the use of sophistic tools as long as they serve rhetorical aims.\(^{413}\) Aristotle seems to have avoided dwelling thoroughly on the relation of rhetoric to sophistry and did not explicitly admit the validity of the use of sophistical reasoning as legitimate for the rhetorician.\(^{414}\) In fact Blaustein explains, Aristotle does not underscore this stance, leaving it implicit instead.\(^{415}\) Ibn Rushd, however, has no qualms sanctioning the use of sophistical argument, and he admits the validity of the use of sophistic reasoning with much ease. He also tackles the validity of using arguments of apparent persuasion along with those that are truly persuasive.\(^{416}\) In *MCAR* 1.1.25, Ibn Rushd explains that both rhetoric and dialectic make use of both true and sophistic reasoning.\(^{417}\) He specifies, along Aristotle’s line, that what differentiates a dialectician from a sophist is not the use of apparent argument but the end to which it is employed. Unlike the dialectician, who might use it for the purpose of testing his or her opponent, the sophist makes use of fallacious argument striving for honor or reputation.

\(^{412}\) *MCAR* 1.2.20, Averroès, *Commentaire* 2, 19.

\(^{413}\) *MCAR* 1.1.25, Ibid., 11.


\(^{415}\) Ibid.

\(^{416}\) Ibid.

\(^{417}\) *MCAR* 1.1.25, Averroès, *Commentaire* 2, 11-12.
The rhetorician, according to Ibn Rushd, strives to arouse passion in or induce action from the addressee. As long as this can produce some sort of good through either the action or passion then it is considered legitimate.\textsuperscript{418} Rhetoric disposes of its own tools to admit certain sophistical fallacies as long as they fulfill its aim. To succeed, each use has mainly to pass the test of popular conviction. As long as it can produce a popular conviction and induce an action or passion, it is considered valid under rhetoric’s scope.\textsuperscript{419} In admitting the use of fallacious argument, Ibn Rushd expands the realm of rhetoric, but finds that it still remains constrained by the purpose of action and public conviction. What is esteemed among the community gains the validity of a similarity of truth.

In outlining the relation between rhetoric and other logical arts, Ibn Rushd succeeds to maintain its position as a logical art. It also gave him room to allow for the use of both dialectical and sophistical method. Still the scope of rhetoric remains guided by its social dimension and its target, which is public conviction. Finally rhetoric seems to be the common denominator among people who all seem to share an inclination to truthful opinion and to act upon it. Thus rhetoric is a substitute, in the human shared domain, for what truth is for the solitary study of demonstrative logic. To put it differently, rhetoric appears as some sort of a lower rationality for human interaction under socio-logical domain, which relies on the unexamined opinion.

\textsuperscript{419} MCAR 1.1.25, Averroès, Commentaire 2, 11-12.
IV. Concluding remarks: Rhetoric as a meta-discourse on opinion, Islamic modes of argumentation, politics and justice

The main conclusion to be drawn is that Ibn Rushd presents rhetoric as a meta-discourse on opinion, politic, and Islamic modes of argumentation, which forms the basis for the system of knowledge in Islamic law. Ibn Rushd’s conception of rhetoric draws clearly from his political context and Islamic sciences that developed around the revealed discourse both *balāgha* and *fiqh* as seen in his reference to *tawātur*, *`āhād*, and *taḥaddī*. While seeking to remain faithful to Aristotle’s framework of rhetoric, Ibn Rushd elaborates the logical aspect of rhetoric and expands its scope to account for these argumentative modes of discourse in the political realm to reflect his own context.

To ensure the integrity of rhetoric and its practical value, Ibn Rushd manages its boundaries on the basis of the unexamined opinions as a shared quasi-rational ground conducive to public conviction. Another important conclusion relates to how he includes the modes of argumentation of the revealed law within the compass of rhetoric, which again affirms his position on the presumptive epistemic status of Islamic law. While this might come as surprise to the proponents of the harmony between Islamic law and philosophy as the realm of truth, as I shall thoroughly discuss in chapter four this is a consistent stance both in his view as a philosopher and a jurist.

Furthermore, such a view is to a certain extent in line with Muslims jurists who underline the reliance of *ghalabat al-ẓann* in discerning legal norms. Be that as it may, Ibn Rushd’s ardor about the valuable role of rhetoric in the political realm is not limited to this epistemic appraisal of legal opinion but is grounded in the practical value to ensure
justice as necessary for political stability. How does rhetoric contribute to justice will be discussed thoroughly in the next chapter.
CHAPTER THREE

NATURAL JUSTICE UNDER RHETORIC

In his meta-discourse about opinion, law and politics under the framework of rhetoric, Ibn Rushd hopes to buttress the political stability of legal opinion in the legal practice, yet underscores justice as the ultimate guarantee for political stability. To this respect, the Andalusian commentator uncovers the various challenges to justice and offers solutions by endorsing Aristotle’s notion of natural justice and its corrective function, while significantly developing the Stagirite’s conception.\(^{420}\) In this chapter, I explore Ibn Rushd’s own construal of Aristotle’s natural justice in *MCAR* in order to argue that he constructs his view of natural justice under two modes: the first mode is in potentiality, and is mainly associated to the masses; the second is in actuality, and is manifested by the elite.\(^{421}\) While he preserves the capacity to discern natural justice to the elite, Ibn Rushd apprehends natural justice as shared by all people, and links it to a quasi-rational basis of the unexamined opinion. Such dialectic between the masses and elite, Ibn Rush proposes, is only possible under the scope of rhetoric governed by the unexamined opinion.

This chapter first outlines Ibn Rushd’s view on the difficulty of justice, and then delineates the properties and function of the written and the unwritten laws. In doing so, I


\(^{421}\) Here I should reiterate that I am not using actuality and potentiality in the technical peripatetic sense. It is merely mean to depict how natural justice is only realized by the jurist; while people can only recognize it through expressing their approval.
hope to construct Ibn Rushd’s view of natural justice, and the two poles associated with natural justice in potentiality and actuality, with a focus on their interaction under the scope of rhetoric. My analysis of specific passages from Ibn Rushd’s works, provides for the most part parallel section from Aristotle’s. This will serve my primary objective, namely: to highlight Ibn Rushd’s reception and appropriation of Aristotle’s views. For the purposes of my argument, I limit my discussion of Aristotle’s view to points that can further illuminate Ibn Rushd’s legal thought.

I. The challenge to justice

In *MCAR*, Ibn Rushd voices his concern about maintaining justice and sketches out three main problems pertaining to the realm of law. These serve to justify the resort to Aristotle’s corrective notion of natural justice to ensure that no injustices can be inflicted on the basis of law. The first of the three is the fallibility of human reasoning, which he links to the incapacity of judges to always guarantee a just outcome within the time constraint that governs this practice. The second is a lawgiver’s undue generalization, and the last is the inherent contingency of matters related to voluntary human actions.

A. The fallibility of human reasoning

In a number of instances in *MCAR* evidenced in the passage quoted here, Ibn Rushd expresses a mistrust of judges regarding their ability to reach a just outcome. Taking Aristotle’s criticism of his contemporaries for focusing on non-essentials for the mode of persuasion in courts, Ibn Rushd voices his own skepticism of judges, then
further underscores the difficulty of the task of administering justice which Ibn Rushd relates to time constraints as well as to the incapacity of judges to properly adjudicate:

**Ibn Rushd:** [Aristotle] said: It is necessary that laws shall determine whether a matter is unjust or just, and delegate to judges [al-hukkām] to decide whether the matter existed in relation to the person or not. Overall, only easy matters should be delegated to judges and that is for two reasons. First, it is rare to find a judge who is able to discern the essence of things in order to set down a matter as just and unjust except for few times. Most judges who exist in the cities in most times do not have this capacity. Second, this is due to the fact that knowing whether something is just or unjust, a lawgiver needs a long time and that is not possible within the short time when the investigation on the matter happens before the judges. Based on these two grounds, it is difficult to delegate to the judges to decide whether a thing is just or unjust, beneficial or harmful. But we shall delegate to them the decision of whether the thing happened by a given person or not. For this is manifest; and also because this matter cannot be laid down by the lawgiver [ṣāhib al-sunna]. 422

**Aristotle:** Now it is of great moment that well-drawn laws should themselves define all the points they possibly can leave as few as may be to the decision of judges; and this for several reasons. First, to find one man, or a few men, who are sensible persons and capable of legislating and administering justice is easier than to find a large number. Next, laws are made after long consideration, whereas decision in the courts are given at short notice, which makes it hard for those who try the case to satisfy the claims of justice and expediency. The weightiest reason of all is that the decision of the lawgiver is not particular but prospective and general, whereas members of the assembly and the jury find it their duty to decide on definite cases brought before them. They will often have allowed themselves to be so much influenced by feeling of friendship or hatred or self-interest that they lose any clear vision of the truth and have their judgment obscured by considerations of personal pleasure or pain. In general, then, the judge should, we say, be allowed to decide as few things as possible. But questions as to whether something has happened

422 *MCAR* 1.1.7 Averroës, *Commentaire* 2, 18.
or has not happened, will be or will not be, is or is not, must of necessity be left to the judge, since
the lawgiver cannot foresee them. 423

Adhering to Aristotle’s position on the superiority of law over judges, Ibn Rushd
likewise concludes that one should only leave few decisions to judges, such as whether an
occurrence happened or not. 424 Decisions like these, in fact, must be left to the judge to
make, for the lawgiver could have not anticipated all possible occurrences. However, he
adds, “to know fully” whether the thing was just or unjust requires a long time for the
lawgiver to decide, and it is thus not possible for a judge to do so, given the time
constraints in court cases. In a similar vein, in MCAR 1.1.10, Ibn Rush iterates this
mistrust and alerts the public to the judges’ inaptitude to deliver a just ruling.
Specifically, he argues that as a universal matter, the question of justice is obscure to the
judges, and is only apprehended by the guardians of law (al-quwwām ‘alā ‘al-sharī‘a). 425
This suggests that Ibn Rushd subscribes to a hierarchical distinction in the legal
institution privileging the guardians of the law over the judges. The hierarchy of the legal
institutions, in Ibn Rushd’s view, bears upon the mistrust of the judges’ ability to fulfill
the aim of justice and determine the universal qualities of just and unjust (ʿadl and jūr).

Ibn Rushd sets out a clear hierarchy of legal roles, separating in three categories
the lawgiver, the jurist, and the judge. To this end, he constructs a general legal hierarchy
applicable to all cities, but illustrates the equivalent of each position in the Islamic city. 426
First, in his discussion of “the judges of future things”, Ibn Rushd refers to the leader, or

423 Aristotle, Rhetoric I, 1. 1354a 31.
424 For more subtle differences between Ibn Rushd and Aristotle see Aouad, “Commentaire du
Commentaire,” in Averroès, Commentaire Volume 3, 18.
425 Cf. ibid.
426 Cf. MCAR 1.3.1 and MCAR 1.7.32, Averroès, Commentaire 2, 27 and 63.
ra`īs (MCAR 1.3.1), while in discussing “the judge on past things,” he specifically refers to this person as having been appointed by the ra`īs, the equivalent of the Qādī in an Islamic city. In his second reference in MCAR 1.7.32, Ibn Rushd further explains this hierarchy. First, he speaks of the lawgivers as `al-ḥukkām al-`uwal (the first judges) or al-shurā` (the lawgivers)—which is a clear reference to the lawgiver(s) who set the first principles of the law (uṣūl al-ahkām). This can be a reference to the legislator, referred to as šāhīb al-sharī`a or wāḍi` al-sunna. As for those who received legal principles from the uṣūl al-ahkām, according to Ibn Rushd, they are of two types: either the conveying recipient (sāmi` muballigh) or scholar recipient (sāmi` `ālim). While the first is only a transmitter, the second is a transmitter who can also infer rulings from the legal principles on matters that have not been already communicated by the lawgiver. Ibn Rushd further divides these two into subcategories, namely that of the politically appointed, such as the Qādī, and the jurist who would not have a political appointment.

This careful distinction between those who have the capacity to extract or extrapolate on principles of the law, and those whose role is limited to transmitting previous opinions, lies at the core of the divide in Islamic legal jurisdiction between the qualified jurist (mujtahid), who could infer legal rulings, and the mere imitator (muqallid). While, as explained by Hallaq, some jurists agree that a Qādī can be a muqallid, their position on the necessary qualification of the mujtahid seems to be more

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427 Ibid., 27.
428 Ibid., 63.
429 Ḥukūma is from the Arabic root h-k-m, which means “to judge, adjudicate.” As Bernard Lewis expounds, “In classical usage the verbal noun hukūma means the act or office of adjudication, of dispensing justice, whether by a sovereign, a judge, or an arbitrator, as for example in some enumerations of the hereditary functions of Kuraysh.” Lewis added that after the Seljuqs, this title was used to designate “the office or function of governorship, usually provincial or local.” Lewis, “Hukūma,” in Encyclopaedia of Islam. Second Edition (EI2), ed. Peri J. Bearman, Thierry Bianquis et al. Leiden: Brill Online, 2012.
430 MCAR 1.1.6 and 1.1.7 Averroës, Commentaire 2, 4-5.
complicated. Whether Ibn Rushd accepts the Qādī to be a *muqallid* or simply does not approve of the performance of the judges of his own time, does not change that he expresses a clear reservation about their capacity for discerning legal judgment in matters that relate to universals. Ibn Rushd takes the reversed position, and praises the capacity of the guardian of the law to discern universal matters in legal practice. Based on these discussions, I conclude that Ibn Rushd deems judges to be only imitators or transmitters without the ability to independently infer legal rulings from the legal principles received from the lawgiver. In what follows, I will further link his skepticism, to the need for a rectification process for the written law.

**B. The lawgiver’s undue generalization**

Ibn Rushd iterates another concern that both explains and justifies the urgency of rectifying laws. This pertains to the lawgiver, and is expressed position Ibn Rushd voices in both *MCAR* and *MCNE*. In the excerpt from *MCAR* quoted here, Ibn Rushd argues that, in some cases, the lawgiver prescribes a universal precept about something that is not always universal: a legal decision declared universal that might not prove appropriate for all times and places “befalls the lawgivers in the written law either out of necessity or of their own making. Of their own making, when they err and lay down a universal determination when it is not universal.”

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432 For a different position on whether a judge needs to be a *mujtahid* or not, see Wael Hallaq, “Was the gate of *Ijtihad* closed?” *International Journal of Middle East Studies* 16, no.1 (1984), 3-41.

433 *MCAR* 1.13.10 Averroès, *Commentaire* 2, 117. Aouad (“Commentaire du Commentaire,” 195) explains that “cmRhét est proche de Rhét. Mais on notera que des lacunes de la loi écrite dues à une erreur du législateur sont présentées, dans Rhét, comme se produisant contre le gré des législateurs, et, dans CmRhét, comme de leur propre fait, alors que les lacunes dues à l’indétermination de la matière sont présentées, dans Rhét, comme se produisant selon le gré des législateurs et, dans CmRhét, comme nécessaires et provenant de al chose même. De plus, la proposition qui établit une gradation dans la valeur des lois et qui la met en rapport avec l’effort de réflexion (*iǧtahada*) du législateur est sans correspondant dans Rhét. On notera, à ce
fault the lawgiver, it is, however, unclear whether this deficiency is only an error on the part of the lawgiver, for making a mistake, or whether the circumstance is also pursuant to the next ground, the contingency of matter. In this instance, I am inclined to assume the former, for he directly faults the lawgivers using the verb ghalaṭū to suggest they [the lawgivers] have made an error in estimating the universality of the legal propositions in question. A similar position is also seen in Ibn Rushd’s discussion of natural justice in MCNE, where he reiterates the same position on the undue generalization of the lawgiver. This time, however, he provides an example from Islamic law on he important question of jihād, the Islamic doctrine of war that historically came to be associated to the military expansions. He writes:

And this will be clear [or, you will clarify this] from what is laid down on the matter of war in the law of the Muslims, for the command in it regarding war is general, until they uproot and destroy entirely whoever disagrees with them. But regarding this, there are times when peace is more choiceworthy than war. And as for [the fact] that the Muslim public requires this generality, despite the impossibility of destroying and uprooting their enemies entirely, they attain in this great harm; this is ignorance on their part of the intention of the legislator [Hebrew mekhuvvan hatorīyi] may God watch over him. Therefore it is appropriate to say that peace is preferable to war sometimes.

…. Donc la nature qui est celle du bienfaiteur et par laquelle il est bienfaiteur est une correction de ce qui manque à la loi du fait de la chose universelle que nous avons instituée. La raison en est...
donc que toutes les règles juridiques légales ne sont pas nécessaires à tout moment ; bien plus, [le bienfaiteur] a besoin, à certains moments, d’une adaptation et, à ces moments-là, il n’a pas besoin de revenir à la loi universelle. Ceci t’apparait manifeste si tu considères la règle juridique instituée concernant la décision de faire des guerres dans la loi des Sarrasins. En effet, le précepte de faire la guerre jusqu’à ce que la racine de ceux qui sont différents d’eux [Sarrasins] soit exterminée est, dans [cette loi], universelle. Or, il y a ici des moments où la paix est préférable à la guerre. Parce que le peuple parmi les Sarrasins a considéré comme nécessaire ce précepte universel et comme il a été impossible avec cela d’exterminer leurs ennemis, de nombreux maux s’en sont suivis de ce fait. Et cela était dû à l’ignorance qu’ils avaient de l’intention du législateur. A cause de cela, il faut dire que la paix doit parfois être plus recherchée que la guerre.437

Ibn Rushd is referring to the question of obligation in the matter of jihād, which is stipulated in the Qur’an, (Qur’an 9:5): “Slay the polytheists wherever ye find them” and (Qur’an 9:29): “Fight against those who do not believe in Allah nor in the last day.”438

As seen here, Ibn Rushd contends that this call is not absolute. For, in some cases, pursuing war might incur great harm to the community, something the lawgiver would not intend.

Ibn Rushd, as such, concludes that this is an undue generalization of the call for jihād, which cannot be universal, as universal war does not fit with the intention of the lawgiver. Instead, he proposes that harm cannot be the intention of the lawgiver, and the mere fact of supposing such inference shows an ignorance of the lawgiver’s intent; he thus concludes that there are circumstances where peace is the better course of action.439

The same position is seen in his BM, where he explains that the Qur’anic verses

437 Aouad’s unpublished translation of Ibn Rushd’s Middle Commentary to Aristotle’s Nichomachean Ethics, from his forthcoming publication “Averroës, Commentaire Moyen à l’Ethique à Nicomaque d’Aristotle.”
mentioned earlier (Q. 9:5 and Q. 9:29) contradict with another verse (Q. 8:61): “If they incline to make peace, incline thou to it, and set thy trust upon Allah.” To address this, Ibn Rushd invokes the Muslim jurists’ technique of smoothing out the contradiction by abrogation, contending that the verse in Qur’an 8:61 abrogates the previous verses. In so doing, Ibn Rushd conveys the process through which the jurist resolves a case of contradiction in two pieces of textual evidence. It will be examined elsewhere in this study, how Ibn Rushd discusses this question in MCAR 1.15.11 under the scope of the application of natural justice.

C. The contingency of matter

The final important ground for the rectifications of law is found in Ibn Rushd’s allusion to what the lawgivers encounters “out of necessity” (bi-ḍ-ḍarrar); this is expressed after an explanation of how and why Ibn Rushd faults the lawgiver. It is important to note that this additional ground recognizes what is beyond the control of the lawgiver. In an attempt to clearly identify this point, what follows closely examines references from MCAR and MCNE, in which this notion seems to be located. In the first reference (MCAR 1.13.10), quoted here with a comparable excerpt from Aristotle’s work, Ibn Rushd attributes the problem to the changing character of things, such as time, place, and people. He writes:

Ibn Rushd: This befalls the lawgivers in the written law either out of necessity or of their own making. Of their own making: when they err and lay down a universal determination when it is not universal. As for the matter itself, [it is] for the following reason: No one can lay down universal and

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441 For a detailed discussion on the concept of jihad in Bidâyat al-mujtahid see ibid., 9-25.
442 Averroès, Commentaire 2, 125-126.
general laws according to all people of all times and all places, for this is not finite – I mean the change of the beneficial and the harmful. The aim of the prudential lawgiver is to lay down law pertaining to the most possible [aktharī], I mean, for most people in most times and in most topoi [al-mawāḍiʿ]. The more a lawgiver makes an effort in legal reasoning to lay down laws that have a long-lasting utility for the majority of man the better the law is. If this is so, it is out of necessity that determined law cannot be true eternally and all the times, I mean to everyone and every time. That is why sometimes it calls for an addition or a subtraction.443

**Aristotle:** Its existence partly is and partly is not intended by legislators; not intended, where they have noticed no defect in the law; intended, where they find themselves unable to define things exactly, and are obliged to legislate universally where matters hold only for the most part; or where it is not easy to be complete owing to the endless possible cases presented, such as the kinds and sizes of weapons that may be used to inflict wounds – a lifetime would be too short to make out a complete list of these. If, then, a precise statement is impossible and yet legislation is necessary, the law must be expressed in wide terms; and so, if a man has no more than a finger-ring on his hand when he lifts it to strike or actually strikes another man, he is guilty of a criminal act according to the written words of the law; but he is innocent really, and it is equity that declares him to be so.444

While Aristotle assigns the deficiency of the written law primarily to error on the part of the lawgiver, Ibn Rushd links it to the nature of human existence.445 Thus, Ibn Rushd explains, considering the changing nature of time, topoi (mawāḍiʿ), and people, no one could possibly have set down universal laws that would be appropriate for every time and place, since this array of yet-unseen possibilities was unfixed.

Ibn Rushd, next, expounds on the aim of the lawgiver, and finds it to be setting laws applicable for the most possible (aktharī), the majority of the people, the longest

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443 **MCAR** 1.13.10, ibid., 117.
possible time, and in most places. The qualifiers in this definition all point directly to the contingency of matter, pertinent to changes of time and place. In tying this back to the quote listed here, Ibn Rushd maintains, firmly, that the aim of the prudential lawgiver is to set down laws for most people and most topoi (mawāḍiʿ). The more the lawgiver deliberates on a law, by reaching a more fitting utility that could last longer and be applicable to more people, the better the law would be. Within this line of reasoning, to Ibn Rushd, no matter how much better and more applicable that law is, it will always remain in relative terms; particular laws, which are determined, cannot always be true (ṣādiqa) for all people and all times. In response to this, Ibn Rushd proposes the need to add to and subtract from the written law the amount of good and bad.

Differently put, Ibn Rushd adopts an ontological position on the contingency of matter—this seems to outline the aim of the lawgiver, namely: setting laws for the most possible (aktharī), the majority of people, the longest time, and most places. The aim of a prudent lawgiver, as such, is to do his best to protect laws from the contingency of matter, and try to set laws that are the most durable, all the while knowing that total protection from contingency is unachievable.

Given the changing nature of times and places, according to Ibn Rushd, a prudent lawgiver would try to protect laws against corresponding changes. This begets that the aim of the lawgiver who instituted invariable laws such is the case in Islamic law with a long lasting validity was to avoid defectiveness (khalal). From these observations, I propose that Ibn Rushd’s evaluation of Islamic law was based on the aim of the lawgiver, and further argue that this forcefully suggests that Islamic law admits rectification. By

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446 MCAR 1.13.10, Averroës, Commentaire 2, 117.
447 Ibid.
formulating this argument as a question on the teleological aim of the law, Ibn Rushd suggests that the prudential lawgiver’s is to protect justice against possible contingencies. More urgent recognition should be placed on Ibn Rushd’s position on this point. By linking the law to the realm of the “most possible,” I would strongly suggest, Ibn Rushd confirms that he does not see law as occupying the realm of truth, nor as the perfect law. This is crucial, I further argue, to understanding why Ibn Rushd submits the legal sphere under rhetoric. Both statements, discussed, highlight Ibn Rushd’s consistency in taking account of the contingency of matter; a prudent lawgiver, according to him, could not seek certainty, but can only attempt the most possible—a case manifested by the lawgiver of Islamic law.

In furthering this discussion, another homologous position on the contingency of matter, from *MCNE* merits citation here:

A cause de cela, l’erreur n’est ni dans la loi ni du fait du législateur, mais du fait de la nature de la chose. En effet, la base des choses volontaires change rapidement. Puisque le Maître de la Loi prononce des discours universels et qu’il arrive quelquefois en eux quelque chose d’autre que ce qu’il a eu pour intention en fait de justice et de rectitude, alors il procède immédiatement à une rectification que le législateur considère [comme nécessaire] dans ce qui est suivi d’erreur du fait qu’il a tenu a ce sujet un propos absolu. La correction de cette [loi] universelle est certes nécessaire, parce que nous savons que la condition que le législateur a laissée de côté, il l’aurait pas laissée de côté du fait du caractère changeant de la matière s’il avait été présent et de rectitude, alors il procède immédiatement à une rectification que le législateur considère [comme nécessaire] dans ce qui est suivi d’erreur du fait qu’il a tenu a ce sujet un propos absolu. La correction de cette [loi] universelle est certes nécessaire, parce que nous savons que la condition que le législateur a laissée de côté, il l’aurait pas laissée de côté du fait du caractère changeant de
la matière s’il avait été présent et était conduit par cela à établir une loi.⁴⁴⁸

In this statement, Ibn Rushd directly links the reason for the deficiency of the law, out of necessity, to the contingency of voluntary human actions. It follows, in his argument, that the deficiency is neither necessarily in the law, nor in the lawgiver, but is instead in the nature of the matter. He further contends that this is the very nature of voluntary things, i.e. they change. Had the lawgivers anticipated the change in the matter to come, they would have corrected the law, but of course anticipating all possible change is impossible. This contingency relates to the unavoidable change in the nature of voluntarily human actions, and this constitutes the central reason particular law requires rectitude over time. I take this position in *MCNE*, with Ibn Rushd’s views on the contingency of law and the aim of the prudential lawgiver, to confirm Ibn Rushd’s admission of this ontological position on the contingency of matter, and most significantly, to reveal important aspects of his philosophy of law in general: Ibn Rushd holds an inconclusive view of law.

The ontological deficiency, recognized and addressed in Ibn Rushd’s discussion of the nature of contingencies, and the aforementioned challenges to justice, together constitute a solid ground for Ibn Rushd to advocate for the necessity to rectify laws. It is within this process that he appropriates the necessity of the corrective conception of natural justice from Aristotle’s work. Hardly a repetition or a verbatim copy, this appropriation will be shown to disclose more concrete and original views of how law and ethic interact in Ibn Rushd’s conception of natural justice.

II. Ibn Rushd’s conception of natural justice

It is appropriate to address Ibn Rushd’s concern over the idea of law as the realm of the administration of justice in his *MCAR*, which is best illustrated in his discussion of injustices under the context of legal complaints (chapter thirteen): in his distinction between the written laws (*al-sunan al-maktūba*) and unwritten laws (*al-sunan gayr al-maktūba*). Paying close attention to Ibn Rushd’s view of the written and the unwritten laws shows his appropriation of Aristotle’s view of natural justice as a corrective notion to the law against possible deficiencies. He, however, marks his stamp in terms of conception of the function of this notion. A detailed discussion of the distinction between the written and the unwritten laws in Ibn Rushd’s *MCAR* follow, as a prerequisite to fully understanding the conception of natural justice and the functions of the unwritten laws in relation to the written laws in the context of just and unjust actions.

A. The written and the unwritten laws

Ibn Rushd introduces the division of laws into the written and the unwritten laws in two separate instances. Both times, he refers to this couplet under the scope of just and unjust actions, specifically under the notion of injustice as *ẓulm* and its categories.\[^{449}\]

Subscribing the Aristotelian distinction between particular-written laws and general-unwritten laws, Ibn Rushd retains some of the Stagirite’s examples, yet proposes his own understanding through a number of shifts from Aristotle’s explanations, as will be discussed here.

(1) Ibn Rushd first tackles this couplet of particular-written and general-unwritten

\[^{449}\] *MCAR* 1.10.5 and 1.13.1, Averroès, *Commentaire* 2, 84 and 112.
laws at the beginning of chapter thirteen, in his analysis of judicial speech related to complaints (shikāya). Following Aristotle’s agenda, Ibn Rushd sets forth the following definition of injustice (jūr): “We say, then, injustice consists of inflicting harm voluntarily in a manner which transgresses law [sunna].”\(^{450}\) By relating the definition of injustice to a voluntarily act of transgressing the law (sunna) in general, Ibn Rushd clearly aligns with Aristotle’s definition, which reads as follows: “we may describe wrong-doing as injury voluntarily inflicted contrary to the laws.”\(^{451}\) Then he follows Aristotle’s scheme and moves to relate this definition of injustice to laws, and expounds on a two-fold division of laws:

**Ibn Rushd:** And laws [al-sunna] are of two kinds: some are particular [khāṣṣa] and others are general [ʿāmma]. Particular laws are written laws [al-sunan al-maktūba], which we fear would be forgotten unless they were written down; and these [particular laws] are specific to each people [qawm] or each community [umma]. As for the general laws, they are unwritten laws [al-sunan al-ghayr al-maktūba], which are acknowledged by [yaʿtarif bihā] all people such as filial piety [birr al-wālidayn] and thanking the benefactor [shukr al-munʿim].\(^{452}\)

**Aristotle:** Law is either special or general. By special law I mean that written law which regulates the life of a particular community; by general law, all those unwritten principles that are supposed to be acknowledged everywhere.\(^{453}\)

The purpose of this distinction between laws as either particular or general is to explain that injustice can be inflicted on someone based on a transgression of either particular or general law. While Ibn Rushd’s distinction between particular and general laws concurs with Aristotle’s in this passage, it patently makes some significant

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\(^{450}\) *MCAR* 1.10.5, Averroës, *Commentaire* 2, 84. Cf. also Aouad (*Commentaire du Commentaire*, 155).


\(^{452}\) *MCAR* 1.10.6, Averroës, *Commentaire* 2, 85.

divergences. Ibn Rushd first identifies particular/written as specific to every people (qawm), but also adds “each community” (umma); then he deems unwritten/general laws common to all people. Here, Ibn Rushd is very clear in identifying three different entities of human organization: qawm, which could imply a tribal entity; umma as larger entity of community which could encompass qawm; and finally al-jamī’, which bears a universal dimension of pertaining to all people regardless of their tribal lineage or political association to a community. Ibn Rushd indicates, most precisely, that the written laws need to be put in writing, so as not to be forgotten. The precision of this iteration entails a concern over the risk of forgetting the written laws, and this has no equivalent in Aristotle’s rendition. His reference to both tribe and umma can be taken to mean that he intended to reflect the different political entities in the then-current Islamic context.

The remark may be safely interpreted to exclude the unwritten laws, since they are acknowledged by all people. This distinction could suggest that while the written laws bear a contractual dimension—therefore needing to be decreed—the unwritten depend only on people’s acknowledgment. Furthermore, Ibn Rushd provides examples for the unwritten laws not found in Aristotle’s rendition, such as filial piety and thanking the benefactor. It is worth noting that while Aristotle does not mention thanking the benefactor as an example here, he does so later in his text when listing the conduct that increase honor and decorations. The association between the unwritten laws and thanking the benefactor is significant, when considering that Ibn Rushd apprehended thanking the benefactor as part of praiseworthy premises (al-maḥmūdāt) which bears a

455 Cf. ibid.
456 “Requital of our benefactor, readiness to help our friends.” Aristotle, Rhetoric I, 13, 1374a 18-25.
universal acceptance among people. Consequently he links the unwritten laws to the *maḥmūdāt*. This begs the question is the shared nature of the unwritten law based on the universal acceptance of praiseworthy premises; if so, what does that imply? To answer these questions, I shall further consider this distinction and its function. So far, the present study hopes to have shown that Ibn Rushd endorses Aristotle’s view on dividing the laws into written particular legal principles that are specific to one community, and unwritten principles that are universal on virtue of being acknowledged by everyone, an example of which would be thanking the benefactor, which has a universal acceptance among both people and philosophers.

(2) Ibn Rushd goes back to further elucidate his couplet the written and the unwritten laws, in a rendition that endorses some of Aristotle’s views on the particular and general laws, but equally makes distinctive derivations, as shown in a comparative consideration of Ibn Rushd’s discussion, quoted here, followed by comparable section from Aristotle’s work:

**Ibn Rushd:** As for laws [*al-sunan*] that make known what is unjust [*jūr*] and what is not, some are specific to a group of the inhabitants of a city; others are universal to all of the inhabitants of the city [*ahl al-madīna*]. Of these two sorts of laws, some are written [*maktūba*] and some unwritten [*ghayr maktuba*]. What I mean by the unwritten laws are those that are in the nature of all people [*ṭabīʿat al-jamīʿ*]. These are what all people consider just or unjust by nature although they had no agreement [*ittifāq*] or contract [*taʿāqqud*] among one another that is between each one of them. From this point of view, these laws are sometimes called general. It is unknown when or by whom these laws were laid down [*wuḍiʿat*]. These laws oftentimes contradict written laws so that they are used to persuade [*fa-yuqnaʿ bihā*] of what was believed to be unjust based on written laws to be just. As recounted by Aristotle about a famous man among them [among the Greeks], when he was reported to have been buried not in accordance with laws of interment particular to his
country, he was defended on the basis that he was buried according to the general law existing in nature; thus his interment was just and not unjust. As for written laws specific to every community, they are similar to what is held by some people on the impermissibility to kill creatures with souls – by that I mean animals, and that it is unjust. For this is neither obligatory [wājib] according to all people nor according to nature [bi al-ṭab’].

Aristotle: By the two kinds of law, I mean particular law and universal law. Particular law is that which each community lays down and applies to its own members: this is partly written and partly unwritten. Universal law is the law of nature. For there really is, as everyone to some extent divines, a natural justice and injustice that is common to all, even to those who have no association or covenant with each other.

The first distinction to note here is that unlike Aristotle, who maintains that particular law could both be written or unwritten to account for customs, Ibn Rushd keeps a clear divide in holding that the general law is unwritten; the particular is written.

Second, Ibn Rushd proceeds to specify the natural character of unwritten law. This natural dimension is defined in Aristotle’s quote under the laws of nature. Concurring with the Stagirite, Ibn Rushd maintains that the unwritten law is a shared natural view of what is just and unjust among all people that does not require having an agreement. After confirming the view which links the unwritten laws to natural justice shared among people, Ibn Rushd eliminates divination, and refers exclusively to the unwritten laws as what people considered to be just or unjust based on a shared nature. Then, he extrapolates that no one knows by whom or when the unwritten laws were originated.

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457 MCAR 1.13.2, Averroès, Commentaire 2, 113.
459 See Aouad, “Commentaire du Commentaire,” 188.
460 Aristotle, Rhetoric I, 13. 1373b 4-17.
461 See Aouad, “Commentaire du Commentaire,” 188.
462 Cf. ibid.
After demarcating the properties of the written and the unwritten laws, Ibn Rushd unravels two important dimensions pertaining to the relation regulating the dynamic between them. Ibn Rushd discloses the possibility of contradiction between the written and the unwritten laws, which entails the intervention of the unwritten laws to mitigate this contradiction. Ibn Rushd indicates that the unwritten laws can be used to persuade people that what is regarded as unjust based on written laws is, instead, just. This last allusion to persuasion and the contradiction between the written and the unwritten laws has no equivalent in Aristotle. In addition, the persuasive function of the unwritten law can also be detected from Ibn Rushd’s interpretation of Antigone. In citing Sophocles’s Antigone, who in an act of defiance against the tyrant of Thebes sought to secure a decent burial for her brother Polyneices, Aristotle explains that there was conflict between the tyrant of Thebes’ decision to prohibit the burial of Polyneices and the natural law that required burial. Ibn Rushd, instead, construed the contradiction to be between the written and unwritten laws on the matter of the burial of people. In identifying these laws as contradictory, he states that the unwritten laws are used to persuade people to believe that something unjust according to the positive law is actually just. This persuasive role serves as a solid ground for associating the unwritten laws with persuasion—the ultimate aim of rhetoric.

Ibn Rushd, to recap, seems clear about the natural view of the unwritten laws. This natural dimension suggests innate capacity to distinguish what is just and unjust. Still, Ibn Rushd does not divulge the origin of this natural view. In addition he alludes to the necessity of using the unwritten laws to persuade with what is just, without clearly

463 Aristotle Rhetoric I, 1373b 4-17.
464 Ibid.
elucidating how the unwritten fulfills this persuasive function. What remains unclear, in other words, lies in asking what exactly is the basis for this naturally shared dimension of the unwritten laws? What does its relation to justice entail? And, lastly, how does persuasion play a role in it?

B. Justice under the written and the unwritten laws

Ibn Rushd defines injustice as a transgression against laws, the written and the unwritten laws. In addition, he equates the unwritten laws to what is naturally perceived as just or unjust to people, and advocates the necessity of using them to persuade on what is just. How does he, then, understand justice in relation to the written laws? And how are the unwritten laws used to persuade about what is just? The answer to these questions maybe located in Ibn Rushd’s views of the injustices to both the written and the unwritten laws, and, interconnectedly, of the corrective role of the unwritten laws and their relation to the written laws. Analyzing this will be the task in what follows.

Ibn Rushd discloses an understanding of injustice in a plural sense, which suggests different categories of injustices that either transgress the written or the unwritten laws. Both types of laws define what is just or unjust, and what is good or bad, in different voluntary human actions. This is first mentioned in *MCAR* 1.13.8 and 1.13.9 quoted here:

**Ibn Rushd:** He [Aristotle] said: There are laws for what are inflicted injustices [*al-zalāmāt*] and for those that are not inflicted injustices, while for others there are no laws. As for those that have laws, some are written laws and others are unwritten. Each of these [laws] gives a definition to what is just [*al-ʿadl*] and unjust [*al-jūr*], good [*al-khayr*] and bad [*al-sharr*]. In fact the good

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466 *MCAR* 1.10.5, Averroës, *Commentaire* 2, 84.
according to unwritten laws are the acts that the more man adds of these to infinity, the more
glorification [ḥamād], praise [madḥ], honor [karāma], and noble standing [rifʿa], attaches to him
such as the cases of helping one’s friends and rewarding good-doers. The bad according to
unwritten laws is the act that the more a man adds of it, the more blame [al-madhamma] and more
shame [al-hawān] attaches to him, and that also adds to infinity such as the cases of ingratitude
toward good deeds and harming one’s friends. As for good and bad in written laws, they are
determined [muqaddar] one can neither add to nor subtract from it. 468

Since this is so and determined laws neither apply to every individual nor every time and every
place, they [the determined laws] are not sufficient [kāfiya] to determine [tuqaddir] the good and
bad in the conduct of every human individual. So this calls for addition to and subtraction from
them [i.e. the written laws] according to what is required by the unwritten law. It is necessary to
have in the unwritten law a written justice and something that goes beyond this written justice; by
virtue of either an addition to or a subtraction from the written law. 469

Ibn Rushd defines unjust actions based on the written and the unwritten laws, in
the discussion quoted here. More specifically, he maintains that both the written and the
unwritten laws define what is just and unjust or good and bad. An important distinction
between the two is linked to “the quantity” of good and bad. For the unwritten laws, the
quantity of good and bad is infinite, and therefore can be added or subtracted. In the
written laws, however, the quantity of good and bad is finite (muqaddara), and
determined, and cannot be added to nor subtracted from. Identifying a finite quantity of
good and bad in the written law implies the recognition of deficiency in the written laws.
Specifically, Ibn Rushd refers to the contingency of human actions, which cannot always
be applicable to all people at all times or places. The written laws’ fixed quantity of good

468 MCAR 1.13.8, Averroës, Commentaire 2, 116.
469 MCAR1.13. 9, Ibid., 116-117.
and bad would eventually prove insufficient. This implies that while, in the unwritten law, the quantity of good and bad is in harmony with the infinitude of human actions, and is proper to all time and places; the written laws are fixed in terms of the principles of good and bad, and cannot maintain the harmony between the changing infinite human actions and the finite quantity of good or bad it bears. Still, the deficiency of the written laws is only relevant to the quantity of good and bad using the unwritten laws. For this reason, Ibn Rushd calls for a correction of this deficiency in the value good and bad. He specifies that one should add or subtract good or bad to the written justice (al-'adl al-maktūb), i.e. the quantity of justice based on the written laws. In other terms, the written laws are coupled to the unwritten laws. The written laws are just, and their deficiency is tied to the quantity of good and bad. This deficiency can be either related to the contingent nature of human action, the human fallibility of the judge who fails to consider the unwritten laws, or an undue generalization of universal principle as seen in the example of the law of jihād. In this case, Ibn Rushd shows how the call to jihād is not absolute because there are circumstances when peace is the better course of action.

Curiously, this whole discussion of the written and the unwritten laws, and the rectifying dimension of the latter in the quoted passages of MCAR, is congruent with Ibn Rushd’s discussion of justice in MCNE. Commenting on Aristotle’s discussion of natural justice based on political and natural law, Ibn Rushd espouses a similar view of particular and general law, but with a specific take on legal justice and natural justice. To illustrate this position, here, I present a translation by Aouad from the Latin text of Ibn Rushd and Feldman’s translation from the Hebrew texts of Ibn Rushd, as the Arabic original is not extant along with Aristotle’s rendition.
In his French translation of the Latin text of Herman the German, Aouad translates this reference as follows:

**Ibn Rushd:** [Aristotle dit: Une partie de la justice politique est naturelle et légale, et une autre est légale seulement, c’est à dire positive. Or la justice naturelle est celle qui est valable en tout lieu et en tout temps, et elle n’a pas de valeur relative. Quant à la loi non-naturelle, elle est certes par son genre quasi naturelle, et il n’y a pas en elle de diversité. Mais, parce qu’elle a une valeur relative, elle se diversifie selon les différentes nations, par exemple la justice instituée, avec une valuer relative, dans les questions de décollations, d’offrandes et de prières instituées dans les lois et les marches.\(^{470}\)

In the Hebrew text, according to Feldman’s Translation, Ibn Rushd writes:

**Ibn Rushd:** [Aristotle] said: Part of political justice is natural legal, and part legal only; he means to say, conventional. As for natural justice, it is that whose power is one in every place and at every time, and in which no change occurs. Whereas the legal, which is not natural, truly with regard to class is quasi-natural [Hebrew: as if it were natural] and there is no difference [Arabic \(khilaf\)] in it, except in quantity [Arabic \(qadr\)] it differs from nation to nation, like the conventional justice on the quantity of sacrifices and offerings and prayers laid down by religions and [revealed] Laws.\(^{471}\)

**Aristotle:** Of political justice (\(politikon dikaion\)) part is natural (\(phusikon\)), and part is legal (\(nomikon\)), natural, that which everywhere has the same force and does not exist by people’s thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent, e.g. that a prisoner’s ransom shall be a mina, or that a goat and not two sheep shall be sacrificed, and again all the laws that are passed for particular cases, e.g. that sacrifice shall be made in honour of Brasidas and the provisions of decrees.\(^{472}\)

\(^{470}\) Quoted in Aouad, “Averroès, Commentaire Moyen à l’Éthique à Nicomaque d’Aristotle,” 4a;
\(^{471}\) Quoted in Feldman, “Reading,” 262.
As both translations show, Ibn Rushd recognizes Aristotle’s position on political justice but makes his own addition. Political justice is seen as both natural and legal by Aristotle. Ibn Rushd expands on this by claiming that political justice can be natural and legal, or legal only. What can be taken from this reference is the following: political justice has two dimensions, one “natural legal,” the other simply legal. This assumption correlates with his idea in *MCAR*: first, that pure justice is based on the unwritten laws, which are in the nature of people and shared by all and second, that written laws correspond only to legal justice. Natural justice is universal and is applicable to all times and all peoples, but justice based on particular or positive law is only relative—as seen in the example of sacrifice within a different community—and can be changed, as in the example of sacrifice and prayers. This can also be connected to Ibn Rushd’s understanding of laws based on their quantity. While the unwritten laws exhibit a harmonious relation between the law and the value (bad or good) of an act, the written laws cannot always be sufficient for all people, at all times. Again, Ibn Rushd deems the written laws, or what he calls legal justice, as part of what he labels political justice. Still he recognizes their relative value that is particular to every nation, unlike the universal value of the unwritten law. Despite these, Ibn Rushd clearly adheres to Aristotle’s conception of natural justice both in *MCAR* and *MCNE*, but curates his own understanding of the relation between the written and the unwritten laws. Ibn Rushd’s view will be more accessible if examined against his understanding of Aristotle’s natural justice.
C. Ibn Rushd’s construal of Aristotle’s natural justice

Aristotle’s view on the necessity to rectify written legal principles, explored in his different treatises, pertains to a view of natural justice.\footnote{Cf. Chapter 1 in this dissertation.} One of the most palpable definition of natural justice in Aristotle’s work, discussed in my first chapter, has been located in \textit{The Rhetoric}. I would further propose that juxtaposing Aristotle’s definition with that of Ibn Rushd can help establish the basis of Aristotle’s view, as well as the commentator’s interpretation. Aristotle’s rendition along with Ibn Rushd’s, which were already quoted merit to be cited again to better grasp an important distinction they make.

\textbf{Ibn Rushd:} He [Aristotle] said: There are laws for what are inflicted injustices [\textit{al-zalāmāt}] and for those that are not inflicted injustices, while for others there are no laws. As for those that have laws, some are written laws and others are unwritten. Each of these [laws] gives a definition to what is just [\textit{al-ʿadl}] and unjust [\textit{al-jūr}], good [\textit{al-khayr}] and bad [\textit{al-sharr}]. In fact the good according to unwritten laws are the acts that the more man adds of these to infinity, the more glorification [\textit{ḥamd}], praise [\textit{madḥ}], honor [\textit{karāma}], and noble standing [\textit{rifʿa}], attaches to hum such as the cases of helping one’s friends and rewarding good-doers. The bad according to unwritten laws is the act that the more a man adds of it, the more blame [\textit{al-madhamma}] and more shame [\textit{al-hawān}] attaches to him, and that also adds to infinity, such as the cases of ingratitude toward good deeds and harming one’s friends. As for good and bad in written laws, they are determined [\textit{muqaddar}] one can neither add to nor subtract from it.\footnote{\textit{MCAR} 1.13.8, Averroès, \textit{Commentaire} 2, 117.}

Since this is so and determined laws neither apply to every individual nor every time and every place, they [the determined laws] are not sufficient [\textit{kāfiya}] to determine [\textit{tuqaddir}] the good and bad in the conduct of every human individual. So this calls for addition to and subtraction from them [i.e. the written laws] according to what is required by the unwritten law. \textbf{It is necessary to}
have in the unwritten law a written justice ['adl maktūb] and something that goes beyond this written justice; by virtue of either an addition to or a subtraction from the written law.\textsuperscript{475}

Aristotle: We saw that there are two kinds of right and wrong conduct towards others, one provided for by written ordinances, the other by unwritten. We have now discussed the kind about which the laws have something to say. The other kind has itself two varieties. First, there is the conduct that springs from exceptional goodness and badness, and is visited accordingly with censure and loss of honor, or with praise and increase of honor and decorations: for instance, gratitude to, or requital of, our benefactors, readiness to help our friends, and the like. The second kind makes up for the defects of a community’s written code of law. For equity is regarded as just; it is, in fact, the sort of justice, which goes beyond the written law.\textsuperscript{476}

Aristotle’s rendition identifies types of right and wrong human conducts toward others in relation to the written and the unwritten laws. Focusing on conduct, which is linked to the unwritten, Aristotle outline two varieties [see highlighted sections]. The first variety Aristotle relates to the human conduct toward others, on the basis of the unwritten law, to value exceptional goodness and badness and gives examples such as thanking the benefactor and readiness to help friends, among others. While exceptional good conduct will prompt praise, he adds, exceptional bad conduct will generate blame. As for the second variety, associated to the unwritten law, Aristotle underlines its corrective role to rectify the deficiencies of written principles. Finally, he links these two dimensions to equity, or what is often known as natural justice, which he defines as going beyond the written law. Under this scheme, Aristotle divides equity or natural justice on the basis of

\textsuperscript{475} MCAR 1.13. 9, Ibid., 116-117.
\textsuperscript{476} Aristotle, Rhetoric I. 13, 1374a 18-25.
the unwritten law into first, the quality of conduct which bears infinite good or bad that would generate blame or praise, and second, the corrective function of the unwritten law. Likewise, Ibn Rushd adheres to the same subdivisions of natural justice, but adds some concrete elaboration, as discussed next.

(1) The value of conduct on the basis of unwritten laws

First Ibn Rushd identifies right and wrong conduct inflicted on others on the basis of the written and the unwritten laws. Then, he adds that it is the written and the unwritten laws that circumscribe (yarsum) injustices, and notes that goodness and badness are likewise defined based on the unwritten and the written laws.477

As for the good acts on the basis of the unwritten laws, Ibn Rushd ascribes to them exceptional features. Specifically, he notes that in these are actions, that the more a person maximizes good acts, toward infinitude, and the more he or she maximizes his or her glorification (ḥamd), praise (madḥ), honor (karāma), and/or noble standing (al-rifʿa). Two illustrative examples of good action based on the unwritten laws are helping friends and rewarding the benefactor. As for bad acts based on unwritten laws, Ibn Rushd explains that the more a person maximizes these, the more blame and disdain he or she will gain. The two illustrative examples of bad actions based on unwritten laws given here are ingratitude toward good deeds (kufr al-iḥsān), and harming one’s friend (al-isāʾa ilā al-aṣdiqāʾ).

(2) The Corrective role of the unwritten laws

Ibn Rushd upholds the same division and advances the necessity to rectify the written laws. Still, he makes some significant development and offers more concrete views on this corrective function. As I noted earlier, Ibn Rushd demarcates the written and the

unwritten laws on the basis of quantity of good and bad and thus calls for rectification, using the unwritten laws by adding or subtracting good and bad to the written laws. Ibn Rushd’s justification hinges on the argument that, given the unlimited nature of human actions, and the limited nature of the quantity of good and bad in the written laws, a deficiency is inescapable. As for the unwritten laws, the infinitude of human actions is in harmony with the infinitude of the quantity of good and bad. To be more precise, the unwritten laws retain the capacity to supplement the bad and good, and to harmonize both with the changing nature of human actions. To better illustrate his point, Ibn Rushd provides concrete examples from the Islamic legal context such as *iḥsān, ḥisba, ḥilm,* among others, to illustrate the different possible equations where good or bad is added or subtracted, as shown in the following

1. **Equation 1:** addition (+) to the amount of good (*al-khayr*) in written law = beneficence (*iḥsān*).

2. **Equation 2:** addition (+) to the amount of bad (*al-sharr*) in written law = corrective accountability (*ḥisba*).

3. **Equation 3:** subtraction (-) of the amount of bad (*al-sharr*) in written law = forgiveness (*ṣufḥ*), forbearance (*ḥilm*), and toleration (*iḥtimāl*).

In adhering to Aristotle’s division of natural justice, Ibn Rushd makes some digressions. First, he incorporates the infinitude of good and bad anchored in the value of conduct into the corrective view of natural justice under the unwritten laws. To be more specific, Ibn Rushd draws a link between the accretion in the value good and bad of the value of conduct to channel the infinite character of good and bad into supplementing quantities of good and bad into the written laws. Furthermore, unlike Aristotle, who

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478 Cf. ibid.
associates praise and blame only with the first dimension of natural justice, Ibn Rushd anchors the feature of praise and blame as an endorsement of the corrective function of the unwritten laws noting that: “For addition [ziyāda] and subtraction [nuqšān] become preferred only when they are attached to praise [madḥ] and honor [karāma].”

Consequently, I argue that Ibn Rushd links the ethic of good and bad and its infinitude, which generates praise and blame in relation to both the value of human conduct as well as the corrective function of natural justice. Such development is not seen in Aristotle’s position, as illustrated in the following table:

<table>
<thead>
<tr>
<th>Table 4: Natural justice in Aristotle and Ibn Rushd’s views</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Aristotle</strong></td>
</tr>
<tr>
<td>Natural justice</td>
</tr>
<tr>
<td>1. Quality of conduct based on good and bad → <strong>praise and blame</strong></td>
</tr>
<tr>
<td>2. Corrective function</td>
</tr>
</tbody>
</table>

Under this prism, I conclude that Ibn Rushd remains faithful to the Stagirite’s subdivision but adds a significant change, which leads to integrating the subcategories associated to natural justice under the unwritten laws. Ibn Rushd’s natural justice incorporates also the written laws, to which Ibn Rushd adds or subtracts quantity of good based on the unwritten laws.

In one of the examples explained above, Ibn Rushd shows how an addition of good to written laws results into beneficence. This affirms also my previous point that the written laws are coupled to the unwritten laws. This strong affinity between the written and the unwritten law also asserts that Ibn Rushd has an original understanding of

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479 MCAR 1.13.11, Averroès, Commentaire 2, 117.
Aristotle’s natural justice. To better grasp this peculiar view, what follows will attempt to reexamine Ibn Rushd’s discussion of justice and beneficence in his *MCNE*.

**Ibn Rushd:** Les deux sont louables, je veux dire la justice et la bienfaisance. Il n’y a pas en elles quelque chose de contraire par elles mêmes, car elles sont louées selon le plus et le moins. Donc, si ce qui est en plus [la bienfaisance] est meilleur que la justice, cela relève alors de l’espèce de la justice: cela n’est pas d’une espèce autre que la justice, mais les deux relèvent d’un genre unique. Cependant l’hésitation et le doute est de savoir comment on trouve, dans la justice, quelque chose de meilleur et de supérieur, si elle est indivisible du fait qu’elles est égale, a moins que cela ne soit résolu par le fait que la bienfaisance n’est pas la justice instituée par la loi, mais qu’elles est une rectification de la justice legal.\(^480\)

Investigating the relation between beneficence (bienfaisance) and justice, as well as the relation between a good action and justice, Ibn Rushd points to some confusion between the two. As a way to settle this confusion, Ibn Rushd posits that they both relate to justice but pertain to two different things. While both are praiseworthy based on the utmost and the least, he explains, beneficence is not justice as determined by the law but is rather a rectification of legal justice. This is consistent with his view in *MCAR*, which states that written justice is what is established by the law and the unwritten is the rectification of the written laws.

This analysis of the properties of the written and the unwritten laws as well as the corrective function of the unwritten laws form the basis for Ibn Rushd’s appropriation of Aristotle’s natural justice in *MCAR*. In his espousal of Aristotle’s natural justice, Ibn Rushd, however, integrates the ethic of good and bad and their infinite character associated to the value of exceptional conduct with the needed value to rectify the written laws. To this end, he juxtaposes the determined criteria of the written laws, which bears a

\(^{480}\) Aouad, “Averroès, Commentaire Moyen à l’Éthique à Nicomaque;” 5a.
fixed amount of good and bad, to the infinite criteria of the unwritten laws to which the amount of good and bad can be added or subtracted. Furthermore, he shows that in the same way the good and bad conduct elicits praise and blame, the corrective function of natural justice—accomplished through a process of addition or subtraction of good and bad to the deficient written laws—prompts praise or blame among people. In integrating both the infinitude of good and bad, and the public endorsement through praise and blame to the corrective function of law, Ibn Rushd offers a more coherent view of natural justice, but also provides concrete formulation of this process under the modalities of addition and subtraction, which is summarized in the table below. Such view was also confirmed in his MCNE, which integrates justice and beneficence, upholding the necessity to rectify the legal justice already established in the written laws. Still this perception of natural justice does not answer what the origin of this view is, and how it can be contextualized under legal institutions, and finally its rapport to rhetoric is?

Table 5: Natural justice under the written and the unwritten laws

<table>
<thead>
<tr>
<th>Type of Laws</th>
<th>Definition of written and unwritten</th>
<th>The relation to justice</th>
<th>The relation to the value of good and bad</th>
<th>The relation to other laws</th>
<th>Function</th>
</tr>
</thead>
<tbody>
<tr>
<td>Particular-written Law</td>
<td>-Particular</td>
<td>The just and good is defined based on the written law -Fixed good and bad</td>
<td>Contradict with unwritten</td>
<td>Determined / fixed and to attain relative justice</td>
<td>1. Good and bad conduct → praise and blame</td>
</tr>
<tr>
<td></td>
<td>-Prescribed</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>-Contractual</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>General-unwritten Law</td>
<td>-Universal (shared by all people)</td>
<td>-The just and unjust is naturally acknowledged by all people -Unfixed good and bad</td>
<td>Contradict with the written and is used for persuasion</td>
<td></td>
<td>2. Rectification: Written justice + or – of good</td>
</tr>
<tr>
<td></td>
<td>-No one knows the origin</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>E.g.: mağmūdāt</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
III. Natural justice: Masses vs. elite under rhetoric

In constructing his conception of natural justice, Ibn Rushd ascribes a universal value to justice shared by all people, which suggests that natural justice is accessible to everyone. This shared characteristic, and its accessibility to all people invites an inquiry into the origin of natural justice. To put it differently: What is the basis of natural justice? Is it epistemological or ontological? An inquiry into the origin of natural justice leads to questions about its practical implementation within a legal context. Assuming that the view of justice is natural and known to all people, then how can this notion be implemented in the court of justice?

Accepting this assertion on the accessibility of justice to all and its legal context might posit a challenge when measured against Ibn Rushd’s view on the judges’ ineptitude to fathom universal matters related to justice. How can this universal view shared by all people, which would also include judges, be reconciled with this claim against them? Also if judges are incapable of implementing natural justice, how could this notion have a practical value? To resolve this tension, I argue that the essence of natural justice and its practical view in Ibn Rushd’s scheme distinguishes between two modes associated to natural justice. While the first mode admits natural justice in potentiality and is particular to the masses, the second discerns natural justice in actuality and is particular to the elite, who can materialize it into concrete legal cases. Such view is
shaped by Ibn Rushd’s legal context and hinges on the epistemological view of rhetoric, which is the basis of Ibn Rushd’s philosophy of law.

A. Natural justice in potentiality

That Ibn Rushd labored over the question of natural justice, and its accessibility to the masses, can be inferred from his discussion of specific, clarifying dimensions. First, he assigns the accessibility of natural justice to a predisposition shared and acknowledged by all people. Second, he underscores its manifestation through people’s approval of the rectification of laws. Left unexplained here are two points: what is the basis for this inclination, and how can the basis for people’s approval of natural justice be discerned.

1. The masses’ natural inclination to natural justice

As already discussed, Ibn Rushd persistently underlines the universal nature of natural justice under the mantle of the unwritten laws. As seen in *MCAR* 1.10.6, Ibn Rushd makes a clear distinction between the written and the unwritten laws. Unlike the written laws which need to be drafted, Ibn Rushd proposes that the unwritten laws are acknowledged by everyone, he writes: “As for the general laws, they are unwritten laws [*al-sunan al-ghayr al-maktūba*], which are acknowledged by [*ya’tarif bihā*] all people.” While this association with an implicit acknowledgement is found in Aristotle, a subtle difference can be seen when revisiting how Ibn Rushd equates acknowledgement with assent in *MCAR* 1.1.11. More specifically, Ibn Rushd defines how one acknowledges a matter: He underlines that people only acknowledge a matter once it

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481 *MCAR* 1.10.6, Averroës, *Commentaire* 2, 85.
has been established inside of them.\textsuperscript{482} In the case of the unwritten laws, it is suggested that the acknowledgement is established within people as it is shared among them based on their nature. This observation needs to be supplemented with other references in which Ibn Rushd further underscores the natural basis of the unwritten laws. These two are most relevant to this discussion:

- A third topic is that written laws are onerous for they constrain a human to determined things, while the general law are suitable to people’s nature and desire.\textsuperscript{483}

- A six topic is that the written law is based in opinion for it is imparted to us from another person while the unwritten is not and is known to us based on nature.\textsuperscript{484}

In the first statement, Ibn Rushd depicts the written laws as onus, which implies the harsh nature of the written laws (\textit{mashaqqa}), and contrast them to the natural view of the unwritten laws, which correspond to the nature and desires of people. Then, he juxtaposes the presumptive value of the written laws, which are often imparted to us from someone else, to the natural and individual view of the unwritten laws, which one can acknowledge based on one’s own. Again this comes to affirm the natural value of the unwritten laws, but does not unravel their origin. An additional difficulty to comprehending Ibn Rushd’s claim on the natural inclination to natural justice is his earlier view discussed elsewhere,\textsuperscript{485} in which he contends that people are attracted to unjust actions.\textsuperscript{486} Such dim view on human nature might be in contrast with the universal value to natural justice?

This seemingly conflicting view, fortuitously, maybe explained through specific references in the works of Ibn Rushd. Ibn Rushd draws a link between the unwritten laws

\begin{thebibliography}{99}
\bibitem{482} \textit{MCAR} 1.1.11, ibid., 7.
\bibitem{483} \textit{MCAR} 1.15.7, ibid., 125.
\bibitem{484} \textit{MCAR} 1.15.10, Ibid.
\bibitem{485} See my discussion on the unexamined opinion chapter two in this dissertation.
\bibitem{486} \textit{MCAR} 1.1.14, ibid., 8.
\end{thebibliography}
and thanking the benefactor and filial piety stating the following “…As for the general laws, they are unwritten laws [al-sunan al-ghayr al-maktūba], which are acknowledged by [ya ‘tarif bihā] all people such as filial piety [birr al-wālidayn] and thanking the benefactor [shukr al-munʿim].”

This correlation between the unwritten laws and thanking the benefactor relates to another discussion in MCAR, where Ibn Rushd also associates thanking the benefactor to praiseworthy premises (muqaddimāt maḥmūda) in MCAR 1.2.28. As already explained, Ibn Rushd apprehends the use of praiseworthy premises under the scope of rhetoric.

And knowledge of all this belongs to the art of logic. For knowing the thing that is true and its verisimilitudes pertains to the same faculty, I mean to this art itself. For if the rhetorical convictions are not true they are verisimilar to what is true. Also people are disposed by nature toward the knowledge of what is true and in most cases they envision what is true and act upon it. And praiseworthy matters, from which enthymemes are derived, are verisimilitudes for they substitute for the masses to what is true. And verisimilitudes may enter into the science of truth, which is the Science of logic.

In this statement, Ibn Rushd makes important points. The first iterates that people are naturally predisposed toward knowledge, with the important corollary that they, in most cases, act upon. The value of knowing what is praiseworthy is positioned in a sense of action. Additionally, he contends that praiseworthy premises are used with people as a substitute for truth. Ibn Rushd, in doing so, associates the importance of praiseworthy premises with the masses. This could be linked to the universal value of thanking the benefactor.

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487 MCAR 1.10.6, Ibid., 85.
488 Ibid., 21.
489 MCAR, 1.2.28, Averroès, Commentaire 2, 21. On divergences between Ibn Rushd and Aristotle in relating the maḥmūdāt to thanking the benefactor. See also Aouad, Commentaire du Commentaire, 51.
490 MCAR 1.1.12, Averroès, Commentaire 2, 8.
benefactor and filial piety, which are accepted among all people—a position Ibn Rushd uphold also in his SCT.491

Their matters, as has been previously [explained], are the generally accepted premises. There are of [different] classes: (a) Some are generally accepted by everybody, and this is the most noble class. It is possible for all of the different nations to meet in agreement on this one despite the variance in their sects and in their natural dispositions. An example is [the premise] that it is good to thank a benefactor or that it is necessary to respect one’s parents.492

From the hierarchy of the different widely accepted premises, Ibn Rushd exalts the maḥmūdāt to which he relates examples of the unwritten laws, such as thanking the benefactor and filial piety. As discussed elsewhere, Ibn Rushd’s exaltation of maḥmūdāt is not based on a truth condition but on notability (sharaf).493 This explains why he declares the maḥmūdāt to be a substitute of truth for the public.494 This is mostly tied to the fact that rhetoric uses praiseworthy premised based on the unexamined opinion, accessible to all people. In this vein, Ibn Rushd in his MCAR 2.13.19 unravels how what is truly widely accepted premises, such as the maḥmūdāt in this case, is admitted on the basis of the unexamined opinion. In the discussion of the unexamined opinion, the present study underscores Aouad’s finding on the quasi-rational nature of the unexamined opinion, which makes it accessible to the public.495 Such accessibility hinges on its

492 Ibid.
493 Ibid.
494 MCAR 1.1.12., Averroès, Commentaire 2, 7-8.
rudimentary rationality, which provides some beliefs to people before they are put under scrutiny. This suggests that, in linking the unwritten laws through the examples of thanking the benefactor and filial piety to the *mahmūdāt*, Ibn Rushd grounds this natural inclination to these beliefs in the quasi-rational basis of the unexamined opinion. This relation to the unexamined opinion makes the unwritten laws accessible to all people.

Furthermore, Ibn Rushd ascribes a practical value to this inclination, which also is central to his view of the unwritten laws. Thus he upholds, “[a]lso people are disposed by nature toward the knowledge of what is true and in most cases they envision what is true and act upon it.”\(^{496}\) In fact this practical value associated to filial piety can be further grasped by looking at some similar position in to Fārābī’s *Tanbihāt*, where he identifies two types of knowledge: (1) knowledge which entails only belief and (2) knowledge which is aimed toward action. To illustrate this distinction, he refers to thanking the benefactor and other ethical maxims. He writes

> It is appropriate now for us to discuss excellent discernment, so we will first discuss excellent discernment and then the means whereby we obtain it. I say that excellent discernment allows us to come into possession of the knowledge of everything people can know. It is of two types. One type of knowledge can be known [but] not acted upon by people. It is simply an object of knowledge, like our knowledge that the world is created and that God is One, and our knowledge of all the things available to sensory perception. The other type of knowledge can be known and acted upon, like our knowledge that honoring our parents is good, that disloyalty is bad, and that justice is a virtue. It is also like the knowledge [imparted by] what produces healthiness. The perfection of what can be known and acted upon is that it be acted upon. Whenever knowledge of these things comes about and is not immediately followed by action, it is purposeless knowledge

\(^{496}\) d’Aristote reconsidérés par Fārābī, ou le concept de point de vue immédiat et commun,” *Arabic Sciences and Philosophy. A Historical Journal* 2 (1992), 133-180.

\(^{496}\) *MCAR* 1.1.12, Averroës, *Commentaire* 2, 8.
lacking benefit. The perfection of what can be known but not acted upon by people is simply that it be known. 497

Here Fārābī distinguishes between theoretical knowledge that is only subject to awareness such as that the world has been created and that God is one, or other sensory perceptions of the world and knowledge that is meant for action. He refers to ethical maxims such as how honoring one’s parents is good, how disloyalty is bad, and how justice is an excellence. This statement also links praiseworthy premises to what is esteemed in an ethical sense, such as filial piety being the basis for good actions. This clearly links ethical maxims to practical aims. Such a view is also found in Ibn Rushd when he alludes to the practical aim of praiseworthy premises, and is also found in a distinction he makes between theoretical and practical knowledge.498 Specifically, Ibn Rushd makes a departure from the Stagirite on this matter, claiming that theoretical knowledge is better than the practical type for its aim is truth and is, therefore, superior to that of practical action.499 This implies that practical knowledge has its aim is action, and therefore targets what is widely accepted among people, even when it still has a universal value, such as thanking the benefactor and filial piety. This universal value is meant to incite practical aims, which makes it a necessary source of motivation in the political realm.

In a nutshell, Ibn Rushd draws a link between the natural inclination to thanking the benefactor as a basis of natural justice and praiseworthy premises according to the

498 MCAR 1.7.22, Averroës, Commentaire 2, 60.
499 Ibid. For an elucidation about Ibn Rushd’s departure from Aristotle see Aouad, “Commentaire du Commentaire,” 123.
unexamined opinion, a notion specific to Arabic philosophy and is peculiar to the epistemological realm of rhetoric. This explains the basis for people’s inclination to some beliefs, which they admit at first glance without putting them under scrutiny is linked to esteemed beliefs, shared by all people on an instinctive basis. Furthermore Ibn Rushd ascribed to these praiseworthy premises a practical value. This value will be seen in the public capacity to approve of the corrective function of the natural justice through praise or blame.

2. The masses’ approval to natural justice

Ibn Rushd configures a link between human inclination to praiseworthy beliefs such as thanking the benefactor and filial piety, which often prompt praise or blame in the case of exceptional acts, and natural justice. In so doing he is then able to associate a practical function to the masses’ embryonic accessibility to natural justice to enable them to also convey public approval in cases of rectification of laws through praise and blame. This dimension, however, uncovers a link to rhetoric’s epideictic speech, which he outlines a basis for public praise and blame.

Specifically Ibn Rushd discusses the process of rectification of law through addition and subtraction of good or bad, and then admits people’s capacity to approve through an act of praise or blame in the following statement in “This becomes clear to you from the written religious communities [millal] in our times. For addition [ziyāda] and subtraction [nuqṣān] become preferred only when they are attached to praise [madḥ] and honor [karāma].” After admitting the necessity to rectify the fixed values of good

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500 Cf. MCAR 1.13.8 and 1.13.9, ibid. 116-117.
501 MCAR 1.13.11, Averroës, Commentaire 2, 117.
and bad inherent to the written laws, and after calling for an addition (al-
ziyāda) or subtraction (nuqṣān) based on the requirement of the unwritten laws,
Ibn Rushd validates this addition and subtraction if it incites praise, not blame. In other words, he
deems that the outcome of the adjustment of written justice can be judged worthy if it
prompts some sort of approval from the people, and is manifested through praise and
honor.

To better understand the basis for public endorsement of the corrective function of
natural justice, Ibn Rushd’s discussion of praise or blame under the context of the
epideictic speech should be consulted here:

Aristotle said: after this we shall tackle excellences and vices and the beautiful and the ugly; these
are the basis for blame and praise. Defining these things shall lead us to know matters that one can
use to establish one’s own excellence since this is the second type of speech among all three types
that produce persuasion, as we have previously said. In fact this second method is a type of praise ,
I mean that is by the things that we can praise others, we are capable of praising ourselves, even if
it does not accord in all things in which we praise others but that is specific to excellence and these
are things that are based on choice. In this passage, Ibn Rushd explains how excellences that are based on praiseworthy views
form the primary impetuses for praise and blame. Thus, Ibn Rushd sets for himself the
task of defining excellences, as they serve as praising others or oneself. Excellences, he
adds, are related to what is beautiful “The beautiful is what is chosen for itself and it is
praised and is good and pleasurable on the basis that it is good.” While he insists on the
voluntary value of the beautiful, he iterates how it elicits praise: the beautiful is both good
and praiseworthy. Then he elaborates:

502 MCAR 1.13.8-1.13.11, ibid., 116.
503 MCAR 1.9.2, ibid., 71.
504 MCAR 1.9.5, Ibid., 82.
Since this is the beautiful then it is clear what the beautiful excellence is and cannot be otherwise for it is good and praiseworthy. And excellence is a habitus [malaka] that determines each act that is good on the basis of that determination or of what we have the opinion to be good. I mean by habitus what preserves this determination and is its agent. For this reason, excellence is to be found in every act that aims at an end- when this act is considerable by its worth and its remarkable standing in fulfilling this end.505

Here he explains how excellence is a habitus that can determine something to be good or rather based on whether, in public opinion, it is perceived as such. This alludes to practical value, as the habitus can rely on a mere opinion that holds that something is good and does not necessitate a certain view.

Next, Ibn Rushd provides a list of excellences: “As for the parts of excellence they are: equity that is general justice, courage, munificence, continence, magnanimity, forbearance, liberality, practical reasoning and wisdom [in general].”506 After providing this list, Ibn Rushd defines these excellences and draws some remarks on how they relate to each other.507 What is striking about his elucidation, summarized below in Table 3, is that Ibn Rushd evaluates them on the basis of laws to give concrete cases of how a different situation requires a rectification to the written law and incites praise or blame.

505 MCAR 1.9.6, ibid., 72.
506 MCAR 1.9.7, Ibid., 72.
507 MCAR 1.9.7-1.9.16, ibid., 72-74.
Table 6: The different type of excellences

<table>
<thead>
<tr>
<th>Excellences</th>
<th>Definition</th>
<th>Relation to other excellences and their contraries.</th>
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</thead>
<tbody>
<tr>
<td>General justice (al-bīr)</td>
<td>- Appreciated in all times both during wartimes and peace.</td>
<td>Just excellence – to give everyone his merit / based on the degree of law vs. injustice, which is a transgression wherein one takes what belong to others or what he or she is not supposed to have based on the law.</td>
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| Courage (al-shajā‘a) | - More appreciated during wartimes than in times of peace.  
- Based on good or beneficial actions in jihād that is called for based on the law                                                                                                                                 | – The opposite of courage is cowardice (al-jubn)                                                                       |
| Munificence (al-murū‘a) | More appreciated in times of need than in times when there is no need                                                                                                                                 | Similar, but superior to liberality                                                                                   |
| Continence (al-‘iffa) | Related to bodily desire: al-‘iffa is to follow the law in terms of the degree of bodily desires imposed by the law                                                                                       | The opposite of continence is obscenity (al-fujūr)                                                                     |
| Magnanimity (kibr al-himma) | Pertaining to the beauty of doing good and great actions.                                                                                                                                               | The opposites of magnanimity are pusillanimity (ṣīghār al-nafs) and abjection (al-nadhāla)                           |
| Forbearance (al-ḥilm) |                                                                                                                                                                                                           |                                                                                                                     |
| Liberality (al-sakhā‘) | - About giving in times of need [money]  
- To do what is on a shared basis known as beautifying the community by giving money                                                                                                                                 | Liberality and munificence are only different in terms of degree.  
The opposite is parsimoniousness (a-ddanā‘a)                                                                   |

508 This table is based on his discussion in MCAR 1.9.7-1.9.16, ibid.
Practical reasoning (*al-lubb*)

This is the excellence of the intellect that is based on good deliberation and good reflection and also ethical excellences that are based on *salāh al-ḥāl*.

Here are a few more details from the text: In his discussion of the excellence of courage Ibn Rushd notes, how it is preferred during times of war rather than in times of peace. Then, he specifically refers to the question of *jihad* and its utility, based on what is determined by law.\(^{509}\) This clearly coincides with his view of *jihād*, as discussed in the examinations of *MCNE* and *BM*, in this study, which assert that *jihād* is admissible in times of war and is not a universal decision. Similarly, his discussion of continence (*ʿiffā*) is a legal prescription, which regulates human desires.\(^{510}\)

The observation most central to the present purpose is found in *MCAR* 1.9.19, where Ibn Rushd notes that virtuous actions are praiseworthy if they can be evaluated based on the determination of justice (*taqdīr*)\(^{511}\). He adds that, “Overall most praise and blame is by analogy (*muqāyasa*) to the people who are esteemed or blamed of the preceding generation.”\(^{512}\) This alludes to how an excellence is assessed based on how we determine justice but remains linked to a habitus, which relies on public opinion to prompt praise and blame. This discussion serves as an illustration of how people are incited to praise or blame. Ibn Rushd admits that this hinges on a habitus, which can be based on what is reputable among people. This leads to the conclusion that this habitus is linked to the human inclination of people to praiseworthy premises such thanking the benefactor which people admits it prompts praise or blame, this predisposition forms the

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\(^{509}\) *MCAR* 1.9.8- 1.9.11, ibid. 72-73.
\(^{510}\) *MCAR* 1.9.12, ibid., 73.
\(^{511}\) Ibid., 74.
\(^{512}\) *MCAR* 1.9.47, ibid., 83.
basis for people’s opinion on what is praiseworthy in terms of excellence to recognize what should be praised or blamed in the realm of justice.

I conclude that Ibn Rushd’s views of the masses’ capacity to acknowledge natural justice rests on this quasi-rational inclination toward what is reputable on the basis of the unexamined opinion. Such inclination bears practical value, which bestows the masses with the inclination to endorse natural justice, once it is implemented, and express it through praise or blame. This comes to confirm my earlier assertion on Ibn Rushd’s integration of the value of exceptional good and bad conduct and its ability to generate praise and blame into the corrective role of natural justice which he asserts also shall generate praise and blame. In other words, people’s inclination to reputable opinion which praises what is good and blames what is bad, also endows them with the capacity to recognize good and bad when it is rectified and either praise and blame it. Both dimensions prove that the accessibility of the masses remains in potentiality through inclination and approval. However, Ibn Rushd reserves the capacity to actualize natural justice to the elite.

B. The elite and natural justice in actuality

The authority of the elite to ascertain the universal question of justice was noted in my discussion of Ibn Rushd’s hierarchy of legal institutions on which basis he exalts the capacity of those he calls the guardian of the law *al-quwwām bi-al-sharī’a* in comparison to the masses and judges.513 Such stance, along with my discussion of the masses’ embryonic access to natural justice, suggests that Ibn Rushd places the

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513 *MCAR* 1.1.10, ibid., 6.
responsibility to apply natural justice on these guardians of the law. This begs the following questions: what is Ibn Rushd’s basis to exalt the elite? Who is the elite and what kind of method does it use?

1. The elite and *ijtihād*

First, as previously discussed, Ibn Rushd was adamant on drawing a distinction between an elite capable of discerning universal matters related to what is just and unjust, and those who are not taking the example of judges as well as the masses. In *MCAR* 1.1.7, Ibn Rushd details that both the time constraint as well as the incapacity of judges, stand as an impediment to determine whether something is just or unjust. In a similar vein, also in *MCAR* 1.1.10, he also notes how knowledge of justice is too complex for both the people and judges, but it is within the reach of *al-quwwām bi-al-sharī‘a* who can grasp the difficult matters of justice. In his argument on the written laws in *MCAR* 1.15.18, Ibn Rushd makes a few consequential remarks “Another topic is that those who are appointed as judges in the city, these are those who know the written law and not the unwritten law. As for their apprehension of the latter, all people are on equal footing.” Ibn Rushd claims that people have the capacity to approve the unwritten laws. This capacity is in fact shared equally between the common people and judges. This places both people and judges on the same level. Another reference is found here:

> Only the common public, who are incapable of deliberate reflection, content themselves with the written laws – for it is a matter that is settled. As for adhering to the unwritten law and determining them it is specific to those who are endowed with deliberant reflection and the elite

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514 *MCAR*, 1.1.7, ibid., 4-5.
515 Ibid., 6.
516 *MCAR* 1.15.18, ibid., 127.
among people...\textsuperscript{517}

This statement restricts the knowledge of the unwritten laws to an elite who is endowed with skills of deliberant reflection, who are those he depicts as the guardians of law (\textit{al-quwwām bi-al-sharī'a}).\textsuperscript{518} Before we can surmise who these experts are, however, I would like to identify how he depicts the act of discerning the unwritten laws, in the following quote:

This befalls the lawgivers in the written law either out of necessity or of their own making. Of their own making: when they err and lay down a universal determination when it is not universal. As for the matter itself, [it is] for the following reason: No one can lay down universal and general laws according to all people of all times and all places, for this is not finite – I mean the change of the beneficial and the harmful. The aim of the prudential lawgiver is to lay down law pertaining to the most possible [\textit{akhtarī}], I mean, for most people in most times and in most topoi [\textit{almawāḍī}]. The more a lawgiver makes an effort of legal reasoning [\textit{ijtihād}] to lay down laws that have a long-lasting utility for the majority of man the better the law is. If this is so, it is out of necessity that determined law cannot be true eternally and all the times, I mean to everyone and every time. That's why sometimes it calls for an addition or a subtraction.\textsuperscript{519}

Here Ibn Rushd explains that the prudential lawgiver is he who applies legal reasoning to bring about laws that have a long-lasting utility for most people. Specifically, he used the verb \textit{ijtahada} (its verbal noun: \textit{ijtihād}). The doctrine of \textit{ijtihād} plays a central role in the development of Islamic law. \textit{Ijtihād} is defined as personal effort in the interpretation of the fundamental principles of the law.\textsuperscript{520} This denotes the individual effort of the jurist to discern the right legal ruling specifically in each new case and in new problems that have not been encountered before. Islamic jurists have devoted

\begin{itemize}
  \item \textsuperscript{517} MCAR 1.1.5.6, ibid., 124.
  \item \textsuperscript{518} MCAR 1.1.10, ibid., 6.
  \item \textsuperscript{519} MCAR 1.13.10, ibid., 117.
  \item \textsuperscript{520} Cf. Jean Calmard, “Mujtahid,” \textit{EI2}.\end{itemize}
sophisticated discussion to the matter of defining who qualifies for undertaking *ijtihād*.

Going back to the quoted passage, Ibn Rushd equates the concept of *ijtihād* with the process of addition or subtraction of good or bad of the unwritten laws to written justice. To put it differently, Ibn Rushd deems this act of rectification an act of *ijtihād*.

Furthermore, he also implies that this deliberative reasoning process, conducted by the jurist, hinges on the capacity of discerning for each law a long lasting utility for most people. Another reference, which also links the consideration of the written and unwritten law to the effort of *ijtihād*, can be found in his *MCAR* 1.15.11. In this context, Ibn Rushd outlines how, depending on the matter one hopes to establish, one can appeal to either the written law or the unwritten laws. Therefore, he furnishes arguments for both the unwritten and the written laws, to be used depending on which law accords with the matter that one aims to establish. In *MCAR* 1.15.11, he discusses how the capacity of using the unwritten law is linked to harmonize two contradictory written laws through the concept of *jam‘*. Such a skill is also specific to *ijtihād* in Islam and is the domain of the qualified jurist. This last example discloses a persuasive ground to the act of *ijtihād* as it relies on the argumentative ground using both the written and the unwritten laws. As I expounded it is not surprising for Ibn Rushd already admitted in 1.13.2 that one can use the unwritten law to persuade on a matters related to what is just. This requires a close scrutiny of the arguments to further grasp the method of the elite to discern the written and the unwritten laws.

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521 See Hallaq, “Gate of Ijtihād.”
522 Averroës, *Commentaire* 2, 125-126.
523 Ibid., 113.
2. Ijtihād and topics

Ibn Rushd values the political role of rhetoric as it can persuade concerning contraries. In *MCAR* 1.1.7, he specifically alludes to this utility of using topics in legal context and admitted in the case of an offender one either needs to persuade that the offender did commit wrong or that he did not. Here, Ibn Rushd underlines the necessity of abiding by the principle of non-contradiction, since one cannot do both. For what can be viewed as beneficial at one time, its contrary can be more beneficial in another case.\(^{524}\)

Such value is best illustrated in his discussion of the written and the unwritten laws in chapter 15 under his discussion of Aristotle’s nontechnical procedures (*al-taṣdīqāt al-ghayr ṣinā‘iyya*),\(^{525}\) which include laws (*sunan*),\(^{526}\) both the written and the unwritten, testimony (*shuhūd*), contracts (*‘uqūd*), torture (*‘adhāb*), and oaths (*aymān*).\(^{527}\) As he insists on the importance of the use of these procedures mainly in judicial speech (*mushājarī*) (*MCAR* 1.15.1), Ibn Rushd outlines how, depending on the matter one hopes to establish, one can appeal to either the written or the unwritten laws. Therefore, he furnishes arguments for both the unwritten and the written laws, to be used depending on which law accords with the matter that one aims to establish. Looking at these different arguments, it can be seen that Ibn Rushd juxtaposes different views on the written and the unwritten laws, by grounding these arguments around the intention of the lawgiver, and the objectives of law in general. Hence, I argue that these different persuasive arguments do not necessarily make a clear-cut claim to which types of law take precedence, but, instead, suggest that Ibn Rushd hopes to ground the different uses of the written and the

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\(^{524}\) *MCAR* 1.1.17, ibid., 9.
\(^{525}\) *MCAR* 1.15.2, ibid., 124.
\(^{526}\) *MCAR* 1.15.2, ibid.
\(^{527}\) Aristotle’s *Rhetoric* I, 14. 1375a 22- 25.
unwritten laws in a general framework of the objectives of the law. Still, this persuasive ground of the topics asserts that he links *ijtihād* to rhetorical argumentation.

*Arguments for the unwritten laws*

In sketching arguments for when to appeal to the unwritten laws, Ibn Rushd starts with the intention of the lawgiver and then lays out some arguments comparing the nature of the unwritten to that of the written laws. In *MCAR* 1.15.5, Ibn Rushd explains that in cases where the written law goes against the judicial matter that one wants to establish, then one can appeal to the unwritten law on the basis of the intention of the lawgiver.\(^{528}\) Building upon Aristotle, who urges supplicants to appeal to principles of equity and call judges not to merely follow the letter of the written law, Ibn Rushd contends that the use of unwritten laws make a judge more beneficent (*muḥsin*). Here, Ibn Rushd explains how fulfilling the demands of what is obligatory based on the law, such as giving alms, does not qualify the giver as a generous person and does not elicit praise.\(^{529}\) In alluding to the obligation of alms-giving in Islam (*zakāt*), Ibn Rushd clearly notes that fulfilling only what is obligatory does not reveal anything about the person’s intention. Consequently, one can conclude that the unwritten law transcends what is decreed as obligatory in the written law and therefore elicits praise and honor.

In the following set of arguments, Ibn Rushd focuses on the differences between the written and the unwritten laws. First, in *MCAR*1.15.6, he contends that, while the written laws are something that most people restrict themselves to, as these are already resolved matters,\(^{530}\) the unwritten laws however require deliberative reflection, something

\(^{528}\) Averroës, *Commentaire* 2, 124.

\(^{529}\) *MCAR* 1.15.5, ibid.

\(^{530}\) Ibid., 124.
that is specific to the elite.\textsuperscript{531} This distinction between people in general, and the subcategory of the elite again affirms a point, argued elsewhere, on how Ibn Rushd establishes a hierarchy among the messenger recipient (\textit{sāmi` muballigh}) and the scholar recipient (\textit{sāmi` `ālim}),\textsuperscript{532} or what is often framed in Islamic law under the qualified jurist \textit{mujtahid} or the imitator \textit{muqallid}. This comes to also affirm how the general populace is able to endorse the unwritten laws through praise, while it is only the \textit{mujtahid} who is endowed with this deliberative reflective capacity and its accompanying discernment. In other words, most people know the unwritten, natural justice in potentiality, and therefore they can express approval or sanction when it is realized, but most cannot necessarily discern its actuality.

In his second argument in support of the unwritten laws, Ibn Rushd distinguishes between the natures of the written and the unwritten laws. Ibn Rushd’s contrast can be summarized in these points: while the unwritten are natural, universal to all people and times, unchanging, and are known based on nature; the written laws are onus, do not adapt to the changing circumstances, are presumptive, and received from another person.\textsuperscript{533}

In the same vein, in \textit{MCAR} 1.15.8, Ibn Rushd continues to explain that, in some cases, not observing the written laws can be more beneficial and can bring an addition of good.\textsuperscript{534} For the written laws are determined and cannot always fit every person, every time, while the unwritten laws can be adaptable to suit everyone, always. Lastly, in \textit{MCAR} 1.15.10 he finds the presumptive nature of the written law, as they are received

\begin{itemize}
\item \textsuperscript{531} \textit{MCAR} 1.15.5, ibid.
\item \textsuperscript{532} \textit{MCAR} 1.7.32, ibid., 63.
\item \textsuperscript{533} \textit{MCAR} 1.15.7, 125. See also \textit{MCAR} 1.15.7, 1.15.8, and 1.15.10, ibid, 125.
\item \textsuperscript{534} Ibid., 125.
\end{itemize}
from someone else, contrary to the unwritten law, which are known to us through nature.\footnote{MCAR 1.15.9, ibid.}

Ibn Rushd continues to tackle cases of how one can appeal to the unwritten laws. In \textit{MCAR} 1.15.11, Ibn Rushd reproduces Aristotle’s comparison of justice to silver and how it must be assayed to differentiate it from counterfeits.\footnote{Ibid.} He then, however, refers to cases of contradiction between the written and the unwritten laws, and alludes to the method of the jurist in resolving contradiction by having recourse to harmonize ‘\textit{jam}’ contradictory proofs (\textit{Isqāṭ al-ta’āruḍ}).\footnote{MCAR 1.15.11, ibid.} In \textit{MCAR} 1.15.12, he also notes that in cases where one cannot resolve the contradiction, specifically based on an ambiguity in terms of doubt \textit{shakk} or \textit{shubha}, then one can defer judgment.\footnote{Ibid., 63.} In all of these arguments, which hinge on the intentions of the lawgiver, some properties of the unwritten laws present a justification to allow for the negotiation of an equitable process by appealing to this unwritten law when the written law is not suitable to someone’s case.

\textit{Argument for the written laws}

Now I turn to Ibn Rushd’s five arguments outlining how to appeal to the written laws. Again here, he alludes to some distinction between the written and the unwritten, finally framing his arguments around the purpose of law and intentions of the lawgiver.\footnote{MCAR 1.15.14-1.15.18, ibid., 126-127.}

In his first argument (\textit{MCAR} 1.15.14), Ibn Rushd maintains how the unwritten laws are not determined, and changes in terms of the topics and the time and place, and are therefore in need of being deduced (\textit{istinbāf}); the written laws, however, are
determined and need no further interpretation.\textsuperscript{540} When the matter one seeks to establish might appear to be contrary to the unwritten law, while it accords with the written law, which is already known, then one should not alter one’s judgment in defiance of the written law.

Then Ibn Rushd, in \textit{MCAR} 1.1.5.15, explains how the unwritten law is a general ruling that does not give particular applications of this ruling; for example, calling the people, “to perform an act of beneficence toward those who did good to you,” does not specify the amount or the time of beneficence \textit{iḥsān}, whereas the written law is often particularized in every detail.\textsuperscript{541} Thus, he demonstrates how, in most action, what we need is a particular ruling, in other words, with exact definition in terms of time or amount of good. So both arguments above seem to suggest how the unwritten laws need a deduction and a determination of the amount and time unlike the written which is already determined.

The second set of arguments he presents for the precedence of the written laws are focused on the intention of the lawgiver and the purpose of the law.\textsuperscript{542} First, in \textit{MCAR} 1.15.16, he notes that if it is stipulated that the written law is obligatory, then it should be abided by, as there is no purpose in legislating something that is not supposed to be followed.\textsuperscript{543} Then, in \textit{MCAR} 1.15.17, he bases the necessity of following the law on the intention of the lawgiver. Here, he tweaks Aristotle’s use of a doctor as an exemplar.\textsuperscript{544} Aristotle warns that one should not try to be more clever than the doctor, for less harm can occur from the doctor’s error than from one’s habit of disobeying authority. Ibn

\begin{footnotes}
\footnotetext[540]{Ibid., 126.}
\footnotetext[541]{Ibid., 127.}
\footnotetext[542]{Cf. \textit{MCAR} 1.15.16-1.15.18, ibid.}
\footnotetext[543]{Ibid.}
\footnotetext[544]{Ibid.}
\end{footnotes}
Rushd appropriates this tale, making an analogy wherein the relation between the doctor and his or her patients corresponds to that of the lawgiver and the inhabitants of the city. In the same way that a doctor has more knowledge than his or her patients in the science of medicine and how to cure diseases, so does the lawgiver possess more knowledge than the inhabitants of the city of the science of public interest (‘ilm al-maṣāliḥ).\footnote{On Ibn Rushd’s use of the metaphor of the doctor, see more in Laurent Gerbier, “La politique et la médecine : une figure platonicienne et sa relecture averroïste,” Astéron 1 (2003), 5-19.} However, he contends, that while disobeying the doctor’s prescription brings harm to one person, disobeying the lawgiver may bring much more harm, as it is damaging not to the interests of one person but rather to the interest of all of the inhabitants of the city. Finally, in \textit{MCAR} 1.15.18, he concludes by recalling that the appointment of judges would also be absurd if written laws were not meant to be followed, as their sole purpose is to know written laws.\footnote{Averroès, \textit{Commentaire}, 127.}

A few remarks are here in order. In sketching out the arguments mentioned above, Ibn Rushd uncovers a more nuanced distinction between the written and the unwritten laws, while affirming the existing understanding of the universal, natural unwritten laws alongside the written as determined; he again asserts how the written laws can fall short, as by being fixed and determined, it will always be more limited than the complex natures and desires of human beings. While one can note that he offers more arguments for appealing to the unwritten laws than to the written laws, it is nonetheless clear that Ibn Rushd also asserts the importance of the written law, remaining quite broad in his analysis rather than providing formal criteria for or a clear hierarchy on how one takes precedence over the other. This outline, which gives supporting arguments for the application and evaluation of both the written and the unwritten laws, comes to provide a
persuasive source of influence in articulating judicial decision-making and interpretation of the law. This scheme will be better grasped once it is contextualized in the scope of Islamic law under discussions of the objectives of the law or maqāṣid al-sharī‘a, a task I shall take in my last chapter. So far, it suffices to say that this outline discloses the argumentative nature of written and unwritten law, made possible by rhetoric’s capacity to argue for contrary positions.

3. *Ijtihād* and the unexamined opinion

Ibn Rushd’s choice of topics to articulate his arguments on the written and the unwritten laws is not arbitrary. First, it is linked to the practical utility of rhetoric in the political realm and specifically, as already noted, this view is mostly anchored in the legal context, but more importantly, in topics’ affinity to the unexamined opinion, which could come to affirm the link I draw between natural justice and the unexamined opinion. This would also mean that the qualified jurist mujtahid is required to produce his legal reasoning on the basis of the unexamined opinion to trigger the approval of the public.

A key dimension to Ibn Rushd’s method to the use of topics is its rapport to the unexamined opinion. As discussed elsewhere, in his outline of the various topics used in rhetoric, Ibn Rushd underlines the importance of the unexamined opinion in *MCAR* in 2.23.19. As already noted, Aouad, insists on the link between the use of topics and the unexamined opinion under the scope of rhetoric mainly that Ibn Rushd specifically defines the unexamined opinion under the scope of the discussion of topics in *MCAR*

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2.23.29. Furthermore, Ibn Rushd provides us with an example to illustrate how the unexamined opinion should prompt immediate persuasion in the context of topics:

As an example for what produces persuasion in a short time [upon mention] is found in what was said by the ancient: that laws need a law to rectify them in the same way how fish in the sea need salt or how olives need oil even if they have oil. In fact- this although is not persuasive it can produce persuasion in a short time [upon mention] if we were to add that fish need salt when one aims to preserve them by means of conservation and give them a different taste; or that one adds to olives oil to preserve them and change their taste. For it will not be persuasive in a short of time [upon mention] to say what has salt needs salt and what has oil needs oil.549

This rendition specifically refers to the argument on the rectification of law, which is not arbitrary given the centrality of this question in Ibn Rushd’s commentary. In addition, this example comes to illustrate how to argue on the basis of the unexamined opinion. Thus, he underlines the immediate persuasive impact of the example of fish that needs salt, which is supplemented with the statement on the aim to preserve them or change their taste. Assuming that Ibn Rushd is consistent in following his own scheme, namely that topics should be based on the unexamined opinion for their immediate efficiency, which allows for integrating individual opinion as people admit arguments for they assume that it is truly widely accepted opinion, then it could be expected that his outline of the arguments for and against both the written and unwritten laws conforms to his own criteria. In fact, the structure of these topics does rely on brief arguments and also seem to aim at immediate persuasion. If this were to be the case, then it could be assumed that Ibn Rushd requires from the jurist mastery of the use of topics under the unexamined opinion. Taking into account Aouad’s conclusion on how the use of the

549 MCAR 2.23.20, Averroës, Commentaire 2, 248-249.
unexamined opinion allows for integrating individual arguments under the communal authority of the unexamined opinion,\textsuperscript{550} I argue that such argumentative method would allow a jurist to integrate his individual arguments, which the masses would admit supposing that these are true-widely accepted opinion. In this case, a question could be posed on whether Ibn Rushd bestows the jurist with the capacity to discern natural justice only under the condition that he remains within the scope of the unexamined opinion which I contend helps to bridge the gap between the masses and the elite.

In a nutshell, setting two modes of natural justice and this dialectic dynamic between the masses and judges is only possible under rhetoric for it provides the proper epistemological scope which bridges the divide between the elite and the masses. This is specifically possible through the unexamined opinion, which allows for the elite to include their individual opinion and presents them to the masses under the scope of what is praiseworthy. While this view of natural justice is anchored around the elite vs. masses divide, using rhetoric and specifically the unexamined opinion serves to reduce this divide and bring both classes into the service of justice. Finally, Ibn Rushd’s conception of natural justice both in terms of some of his examples and mainly his reference to the qualified jurist is clearly shaped by the Islamic legal context. This pushes us to ponder how does Ibn Rushd contextualize this conception of natural justice within the context of sharī‘a. But before one can answer this question, the relation between sharī‘a and rhetoric needs to be further discerned.

\textsuperscript{550} \textit{MCAR} 2.23.19, ibid.,248. For more see chapter 2 on the unexamined opinion.
CHAPTER FOUR

SHARĪ‘A AND THE MODES OF ARGUMENTATION OF THE DIVINE DISCOURSE UNDER RHETORIC

My scrutiny of Ibn Rushd’s conception of Aristotle’s *Rhetoric* shows the influence of Islamic jurisprudence in shaping his view on the necessity of rhetoric in both its political role and his conception of natural justice. I unravel that Ibn Rushd ties the mode of argumentation of legal opinion to the epistemological scope of rhetoric as a logical art and that he relates Islamic law to the realm of doxatic opinion. In admitting such a position, Ibn Rushd allows for rectification of the law in order to fulfill the ethical aim of natural justice based on the unexamined opinion. If this is so, a new question posits itself: does Ibn Rushd show the same commitment to this philosophy of law and ethic in his legal treatises, or is this view restricted to his commentaries on Aristotle’s treatises? To be more specific, can Ibn Rushd’s conception of sharī‘a admit of Aristotle’s natural justice? The relevance of this question is mostly important with regards to the dominant view on Ibn Rushd’s conception of the relation between the revealed law and sharī‘a in *FM*. This view centers around the assumption that there is a harmonious relation between the revealed law and truth. As it equates the revealed law to truth, this idea of harmony makes no room for a corrective notion, including natural justice. In this chapter, I revisit this thesis of so-called harmony between the revealed law and truth to argue that Ibn Rushd’s philosophy of law in his commentaries accords with the general outlook of his legal philosophy in his legal and religious treatises including *FM*. Both
submit law to rhetoric the realm of opinion ḥanz. I shed light on some subtle arguments in Ibn Rushd’s *FM*, which not only corresponds to his general outlook of the relationship between sharī’a and rhetoric, but also reflects some of his development on the scope of rhetoric in *MCAR*. Mainly, the chapter explores the expansion of assent according to the concept of the unexamined opinion. I argue that Ibn Rushd’s epistemological view of the Islamic system of knowledge under *shahāda* is mostly articulated in *SCR* and in his *DFF*, which were both written around the same time. While he remains consistent in admitting this view in his later works, he seems to frame the relation between law and rhetoric around the theoretical framework he exposes in *MCAR*, and this view is expressed in his *FM* and *BM*.

In what follows, I first briefly discuss the predominant view of *FM* and the harmony between the revealed law and truth. I then outline Ibn Rushd’s appraisal of Islamic modes of argumentation in *SCR* as he probes into their epistemic nature and criteria under testimony *shahāda* and draws a parallel with his view in *DFF* and *KM*. Also I look into his discussion of *shahāda* in his *MCAR*, where he underscores its practical value while still affirming the same position developed in his *DFF* and *BM*. Finally, I show how the expansive scope of rhetoric in *MCAR*, paves the ground for Ibn Rushd to make some rapprochement between Islamic law and practical philosophy in *FM*. Specifically, I shall focus on how he expands the scope of assent within sharī’a and asserts the connection between law and practical philosophy.
I. Revisiting *Faṣl al-Maqāl*: Is sharī‘a truth or opinion?

*FM* is considered to be a fundamental text to understand Averroes’s thought.\(^{551}\) In fact, this short treatise has attracted a lot of attention from various scholars, who noted its importance. Alain de Libera contends that “of all the texts of Ibn Rushd, none is more representative of the man, of his work, and of his era than the *Faṣl al-Maqāl.*”\(^{552}\) This attention to *FM* stems from an interest to fathom the nature of the relation between the revealed law and philosophy discussed in the treatise. In seeking to grasp the nature of this relation, one can note two main trends. First there are those who viewed a conflict between the tenets of the Islamic religion and rational thinking and, thereby admitted that Ibn Rushd had an exoteric stance to advocate a harmony between sharī‘a and truth, as seen in my early discussion of Strauss.\(^{553}\) Second, there are those who admitted a harmony between the revealed law and philosophy, a position that is purported by George

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551 Taylor explains how almost every scholar working on Averroes has discussed the importance of this treatise in the philosopher’s thought. To underline further this importance, he quotes Delibera saying, “of all the texts of Ibn Rushd, none is more representative of the man, of his work, and of his era than the *Faṣl al-Maqāl.*” Richard C. Taylor, “Truth Does Not Contradict Truth: Averroes and the Unity of Truth,” *Topoi* 19 (2000), 3-16: 1.

552 ibid., 3.

553 One of the early profounders of this idea of conflict between Islam and rational thinking were the French orientalists Ernst Renan and Léon Gauthier, and later the German-American philosopher Leo Strauss. In trying to reconstruct the early seeds of rationalism in the Arab tradition, Renan singled out Averroes, the commentator of Aristotle, as a solitary rationalist who still remained confined to Islamic lyricism and prophethood. Renan espoused the idea of the hostility of Islam to rational thinking leading him to construct the alleged idea over the duality of truth as a compromise necessitated by the context to study philosophy in a hostile religious environment. Ernst Renan, *Averroës et l'Averroïsme : Essai historique* (Paris: Calmann Levy, 1882), 90. Thus Renan ascribed to Averroes what also came to be known as the double truth theory, which held that same proposition could lead to various truth values in philosophical investigation or revelation. This idea of double truth has already been challenged in the scholarship. On challenging Renan’s idea of “double truth” see Richard C. Dales, “The Origin of the Doctrine of the Double Truth,” *Viator* 15 (1984), 169-179: 178-179; and Alain De Libera, “Averroes, le Trouble-fête,” *Alliage,* 24-25 (1995), 60-69: 3. One should note that Renan did not have access to *FM,* this view of conflict still had an impact on the reading of Ibn Rushd’s *FM,* which can be seen in Gauthier’s work. While Gauthier did not advocate the idea of double truth, he still espoused the idea on the inherent conflict between religion and revealed law and asserted that one cannot think of two more radically conflicting system of thought as Greek philosophy and Muslim religion: “Or il est difficile de concevoir deux tendances, deux esprits plus radicalement opposés que celui de la philosophie grecque telle que la reçurent les falācifa et celui de la religion musulmane.” Léon Gauthier, *La Théorie d’Ibn Rochd (Averroës) Sur les Rapports de la Religion et de la Philosophie,* (Paris: Ernest Leroux, 1909), 25; on Strauss see chapter 1 of this dissertation.
Hourani who was the first to translate *FM* into English. In discerning the nature between *sharī’a* and truth in terms of harmony whether as pretense or as true stance undermines some interesting subtleties in *FM*. While I take issue with the first position, which as I discussed in my first chapter rests on wrong assumption, my aim here is to focus on pointing to some nuances in Ibn Rushd’s vision of the relation between *sharī’a* and truth, which also tend to be ignored by the proponents of the harmony thesis. To our purpose such a reading overshadows the modalities of the correlation between epistemological scope of rhetoric and Islamic law and almost eclipses Ibn Rushd’s peculiar construal of Aristotle’s natural justice. Before delving into Ibn Rushd’s epistemology of Islamic law under rhetoric, a few points shall be made on the plausibility of the harmony thesis, which equates *sharī’a* to truth in *FM*.

As he announces in the full title *Faṣl al-Maqāl wa-Taqrīr mā bayna al-Sharī‘a wa-l-Ḥikma min al-Ittiṣāl* (the Decisive Treatise on Establishing the Connection between the Revealed Law and Philosophy), Ibn Rushd sets the purpose of the treatise, which is to discern the connection between philosophy and law. More specifically, the treatise unfolds through the close scrutiny of the legal status of philosophy and it comprises three main sections. In the first part, Ibn Rushd defines the legal status of philosophy. In the second part, he sets forth objections against the study of philosophy based on the presumption of the disagreement between philosophy and revealed law as well as on the heterodoxy of certain philosophical figures (Fārābī and Ibn Sīnā). Lastly, he analyzes the nature of the revealed text. This affirms that the treatise does bring the relation between

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the revealed law and philosophy at the forefront. In fact, Ibn Rushd’s makes an intriguing statement in *FM*, which serves as interpretive basis to grasp the nature of the relation between the revealed law and philosophy:

Since the revealed law is true and calls to inquiry that leads to knowledge of truth, we, the Muslim community, know definitely that logical inquiry does not lead to conflicting with what is given in the Law. For Truth does not contradict truth rather, it agrees [*yuwāfiq*] with it and testifies to it [*yashhad*].

This much-quoted statement is seen as the proof that truth revealed through law and truth reached through rational reasoning equal one another. Despite their reliance on different methods, they ultimately reach the same truth. As a matter of fact, Hourani took this as a clear assertion of a harmonious relation between philosophy and law, which projects a synthesis between rational inquiry and the meaning of the scripture. In this vein, Hourani argues that this effort to harmonize or what he depicts as *jam*’ is an intrinsic trend in Islamic thought which aims at reconciling the meaning of the scripture to scientific proof about the world. However, a closer scrutiny of *FM* shows that Ibn Rushd is not keen on those who admit a synthesis *jam*’ between sharī’a and ḥikma. In leveling his criticism against Ghazali for confusing people with interpretations on theoretical questions, Ibn Rushd points to the ramifications of such endeavor and identifies three major trends “As a result, one group came to slander wisdom, another

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556 Averroes, *The Book of the Decisive Treatise Determining the Connection between Law and Wisdom*, ed. and trans. Charles Butterworth (Utah: Brigham Young Uni Press, 2001), §12, 8-9 (with slight modification). In this chapter quotations from Ibn Rushd’s *Faṣl al-maqāl* refer to Butterworth’s edition [marked as *FM*] and also to his translation with some occasional modifications. My reference to Hourani’s translation is only meant to highlight Hourani’s interpretative framework.


558 Hourani explains that *jam*’ is rooted in Islamic culture in the Qur’an and Islamic literature. In fact he contends that the formula of *jam*’ seems to be a characteristic of many works in the West during the 12th century. He refers to Ibn al-Abbār’s that mentions six titles in his biographical dictionary and he also adds that jam’ was characteristic of Fārābī’s *Kitāb al-Jam*’ Bayna Ra’ yay al-Ḥakīmayn Aflāṭūn al-Ilāhī and Aristōtēlis among others. Hourani, in Averroes, *On the Harmony*, 24-28.
group to slander the revealed law, and another group to synthesize \([al-jam']\) between the two.\(^{559}\) In so doing, he clearly rejects all three positions including those that sought to combine \(sharī'a\) and \(ḥikma\). This refusal raises questions regarding the thesis of synthesis or \(jam'\) between \(sharī'a\) and \(ḥikma\) advanced by Hourani. This statement, however, was blurred by Hourani's translation as it discredited his thesis altogether, which reads as follows: \(^{560}\) “As a result, one group came to slander philosophy, another to slander religion, and another to reconcile the [first] two [groups].” While we should not conclude that Ibn Rushd advocates for a conflicting view having already admitted that they do not contradict each other, we still face a dilemma: how does Ibn Rushd conceive of the relation between law and philosophy? To complicate matters, he also makes another intriguing statement to assert the superiority of demonstrative inquiry over legal method.

Since the jurist does this with respect to many of the Legal statutes, how much more adequate it is for the possessor of demonstrative logic to do so, for the jurist has at his disposal only a presumptive syllogism \([qiyās ẓanni]\), whereas the master has a certain syllogism \([qiyās yaqīnī]\).\(^{562}\) This stance affirms the superiority of the apodictic value of the demonstrative approach, which he juxtaposes to the presumptive nature of legal syllogism. In so doing, Ibn Rushd admits that the jurist uses presumptive syllogism associated to opinion \(ẓann\) unlike demonstration, which relies on certain premises. To grasp this position, one needs to contextualize this view within the scope of Aristotle’s logical arts, which admits the certainty of demonstrative syllogism as it relies on certain premises unlike the doxastic nature of the unapodeictic arts such as rhetoric and dialectic for their reliance on

\(^{559}\) FM,§35, 22.
\(^{560}\) Averroes, On the Harmony, 61.
\(^{561}\) Ibid.
\(^{562}\) FM,§14, 9 (trans. With slight modification).
mashhūrāt the widely accepted premises. In other words, Ibn Rushd associates legal syllogism to the realm of the widely accepted, which corresponds to the link he draws between legal opinion and its reliance on testimony as discussed previously. In fact, this view can be substantiated with an important subtlety in his statement that truth does not contradict truth, which suggests that the relation between revealed law and philosophy needs to be contextualized within the scope of the link between the revealed law and rhetoric as a logical art. Specifically I underline his reference to *yuwāfiq* and *yashhad*:

“For Truth does not contradict truth rather, it agrees [*yuwāfiq*] with it and testifies to it [*yashhad*].” While much ink has been spilled on interpreting ‘truth does not contradict truth’, little attention was given to Ibn Rushd’s allusion to *yuwāfiq* and *yashhad*. Moreover this reference to *yashhad* is not accidental, for it reiterates this association to law in the following passage.

Indeed, we say that whenever a statement in the law contradicts in its apparent sense with a conclusion of demonstration, if the Law is considered and all of its parts scrutinized, there will invariably be found among the expressions of the Law something whose apparent sense testifies [*yashhad*], or comes close to testify [*yuqārib an yashhad*], to that interpretation.

This reference tackles the connection between revealed law and philosophy to assert that in cases of apparent contradiction between the two, one should use interpretive frameworks to untangle this contradiction and one therefore, concludes that law comes to testify or comes close to testifying to the same interpretation. This reference to *yashhad* is not arbitrary and it resonates with his view of testimony *shahāda*, which he associates to Islamic modes of argumentation under the epistemological scope of rhetoric. This rapport

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564 FM, §12, 9 (trans. with slight modification).
565 FM, §14, 10 (trans. with slight modification).
between the revealed law and *shahāda* will be thoroughly discussed in this chapter as well as the nuance of *yuwāfiq* and *yashhad*. For now, it shall suffice to conclude that Ibn Rushd’s view of the relation between the revealed law and philosophy in *FM* should be addressed under the framework of the relation between rhetoric’s logical and political character and the hermeneutical nature of Islamic jurisprudence and its reliance on the predominance of opinion. Furthermore, one should also account for some of the development Ibn Rushd makes to expand the scope of rhetoric in *MCAR*, which will have clear ramification on his positions in *FM*.

II. The epistemology of Islamic modes of argumentation under *shahāda*

The nexus between Islamic law and rhetoric is detected in Ibn Rushd’s discussion of the basis of the Islamic system of knowledge in his *SCR* according to *shahāda*. Specifically, Ibn Rushd tackles the different persuasive things that can produce assent under the scope of rhetoric.\(^{566}\) In his list of persuasive things, he bestows testimony, the mode of transmitting human knowledge about statements on past events such as *akhbār*, reports, with the highest rank.\(^{567}\) In his definition and appraisal of testimony, Ibn Rushd relies on the discussion of transmitted tradition, reports on prophetic tradition, the ground for Muhammad’s prophecy under what he called challenge namely, principles of jurisprudence used in Islamic law, including the theory of unanimous consensus of the Muslim community as a regulation imposed by God known as *ijmā‘*,\(^{568}\) and established


\(^{567}\) Ibid.

written laws. Within this prism, Ibn Rushd draws his taxonomy from discussions among usūlis on the epistemological criteria used in Islamic law. First, I examine his appraisal of shahāda in relation to what is known in the Islamic sciences lexicon as tawātūr concurrent reports, and to āḥād, solitary reports, based in SCR. I then supplement this with his discussion in his DFF to show his parallel views. Last, I dwell on how he expands the scope of shahāda to include the argument for Muhammad’s prophecy in KM, the notion of consensus in Islamic law, and the written laws, a position that he also admits in DFF.

A. The appraisal of shahāda: tawātūr and āḥād

In establishing the epistemological validity of historical knowledge about the early Muslim community, the Islamic tradition has developed a taxonomy among the different sources of information and among contrasting concurrent reports, known as tawātūr, with the solitary reports, called āḥād. The notion of tawātūr is applied to prophetic reports that were based on a concurrent chain of transmission, while āḥād are solitary reports that are based on one or very few transmitters and therefore bear a lower epistemic status in terms of their veracity. Lengthy discussion of the Islamic theory of knowledge in legal treatises often focuses on akhbār: both tawātūr and āḥād. Islamic scholars address the question of proof (hujjiyāt) and the use of prophetic traditions to establish a legal ruling concerning an act. While they agree that reports based on tawātūr yield certainty (yaqīn), they held different views on āḥād. Ibn Rushd scrutinizes both tawātūr and āḥād, interested

mainly in how they produce assent and in the criteria used to assess these reports. In his
*SCR*, he specifically uses them to elucidate his view and appraisal of *shahāda* under the
scope of rhetoric.

1. *Tawātur*

   First, Ibn Rushd defines testimony as a kind of report and exalts it as the most
powerful among the different persuasive things.

   Testimony holds the most powerful rank. In general, testimony is a certain kind of report. Those
who bring the report can either be one or more than one. When they are more than one, they may
either be a group, which it is possible to enumerate or they may be a group, which it is not possible
to enumerate. Things reported are either perceived by the senses or intellectually apprehended.
Those who report things perceived by the senses are either those who have perceived these things
themselves or those who report them from others like, fewer, or more numerous than themselves.
Now things perceived by the senses, which are reported either concern past matters that we have
not perceived or matters occurring in the present but absent from us.
Reports about those things we have perceived by the senses are of no use or benefit. It seems this
is likewise the case concerning intellectually apprehended things for those practitioners of arts
whose habit it is to deduce such intellectually apprehended things in their art. For the multitude,
however, testimony about them may possibly bring about persuasion. For this reason, you will
find that the sect among the people of our religious community known as the dialectical
theologians does not limit itself only to the testimony of the Legislator [Muhammad] concerning
knowledge of the origin of the world, the existence of the Creator, and other things; rather,
concerning knowledge of that, it also employs syllogisms. Now the sect known as the Hashawiyah
rejects that.571

   To explain testimony, Ibn Rushd distinguishes between reports on two bases. First, he
notes the quantitative criterion of reporters that is for reports that have transmitters, which

571 *SCR*, §35-36, 74 (Arabic 189-190).
can be enumerated and which are impossible to enumerate. His second distinction between reports is the nature of the thing reported, which can either be intelligible \([ma'qūla]\) or sensible \([mahsūsa]\).[572]

Herein, he notes that reports on sensible things can be either perceived directly by the person who reports them or reported based on what was imparted to someone from other transmitters. As for sensible things that we can access on the basis of direct observation or intelligible things that can be conveyed through the syllogistic method, there is no need for \(shahāda\). To put it differently, Ibn Rushd repudiates the value of \(shahāda\) in sensible things that we can empirically observe or intelligible things that can be apprehended based on syllogism. Ibn Rushd is willing to make one exception for intelligible matter when it comes to certain beliefs linked to theoretical knowledge where it is acceptable to use a testimony in order to persuade people. For this matter, he admonishes theologians for not being content with the testimony of the lawgiver on the origination of the world (\(ḥudūth al-ʿālam\)) and existence of the creator (\(wujūd al-bārī\)), instead seeking to use demonstrative syllogism in these matters.[573] I shall come to the basis of testimony of the lawgiver later. But I limit myself to deduce here that Ibn Rushd clearly views testimony as a basis for assent in contingent matters that we have not observed, such as the sending of prophets and the geographical existence of Mecca and Medina. The question, then, is how does assent happen?

To answer this question, we shall discuss his preceding statement wherein he also acknowledges a type of assent that is produced by reports of sense-perceived matters.

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572 SCR, §38, 75 (Arabic 190).
573 For a parallel view on the unnecessary value of \(tawātur\) on matters that can be proved by a syllogism see DFF ed. al-ʿAlawi, §75, 68.
without empirical basis. He asserts that their validity can be strengthened and weakened based on the number of reporters, or, on what he calls the circumstantial indicant \([\text{garîna}]\) associated to them. While this gradual fortification or diminishing is related to numbers, Ibn Rushd suggests that the number may not and does not necessarily need to be identified:

Assent to testimonies and reports of sense-perceived matters which have not been witnessed is strengthened and weakened in accordance with the number of reporters and the circumstantial indicant that relates to them. Thus, the most powerful assent resulting from reports is what a group which cannot be enumerated reports it has perceived or what a group reports on the authority of another group which cannot be enumerated but which has perceived it. Now it [powerful assent about the report] is like that, however much the group increases in size, too whatever extent it reaches, if in the beginning, the middle, and the end it remains the same in that determining their number is either impossible or difficult. **This class of reports is the one that is called continuous tradition \([\text{tawâtur}]\).**

Certainty with regard to diverse matters—like the sending of Prophet, the existence of Mecca and Medina, and other things—may result from this.\(^{574}\)

In this statement, he specifically singles out testimonies that are based on group of reports that cannot be enumerated as those that prompt the most powerful assent. This type of report is what is known in \(\text{uşūlis’s}‘\) discussion as tawâtur. To this end, he provides the example of tawâtur in the knowledge of the existence of Mecca. To further elucidate his view, Ibn Rushd investigates how assent is produced on matters pertaining to sense perception by outlining three positions.

**We should theoretically investigate the manner in which this results, for there are some things that produce assent essentially and some accidentally.** Now it is clear that assent about the existence of sense-perceived matters results, primarily and essentially, through sensation.

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\(^{574}\) *SCR*, §37-38, 75 (Arabic 191).
Thus, whoever loses some kind of sense, loses some kind of sense perception. Nor does [assent to] the existence of sense-perceived things result essentially only through sensation; indeed, it may also result through an imaginative representation of them according to their essence. Then, too, certainty about the essential existence of sense-perceived things may result through the syllogism; an example of that is: This wall is built; thus it has a builder. However, the essential form of the particular builder does not result through it.  

Herein Ibn Rushd alerts the reader on a distinction between things that produce assent essentially (bi al-dhāt) and accidentally (bi al-‘arad.). First, he delineates the type of assent produced by the senses as being primarily essential and not accidental. Therefore, he notes that losing one’s senses results in losing the ability to produce sensations. Second, he adds that assent about sense-perceived things is not only restrained to senses but also extends to imagination. One last condition is the ability to produce certainty about sense perceptions using syllogism, for which he offers the example of the wall being built: that it has a builder can be readily assumed by all. The question is, then, how shall we depict assent that is produced on the basis of shahāda?

Firstly, Ibn Rushd expounds that the notion of tawātur is associated with cases of sense perceptions without empirical experience. Then he contends that tawātur produces certainty in the least sense.

Certainty may be obtained about the existence of sense perceived matters which have never been perceived and whose existence we have no way of apprehending by means of a syllogism, but very seldom- just as we very seldom manage to conceive of them according to their essence. However, even if individual instances of such matters cannot be distinguished by sensation, there is no doubt but what their names or what indicates them can be distinguished by it. Now for the greater number of people, assent to something like this comes about by means of the continuous tradition and exhaustive reports. However, it is clear that this is an accidental effect, because that about

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575 SCR, §38, 75(Arabic191).
them which brings about assent rarely follows from what is presumed to be its cause, namely, the reports—just as effects rarely follow from their accidental causes.\footnote{SCR, §39, 75-76 (Arabic 192-193).}

After admitting the ability of \textit{tawātur} to produce assent, Ibn Rushd characterizes this type of assent as accidental. This point is significant and requires some elucidation for us to understand both how \textit{shahāda} such as \textit{tawātur} produces assent on sensible things that we have not come to directly observe and why he perceives this type of assent as accidental. Ibn Rushd alerts us that this question does not fall under the scope of the art of rhetoric: “In this science, it is not necessary to dwell upon the cause for this accidental certainty resulting nor upon how it results; for it has already been spoken about in \textit{Sense and Sensible Objects}.” Still he refers us to his account on this matter in his \textit{Epitome the Parva Naturalia}, where he presents the following ground for how \textit{tawātur} produces assent in accidental terms:

Thus, Aristotle relates of a certain one of the ancients that he would form the image of things conveyed to him by hearing, without his ever having seen them, and when those forms were examined in actuality, they were found to be exactly as they had appeared to the person. In this manner it is possible for a person to form the image of an elephant without his ever having perceived one. The latter process will occur in man only through the joining of these three faculties. The joining of these faculties is due to the rational soul, that is to say, because the faculties are subservient to it, in the same manner as the separation of the faculties will be due to the animal soul. The joining of the faculties is exceedingly difficult for man because it involves the use of the intellect, while the state of ease of the animal soul is due to the separation of the faculties.\footnote{Averroes, \textit{Epitome Parva Naturalia}, trans. Harry Blumberg (Cambridge: Medieval Academy of America, 1961), 28.}

When Ibn Rushd talks about how people can form an image about matters that were conveyed to them through hearing, he is clearly referring to \textit{tawātur}: concurrent
reports that are imparted to us about the existence of an event that we have not empirically experienced. To this end, he holds that it is feasible that man can picture things that he has never seen. Furthermore, he advances the idea that the formation of a sensory representation of unexperienced matters comes into being as the work of internal senses. To illustrate this point, he takes the example of the image of an elephant that can be formed in someone’s mind based on how that person, using description provided by others, can imagine an elephant even if he has never experienced seeing an elephant first hand. Similarly, a testimony also prompts the formation of an image of a contingent particular. Relying on one’s repository of material images and intentions from past experience can be a basis for producing assent. As Aouad comments on this statement, it seems that the certainty produced by tawātur pertains to a psychological process.\(^{578}\) As seen in the passage, this representation is the work of the rational faculty. Still, to better grasp Ibn Rushd’s view, this elucidation, as has been noted by Bou Akl, needs to be put in the context of his Ḍarūrī, which again will affirm how tawātur can generate assent accidentally and further discloses how this accidental mode occurs.

We say that concurrent reports are profused reports producing certainty in certain matters under certain conditions without knowing where nor how or when this certainty has been produced. And when we said for ‘certain matter’ that is because this assent is neither produced for intelligibles that are not sensed nor for those whose correlative is sensible but whose existence is impossible like the goat-deer and other things that have no existence outside the soul [khārij al-nafs], nor for those things whose existence is possible and will be sensed later. Certainty is only produced by concurrent transmission to those whose existence is effective in the present time or was in the past, and this includes things that we have not sensed. For those things that we have sensed or those we

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have the means to apprehend by certain syllogism such as the origination of the world and other things, the concurrent transmission has no utility.\textsuperscript{579}

Ibn Rushd expounds that \textit{tawātur} are reports that produce certainty in relation to certain things. Here he clarifies that neither the causes nor the reason of how this certainty is produced can be known to us.\textsuperscript{580} Again, he holds the same position taken in \textit{SCR} on the invalidity of \textit{tawātur} in relation to intelligibles, which can be apprehended by a syllogism or by sense-perceptions based on empirical observation. Thus, he admits that this type of knowledge produced through \textit{tawātur} is neither linked to intelligibles nor to sense perceptions. Consequently, he suggests that like in the case of the goat-deer, convictions based on \textit{tawātur} only exist inside of the soul. This certainty produced by \textit{tawātur} thus pertains to effective existence in the present or the past--and in this case only for things in the past that we have not sensed.

This position is further elucidated, in the following passage:

And if this is the case then we cannot uphold that the agent of assent is an outcome of the premises and that this occurred in the manner we affirm that first intelligibles are produced by the senses. And he who believes that this is the case in concurrent transmission, similar to that of sensible premises which produce certainty based on the universality produced during the sensation created by the particulars, is utterly mistaken. Assent produced by concurrent transmission is rather an action of the soul and its rapport to it is similar to that of the first intelligibles to the senses.

Overall, there is no disagreement on the fact that concurrent transmission produces certainty except from those who deserve no attention, that is the sophists. He who refutes this deserves to be punished for verbally denying what exists in his soul.\textsuperscript{581}

\textsuperscript{579} \textit{DFF} ed. al-'Alawī, §75, 68.
\textsuperscript{581} \textit{DFF} ed. al-'Alawī, §76, 68-69.
Herein Ibn Rushd affirms that the essential grounds for certainty produced by \textit{tawātur} are inside the soul and are not external things. Thus, he explains that if the information was the essential cause, then certainty would be produced every time the name of the things came up and then the soul would be saturated by the amount of certain information transmitted.\footnote{582 Cf. Bou Akl, \textit{Averroès}, 30.} Within this prism one can deduce that Ibn Rushd contends that the type of certainty produced via \textit{tawātur}, is accidental, for it is only internal to the soul, which corresponds to his statement in the Parva naturalia where he also held that the certainty produced on the basis of \textit{tawātur} is an action of the rational soul.\footnote{583 Cf. \textit{ibid.}} This means that the outcome that is the certainty produced on the basis of \textit{tawātur} is an action of the soul. It does not relate to the report itself as it is the case for sensible things, which are conceived as the product of an external cause.\footnote{584 Cf. \textit{ibid.}} As explained by Bou Akl, Ibn Rushd provides both a noetic and psychological basis for this taxonomy of knowledge that is drawn from Islamic theories but can be relevant to universal transmissions of knowledge such as that of geography – this position is counter to the sophistical basis of knowledge.\footnote{585 Cf. \textit{ibid.}, 10 and 21.}

Ibn Rushd rejects the view among \textit{uṣūlīs}, which admitted that the reports and their numbers are the essential cause of certainty. He underlines how they disregarded that the cause to producing conviction is not external but rather internal to the soul.\footnote{586 Cf. \textit{ibid.}, 30.} Specifically, Ibn Rushd levels his criticism at the quantitative quota used as a criterion to explain the cause of certainty produced by \textit{tawātur}, in his \textit{SCR}:

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\textit{Cf. \textit{ibid.}}\footnote{583 Cf. \textit{ibid.}}
\textit{Cf. \textit{ibid.}}\footnote{584 Cf. \textit{ibid.}}
\textit{Ibid.}, 10 and 21.\footnote{585 \textit{Ibid.}, 10 and 21.}
\textit{Cf. \textit{ibid.}, 30.}\footnote{586 Cf. \textit{ibid.}, 30.}
When some people become aware of this, they wanted to set down as conditions for reports a specific number from which certainty would result essentially. When this did not succeed for them, they said: “In itself it results, even if it does not happen for us.” Now this is a clear falsification, for if there were some essential number which would lead to certainty, continuous accounts with respect to the number of reporters would not vary, and it would be possible to perceive and to grasp this number. But the many and the few are closely related. Thus, when some of them wanted to set down conditions with regard to the continuous tradition which would lead to certainty and they did not succeed at it, they said; “One of its conditions is that to lead to certainty.” Since that is the case, there is no condition at all which could be set down and no means by which certainty could result essentially. Now this art employs the reports and the testimonies in the manner in which they are taken for the most part, which is according to opinion. For it is very seldom concerned with something which no art employs at all.\footnote{587} 

Ibn Rushd’s critique is directed towards \textit{uṣūlis}, specifically Ghazalī, for admitting the quantitative quota as a condition for reports to produce certainty. While both Ghazalī and Ibn Rushd agree on the impossibility of identifying a definite number of reporters, a precision they feel only God can conceive of; they disagree on the relation between \textit{tawātur} and sense perception as well as on the criteria to be used.\footnote{588} One problem arising from admitting quantitative quota as the criterion for certainty is the suggestion that the certainty produced \textit{tawātur} is caused by the frequency of reports themselves. This means that certainty is linked to something external rather than being inside the soul, as Ibn Rushd holds. Furthermore, this means that \textit{tawātur} pertains to sense perception, that is, to a necessary type of external knowledge. Ibn Rushd upholds that the cause is not external the way it is for sense perception.

\footnote{SCR,§40, 76 (trans. with slight modification, Arabic: 193-194).} \footnote{Cf. Bou Akl, \textit{Averroës}, 31.}
In this scrutiny of *tawātur*, Ibn Rushd elucidates his view of testimony by drawing upon the epistemological assessment tools used in Islamic law and is clearly engaging with *usulis*’ discussion on how to define *tawātur*. Ibn Rushd remains in line with the *uṣūlis* view that *tawātur* produces certainty, but he also draws upon the Aristotelian view and justifies how this is only accidental certainty and is, in fact, the work of the rational faculty. Therefore, he maintains uniform views both in his *SCR* and *DFF*. In linking *tawātur* to testimony, Ibn Rushd clearly submits it under the epistemological scope of Aristotle’s rhetoric. This leads me to conclude that Ibn Rushd does not only draw upon the Islamic mode of argumentation to elucidate his point on what *shahāda* is; he also seems to be determined to subsume the designation of what forms the basis of the Islamic system of normative knowledge in Islamic law under rhetoric.

**2. The solitary report: al-khabar al-āḥād**

In outlining Ibn Rushd’s account of *shahāda*, I focused above on *tawātur* reports. However, Ibn Rushd did not limit *shahāda* to *tawātur*, which he exalts for their ability to yield to certainty in accidental fashion. Under this framework, Ibn Rushd also discusses the other type of report, known in the Islamic tradition as āḥād or khabar al-āḥād, which, as noted above, can be translated as solitary reports. This is a type of testimony that hinges on one or few transmitters.\(^{589}\) Along with *tawātur*, āḥād attracted a lot of discussions among Islamic legal theoreticians to assess its epistemic nature and validity, mainly as a basis for legal ruling.\(^{590}\) While most *usulis* agreed that this type of report conveys probability and not definite knowledge, some have stipulated different

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conditions to boost its validity through the use of circumstantial indicants, known as
\textit{qarīna}, which could lead to conclusive knowledge.$^{591}$ \textit{Qarīna} is a technical term, which is
pervasive in discussions of Muslim jurists; Wael Hallaq defines it as follows:

The term \textit{qarīna} in Islamic legal discourse represents a central technical concept whose
multifarious meanings have not been adequately explicated in the authoritative technical
dictionaries. While the \textit{qarīna} plays an important role in the linguistic interpretation of the texts,
thus partaking in the very process of defining the language of the law, it is of no less significance
in the epistemic evaluation of Prophetic traditions. The various technical connotations of the term
\textit{qarīna} in these spheres of legal theory, as well as in positive and substantive law are the main
concerns of these notes.$^{592}$

Based on this definition, \textit{qarīna} plays a linguistic role in discerning legal
interpretations but also bears an epistemic value, by which it can provide some indication
to the validity of reports. This definition corresponds to a certain extent to Ibn Rushd’s
position. To better examine the role of \textit{qarīna}, I shall refer to his discussion in both the
\textit{SCR} and \textit{DFF}.

Ibn Rushd engages this question through an Aristotelian framework, positioning
both \textit{āḥād} and \textit{qarīna} within the realm of rhetoric. In his \textit{SCR}, Ibn Rushd mentions the
solitary report under his general definition of \textit{shahāda}: “In general, testimony is a certain
kind of report. Those who bring the report can either be one or more than one.”$^{593}$

\textit{A shahāda} can be based on either one report or more than one report. As I have
already shown, he also maintains that \textit{tawātur} has the highest rank among \textit{shahāda},

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$^{592}$ Hallaq, “Notes on the term \textit{Qarīna} in Islamic legal discourse,” \textit{Journal of the American Oriental Society}

$^{593}$ \textit{SCR}, §35, 74 (Arabic 189).
although the *tawātur* type is not frequently used.\textsuperscript{594} Therefore, his exaltation of *tawātur* does not indicate that he is only interested in this type. In fact, Ibn Rushd explains that rhetoric as an art cannot be solely understood by examining rare cases:\textsuperscript{595} “Now this art employs the reports and the testimonies in the manner in which they are taken for the most part, which is according to opinion. For it is very seldom concerned with something which no art employs at all.”\textsuperscript{596}

Before discussing how he justifies the epistemic validity of the solitary report in his *SCR*, I refer to his definition of this type of report in his *DFF*

As for the solitary report, as it is defined in this art, it is what does not reach to generate certainty in certain cases that relied on a solitary report and the circumstantial indicant which is associated to that. We say: even though this possibility is not to be ruled out, it is of scarce frequency and could happen to one person in a particular case. Based on this degree of divergence of opinion produced in the soul at the moment of the association of circumstantial indicant to the solitary report, some considered that the information transmitted as a solitary report could generate certainty.\textsuperscript{597}

Here Ibn Rushd admits that the very basis of solitary report does not generate certainty but can produce probability: that is, a degree of opinion based on the circumstantial indicant or *qarīna* associated to it. While he mentions how some theorists believe that a solitary report can produce certainty, Ibn Rushd links the validity of the solitary report to the circumstantial indicant, as it generates conviction in the soul at the moment of the association between the report and the circumstantial indicant. This means that the solitary report’s capacity to produce certainty is not universal but rather is tied to

\textsuperscript{594} As discussed by Hallaq, there are almost no *tawātur* reports in Islamic law. See Wael Hallaq, “The Authenticity of Prophetic Ḥadīth: a Pseudo-Problem,” *Studia Islamica* 89 (1999), 75-90.

\textsuperscript{595} Cf. also Bou Akl, *Averroès*, 41.

\textsuperscript{596} *SCR*, §40, 76 (trans. with slight modification, Arabic 194).

\textsuperscript{597} *DFF* ed. al-'Alawī, §79, 70.
particular conditions, which could boost its epistemic status. After this definition of the solitary report, Ibn Rushd provides us with the legal and rational grounds to substantiate the validity of admitting solitary reports as ways of discerning legal norms in Islamic law:

As for the solitary report, it is both warranted based on the intellect and practiced based on law. As for its possibility based on the law, it is not ruled out that God the exalted erected the predominance of opinion as a sign for establishing rulings in the manner that he erected most things as signs. On this basis, we conceive of adjudication with witnesses and to discern rulings based on the status of fatwas and to admit the orientation of the Ka’ba when there was no examination. And some saw that erecting the preponderance of opinion as a sign to discern rulings in law is obligatory on the basis of the intellect. And if it weren’t for that, then most ruling would be limited to he who has not spoken mouth to mouth with the prophet, peace be upon him.

In this statement, Ibn Rushd first admits the legal basis for the validity of the solitary report. Thus, he grounds the validity of the solitary report in the acceptance in Islamic law of basing rulings on the predominance of an opinion (ghalabat al-ẓann). This acceptance of a presumptive view of law, which makes opinion operative, fits very well with his view of the scope of rhetoric as seen in my previous chapter: “It is apparent that persuasion [al-qanāʿ ‘a] is a kind of a preponderant opinion [ẓann ma ghālib] which the soul trusts, despite its awareness of an opposing consideration. In what preceded, we already defined opinion.” The admissibility of the preponderant opinion as a producer of assent corresponds to his view of the validity of testimony. Thus testimony is able to

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599 DFF ed. al-ʿAlawi, §81, 71.
600 SCR, §1, 63 (trans. with slight modification, Arabic 169); This definition resonates with al-Fārābī’s definition of persuasion in his Kitāb al-khaṭāba also as some sort of opinion (ẓann): “Persuasion is a kind of opinion (ẓann). And in general, opinion is to believe that something is or is not the case, but that it is possible that what one believes of [the thing] is different from what belongs to the existence of this thing essentially.” Quoted in Black, Logic, 108.
generate assent inside of the soul, which implies that it corresponds to the epistemological criterion of rhetoric.

Ibn Rushd adds another Islamic ground for the validity of opinion in the realm of law: “Overall, if we did not adjudicate on the basis of testimony and oaths and discern legal interpretations [ijtihād], there would be no way to avert injustice and defend people’s rights.” He links the validity of opinion to God’s call to use shahāda or testimony as legal proof in litigious cases, as seen in Qur’an 2, 282: “The witnesses must not refuse whenever they are summoned.” As explained by Emile Tyan, in the Islamic doctrine of proof, witnessing is seen as the proof par excellence. At the same time, Ibn Rushd refers to another Islamic legal basis linking the acceptability of opinion to the validity of ijtihād legal reasoning. More importantly, Ibn Rushd states that if one does not admit opinion then one cannot eliminate injustices. This link between adopting opinion and the practical function of eliminating injustice also correlates to his view of the political function of rhetoric. Ibn Rushd admits the necessity of rhetoric specifically to establish a binding view, to cement a incumbent basis for justice. On this basis he concludes here that if it were not for admitting the preponderance of opinion, most rulings would be dropped, which would be absurd.

Ibn Rushd’s justification for the validity of opinion on the basis of witnessing and ijtihād, he remains in line with principles of jurisprudence, which admit the presumptive ground of both court testimony and ijtihād. As explained by Baber Johansen, Islamic epistemology admits a skeptical view in both its method of legal interpretation and the

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601 DFF ed. al-'Alawī, §81,71.
What is unique about Ibn Rushd’s position, however, is that he takes this skepticism toward submitting Islamic jurisprudence under the realm of rhetoric as emphasizing the necessity of admitting opinion for the sake of practical action.

Finally, I shall turn my attention to how Ibn Rushd determines the degree of assent conveyed by solitary reports both in his SCR and DFF:

In his SCR, he asserts that testimonies and reports can convey assent, which is weakened or strengthened on the basis of both the number of reporters and circumstances:

Assent to testimonies and reports of sense-perceived matters which have not been witnessed is strengthened and weakened in accordance with the number of the reporters and other circumstantial evidence [qarā‘in] associated to them Thus, the most powerful assent resulting from a report is what a group which cannot be enumerated reports it has perceived or what a group reports on the authority of another group which cannot be enumerated but which has perceived it.⁶⁰⁶

Once again, Ibn Rushd pins down the basic distinction in the formalistic Islamic legal system between modes of transmission such as tawātur, which yields absolute certainty, and those that are merely presumptive and are thereby subject to testing. Here, he alludes to how the solitary report needs a circumstantial indicant to boost or undermine its epistemic value. Ibn Rushd clarifies this position in DFF:

Overall reports and testimonies on reports can only produce opinion and that varies based on the divergence of circumstantial evidence until certainty is produced in some reports. For that reason, people held different views on the rank of convictions [tasdiqāt] produced based on reports and their associated circumstantial evidence. Some, for example, considered a solitary report to be a

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⁶⁰⁵ Johansen, Contingency in a Sacred law: Legal and Ethical Norms in Muslim Fiqh (Brill: Leiden, 1999), 37.
⁶⁰⁶ SCR, §37, 75 (trans. with slight modification, Arabic 191).
report by a group of individuals that one is wary to refute and that their number that is based on customary practice would convene to lie, and takes the status of tawātur if what was reported was apprehended through senses. Also the circumstantial evidence can weaken opinion produced by reports such that it in some cases is categorically refuted, like the case of he who reported in the market the murder of the king of a town and then people from the market passed by with no mention of it [the murder]. It is based on this type of scenario that Abu Hanīfa rejected solitary reports in matters to ruling pertaining to public weal. For he deemed that for these matters pertaining to the public weal, it should be transmitted in profuse manner. Similarly, Mālik rejected many reports if they were not supported with practice. This is what needs to be said on the rank of assent that is produced by report.607

Ibn Rushd emphasizes the validity of qarīna in determining whether certain reports can produce assent. He reiterates that reports can only produce doxastic opinion and that the degree of distinction between the different types of reports is the circumstantial indicant. Under this scheme, he outlines how a circumstantial indicant could strengthen the epistemic value of a report. He asserts that this is possible providing that (1) it is reported by a community of people which would not transmit lies or their number was too large as to be able to convene to propagate a lie or (2) this report was apprehended based on senses. As for a circumstantial indicant that would weaken the epistemic value of a report, he provides the example of a report on the murder of a king in the market. In such an event, if people were to pass by the market but heard no mention of the murder among people in the market, then this indicant would weaken the report. This again leads me to reiterate how traditions of solitary reporting are not deemed problematic, because these are not accepted indiscriminately.608

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607 DFF ed. al-‘Alawī, §77, 70.
608 Cf. also Zysow, “Economy of Certainty” (diss.), 33 and 35.
a few times could lead, with the right circumstantial indicant, to a degree of knowledge, another without would fail.

This elucidation of the concept of tawātur and āḥād under shahāda is consequential. First, this implies that Ibn Rushd submits the basis for Islamic legal norms to the realm of doxa that is rhetoric. As Aouad suggests, by adopting an Aristotelian approach, Ibn Rushd sets the epistemological nature of the principals of theological and legal basis of Islam as doxastic at best. While I would agree with Aouad in asserting the doxastic view of Islamic principles, I concurr with Bou Akl’s conclusion that Ibn Rushd’s position is still framed in line with the uṣulis, who admitted the validity of a predominance of opinion as a basis for discerning legal norms. Still, I would emphasize that Ibn Rushd’s particularity among other Muslim jurists is that he wanted to contain Islamic legal taxonomy under an Aristotelian framework to emphasize the practical value of using opinion that is based on testimony to incite people for practical reasons, or, as he noted above, to eliminate injustices. Another idiosyncracy in Ibn Rushd’s conception of testimony as a mode of argumentation is that it is not limited to reports; rather he extended his definition of testimony to include other persuasive things such the notion of challenge related to the basis for Muhammad's miracle, which will be discussed next.

B. The basis of Muhammad’s miracle: the testimony of the lawgiver

Ibn Rushd’s discussion of the validity of testimony to generate assent for public conviction is not limited to tawātur and āḥād; in fact, Ibn Rushd also positioned the

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610 See Bou Akl’s discussion in the first chapter of his Averroës, 11-49.
discussion of the grounding of Muhammad’s prophecy under what he called the testimony of the lawgiver (shahādat al-shāri’). Looking at how Ibn Rushd conceived of miracles and of the sending of prophets, I base my analysis on corresponding discussion in the SCR, under the notion of challenge, and his elaborative account of this matter in his theological treatise KM, specifically his consideration of the sending of prophets and miracles.

In his SCR, Ibn Rushd discusses the grounding of prophecy within his treatment of nontechnical procedures: specifically the notion of challenge and the virtuous nature of the prophet. Ibn Rushd outlines his conception of prophecy in the following pithy statement:

Challenge may be made by means of different things. However, the most persuasive of challenges is the one that is made by means of the completely unprecedented miracle, i.e., by the performance of something considered impossible by mankind. But it is obvious, even if the feat is extremely marvelous, that it provides nothing more than good opinion about the one who performs the feat or nothing more than trust in him and in his excellence when the feat is divine. Now Abū Ḥāmid [al-Ghazālī] has explicitly stated this in his book called The Balance. He said: “Faith in the Messengers [i.e., the Prophets] by the way of the miracle, as the dialectical theologians have described it, is the popular way; and the way of the select few is other than this.”

Here Ibn Rushd fleshes out a few ideas, such as his objection to the validity of theological grounds to support the claim of prophecy based on miracle, and levels his criticism specifically against Muslim theologians who tried to use this argument as basis with the masses. Also, Ibn Rushd criticizes how the theologians have failed to rely on the testimony of the lawgiver as sufficient ground to convince people and, instead, tried to make a rational argument. To put it differently, Ibn Rushd specifically contests the

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611 SCR, §43, 77 (Arabic 196).
theologians’ rational grounding of the miracle as a basis for prophecy as expressed by Ghazālī, in his book The Balance. Instead, he claims that the basis for prophecy is the challenge, trust, and excellence of the prophet. This leaves us puzzled about what he means by challenge and trust as a basis for prophecy, seeking to understand how his argument differs from that of the theologians. In order to grasp this condensed view, we would do well to put this statement in the context of KM, where he takes the same position but elaborates extensively on the question of challenge and this idea of trust. In outlining the whole thread of his argument, I first discuss in detail his position against the theologians and why he criticizes them. I then explain how he builds his understanding of Muhammad’s prophecy and what he means by the notions of challenge, taḥaddī, and trust in his excellence.

1. Ibn Rushd’s argument against theologians

   It is not uncommon for readers of Ibn Rushd to come across his repudiation of theologians’ methods and specifically, in this context, their unsatisfactory attempt to prove Muhammad’s prophecy, as well matters of belief such the existence of God, on the basis of rational argument instead of contenting themselves with the witness of the lawgiver as already outlined above. Supporting his view with Ghazālī’s position, Ibn Rushd tries to argue against using demonstrative reasoning to account for prophecy in communicating with the masses. In his KM, Ibn Rushd reiterates his criticism of the theologians for seeking to use syllogism to prove the prophethood of Muhammad: “As for the existence of this type [prophets] among people, some group of people like to

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612 Cf. Ibid.
demonstrate it with syllogism and those are the theologians.” Ibn Rushd does not only dismiss the basis of the theologians’ argument but tries to show that it is untenable on both rational and Islamic grounds. Ibn Rushd recounts that concerning the theological argument on the question of the genuineness of God’s messenger the classical Ash‘arite theologians propounded that the basic distinction between a true prophet and imposter is the miracle, something that is exclusively specific to the Prophets. Thus, he calls attention to their use of the syllogism of al-shāhid ‘alā al-ghā’ib. This argument used by theologians can be translated as follows: “to draw a conclusion regarding the imperceptible (God) on the basis of the observable (sublunary world).” The basis of the argument is summarized here:

- God has both the will and speech and is the sovereign over the affairs of mankind
- It is possible to admit based on the observable [al-shāhid] that He who has speech and will and is sovereign over the affairs of mankind is able to send a messenger.
- Consequently, sending a messenger is a possibility in the case of the imperceptible [al-gā‘ib] that is God.

But it seems that the theologians used this argument, shāhid ala al-gā‘ib, to address the Brahmins who were ardent opponents of prophecy. Ibn Rushd adds that this argument is also supported by the analogy of the emissary of the king who can prove his genuine identity by showing signs that attest ineluctably to the origin of his message,

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614 KM, § 235, 173.
616 KM, 173-74.
617 Joep Lameer, Al-Fārābī and Aristotelian Syllogistics (Leiden: Brill, 1994), 204.
i.e. that he is summoned to transmit a message from the king. First, Ibn Rushd comments that this type of reasoning can be persuasive and might seem satisfactory for the multitude, but would not hold up in the face of close scrutiny. In specific, he points out that knowing whether the emissary is genuine based on the sign is contingent to one’s knowledge that the sign itself is that of the king. He deduces that this is only possible if the king informs people of these particular signs or if this sign has been established based on customary practice to be only associated with the king’s emissaries. Therefore, Ibn Rushd posits the following question: how does one establish that the performance of a miracle by someone is a sign exclusive to the prophet? The answer provided by theologians is the following. Ibn Rushd outlines the basis of their argument in two premises:

1- Whoever claims to be a prophet performs a miracle.

2. Everyone who performs a miracle is a prophet.

Then it is necessary that this person is a prophet.

Ibn Rushd expounds upon the proposition by adding a qualification: whoever claims to be a prophet performs a miracle which is perceived by senses, which cannot be invalidated unless one consents to the fact that miracles are actions that are performed by human beings and attests that these acts are neither unnatural or the work of certain particular type of people nor are the product of imagination. As for the second proposition, that everyone who performs a miracle is a prophet, it can only be valid under two conditions. First, one has to admit the existence of prophets, and second, one has to

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620 Ibid.
621 Ibid.
622 Ibid., 175.
acknowledge that a miracle is only possible to be performed by a true prophet. The validity of the premise that everyone who accomplishes a miracle is a prophet cannot be proved when one still has not established the existence of prophecy. In sum, this proposition is only valid to those who acknowledge the existence of both prophets and miracles. Consequently, Ibn Rushd invalidates this argument, for he claims that it tries to establish an inaccurate causal relation between the premises and the middle term. 623 He then anticipates the answer of those theologians who would claim that one can demonstrate the possibility of the existence of a prophet based on reason (al-‘aql). 624 In fact, he calls this possibility sheer ignorance, for it misrepresents the meaning of possibility, a state often inherent in the nature of things (fī ṭabī‘at al-mawjūdāt), such as in the example of saying that rain is possible for it could or could not rain. 625 Thus, he explains that it is in the nature of things to sense that something is, similarly with rain, at times existent and at others absent. In this respect, reason draws a universal judgment that this nature is possible. 626 As for necessary things (al-wājib), these are things whose existence one can apprehend in a universal sense, all the time, which cannot be changed or transformed. 627

To further this analysis, he adds that, if a contender admits the existence of one prophet at some point, then the revelation would be admitted as something possible. But considering that the contender claims that this was never sensed, then this possibility is void and ignores one of the two opposites, the possibility (al-imkān) and impossibility (al-imtinā‘). Instead Ibn Rushd contends that this authenticity of the existence of prophet

624 KM,§241, 175.
625 Ibid.
626 Ibid.
is pertaining to *tawātur*, for one can apprehend the existence of prophets from previous
generations. He adds that assuming that this past generation’s apprehension of the
existence of the prophet is based on senses would prove the possibility of divine origin is
also invalid, for it corresponds to claiming that the existence of someone sent by *'Amr*
validates the possibility that *Zayd* has sent someone, which implies an equivalence in
nature between *'Amr* and *Zayd*, which is inaccurate. Also, he adds that if one is to assume
this possibility, in itself, in the future, this is not based on our knowledge of it, so this
possibility would only be valid on the basis of the thing itself but not on the basis of our
knowledge of it.628

Considering that one of the two opposites—the possibility of sending a prophet or
the impossibility of sending of a prophet—becomes manifest, one would not have
knowledge of these things. This is similar to the doubt one can have about whether *'Amr*
sent an emissary in the past, which would not be equivalent to knowing whether there
would be an emissary in the future or not. The reason for this is, whether or not one
ignores the fact that *Zayd* sent an emissary in the past or does not, it is still impossible for
someone to affirm that whoever has *Zayd’s* sign is his emissary unless one knows that
this sign is that of the emissary.629 This can only be known if one has knowledge that a
messenger was sent.630 In a nutshell, Ibn Rushd assesses the theologians’ argument on the
possibility of sending a prophet in relation to our knowledge, the thing itself (*al-amr*) and
its relation to the past. This implies that this possibility evoked by theologians is related
to our knowledge and to the past. As he already explained about *tawātur*, our knowledge

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628 For the whole paragraph: *KM*, 176.
629 Ibid.
of past occurring events has no existence outside ourselves and therefore cannot be linked to the possibility of the existence of the thing itself.\textsuperscript{631}

Finally, Ibn Rushd addresses the argument of the possibility of prophecy based on the revelation.\textsuperscript{632} First, he asserts that this would be invalid, for the establishment of the argument of the revelation is in and of itself subsequent to establishing the basis of prophecy, unless one intends to establish something on its own basis, the approach of which is incorrect. He adds that one can neither refer to experience nor habit to support this proposition, unless one has witnessed miracles performed exclusively by a prophet. This can be seen as a decisive criterion for distinguishing a true from a fake prophet, an idea that seemed to escape the theologians. Ibn Rushd accuses them of making a possibility into an existence. While he acknowledges that theologians tried to correct their position and admitted that anyone who produces a miracle is a prophet, he also argues that this can only hold if the miracle proves the prophetic mission itself and the messenger and cannot be based merely on the unnatural value of the miracle, which is often deemed, simply on a basis of being unnatural, to be something divine.

The acceptable basis of this argument would be that whoever does these things is virtuous and a virtuous person cannot be accused of lies.\textsuperscript{633} Instead Ibn Rushd asserts the following position:

The miracle cannot prove the prophetic mission because reason cannot apprehend a connection between them except to admit that a miracle is an act of prophecy, just as healing is the act of

\textsuperscript{631} Cf. \textit{KM}, § 250,176.
\textsuperscript{632} Ibid.
\textsuperscript{633} Ibid., 177.
medicine. So he who can produce an act of healing proves the materialization of medicine, and thus this person is a physician. This is one of the fallacies of the argument.\footnote{Ibid.}

Here, he argues that one cannot establish a rational connection between the miracle and prophecy, unless one admits that a miracle is an act of prophecy in the practical sense that he who brings a miracle is a prophet, in the same sense that he who can heal is a doctor.

Ibn Rushd reminds us that those theologians who drew this rational connection and made this possibility into an existence by claiming the miracle as proof for the truthfulness of whoever claims to bear a revelation, risks including wizards and saints who can perform miracles.\footnote{Ibid.} In fact these theologians anticipated this objection advanced that the miracle does attest to prophecy only with the claim of the revelation.\footnote{Ibid.} In this sense, they held that if this claim is advanced by someone who is not a true prophet, then that person who is otherwise able to perform a miracle will find him- or herself incapable of performing a miracle in the context of this claim to prophecy. Ibn Rushd again concludes that this argument is void both based on reason and tradition.\footnote{Ibid.}

In a nutshell, Ibn Rushd makes it clear that the basis for the possibility of sending a prophet is in the past and our knowledge of it is not due to the existence of the thing but rather relies on \textit{tawātur}, that is, testimony. It is something that happened in the past and has been transmitted to us by people who sensed it, but without any direct empirical observation on our part. As this type of testimony was given to us based on transmission, one cannot make an argument for it based on revelation, for it will be a circular argument. Ibn Rushd is in line with his earlier position on the nature of \textit{tawātur} and its \footnote{Ibid.}
epistemological basis for knowledge about the past. As I have already shown above, he argues that the existence of the prophet and Mecca was transmitted to the people based on testimony and this knowledge only exists inside one’s soul. The next question, then, is what is Ibn Rushd’s basis for the sending of prophets?

2. Ibn Rushd’s argument: the inimitability of the Qur’an and the Aristotelian ethos

As I noted above, in the SCR, Ibn Rushd claims that those who believe in the unnatural basis of the miracle are mistaken; rather, he identifies the prophecy as a matter of taḥaddī, a challenge, and the trust in the excellence of the prophet, but he did not elaborate much on what he means by this. In order to decipher this view, I suggest supplementing our reading of this statement with his discussion of prophecy in KM.

After disputing the theologians’ consideration of the miracle as a basis for prophecy, Ibn Rushd provides this position:

However, the thing by which He summoned people to believe and with which he [i.e the Prophet] challenged them is the precious book for God said: Say, ‘Even if all mankind and jinn came together to produce something like this Qur’an, they could not produce anything like it, however much they helped each other.’[638] If they say, ‘He has invented it himself,’ say, then produce ten invented suras like it, and call in whoever you can beside God, if you are truthful.’[639] This being the case, the miracle of the Prophet with which he challenged people and which he advanced as a proof for the truth of his claim to his message, was the Precious Book.[640]

First, Ibn Rushd explains how God summoned us to believe on the basis of taḥaddī, the divine challenge voiced in the Qur’an on its inimitability. Here, he refers to how God challenged people to provide a book equal to the Qur’an in terms of its clarity

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and rhetorical features, referring to the above passages from the Qur’an known as the challenge verses. These verses ushered in the debate on the veracity of Muhammad’s prophethood. Ibn Rushd refers to the different positions taken by Muslim theologians on the question of God’s challenge. Some held that the proof that the Qur’an is a divine speech, miraculous or inimitable. To be specific they meant that the divine speech in itself is miraculous based on its rhetorical eloquence. This position can be found in the Ash’arite theologian al-Bāqilānī.641 On the other hand, as Ibn Rushd shows, others believed that it was not the speech in itself but its uniqueness; such is the position of some of the Mu‘tazilites, who propounded the doctrine of ṣarf, which meant that people were deterred by God from producing a text like the Qur’an.642 As already discussed this debate, in fact, formed the basis for the inception of the early balāgha, Arabic rhetoric specifically focusing around the doctrine of the inimitability of the Qur’an.643

In asserting that the basis for Muhammad’s persuasive argument is embedded in the fact that he performed the most persuasive challenges, that is, the revelation made by means of the completely unprecedented miracle, i.e., by the performance of something considered impossible to mankind. Ibn Rushd admits this inimitability of the Qur’an as the basis for Muhammad’s prophecy, but he provides his own understanding of the basis for the challenge:

That the Qur’an is a proof of the truthfulness of his prophecy, peace be upon him, is built for us, upon two principles, to which the Book itself alerted us:

The first being that the existence of the type of people called messengers and prophets is known

by virtue of itself. They are the type of people who lay down laws for other people by divine
revelation, and not by human education. Their existence can be denied only by the people who
deny concurrent [alumur al-mutawatir], as the existence of all things, which we have not seen - the
lives of the famous philosophers and so forth. Philosophers and all people agree, except those who
pay no regard to their words (and they are the dahriyya), that there are certain persons among
people to whom have been revealed many commandments for the people in matters related to
knowledge and beautiful actions which fulfill their happiness and proscribe wrong beliefs and ugly
actions. This is the act of a prophet.\footnote{KM,§ 258, 179.}

The second principle is that he who performs this act, that is, the laying out of law revealed from
God the almighty, is a prophet. This is a principle that is not doubted on the basis of humans’
innate disposition. For, in the same way it is known by virtue of itself that the act of a doctor is
healing, so he who performs healing is a doctor; likewise, it is known by virtue of itself that the act
of the prophets, peace be upon them, is to law down laws based on a divine revelation, and he who
performs this act is a prophet.\footnote{KM, § 260, 180.}

In the first principle Ibn Rushd asserts that the basis of human knowledge of the
past is tawātur, people’s way of understanding the things they have not observed
themselves, such as the existence of famous philosophers, a basis both the philosophers
and other people agree on, such as the existence of those who come to lay out the laws
needed to fulfill happiness. This basis of agreement between other people and
philosophers is central, for it relates to the mahmūdāt, the praiseworthy premises which,
as I discussed in the previous chapter, hold the highest rank among rhetorical premises as
they are esteemed for their notability in being shared by philosophers and other people.\footnote{See my discussion of mahmūdāt in chapter two.}

So, clearly, Ibn Rushd asserts the reputable value of the argument of prophecy based on
tawātur, testimony, and relies on mahmūdāt.
Furthermore, he adds that this basis of the argument is grounded in humans’ innate disposition to believe that whoever performs the act of healing is a doctor; similarly, he who performs the act of bringing a law is a prophet. Thus, the concrete practical outcome that is healing or establishing a revealed law is the very basis of belief. This rhetorical grounding should not lead to a claim that the reputable basis of the argument presupposes mere persuasion. Rather, Ibn Rushd seeks to convey that the argument for prophecy hinges on a reputable opinion that is shared between philosopher and other people, for it is linked to the practical outcome, which is the success of the law to better lives and fulfill happiness by calling people to good action and the avoidance of evil actions. This is portrayed as self-evident and is experienced by human beings. For as he notes in his SCR, the essence of this exceptional performance of a miracle is that it provides a good opinion: “But it is obvious, even if the feat is extremely marvelous, that it provides nothing more than good opinion about the one who performs the feat or nothing more than trust [thiqa] in him and in his excellence [fadīla] when the feat is divine.” In other words, he holds that the main ground for recognizing the validity of Muhammad’s prophecy is its generation of a good, reputable opinion, which vouches for the trustworthiness and excellence of the prophet. So he contests any unnatural dimension to Muhammad’s act of prophecy on the basis that it rests on the validity of the opinion, which, as I deduced, is grounded in the practical outcome it generates, but also in the ethos of this person based on his ability to prompt trust and virtue. The main thrust of the argument is the testimony of the lawgiver. This testimony is concomitant with the practical outcome of delivering a revealed law. The testimony of the lawgiver is not merely a linguistic testimony but is rather perceived in practical terms, which forms

647 SCR, §43, 77 (Arabic 196).
enough ground for people to believe and is agreed on by both philosophers and other people.

In addition, Ibn Rushd provides some scriptural evidence that corroborates his main arguments. First, he defends his view with a few pieces of scriptural evidence, such as the fact that God sent prophets like Noah, Moses, Abraham, and Jesus, etc. As for the second ground, Ibn Rushd cites the following scriptural evidence:

“People, convincing proof has come to you from your Lord and We have sent a clear light [al-nūr al-mubīn] down to you” (Qur’an 4: 174) and “People, the messenger has come to you with the truth from your Lord, so believe- that is best for you.” (Qur’an 4: 170) “But those of them who are well grounded in knowledge and have faith do believe in what has been revealed to you [Muhammad], and in what has been revealed before you,” and finally “But God Himself bears witness to what He has sent down to you-He sent it down with His full knowledge- the angels too bear witness, though God is sufficient witness. (Qur’an 4: 166).

What is most striking about his choice of scriptural evidence is that they all seem to underline the practical basis of the prophecy as an act of bearing witness to truth and communicating the revealed law to people. Such an understanding can be first detected in his use of the notion of the elucidating light, al-nūr al-mubīn, or elucidation, bayān. Linking these scriptural statements in context to Ibn Rushd’s argument on the grounds for Muhammad’s prophecy being practical outcome, one is inclined to construe that this view of light, elucidation, and witnessed truth also supports his argument that the revelation as discourse was delivered to bring about concrete outcomes, through elucidation, to good opinions. In fact, this view becomes more clear in a later statement made by Ibn Rushd in KM contending that the Qur’an’s miracle is associated with bayān, elucidation: “God’s

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648 KM, §262, 180.
Precious book came as a miracle on the basis of its clarity and elucidation \([bayān]\).\(^{650}\)

The association to \(bayān\), elucidation, as the basis for the miracle of the revelation is not arbitrary. God’s revelation came as elucidation through discourse, which challenges people on the basis of its rhetorical feature that is the \(bayān\). The importance of this notion is that it bears rhetorical and argumentative features; it is persuasive, for it communicates an argument through delivering it to people in the most elucidating way. This elucidation is rather anchored in its practical value, which is delivering good opinion and establishing a law. This understanding seems to draw from the notion of \(bayān\) in \(balāgha\). In fact, under the context of \(balāgha\): “\(bayān\) develops from a (near-)synonym of \(balāgha\), eloquence, to the designation of a particular aspect of it which, within the \(‘ilm al-balāgha\) is dealt with by the \(‘ilm al-bayān\)”\(^{651}\). Again, along with the notion of challenge, Ibn Rushd seems to borrow from the concept of \(balāgha\) to erect a cogent argument about the validity of prophecy, which relies on both reputable opinion and practical value. In so doing, he seems to assert the rhetorical basis of the divine discourse, but not in a merely persuasive theological sense: rather, in the sense that it relies on a practical view, which is communicated in a concrete sense. This brings me to the second interesting allusion to God being the witness to truth (\(shahīd\)), which can be linked to his understanding of testimony or witnessing as the main grounding for the prophecy of Muhammad. This reference to God being the witness also resonates with his view on the testimony of the lawgiver (\(shahādat al-shāri’\)) as enough grounds for people to believe, in his \(SCR\).

In a nutshell, Ibn Rushd admits that elucidation of the revelation is the basis of the

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\(^{650}\) \(KM\), §156 149.

\(^{651}\) Gustave E. von Grunebaum, “\(Bayān\),” \(EI2\).
miracle of the prophet, one that is inimitable and cannot be performed by humans, as is seen in the passage referred to as God’s challenge. For this elucidation materializes through delivering good opinion and establishing a revealed law. The basis of the validity of the revelation is its practical outcome. Thus sharī‘a has as its epistemological argument God’s testimony that was elucidated to them in concrete terms. I, thus, deduce that Ibn Rushd’s basis for the validity of Muhammad’s revelation is rhetorical, but not in a conventional sense. The rhetorical value he sees as the basis for Muhammad’s revelation is drawn from both an Aristotelian understanding of the practical view of rhetoric, from the notion of ethos, and from some notions from balāgha and the Qur’anic lexicon. In so doing, Ibn Rushd tries to anchor the validity of Muhammad’s message to its practical efficiency as the prophet delivered a law that came to witness truth.

C. Consensus and written laws under shahāda

The last two types of persuasive things I discuss are consensus and written laws.

In his exposition of the persuasive things in SCR, Ibn Rushd refers to both consensus and written laws as examples of nontechnical procedures. While his discussion of consensus and the written laws is brief and does not allow for an extensive analysis, in both references Ibn Rushd draws from discussion in Islamic law and again identifies shahāda as the epistemic basis of both modes of argumentation.

First, Ibn Rushd explains the basis of written laws and mentions that it is to be taken as testimony:

As for taking as a testimony the written laws, things are clear this matter. However, whatever assent to them results because of being brought up with them or because of habit is very powerful. Thus, you see many who are brought up according to the ignorant ways of life believing fables
from which we are not able to turn them away.\textsuperscript{652}

Here, he shows that written laws are based on testimony, which produces assent in public matters. This type of assent, he explains, pertains to habit (\textit{al-\textasciitilde{a}da}), which is important for people’s belief in certain things having a customary basis. The same view holds in his reference to consensus, which he also links, in its persuasive nature, to the testimony of the lawgiver.

The foundation for the persuasiveness of consensus, which is the mutual understanding of the people of the religious community and their agreement about something pertaining to the religious community, is the lawgiver’s testimony to them about their infallibility. When a group of people became aware of this they said: He who departs from consensus is not an infidel." Abū Ḥāmid al-Ghazālī explicitly stated this idea about consensus in the first part of his book called The Distinction Between Islam and Atheism. He said: "What consensus is has not yet been agreed upon.\textsuperscript{653}

Here, Ibn Rushd puts consensus in the context of concordance within a religious community and relates the question of its basis to the testimony of the lawgiver. Drawing from the Islamic legal context, he refers to the consensus of the Muslim community, which is used in principles of jurisprudence as one of the sources for discerning legal norms and is grounded on the view of the infallibility of the Muslim community. Specifically, he refers to Ghazālī’s position on consensus. What is important for us is that consensus appears to be also grounded in testimony. In \textit{DFF}, Ibn Rushd admits the same position on consensus. He argues that trying to account for consensus on rational grounds is not feasible, reminding us that people could not have a consensus on lies but it is not unlikely that they would have a consensus on errors. Therefore, he concludes that

\textsuperscript{652} \textit{SCR},§41, 76 (with slight modification, Arabic 194).
\textsuperscript{653} \textit{SCR}, §42, 76-77 (Arabic 195).
in case we only had a few mujtahids, perhaps two or three, then consensus could be
established on the basis of the testimony of the law on their infallibility (‘iṣma), as they
are deemed the umma in that time.654 This comes again to show that he submits this mode
of argumentation used in Islamic jurisprudence to testimony as its epistemic basis; it
cannot be grounded in rational argument.

This shows that Ibn Rushd bestowed his understanding of testimony with a broad
scope, which seems to encompass both the question of concurrent reports and solitary
reports and the basis of acceptance for Muhammad’s miracle, written laws, and
consensus. This expansive scope seems to submit the whole machinery of Islamic modes
of argumentation, which form the basis for Islamic jurisprudence, to the overarching
concept of shahāda. Consequently, he seems to both admit the doxastic value of Islamic
principles and build in a specific understanding of the efficiency of these modes of
production of assent mostly by drawing upon Islamic jurisprudence and balāgha. Ibn
Rushd’s view of the importance of relying on opinion seem to rests on the teleological
value he vests in opinion as a way to ensure stability and eliminate injustice in the
political realm. This view is further illuminated in MCAR.

III. Islamic legal practice under shahāda

Adopting testimony as an epistemological compass, which encloses a variety of
mode of argumentation within the sphere of rhetoric, as seen in SCR, is also affirmed in
the MCAR. Although Ibn Rushd holds fast to the same view setting testimony under the
epistemic scope of rhetoric, he did not see the need to reiterate his early scrutiny and the

654 DFF ed. al-‘Alawī, 91.
appraisal of different opinions such as the distinction between reports, based on the
categories of tawātur and āḥād. Instead, Ibn Rushd appears to be keener on pinning down
the practical value of shahāda by drawing from both Islamic legal method and practice in
the court. On this basis, he aims at showing the use of testimony in legal methodology,
pertaining to interpreting the law to make sound legal rulings, but also in terms of court
practice, focusing on the Islamic doctrine of proof. Hence, I focus on this practical and
legal outlook in an effort to underscore that such a view of Islamic legal methods as a
subset of rhetoric accords to his philosophy of law in his legal works, mostly DFF, BM,
and FM. Although Ibn Rushd remains consistent in submitting Islamic law beneath the
realm of testimony to underline both its doxastic and practical views, he appears to be
more inclined in MCAR to draw some rapprochement between testimony and rhetorical
procedures mainly in his discusssion of the written and the unwritten laws.

A. Defining testimony [shahāda] and witnesses [shuhūd] in the Middle
Commentary to Aristotle’s Rhetoric

In discussing testimony in MCAR, Ibn Rushd oscillates between referring to
testimony (shahāda) and witness (shuhūd). Also, he distinguishes between past
witnesses, those predecessors who were responsible for reporting past events, and present
witnesses, those who are contemporary to a current community:

As for witnesses, some are either among our predecessors and some are contemporary and still
present. Among those contemporaries are those who share with the witness the expected good or
the feared bad.655

And I mean by these past, predecessor witnesses those who are widely known and accepted by most people and are notorious for their virtue. Those people’s testimonies are accepted on precedent things regardless of whether they reported to us that they saw it with their own eye or not. For overall their testimony is taken – on the reported matter- to produce assent.656

Within this division, he admits that contemporary witnesses are those who are partners to us on what is good and bad. As for witnesses who are from a predecessor’s generation, their virtue has already been established and accepted based on past events. Here, Ibn Rushd reminds us that the validity of their reports has an empirical basis, a point he already made in discussing tawātur earlier. After making this division between past and present witnesses, Ibn Rushd adds another distinction on the basis of the subject of the testimony imparted to us by the witnesses, which he divides into testimony about the past, present, and future.

And testimonies are either testimonies on past things and those are things that were apprehended by most of those who existed in that time or testimony on future matters. As for past things, the only possible witness for those are the predecessors. As for the witness to the existent things in our time those are people from our time and the witness for the future matters are of two types: diviner whether their foretelling can be based on a skill or not and those who master maxims which interdict or authorize actions, like when we say “be united to your kin” because the lawgiver – peace be upon him- said that “being united to your kin increases your lifespan.657

While the past testimony is that which was imparted to us from past reporters, present testimony is given to us by witnesses who are among us. Finally, he links future testimony to past reporters who imparted to us sayings predicting future events, which pertain either to maxims or divination. In discussing the methods for assessing these types of testimonies, Ibn Rushd again draws upon Islamic law, specifically the

656 MCAR 1.15. 22, ibid.  
657 MCAR 1.15. 23, ibid.
qualification of establishing the probity of past reporters of prophetic tradition as well as qualifications discussed for court witness. Specifically, in *MCAR* 1.15.26, he notes how testimonies linked to past reports in general or in the specific case of legal disputes are assessed in the Islamic legal context. For past testimonies, the assessment is made under what is known as *hadith* criticism, which is a science of establishing the probity of reporters of prophetic traditions, something that he discusses in extensive detail in his *DFF.*

The appraisal of past reports depends on discerning their epistemic value through either boosting or weakening the validity of those reports, as shown in the above discussion of solitary reports. Similarly, in court cases, Islamic judges resort to the process of *tazkiyya*, which is the act of public inquiry, usually undertaken secretly by the Qādī, to establish the good morals of witness. Here, he notes that in cases of testimony or witness in the court, an important fact is that the person is neither a friend nor an enemy to the plaintiff or defendant. This reflects the importance of testimony in Islamic law, specifically its priority in the doctrine of proof used by judges in the court. Along the same line, in his *BM*, Ibn Rushd discusses the qualifications, gender, and number of people required to give valid testimony:

The number of qualifications considered for the acceptance of a witness are five: ‘adāla, puberty, Islam, freedom, and the absence of an accusation. Some of these are agreed upon, while others are disputed. The Muslim jurists agreed about ‘adāla and its stipulation for the acceptance of

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658 *DFF* ed. al-‘Alawī, 75-83.
659 For more on the method of criticism of reporters known as *tajrīḥ and ta’dīl* see *DFF* ed. al-‘Alawī, 75-83.
660 Peters, “*Shāhid.*”
testimony, because of the words of the exalted, “[O]f such as ye approve as witness”, and His words, “[A]nd call to witness two just men among you.”

As he explains here, the main qualifications are associated to the witness’s moral reputation, mental maturity, and status as a free Muslim who is not liable to any blame. Furthermore, like in the MCAR, Ibn Rushd underscores in BM the inadmissibility of testimony of someone who holds kinship or even someone who holds animosity against the party involved in the court case, as kinship or hatred would affect the neutrality of the testimony of the witness. Finally, as for future testimonies, Ibn Rushd admits in the above statement that their validity rests on a habitus, which is related to virtuousness and one’s capacity to foresee the future. This capacity is something he relates to the Prophet. His view of future testimony and how to establish its validity is intriguing, as it could be related to his conception of the prudential lawgiver found in MCAR 1.13.10. As I discussed in chapter two, Ibn Rushd defines the prudential lawgiver based on his capacity to lay down laws pertaining to situations and circumstances that are the most possible (akhtarī), for the most people in the most times and in the most topoi (al-mawādī’). The more a lawgiver makes an effort through legal reasoning to lay down laws that have a long-lasting utility for the majority of people, the better the law is. So one could read this future validity as a warrant for the prophet’s habitus and capacity to provide maxims that relate to future events. Be that as it may, Ibn Rushd’s conception of witnessing, the different types, and the method to assess their validity all fall within the scope of the Islamic legal context.

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662 BM ed. 6, 213.
Table 7: Testimony in Islamic law

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B. Shahāda and Islamic legal interpretation

An important dimension of Ibn Rushd’s analysis of the notion of testimony in his *MCAR* is his focus on its practical value in the context of the methodology of Islamic law. This section examines the method of Islamic jurists to extrapolate principles from the finite body of the authoritative texts to serve in the infinite number of possible legal incidents.663 In Islamic jurisprudence, five main sources of established laws are recognized: first, by “God’s revelation; second, by the Prophet’s inspired actions and decisions; third, by consensus; fourth, by analogical reasoning, which is often identified with a fifth source of licit norm production namely, ‘the individual effort of legal reasoning’ (ijtihād).”664 Given that the activity of the jurist is primarily linked to the contingent nature of changing human action, a central part of the jurist’s activities falls

within the scope of *ijtiḥād*, translated by Johansen above as “the individual effort of legal reasoning.”\(^{665}\) Such legal activity requires skillfulness and particular criteria, which Ibn Rushd’s alludes to in his *MCAR* 1.7.32, where he divides legal experts into two types: the messenger recipient (*sāmiʿ muballigh*) and the scholar recipient (*sāmiʿ ‘ālim*).\(^{666}\) In this scheme, the first type is only a recipient; he does not have the capacity to infer legal decisions. The second type is a recipient who can also infer rulings from the legal principles for applications that were not originally communicated by the lawgiver.\(^{667}\) Ibn Rushd reflects on this activity in his discussion of testimony.

Dwelling on the value of testimonies as *taṣdīqāt*, convictions that procure assent, Ibn Rushd discusses their validity in the context of Islamic legal methods:

> And convictions may occur either based on testimonies or the circumstantial indicants [*qarain al-ahwal al-mushakila*]. These play the role of testimonies. Basing judgment on circumstantial indicants is an act for the perspicacious and the skilled judge. For this reason, a judge should not confuse counterfeit circumstances the way a teller would confuse counterfeit silver. These circumstances call the judge’s attention to the true thing itself, even though the false testimony is contrary to it. Then they are better fit to call attention to the true thing when there is no testimony or when there is a testimony which accords with them. For this matter, for the judge these circumstances play the role of the witness, for there is no difference between judging based on witness or these circumstantial indicants that are attached to a speaker. These indicants are not enthymemes and therefore they are deemed testimonies.\(^{668}\)

Here again he notes the importance of *qarīna*, that is the circumstantial indicant, which he discussed earlier in *SCR*, in relation to testimonies. He explains how these are used as an indicant to boost or weaken the epistemic value of reports. *Qarīna*, as

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\(^{665}\) Ibid.
\(^{666}\) Averroès, *Commentaire* 2, 63.
\(^{667}\) Ibid.
\(^{668}\) *MCAR* 1.15.25, ibid., 129-130.
explained here, is instrumental to the Islamic legal method from both a linguistic and an
epistemic view. To gain a glimpse of Ibn Rushd’s view, I first expose Ibn Rushd’s view
of *qarîna* in the above quoted passage *MCAR* 1.15.25. I then use his discussion of
indicants in relation both to textual interpretations of command and to epistemic
assessments of prophetic tradition based on his *DFF*.

In the above passage, Ibn Rushd distinguishes between assent produced on the
basis of testimony and that, which is triggered on the basis of circumstantial indicant,
*qarîna*. As I have already noted in my previous discussion, *qarîna* relates to non-
concurrent reports such as the solitary report and the jurist is, therefore, required to assess
their epistemic value before using them as a basis for legal norms. When he admits the
validity of the ’āḥād, he requires the use of *qarîna* to boost their epistemic value.
Similarly, here, Ibn Rushd notes that while in certain cases you rely on the testimony to
fulfill assent, in others you rely on circumstantial indicants (*MCAR* 1.15.25). In so doing,
he affirms his early position but also adds some qualitative criteria for determining which
jurists have the capacity to hit the mark in discerning *qarîna*. He thus mentions that the
capacity to evaluate indicants requires some perspicacity and skill to distinguish what is
true from what is counterfeit. This qualitative criterion makes an allusion to the qualified
jurist that is the scholar recipient (*sāmi‘ ʿālim*) who, unlike the messenger recipient who
is restrained to being a transmitter of reports, is endowed with the capacity to discern new
rulings from the legal principles. In order to understand this allusion, I shall supplement
this passage with his reference to *qarîna* in *DFF* in relation to *ijtihād*.

In *DFF*, Ibn Rushd discusses *qarîna* in two instances. While the first relates more
to the linguistic interpretation of divine commands the second is concerned with
epistemic value thereby divulging a hierarchy among different indicants. In both cases, Ibn Rushd seems to relate this discussion of qarīna to his conception of the use of legal reasoning to establish legal norms.

Defining the method of legal reasoning, Ibn Rushd clarifies that it should be constructed around the understanding of the divine discourse and its types of speech as well as its indicant (qarīna):

This part is the one whose examination is most proper to this science, according to what we have already stated. It is divided according to the things that realize comprehension based on the prophet that is either through an expression or an indicant.

The expression is divided into what indicates the legal norm by its form or its implicit content and the meaning conveyed.

And the indicant is divided into two parts: the first is his act (peace be upon him) and the second is his tacit agreement to a legal norm.669

In this passage, Ibn Rushd reminds us that legal reasoning is based on utterance (lafz), which is either implicit or explicit. As for indicants, they are related to the Prophet’s action (‘amal) or tacit approval (iqrār).670 This outlook reveals an expansive scope of the discourse of the revelation to encompass speech, qawl, and action, ‘amal, of the prophet.671 To this end, he shows how interpretation of the divine discourse is built upon the taxonomy of speech and indicants hinging upon the Prophet’s actions or tacit agreement. While he adopts the taxonomy of uṣūlists, which divides expression of the divine discourse into the apparent and the equivocal, he also reminds us that, before we get into this dichotomy, we should consider the two categories of speech, simple

670 Ibid.
(mufrada) and composed (murakkaba) expression. While the simple expression can either be a verb, noun, or particle, the composed ones consists of those with simple expressions and those that partly indicate a given meaning. Within this last category that has bearing on meaning, he adds another. Specifically, he identifies how some expressions are independent for comprehension while others are dependent. Under the independent ones you may find apophantic modes of discourse that determine truth or falsity and non-apophantic modes of discourse, including command, prohibition, request, supplication, and plea.

Let us start over from the beginning to say: Expressions are either simple or composed. A simple expression can either be a noun, a verb or a particle. Composed expressions are those that consist of these simple expressions, a component of which partially conveys a meaning and among these some which are not independent in themselves to convey a meaning and some which are. The latter [those which are independent] are divided into ones whose composition yields to veracity or falsehood and those who do not. The latter are divided as well into command proscription, demand, supplication and sermon.

This distinction is key, for it shows how he brings together the Aristotelian taxonomy of speech with that of uṣūlis. Specifically, Aristotle divides logos into the apophantic language of propositions relating to finite objects in sentences capable of truth and those non-apophantic types, which do not refer whether something is true or false, such as the euche, the plea, the prayer, and the desire and Ibn Rushd alerts us to this

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672 DFF ed. al-‘Alawī,§150, 101.
673 This important position on the non-apophantic mode of discourse is not found in ‘Alawi’s edition but was identified in Bou Akl’s. Thus in this case I base my translation on Bou Akl’s edition (Averroès, §178, 236). For a comparison see DFF ed. al-‘Alawī, 101.
division of speech. Subsequently, he adds that, in the Arabic language, non-apophantic discourse needs a circumstantial indicant that is based on the addressee and addresser:

> It appears that the order, demand, and supplication do not possess in the Arabic language their own proper forms and are to be distinguished based on circumstantial indicant.

Here, he notes that in Arabic, non-apophantic speech such as demands or supplication requires a circumstantial indicant or *qarīna*. If we are to make sense of both passages, we have to account, first, for how Ibn Rushd identifies the indicant with the action or tacit agreement of the prophet, that is, the level of praxis. He then also requires the indicant in non-apophantic speech, which pertains to orders, demands, or supplication. To discern an order, demand, or supplication from the divine discourse, one needs an indicant, which is anchored in the prophet’s action or tacit agreement. In so doing, Ibn Rushd integrates the Aristotelian division of speech with that of the *usulis*. He relates *qarīna* to the tacit agreement or action of the prophet: as the indicator to identify the teleological value of divine discourse as either a form of demand or supplication. In Islamic law, such view has major ramifications in identifying what are morally imperative duties and what are not. This approach to discerning legal norms tries to resolve the ambiguity that is often found in discourse. In establishing *qarīna* as a sign for discerning the intention of the lawgiver through the praxis of the prophet, Ibn Rushd anchors the efforts of legal reasoning in a teleological view, which is rooted in the importance of action as a central value of the divine discourse, as it was primarily elucidated to us through the normative praxis of the prophet. Such a view of the divine discourse sits well with his own interpretation of the miracle of the prophet, which rests

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675 *DFF* ed. al-‘Alawi, §197, 120.
on the elucidation of the divine discourse through delivering a concrete practical outcome, that is, sharīʿa.

The second discussion of qarīna found in DFF is also included in Ibn Rushd’s examination of the method of legal reasoning. Specifically, Ibn Rushd discusses how legal interpretation, which is contingent on discerning the meaning of the divine discourse, needs to be justified based on proofs. These proofs are subject to an epistemic hierarchy based on the indicants available to the jurist to enable him to establish assent. This specific discussion falls under Ibn Rushd’s identification of the notion of elucidation, bayān, used by usūlis:

The name of elucidation [bayān] is applied for them in this art to everything that can be used to establish [tuthabata bi-hi] legal norms and by which comprehension is fulfilled through either the form of expression or its implicit meaning, as well as what we have previously enumerated based on its hierarchy in causing assent. And we will talk about each type of elucidation [bayān] -- in what makes it a legal proof. 676

Ibn Rushd refers to bayān, as used by usulis, as the basis for establishing legal norms discerned from divine discourse that is either explicit or implicit. In one of his articles, Joseph Lowry discusses the notion of bayān among Muslim jurists and shows some evolution in how it has been defined. First, Lowry defines bayān as discourse or speech that is a communication in reference to the various modes of divine speech used to announce norms to humankind. 677 Lowry reports that one of the early definitions of bayān is found in al-Shāfiʿi’s Risāla. 678 However, he shows how al-Shāfiʿi’s bayān had a

676 DFF ed. al-ʿAlawī,§159, 103-104.
678 Al-Shāfiʿi defined bayān as, “A noun comprising several convergent basis meanings which are, however, divergent in their ramifications [ism gamiʿi- maʿānī [sic] mujtamiʿ] at al-uṣūl mutashaʿibat al-furūʿ]. The lowest common denominator among those convergent and yet divergent meanings is that a bayān is
specific interpretation linked to the “finite number of textual arrangements, conceived as
discrete revelatory structures composed of the Qur’an and the sunna.”\textsuperscript{679} In other words,
it is central to the very nature of the method described in \textit{uṣūl al fiqh}, which regulates the
hierarchy of principles and the relation between Qur’an and sunna. Thus\textit{ bayān}
encompasses all of the different combinations possible between Qur’an and sunna.\textsuperscript{680}
This shows that God delivered normative knowledge based on structural typology.\textsuperscript{681}

For this matter, Lowry considered Shafi‘ī’s definition structural and as carrying
no qualitative value for the word in terms of communication of discourse.\textsuperscript{682} In his survey
of later jurists’ conception of \textit{bayān}, Lowry makes an important remark on the
transformation that could have been attached to this notion:

In addition, by the time we are in the world of full-fledged books on \textit{uṣūl al-fiqh}, the science of
Arabic rhetoric, which has become highly evolved, comes to be denoted as \textit{balāgha}, possibly
khatāba, but sometimes also as \textit{‘ilm al-bayān}, and this fact has, obviously, affected both the
understanding of the term \textit{bayān} and the science of \textit{uṣūl al-fiqh}, which is preoccupied with issues
of language and signification. This point must be kept in mind because whereas for Shāfi‘ī the
notion of \textit{bayān} seems to have a structural significance, denoting interaction of the Qur’an and the
Sunna, for later authors it has a more literary, linguistic, communicative, or perhaps even semiotic
connotation, as well as a qualitative sense of particularly felicitous usage.\textsuperscript{683}

This transformation of the notion of \textit{bayān} to reflect the qualitative
communicative understanding that makes something intelligible seems to fit within Ibn

\textsuperscript{679} Ibid.
\textsuperscript{680} Cf. ibid.
\textsuperscript{681} Cf. ibid., 509.
\textsuperscript{682} Ibid.
\textsuperscript{683} Ibid., 510.
Rushd’s view.\textsuperscript{684} As noted here, this could be linked to the influence of rhetoric, both in its peripatetic and Arabic trends. In fact, I would argue that Ibn Rushd’s view of the Islamic legal method under the scope of rhetoric is a case in point of this conception of \textit{bayān}. My contention is based, first, on how Ibn Rushd links \textit{bayān} to both \textit{tathbīt} and \textit{taṣdīq}, which, as I established in my previous chapter, reveals the intersection between the legal method and rhetorical argumentation. Also, I hold that in addressing \textit{bayān} in relation to the use of proof to establish assent, Ibn Rushd seems to be concerned with the problem of ambiguity in language and in how to establish a binding opinion rather than with the structural incompatibility between Qur’an and sunna found in al-Shāfi‘ī\textquoteleft i definition.\textsuperscript{685} Finally, in admitting \textit{bayān}’s role in establishing legal rules, Ibn Rushd creates a hierarchy among the types of \textit{bayān}, based on \textit{qarīna}\textsuperscript{686}: in order to discern the intention of the lawgiver in implicit expression, one is required to use \textit{qarīna} as a basis for interpretation. Furthermore, he discloses a hierarchy among the different \textit{qarīna}, which indicates various degrees of qualitative value of \textit{bayān}. Under this hierarchy of indicants, Ibn Rushd exalts \textit{fāhwa al-khitāb}, or the implicit a fortiori of discourse, where the unspoken is stronger than what is articulated in the divine discourse.\textsuperscript{687} In the second rank, he puts \textit{qiyyās al-ma‘nā}, where the unspoken is equal to the articulated, and then in third rank, he puts the \textit{qiyyās al-mukhayyal} or \textit{al-munāsib}, where the unspoken is attached to the spoken on the basis of \textit{maṣlaḥa}.\textsuperscript{688} Finally, in the fourth rank, he sets \textit{qiyyās al-shabah}, which considers a legal case in terms of its similarity to others.\textsuperscript{689} This hierarchy

\textsuperscript{684} Cf. ibid., 513.
\textsuperscript{685} Cf. ibid., 526-527.
\textsuperscript{686} \textit{DFF} ed. al-‘Alawī, §215-218, 127-129.
\textsuperscript{687} Ibid.
\textsuperscript{688} Ibid.
\textsuperscript{689} Ibid.
establishes a spectrum between the different indicants in terms of their epistemic value.

To put it differently, Ibn Rushd admits that the divine discourse bears a qualitative communicative view that produces assent but depends on a hierarchy. Still, this hierarchy remains anchored in the notion of how the divine discourse is communicated to people. This suggests that God is addressing us through ways that are accessible to us, for he is a speaker, subject to rules of public speaking, *al-mukhāṭaba al-jumhūriyya*, always bearing this communicative purpose in mind.690 As the teacher of *bayān*, God, sent us his revelation teaching us through speech and action (*qawl* and *‘amal*) in the best pedagogical way possible. So the practical aspect of prophetic *sunna* expanded the realm of discourse to spread beyond mere speech (*qawl*) to include action and tacit agreement. Such an understanding of discourse, I would argue, draws from the rhetorical value of discourse acknowledged in the science of *balāgha* to assert the practical dimension of the *sunna* as a normative praxis, a view he also uses in advancing the basis for adherence to Muhammad’s miracle being *bayān* as it was revealed through the practical outcome of bringing a law. Thus, he uses *bayān* and its hierarchy of indicants as both a medium to proximate this praxis and as a stabilizing factor in ascertaining legal rules.691 This link between the divine discourse and *bayān* is also found in his epilogue:

> After the praise of God, the teacher of elucidation *bayān*, [*mu‘llim al-bayān*], He who has required theoretical inquiry (*al-nazar*) and inference (*al-istidlāl*) and distinguished man with [the capacity] to establish cogent arguments [*al-hujaj al-bāligha*] and draw analogy [*darb al-amthāl*], and blessing upon the soul of the messengers, the peak of perfection and excellence.692

Herein Ibn Rushd identifies the divine discourse with *bayān* and admits that while God

690 DFF ed. al-‘Alawī,§213, 126.
692 DFF ed. al-‘Alawī,§1, 34.
required people to pursue theoretical inquiry and inference, he endowed all people with the capacity to establish cogent argument [al-ḥujaj al-bāligha] and to draw analogies.

Such a statement alludes to a shared human capacity to establish rhetorical argument and analogy, which resonates with Ibn Rushd’s argument in *MCAR*, as I discussed in my previous chapter, on the shared social value of rhetoric as the common denominator among people. Again, the very foundation of the revealed law is *khīṭāb*, deeming God as a Speaker and Teacher of *bayān*, which ascribes a teleological essence to his speech. This view fits very well with his view of rhetoric as a common denominator among people but also as a practical teleological value for establishing binding opinion among the public. To conclude, Ibn Rushd’s legal treatises remains consistent with his philosophical commentary in submitting Islamic law under the scope of rhetoric as befits its practical and epistemological attributes, while drawing upon certain notions from the Arabic sciences of *fiqh* and *balāgha*, such as the notions of *qarīna* and *bayān*. Such a view of the legal method still remains under the epistemological scope of testimony.

**C. Shahāda and the doctrine of proof**

Another important concordance between Ibn Rushd’s outlook on testimony in his *MCAR* and his legal works, specifically in his Book of judicial judgment, *BM*, relates to the doctrine of proof used by the judge to render judgment in Islamic courts.

As I already discussed, Ibn Rushd’s discussion of *shahāda* in *MCAR* as a proof for use in adjudication is clearly contextualized in the context of the Islamic doctrine of proof. Aristotle characterizes the proofs to be used by the pleader in a court of law as
nontechnical and gives the examples of laws, testimony, contracts, oaths and torture. Ibn Rushd follows the same scheme, calling the non-technical proofs *al-taṣdīqāt al-ghayr șināʾiyya*. These include laws (*al-sunan*) both written and unwritten; testimonies (*al-shuhūd*); contracts (*al-ʿuqūd*); torture (*al-ʿadhāb*); and oaths (*al-aymān*). Ibn Rushd inscribes these procedures as exemplars of extra-legal factors used in the court. While in the Greek context the litigant is supposed to deliver a persuasive speech in front of audience of non-legal experts, in Islamic court it is also incumbent on the litigant to present his case and provide proofs, yet the case remains at the discretion of the Qādī’s judgment. As explained by Johansen, in his article “Signs as Evidence: The Doctrine of Ibn Taymiyya (1263-1328) and Ibn Qayyim al-Jawziyya (d. 1351) on Proof,” in Islamic law, the role of the judge is accusatory, primarily involved with deciding, between the litigants, which party bore the burden of proof. While the most cogent proof is testimony, Johansen explains that: “The acknowledgement of the defendant, the deposition of the witnesses, and the oath of the parties or their refusal to take the oath are also proofs that serve as the basis of a valid judgment.” Ibn Rushd outlines in *BM* the basic doctrine judges use to render judgment: “a judgment may be based on (one or more of) four things: testimony, oath, refusal to take an oath, and confession. It may also be based on a combination of these things.” While testimony and oaths play an important role in Islamic law, he also discusses contracts and torture as well as an analogous concept to the written and the unwritten laws, which he calls the practical law, *al-sunna*.

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693 Aristotle’s *Rhetoric*, I 15. 1375a, 22-25.
694 *MCAR* 1.15.2, Averroës, *Commentaire* 2, 124.
696 Cf. Ibid., 169.
697 *BM* ed. 6, 556.
al-'amaliyya al-mashrū‘a’. This resonance between Ibn Rushd’s discussion of proofs used as nontechnical procedures lies parallel to his conception of testimony and the criteria for the appraisal of witnesses, his view of oaths as testimony, which serves to strengthen the claim of the litigant, and, finally, in his rejection of torture, which corresponds to Islamic law and remains in line with early Islamic doctrine, which often declared confession under torture to be null and void. 698

Another parallel found with his conception of how to administer justice in MCAR centered on the importance of testimony in Islamic law as the prime proof. It is found in his outline of legal cases, which cannot admit the application of ḥilm, or forbearance. Among the cases he outlines are betraying the trust of people, (ghadr al-amānāt), breaking an oath (fujūr al-aymān), and revoking a covenant (naqẓ al- ‘uqūd). He also adds cases of false-testimony (shuhadā’ al-zūr) and the refusal to bear witness. This choice is not arbitrary, as these are all cases have major bearing on the administration of justice, as they all target the doctrine of proof. As a matter of fact, these offenses are grounded in clear scriptural injunctions:

“Believers, do not betray God and the Messenger, or knowingly betray [other people’s] trust in you.” 699

“Honour your pledges: you will be questioned about your pledges.” 700

“O you who believe, be upright for God, and (be) bearers of witness and Justice.” 701

This central value of testimony and oaths as qualification to bear testimony for justice explains why he rejects forgiveness in these outlined cases. In other words, testimony forms a moral limit in Ibn Rushd’s conception of natural justice. This could

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698 MCAR 1.15.45, Averroës, Commentaire 2, 133.
699 The Qur’an 8:27, trans. Abdel Haleem.
700 Qur’an 17:34, ibid.
701 Qur’an 5:8, ibid.
lead us to deduce that the importance of bearing witness to truth is a central ethic in Islamic law and is, therefore, considered to be the proof par excellence, which explains why Ibn Rushd exalts *shahāda* among the different persuasive things.

To sum up, Ibn Rushd accounts for the divine discourse and for the principles of the law to discern the lawgiver’s intent under testimony. Thus, he extends *shahāda* into an epistemological framework forming the basis for Islamic modes of argumentation under the scope of rhetoric. *Shahāda* encompasses all the different Islamic modes of argumentation used in Islamic law. To explain its capacity to produce assent, Ibn Rushd focuses on its ability to produce assent in people’s souls and he rejects the idea of considering it a necessary type of knowledge. This grounding is an effective place from which to form assent and cement political stability. One last point is that while Ibn Rushd exalts *shahāda*, he still admits the superiority of the enthymeme under the scope of rhetoric, especially in *SCR*, which raises the question of how Ibn Rushd conceives of this relationship in his *MCAR* and is then reflected in his *FM*.

D. Rapprochement between the enthymeme and Islamic modes of argumentation

Ibn Rushd remains consistent with the philosophy of law exposed in his legal works, as he submits Islamic law, in terms of its principles, methods, and practice, under the concept of *shahāda* setting Islamic law under the scope of rhetorical argumentation. Still, the question remains: how does Ibn Rushd conceive of the Islamic legal method in relation to the main pillar of rhetorical argumentation, that is, the enthymeme? In what follows, I expose some hints made by Ibn Rushd mainly in his *MCAR*, which suggest an attempt to make some rapprochement between *shahāda* and the enthymeme.
In his *SCR*, Ibn Rushd is clear on the superiority of enthymeme and, therefore, he extols its function to support persuasive things:

These external matters which we have enumerated are the ones from which it is supposed that certainty will result. The persuasiveness of the others is self-evident. Now the enthymemes are more noble and take precedence over these, because they may be used to establish those which are neither clearly existent nor clearly persuasive. For example, when the moral excellence of the speaker is neither evident nor generally accepted, they are used to make it evident. Similarly, when someone supposes that he who claims to be a miracle-worker is not a miracle-worker, they are used to make it clear to him that he is a miracle-worker. The same holds with testimonies, traditions, and other things when the opponent contests them.702

In these examples, the enthymeme can be used to support the claim of a miracle worker or to buttress testimony used in the context of Islamic law. From this alone, it could be interpreted that the enthymeme is superior to *shahāda* especially since Ibn Rushd remains consistent in his stance of exalting the enthymeme as the pillar of rhetorical argumentation in his *MCAR*. While doing so, his demonstration of how enthymemes produce assent relies on legal examples. As I previously discussed in his illustration of how assent is produced through establishing a binding conviction by use of *tathbīt* Ibn Rushd draws from the method of establishing proof in Islamic law:

Given that it is known that the things pertaining to this art are aimed at assent or acknowledgement from the addressee of the matter subject to the allegation, and this can only occur when you establish within him the acknowledged matter- for we only acknowledge a matter once we judge that it has been established in us. And the matter with which we establish things based on rhetorical method is the enthymeme, for this is the root and pillar of assent in matters that produce

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702 *SCR*, §44, 77 (Arabic 196-197).
this type of assent, I mean assent that pertains to balāgha. And the enthymeme is a type of
syllogism and the knowledge of syllogism is part of the art of logic.\textsuperscript{703}

Herein, Ibn Rushd discloses how rhetoric aims at producing assent (\textit{taṣdīq}) and
acknowledgement (\textit{iʿtirāf}). He then elaborates that this is conditioned by the
acknowledgement of the addressee of the idea that is subject to the allegation (\textit{daʿwa}). He
remarks that this goal can only be attained once the matter in question has been
established (\textit{taḥtībīt}) in the addressee once it has been established within himself. Ibn
Rushd calls this type of binding assent \textit{taṣdīq balāghī}, that is assent pertaining to
\textit{balāgha}. Here again, one can note the influence of both \textit{fiqh} and \textit{balāgha} in this
definition of assent, a connection that cannot be entirely arbitrary. This could be taken as
evidence of a rapprochement between Islamic modes of argumentation and the rhetorical
argumentation device namely, the enthymeme.

Another point which also suggests this concord between enthymeme and \textit{shahāda}.
It is found in Ibn Rushd’s discussion of proofs used by Muslim jurists, specifically
testimony and oaths. In \textit{MCAR} 2.18.3, Ibn Rushd explains that, unlike in the Greek court
where there is a speaker and a contender, in the case of lawsuits (\textit{khusūmāt}) in the Islamic
community (\textit{millat al-Islam}), the lawgiver warrants the use of the speech of the judge and
of the inclusion of external things [\textit{al-ashyāʾ al-latī min al-khārij}] such as testimonies and
oaths, as evidence, which is a reference to the Islamic doctrine of proof.

And the difference between the judge and the contender is that the judge is superior to the
contender. This is why he is not required to provide a sign to prove his judgment. As for the
contender, he is equal to the speaker. This is why it is not enough for him to just reject what was
said, but he is required to provide a sign. It might be possible that in some cities, in litigious cases,
they are content with the opinion of the judge excluding the speaker or the contender as is the case

\textsuperscript{703} \textit{MCAR} 1.1.11, Averroès, \textit{Commentaire} 2, 7.
in our Muslim community for we use in litigious cases the opinion of the judge along with the external things like testimony and oaths. And the difference between a witness and judge is that while the witness testifies of the truthfulness of the conclusion, the judge testifies of the veracity of the syllogism that produces this conclusion and the contender argues to nullify it.\textsuperscript{704}

Aside from the distinction he makes between Greek and Islamic judges, Ibn Rushd draws a significant comparison between the use of witnessing and the use of syllogism, \textit{qiyās}. Thus, he asserts that while the witness attests on the basis of the truthfulness of the conclusion, the judge attests to the truthfulness of his syllogism while the contender will try to nullify it. I suggest that in order to understand this statement in the context of testimony, in the Quranic sense (O you who believe, be upright for God and (be) bearers of witness with justice)\textsuperscript{705}, one is bound to bear witness to justice as a guarantee to the truthfulness of the conclusion. Thus, the witness is bound to bear witness to justice in the same way a judge testifies to the veracity of the syllogism.

Again the relevance between the enthymeme and legal method is also found in his discussion of topics in \textit{MCAR}. Specifically he addresses the topics that can be used to form enthymemes both real and fallacious. To this end, Ibn Rushd lists those topics used for resisting or opposing certain propositions. What is striking about this discussion of how to produce resistance against certain proposition is that Ibn Rushd draws examples from the legal context and refers to the written and the unwritten laws:

As for resistance that occurs based on the opinion of a judge which concerns public weal to which the laws are opposed, such opposition exists between general and particular law and I mean by general law those shared by all nations and I mean by particular that what is particular to each nation.\textsuperscript{706}

\textsuperscript{704} \textit{MCAR} 2.18.3, Averroès, \textit{Commentaire} 2, 216.
\textsuperscript{705} \textit{The Qur’an} 5:8, trans. Abdel Haleem.
\textsuperscript{706} \textit{MCAR} 2.25.7, Averroès, \textit{Commentaire} 2, 259.
Here, Ibn Rushd is discussing the argumentative basis of the legal method, which means its reliance on topics to argue for or against a particular proposition, a point that is discussed more at length in my early chapters, where I examine the fertility of valid topics in legal contexts, specifically their use in carving arguments on the basis of the written and the unwritten laws. Here, Ibn Rushd refers to topics that are to be used to produce resistance in the case of an opposition between two arguments, one based on the unwritten laws and the other based on the written laws. Ibn Rushd comments that such situations are quite prevalent in the context of public interest [maṣāliḥ], which often conflicts with laws. In Islamic law, the concept of maṣlaḥa refers to the communal good. It is a legal concept and a term for something considered good and beneficial.\(^707\) This legal concept was mainly discussed in terms of the purpose of law: “the purpose of the divine law is understood as attaining the well-being (maṣlaḥa) of humanity in all their mundane and otherworldly affairs.”\(^708\) As explained by Opwis, maṣlaḥa can be used as a vehicle for finding new laws if the scripture is silent on a matter or adapting existing laws when required by the changing circumstances.\(^709\) This relevance of public interest to changing circumstances can be detected in Ibn Rushd’s assumption that written laws often contradict the public interest. To better illustrate his position, Ibn Rushd offers the following example:

As it is not possible to resist the enthymeme called the obligatory - which is an enthymeme composed of praiseworthy premises in the concluding figures- based not on the composition of the syllogism but rather based on its premises, since its premises are praiseworthy, and that this type of enthymeme is composed of possible material in most cases ['ala al-akthar], I mean those that

\(^{707}\) Cf. Opwis, Maṣlaḥa, 9.
\(^{708}\) Ibid., 2.
\(^{709}\) Ibid.
pertains to a topic in most cases, such as the association of grey hair to a man of mature age, or that exists in most times, such as the intensification of heat when Sirus rises– it is possible to demolish this type based on three postures. One of them is to admit that the premise is not praiseworthy. The second is to admit that the premise that is possible in the most cases is not necessary and that it is sometimes possible for that which is not necessary to be wrong. And this is a fallacious demolition but it is still used in this art. As a matter of fact, the auditor, I mean the judge, sometimes has the opinion that if the premise is not necessary then it is not praiseworthy. So two possible positions occur to the auditor: either that he is of the opinion that he should not judge, or that if he is to adjudicate, it should not be based on the use of the particular written law but rather the general law – what is required by the decision of which is the best in each case. That is, the judge only adjudicates by means of these two things: particular or general law. The third posture is to show that what was taken for being for most cases is not; it is rather pertaining to the least or equal case, and that in terms of the topic or time. For example, if a plaintiff said to the judge: such person killed Zayd, for he was found standing with a sword in his hand, then the defendant says: “This is not necessary, even though it pertains to what happens in most cases, for not every man found standing with a sword in his hand is a murderer” or says: “this does not fall within the scope of what happens in most cases, rather of what is equal, for it is possible for he who has this qualification to be a murderer and it is possible that he is a defender.”

In this long statement, Ibn Rushd explores topics that can be used to develop possible arguments in order to resist a praiseworthy premise. Under this scheme, he provides three postures through which to resist a praiseworthy premise, all of which rely on examples from Islamic law. In the first posture he suggests, that one can admit that what is believed to be a praiseworthy premise is not actually praiseworthy. As for the second posture, he suggests that it is possible to admit that what was thought to be necessary is, in fact, not necessary. The example he provides here relates to judge who might believe that if a premise is not necessary then it is not praiseworthy. Two possible

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710MCAR 2.25.9, Averroès, Commentaire 2, 259-260.
scenarios could be derived here (1) either that he will have to consider the general unwritten law based on what is best for public interest or (2) that he will have to show that what was deemed to be valid in the majority of cases is not valid to this topic or time. To illustrate this position, Ibn Rushd chooses an example that is prevalent in Islamic jurisprudential literature to illustrate how Muslim jurists deal with cases of doubt in determining a legal decision in criminal offence. Ibn Rushd takes the example of someone who was found standing with a sword over the body of another man. This example resonates with a particular case discussed among scholars and recounted as a legal case that was brought in front of the fourth caliph, Ali (d. 632). A member of early police patrolling the desert found this butcher standing over a killed person with a blood-stained knife. Upon hearing the case, the caliph Ali who ordered capital punishment to sentence for committing murder. As the sentence was about to be carried out, another person rushed to confess that he was the actual murderer. After hearing this confession, Ali asked the butcher why he had confessed to a murder he had not committed. The butcher said that all proofs were against him. The basic thrust of the story is that the caliph Ali was confronted with contradictory evidence and eventually had to opt out of administrating the criminal punishment. This contradiction of evidence led Ali to drop the case. Ali’s precedence formed a basis of the legal maxim “avoid[ing] criminal punishment in cases of doubt.” Ibn Rushd himself advocates for the practice of deferring judgement under the argument for the unwritten laws. At any rate, one cannot attest that Ibn Rushd had this particular case of caliph Ali in mind, but the resemblances are

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712 Ibid., 4.
713 For a discussion of legal maxims see chapter five in this dissertation.
striking and, more importantly, fall within the scope of the topics, which Ibn Rushd associated with the use of legal maxims to avert “criminal punishment in cases of doubt” in his discussion of the arguments for and against the use of written or the unwritten laws.

Ibn Rushd’s discussion of the written and the unwritten laws as well as his demonstration of using topics relies on examples from Islamic jurisprudence that again disclose some rapprochement between legal methods and the rhetorical procedures such as the use of topics. This link suggests a correlation between *ijtihād* and the use of topics.

**IV. Sharī‘a under the expansive scope of rhetoric in *Faṣl al-Maqāl***

After exposing Ibn Rushd’s consistency on the epistemology of sharī‘a under rhetoric, I shall come back to shed light on the intricacy of the relation between the revealed law and truth in *FM*. Taking into account Ibn Rushd expansive scope of rhetoric as the human discourse which he associates to the scope of logic and allows for the use of dialectical and sophistical argumentation and specifically delineates the parameters of rhetoric under the unexamined opinion in the *MCAR*, shall reveal how Ibn Rushd endorses the same framework in his *FM*. To sustain this view, I focus on first the correspondence between his expansion of assent in relation to sharī‘a in *FM and MCAR*, then the impact of his rapprochement between legal argumentation and rhetorical procedures mainly in his discussion of the written and the unwritten laws. Such a scheme leads us to hold that Ibn Rushd’s view of the connection between truth and sharī‘a concerns practical rather than theoretical philosophy.
A. Rhetorical assent: the basis of adherence to the divine command

In discussing the basis of adherence to divine command in his *DFF*, Ibn Rushd expresses his discontent with the positions held by the major theological schools namely, the Mu‘tazilites and Ash‘arites. First, Ibn Rushd exposes the Mu‘tazilites’ position, which maintained that the human adherence to the obligation of divine commandment rests on a rational basis: such as that demonstrated by the rational value of thanking the benefactor, which he relates to the *mahmūdāt*.

Ibn Rushd rejects this rational grounding and asserts that if people were to adhere to divine commandment on rational grounds alone, this would imply that knowledge of God is a necessary type of knowledge for everyone. Consequently, every person would be inclined to know God and believe in him. It would mean that there would be no disbelief, which is not tenable.

As for the Ash‘arites’ position, he claims that they believe knowledge of God was acquired. Ibn Rushd argues that this implies for knowledge of God to be based upon some kind of examination that leads to the acquisition of the knowledge of the obligation of divine command. Therefore, he concluded that this would lead to a circular argument or infinite regression.

After expressing his discontent to both positions, Ibn Rushd provides his own alternative:

What should be said in this position, is that assent, which is pertaining to the legislator’s call upon the appearance of a miracle corresponding to his call, falls into the type of necessary knowledge. And that assent occurs based on seeing [*mushāhada*] directly or knowing of existence on the basis of concurrent testimony [*tawātur*].

Here, Ibn Rushd asserts the basis of accepting the legislator’s call is assent,

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714 *DFF* ed. al-‘Alawī, §14, 42.
715 Ibid.
716 Cf. ibid.
taṣdīq, for it imposes a certain type of necessary knowledge without any call to investigation – regardless of whether one supports the necessity of investigation to know God or not. In so doing, he implies that theologians confused the necessary nature of taṣdīq, which imposes itself, with the necessity of investigation to know God as a basis for belief. This comes to affirm his earlier position on the basis of miracles. As I already explained, Ibn Rushd rejects the use of rationality to ground the miracle of the prophet. Instead, he associated its cogent argument with its practical outcome and asserted tawātur as its foundation, which is grounded inside of the soul. On this basis I would argue that Ibn Rushd makes a clear departure from any rational theological grounds for adherence to the divine law. Rather, he roots it in its outcome, which implies a quasi-utilitarian basis for belief to which people bear witness and that they transmit to later generations.

This view on assent is also affirmed in Ibn Rushd’s FM. He reiterates the binding view of assent as it imposes itself upon us: “for assent to something due to an indication arising in the soul is compulsory, not voluntary- I mean that it is not up to us not to assent or to assent as it is up to us to stand up or not stand up.” This type of adherence is not apodeictic but it imposes itself on people’s souls, for it relies on tawātur and has existence only inside of the soul. For that matter, he relates unbelief (kufr) to denial (juḥd), in this case the denial of a process that occurs inside of one’s soul. Thus, he depicts an unbeliever as one “who resists obstinately with his tongue what is in his heart. Yet, one can trace some development in Ibn Rushd’s conception of assent in his FM, which I argue comes to reflect his conception of assent in the MCAR, as he expands the scope of Aristotle’s rhetoric to associate it to logic while drawing a rapprochement to

718 FM, §23, 17.
719 ibid., §26, 18.
dialectic. Thus, he argues that the divine discourse can produce assent based on different human capacities

Since some of the methods for bringing about assent -I mean assent taking place because of them- that which is common to most people, namely, the rhetorical and the dialectical, the rhetorical being more common than the dialectical; and some of them are particular to fewer people, namely, the demonstrative; and what is primarily intended by the Law is taking care of the great number without neglecting to alert the elite; therefore, most of the methods declared in the Law are the methods shared by the greater number with respect to concept or assent taking place.  

In this statement, Ibn Rushd reveals how assent is primarily used to refer to the most common type of assent that is the rhetorical and dialectical types in the revealed law. This corresponds to his stance in the MCAR 1.1.1, which affirms that both rhetoric and dialectic are used to discourse with others. In other words, he links the method of assent associated to shari’a to the realm of mashhūrāt and specifically notes the value of rhetorical assent in encompassing most people. This position corresponds to his view of the scope of rhetoric as being most fitting to induce public conviction. Still, he admits that shari’a should also address the few who are inclined toward what is truthful. Such a position also corresponds to the epistemological scope of rhetoric, which is marked under the scope of the unexamined opinion but still admits what is true or what is a similitude to truth such as māhmūdāt or praiseworthy premises. Taking the unexamined opinion as the main criterion of rhetorical assent allows for the use of the true widely accepted premises and of what people assume to be widely accepted premises.

Also, another observation one can make is that, while Ibn Rushd seems to

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720 ibid.§40, 24.
721 Averroès, Commentaire 2, 1.
722 SCR, §17, 67(Arabic 176).
undermine the theologians in *DFF*, for they have not admitted *taṣdiq* as the basis of adherence to divine commands, his *FM* he acknowledges that they have admitted assent as the basis for adherence to divine command. Yet here, he faults them for failing to build an expansive scope of assent that is appropriate to describe the value of the divine discourse in the revealed law. Specifically, he associates two features with assent in the revealed law, *nuṣra* and *tanbīḥ*.

The statements of the law declared to everyone in the precious Book have three particular characteristics that indicate their inimitability. The first is that nothing more completely persuasive and able to bring about assent for everyone is to be found than they. The second is that by their nature they admit of defense (*nuṣra*), ending up at a point where no one grasps an interpretation of them- if they are such to have an interpretation- except those adept in demonstration. The third is that they contain a means of alerting those adept in the truth to true interpretation. And this is not found in the doctrine of the Asharites, nor in the doctrines of the Mu'tazilites. I mean, their interpretation neither admits of defence, nor contains a means of alerting to the truth, nor is true. Therefore, innovative heresies have increased.\(^{723}\)

In underlining the inimitability of the divine discourse, Ibn Rushd affirms its ability to produce assent but expands the scope of assent to convey its capacity to admit defense (*nuṣra*) and also alerting (*tanbīḥ*) mainly to people who are adept in demonstrative argumentation. Again, this shows how the divine discourse is adapted to all different capacities of people. Such common ground is found in rhetoric, which includes in its procedures not only most people but also both what is true and what is a similitude to truth as long as it is reputable under the unexamined opinion. This also corresponds to his view of natural justice, which people can apprehend but only the elite can grasp.

\(^{723}\) *FM*, §58, 32 (trans. with slight modification).
So far it shall suffice to assert that Ibn Rushd clearly adopts assent in line with his expansive scope of assent in *MCAR*.

**B. Sharī‘a’s connection to practical philosophy**

Another ramification of the expansion of rhetoric’s epistemological scope on Ibn Rushd’s conception of sharī‘a in *FM* is the connection he draws between the revealed law and truth. Specifically, Ibn Rushd adopts some development in how he demarcates the epistemological scope of legal argumentation. While he deems legal argumentation as a linguistic substitution in *DFF*, his *FM* affirms its relation to rhetorical procedures and implies its reliance on the unexamined opinion. This serves as a basis for him to hold that consensus is possible only in the practical realm and not in theoretical truth. Consequently, Ibn Rushd draws a connection between practical philosophy and the revealed law under the scope of rhetoric.

In *DFF*, Ibn Rushd seems apprehensive to the idea of admitting a syllogistic view to legal analogy as a method of discerning legal rulings on the basis of similitude:

Overall, what becomes apparent is that in most of the cases where the proponents of syllogism [*qiyās*] in law use it, they do not use it in order to extract the unknown from the known in the manner in which an unknown *quaestum* is extracted from logical premises, but rather they do so in order to verify [*taṣḥīḥ*] the substitution of expressions [*ibdāl al-alfāẓ*] in each occurrence and each case. In fact, the type that they call syllogism [*qiyās*] such as the conjectural [*mukhayyal*], the suitable [*munāsib*], and similitude [*shabah*] are indicants for them of the substitution of expression, but/though they are neither syllogisms nor do they bear the action of a syllogism.\(^{724}\) Here, Ibn Rushd argues that what the jurists call *qiyās* would not be qualified as a

\(^{724}\) *DFF* ed. al-‘Alawī,§ 223, 130-31.
syllogism in the Aristotelian sense that it is used to extract an unknown from the known; it rather pertains to linguistic substitution. Thus, here he refers to the different types of *qiyās*, such as the conjectural (*mukhayyal*), the suitable (*munāsib*), and similitude (*shabah*). He then adds:

> If this is so, and what they meant by *qiyās* in this art pertains, for the most part, to what is implied by expressions through their implicit meanings, and what expressions imply is based on the indicants that are tied to them, then it is not any indicant which is taken accidentally but those to which the law bears witness with consideration of their genus. This situation is similar to public discourse [*al-mukhāṭaba al-jumhūriyya*]: for just as the indicants taken into consideration by an Arab when addressing another person are to be known by the addressee; and the Arab knows that the addressee turns to this indicant at the moment of being addressed, the same should happen in law. And we will indicate each one of them [the indicants] taken individually and order them according to their ranking in *bayān*.

Ibn Rushd’s rejection of the validity of equating legal syllogism with demonstrative syllogism is linked to the doxastic nature of legal syllogism and its lack of apodeictic value. Thus, he argues that the majority of *uṣūlis*’ operations are equivalent to linguistic substitutions (*ibdāl*) as a way to convey its linguistic or non-apodictic character. In fact, in his *MCAR*, he identifies both substitution (*ibdāl*) and transformation (*taghyīr*) as fruitful rhetorical convictions particular to Arabic *balāgha*. More specifically, he asserts that substitution (*ibdāl*) is a habit in Arabic *balāgha*. The classification of *qiyās fiqhi* under the sphere of language through the usage of rhetorical

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725 *DFF* ed. al-‘Alawī,§ 213, 126.
727 *MCAR* 3.1.15 and *MCAR* 3.1.17, Averroès, *Commentaire* 2, 269.
devises such as *ibdāl*, linguistic substitution, should not be seen in merely linguistic terms. Thus, one should not underestimate the importance of *qarīna*, particularly as I already noted its value in discerning the intent of the divine discourse in relation to the notion of *bayān*. Ibn Rushd’s emphasis on *qarīna* shows how he understands Islamic legal methods in relation to *shahāda* as representing the epistemic scope of the law. I would also like to emphasize that Ibn Rushd’s correlation of law with rhetoric asserts that he holds fast to the presumptive approach to legal interpretation but feels that linguistic value should be understood through the practical efficient value he ascribes to the mode of argumentation of the divine discourse.

Ibn Rushd made some elaboration on his stance in *FM*, which admits legal argumentation under the syllogistic view of rhetoric. Thus, in *Faṣl*, he identifies legal analogy with syllogism but still maintains the lack of its apodictic value, explaining that the jurist has at his disposal only “a presumptive syllogism (*qiyās ẓanni*), whereas the adept has a certain syllogism (*qiyās yaqīnī*).” Still he is willing to admit it as presumptive syllogism, which links it to rhetoric. Dwelling on the question of legal analogy in Ibn Rushd’s understanding, Bou Akl suggested viewing Ibn Rushd’s position as in line with Farabi’s association of legal analogy with rhetorical analogy, *al-mithāl*. I am inclined to endorse this view but I would suggest that one should also take into account Ibn Rushd’s rapprochement between other rhetorical procedures such as the topics and the Islamic legal method. Such framework seems to shape his view on the relation between the revealed law and truth in *FM*.

Thus, I would like to underline the link that exists between legal argumentation

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728 *FM*, §14, 9.
and rhetoric in his allusion to the relation between the revealed law and truth referring to *yashhad* and *yūwāfiq*

Since the revealed law is true and calls to inquiry that leads to knowledge of truth, we, the Muslim community, know definitely that logical inquiry does not lead to conflicting with what is given in the Law. For Truth does not contradict truth rather, it agrees [*yuwāfiq*] with it and testifies to it [*yashhad*].

First, one needs to understand what he means by *yūwāfiq*. In other words, how does sharī‘a agree with truth. For this aim, I shall refer to an analogous statement in his *DFF* where Ibn Rushd uses a similar formulation in his discussion of the Mu‘tazilites position on the relation between *mashhūrāt* and intelligibles:

As for the Mu‘tazilites, they proved that good and bad are essential attributes to things on the basis of agreement of the wise to talk about them in a non-relative way, such as the goodness of telling the truth and badness of lying on the basis that these are reputable propositions which are widely accepted [*mashhūrāt*] and agreed upon [*mutafaq*]. But it appears that although it is possible for intelligibles to be widely accepted, this cannot be the other way around.

In this context, Ibn Rushd argues that *mashhūrāt* such as ethical maxims are widely accepted and agreed upon. This view of how ethical maxims are agreed upon as universally accepted among people has been demonstrated in his view of the unwritten laws. Still, Ibn Rushd asserts these are widely accepted premises that should not be viewed as intelligibles. In my discussion of the link between the *mahmūdāt* and the unwritten laws, I also show that, in the realm of practical knowledge, the aim of these *mahmūdāt* is not truth but rather action. For this reason, Ibn Rushd underlines the need to admit widely accepted among people, such as thanking the benefactor and filial piety.

This universal value of practical knowledge is meant to incite practical aims and not

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730 *FM,* § 12, 8-9.

731 *DFF,* ed. al-‘Alawī, § 21, 42.
theoretical truth. Another important fact is that Ibn Rushd’s insistence that consensus is only possible in practical matters and not possible in theoretical matters.

So how is it possible to conceive of consensus about a single theoretical question being transmitted to us when we firmly know that no single epoch has escaped having learned men who are of the opinion that there are things in the Law not all of the people ought to know in their true sense? That differs from what occurs with practical matters [al-‘amaliyāt], for everybody is of the opinion that they are to be disclosed to all people alike; and, for consensus about them to be reached, we deem it sufficient that the question be widely diffused and that no difference [of opinion] about it transmitted to us. Now, this is sufficient for reaching consensus about practical matters [al-amaliyāt] ; but the case with theoretical matters [al-‘ilmīyāt] is different.732

In holding that consensus is possible only in practical matters associated to the revealed law, Ibn Rushd rejects the possibility of establishing consensus over theoretical matters. This is best demonstrated by his position on the role of the mahmūdāt in the practical realm. These widely accepted premises are agreed upon, including thanking the benefactor, and form a basis for practical action. Thus, the use of mahmūdāt is not based on its truthful value but rather on its widely accepted value among people. Similarly tawātur is possible on practical matter in the law but is not admitted in matters that can be affirmed on the basis of demonstration. In so doing, Ibn Rushd separates theoretical matters from the realm of practical view of the revealed law.

When considering that Ibn Rushd was clear on setting law under practical realm of ‘amaliyāt and also his insistence that consensus is only possible under the realm of ‘amaliyāt and not in the realm of theoretical knowledge, 733 leads me to conclude that this

732 FM, §15, 11-12.
733 By identifying two sciences, here, mathematics and jurisprudence, Ibn Rushd wants to uphold the validity of knowledge as a collective process in order to challenge the absurdity of rejecting the contribution of previous scholars, including Greek philosophers. Therefore, it is unimaginable for practical
reference to the agreement between truth and shari’a, is meant to elucidate the value of praiseworthy premises in the realm of practical philosophy.

As far his use of yashhad or yuqārib an yashhad, Ibn Rushd remains in the same epistemological framework, which admits that shari’a testifies to truth or comes close to testifying to truth. This clearly comes within the scope of the relation between legal argumentation and testimony. What is important here is that Ibn Rushd adds another subtlety that the revealed law can testify or comes close to testifying which admits some acceptance of mere proximity to testimony, ‘yuqārib an yashhad’:

Indeed, we say that whenever a statement in the law contradicts in its apparent sense a conclusion of demonstration, if the Law is considered and all of its parts scrutinized, there will invariably be found among the expressions of the Law something whose apparent sense testifies, or comes close to testify, to that interpretation.\(^{734}\)

Ibn Rushd postulates a situation when there is a conflict between the conclusion of demonstration and the apparent statement of the law. He asserts that this contradiction can be overcome and law can testify or comes close to testify to the interpretation that is in agreement with philosophy. This situation again resonates with contradiction between the written and the unwritten laws. In cases of contradiction, Ibn Rushd admits the use of persuasion to establish natural justice through using topics to either arguing based on the unwritten laws or the written laws. Such argumentation has to remain under the scope of the unexamined opinion. Furthermore, Ibn Rushd also tasks the elite to carry on the task of interpretation, something he admitted also in his conception of natural justice in *MCAR*.

\(^{734}\) *FM*, (trans. with slight modification), §13, 10.
Thus, one can draw a link between the epistemological parameters for testifying or coming close to testifying and the unexamined opinion. Under this prism, the jurist draws his testimony based on praiseworthy premises or comes close to testify. This coming close to testify is mostly possible through the use of topics and the unexamined opinion which allows him to represent his argument under the guise of praiseworthy premises based on the particular case he has at hand. In my view, Ibn Rushd’s conclusion of the connection between the revealed law and philosophy is shaped by his conception of law and rhetoric in *MCAR* in the realm of practice under the scope of the unexamined opinion.

To sum up, Ibn Rushd’s position on Islamic law, in terms of its principles, method, and practice as discerned in his commentaries on Aristotle corresponds to the position held in his legal works. Thus, he remains consistent on the doxastic value of legal opinion as well as the practical value of how to discern the divine discourse. Ibn Rushd’s association of sharī‘a to the scope of rhetoric has a major ramification. It evokes a rupture with theology while asserting the connection between Islamic law and practical philosophy. Such framework seems to be fitting with Ibn Rushd’s endorsement of Aristotle’s natural justice within sharī‘a, which as I shall explore in the next chapter, is endorsed not only in *MCAR* but also in *FM* and *BM*.
The present study follows, in interconnected trajectories, threads of inquiry centered around natural justice, rhetoric and sharī‘a, and presents a review of Aristotle’s work on natural justice. I hope to have shown, in these combined, the engagement, revisions and changes in the works of Ibn Rushd. Arriving at an understanding of the configuration of sharī‘a in relation to rhetoric, I have provided the contours for embarking on yet another crucial discussion, namely: the relation between natural justice and sharī‘a. After putting under scrutiny Ibn Rushd’s philosophy of law in his legal treatises, I argue that he admits the presumptive nature of legal opinion as justified by its practical aim to fulfill justice. Such position proves to be in line with his conceptualization of the rapport between rhetoric and law, and therefore undermines the contention of perfect and conclusive view of sharī‘a constructed in the scholarship around FM, and as such, paves the ground to disentangle Ibn Rushd’s appropriation of Aristotle’s natural justice under the scope of sharī‘a in MCAR as well as BM and FM. Furthermore, I explain how Ibn Rushd’s demonstration of the rectifying function of natural justice under the distinction between the written and unwritten laws draws from his Islamic legal context with a particular focus on the role of legal institution of the mujtahid to which he exclusively assigns the capacity to discern natural justice arguing on the basis of the unexamined opinion. To this end, Ibn Rushd, I contend, ascribes a universal and natural
view to justice, which is grounded in the epistemological scope of rhetoric under the unexamined opinion to ensure its binding nature within a political community. While this illuminates our understanding of his philosophy of law and the nature of the conception of natural justice, it still leaves the question of how Ibn Rushd contextualizes natural justice in relation to sharia.

In what follows, I prove that Ibn Rushd attaches a practical value to natural justice which, in his view, can be actualized through *ijtihād* to anchor natural justice in shari’ā. Within this preposition, the *mujtahid* is required to take into account both the written laws and the unwritten laws. Under the framework of shari’ā, Ibn Rushd associates the written laws to *ḥudūd* which are specific and determined legal opinions. He however grounds the application of the unwritten law in the interpretive method of jurists, such as the teleological aspect in the theory of law, the Qur’anic ethic of forgiveness and the objectives of the law (*maqāṣid al-shari’ā*). The present chapter argues that Ibn Rushd anchors the ethical value of natural justice within the interpretive scope of shari’ā which encompasses both the written determined laws from the scripture and the unwritten laws associated to jurist’s interpretive effort. Through anchoring natural justice within shari’ā, Ibn Rushd implements a practical method to supplement the value of good and bad for the purpose of protecting law from contingency in human actions. The configuration of natural justice in *MCAR* affirms how Ibn Rushd also endorses his appropriation of Aristotle’s natural justice within the scope of shari’ā, in *BM* and *FM*, which again anchors Aristotle’s notion in his own legal philosophy, and reiterates the *mujtahid*’s role. Still, in *BM*, Ibn Rushd further buttresses the Islamic ground for the concept of natural
justice, and associates the capacity in natural justice to supplement the value of good and bad to religious rituals.

I. Natural justice within the Islamic normative framework in the *Middle Commentary on Aristotle’s Rhetoric*

Ibn Rushd’s discussion of natural justice under the mantle of the written and the unwritten laws reveals that, when compared to Aristotle, Ibn Rushd holds a more elaborate view of the properties and functions of this couplet. This is attested to in his articulation of concrete procedures of addition and subtraction, a point already underscored by Aouad. When looking further into the intricacies of Ibn Rushd’s analysis, what becomes instantly clear is his reliance on Islamic legal norms and practices to delineate the different types of injustice as the basis for setting the moral boundaries of natural justice. In order to best demarcate these boundaries, Ibn Rushd relies on Islamic legal norms and Qur’anic ethic. Carving out the ethical boundaries of natural justice within the normative scope of shari‘a, Ibn Rushd draws on three points: first, the boundaries of Islamic norms within the theory of law; second, the discretionary practices of Islamic jurisprudence and Qur’anic ethic, and lastly, Islamic legal maxims (*al-qawā‘id al-fiqhiyya*), framed under the scope of intention of the lawgiver or *maqāṣid al-sharī‘a*, to establish argument for the written and the unwritten laws.

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A. Islamic legal norms under the moral boundaries of natural justice

Ibn Rushd’s conception of natural justice, as has been established in the present study, rests on both the written laws and the unwritten laws. His understanding of the moral boundaries, in other words, hinges on the consideration of what is determined on the basis of the written justice and the unwritten law, which comes to add the amount of good and bad. Taking this configuration, Ibn Rushd anchors natural justice under the scope of Islamic norms through two steps. First, he recognizes the obligatory and teleological value as the basis for demarcating between just and unjust actions. Second, Ibn Rushd draws from Islamic jurists evaluation of human acts on the basis of intention (niyya) to delimit the boundaries of injustices. In so doing, he is able to draw a spectrum between minor and major injustices relating the intention of people’s actions to both the written and unwritten. While he distinguishes between minor and major injustice on the basis of both the written and unwritten laws, it is important to note that the moral limits remain associated to the unwritten laws. To illustrate this scheme, Ibn Rushd provides concrete view of his practical conception of natural justice from the Islamic legal practice.

Essential to this discussion is the attempt to grasp Ibn Rushd’s outline of moral boundaries in relation to injustices in the realm of human action, to which the following reference to the obligatory, al-wājib, and injustice, al-ẓulm, seems most pertinent. In MCAR, Ibn Rushd writes

Ibn Rushd: We have to first introduce the types of injustice [al-ẓulm] and the obligatory [al-wājib] and by that I mean that which is not unjust. As it was already said in what preceded the sorts of injustice occur with regard to two things: they are either pleasant [al-ladhūd] or beneficial [al-nāfī]. These sorts come to pass within the things in which they come to pass in two ways:
either by averting harm [dafʿ al-madarrat], or acquiring benefit [ijtilāb manfaʿa].\footnote{MCAR 1.13.1, Averroès, Commentaire 2, 112-113.}

Aristotle: It will now be well to make a complete classification of just and unjust actions. We may begin by observing that they have been defined relatively to two kinds of law, and also relatively to two classes of people.\footnote{Aristotle, Rhetoric I, 13, 1373b1-3.}

From the onset, a comparative assessment shows Ibn Rushd faithfully adhering to Aristotle’s scheme in framing the discussion around injustice. He, however, uses his prerogative as interpreter and inserts new concepts drawn from the Islamic legal contexts, such as ḏarar, ḏarar, and naf’. Unlike Aristotle, who links the classification of just and unjust actions to the types of laws and people, Ibn Rushd argues that categories of injustice (al-ẓulm) and obligation (al-wājib) occur in relation to two things, the pleasurable and the beneficial (al-ladhīdh wa al-nāfi`).

The concept of ṣulm in Arabic, implying displacement,\footnote{Bernard Lewis, “Zulm,” Encyclopaedia of Islam. Second Edition (EI2), ed. Peri J. Bearman, Thierry Bianquis et al (Leiden: Brill Online, 2012).} means “putting a thing in a place not its own,”\footnote{Toshihiko Izutsu, Ethico Religious Concepts in the Quran (McGill Queen’s University Press: Montreal, 2002), 165.} This concept is also a Qur’anic idiom used in moral terms to refer to wrongdoing or injustice.\footnote{Lewis, “Zulm.”} In an ethical sense, it can be defined as “acting in such a way as to transgress the proper limit and encroach upon the right of some other person.”\footnote{Izutsu, Ethico Religious Concepts, 165.} Both the linguistic and Qur’anic meanings are close to Ibn Rushd’s definition, which bears this same sense of transgression.\footnote{Cf. MCAR 1.10.5.} More importantly, in this definition, injustice relates to what is pleasurable and beneficial. Within this context, Ibn Rushd brings in the legal concept of wājib, linked to Islamic legal norms for what is ‘not unjust.’

This is a concept from Islamic law that defines one of the main categories related to legal
norms. Islamic law specifies five categories in qualifying human acts: obligatory (wājib), recommended (mandūb), permissible (mubāḥ), disliked (makrūh), and forbidden (muḥarram).\textsuperscript{743} The wājib is an obligatory duty, the performance of which is rewarded, and its omission is punished.\textsuperscript{744} Ibn Rushd explains that injustice is inflicted in relation to the beneficial or pleasant, and can be found in two modes, either the prevention of harm or the gaining of a benefit, presuming a teleological understanding in relation to norms of action. This teleological dimension resonates with a similar view expressed in Ibn Rushd’s al-Ḍarūrī fī uṣūl al-fiqh, specifically his definition of the concept of wājib. In tackling this concept, Ibn Rushd explains that Muslim jurists could not have conceived of wājib independently of the harmful (al-ḍarar) and beneficial (al-nafṣ). The concept of wājib is thus understood as serviceable to an end, and is essentially related to the interest of the agent himself.\textsuperscript{745} This explanation fits well with Ibn Rushd’s identification of injustices in relation to the pleasant and the beneficial. In other words, drawing from an Islamic legal concept, Ibn Rushd introduces a teleological understanding linked to just and unjust actions, which he associates to the written and the unwritten laws in MCAR 1.10.6. This particular connection serves as ground to admit the Islamic norm of the obligatory under the scope of the natural justice. While this gives a teleological value to discern the basis of human actions, the question remains how does Ibn Rushd delineate the limit for the boundaries of injustices.

\textsuperscript{743} Gautier H. Juynboll, “Farḍ,” EI2. As a matter of fact, Ibn Rushd also referred to the debate among Islamic law schools on the notion of the obligatory. Thus, he explained that the Hanafite School of law set a distinction between farḍ and wājib based on whether the sanction was categorical (farḍ) or not. Ibn Rushd concludes that there was no need for a terminological quarrel as long as we understood the meaning of terms. Abū Al-Walīd Ibn Rushd, al-Ḍarūrī fī Uṣūl al-Fiqh, Mukhtaṣar al-Mustaṣfa, ed. Jamāl al-‘Alawī (Bayrūt: Dar al-Gharb al-Islāmī, 1994) [in the following : DFF ed. al-‘Alawī], 44-45.


To delineate the moral boundaries of human actions, Ibn Rushd traces a spectrum of injustice, which distinguishes between minor and major injustices. In so doing, he establishes human’s intention as the yardstick of unjust action, in relation to both written and unwritten laws. Still, he sets the unwritten as the ultimate ethical boundary of unjust actions, upholding that there is no worse offense than to transgress the unwritten law with clear intention.

First, he states that unjust acts cannot be equally judged. Instead, he held a teleological view, which recognized the causes of injustice as a basis.

**Ibn Rushd:** Aristotle said: As for the kinds of wrongdoings and injustice, although these are not of one type but many, we should not put on equal footing those that happen out of mistakes, that is what occurs erroneously [khaṭa‘a] namely out of inattention [sahw] or error [ghalaṭ] and what does not happen out of error [ghalat] but out of deception [makr] and evil [sharr].

**Aristotle:** Equity must be applied to forgivable actions; and it must make us distinguish between wrongdoings on the one hand, and mistakes, or misfortunes, on the other. (A misfortune is an act, not due to wickedness, that has unexpected results; a mistake is an act, also not due to turpitude, that has results that might have been expected; a wrongdoing has results that might have been expected, but is due to turpitude.).

While Aristotle identifies three types of injustices—wrongdoings, mistakes, and misfortunes—Ibn Rushd distinguishes between two types, and divides each into two subcategories. He identified the first type of unjust actions as caused by a mistake (al-khata‘), either prompted by inattention (al-sahw) or error (al-ghalaṭ); and the second, as caused by trickery (al-makr), or evil (al-sharr). The causes determine the magnitude of

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746 Baron Carra de Vaux, Joseph Schacht, and Amélie Marie Goichon, “Ḥadd,” EI2.
747 MCAR 1.13.13, Averroès, Commentaire 2, 118.
748 Aristotle, Rhetoric I. 13, 1374b 4-7.
the injustice that has been committed. While the first type is attributable to an accident 
(ittifāq), the second is the result of a deliberate consideration. This latter, according to Ibn Rushd, is be the worst kind of injustice, and cannot be exonerated. Against this taxonomy, Ibn Rushd differentiates between major injustices (al-zulm al-'azīm), and minor injustices (al-zulm al-yasīr), a distinction that would prove instrumental in his view of rectifying laws which aspired to achieve an equitable outcome based on the magnitude of an injustice. At this juncture, an important conclusion can be stated: that injustice is evaluated based on various degrees linked to its identified cause.

In his recognizable methodological precision, to illustrate the relation between intention and the written law, Ibn Rushd mentions the ḥudūd punishment for theft and illicit sexual intercourse (zīnā). The scripture stipulates against theft (sariqa): “the man thief and the woman thief, cut off the hands of both as a punishment, for that they have erred- an example from Allah, for Allah is mighty, wise.” Similarly, the offense of illicit sexual intercourse is punished by stoning on the basis of prophetic example. Ibn Rushd defines theft specifically around the parameters of Islamic law, he states: “innamā hiya min ḥirz.” Here, ḥirz means the private place from which the stolen things were taken. This is discussed by Muslim jurists in their definition of theft as a removal of legal property from a place of safe keeping (ḥirz) to another place. In particular, these laws

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750 MCAR 1.10.5-1.10.27, Averroès, Commentaire 2, 84-91.
751 See MCAR 1.14.1, Averroès, Commentaire 2, 120. As an example of great injustice (MCAR 1.14.3), he mentions attacks on God’s houses and his friends (buyūt allah and awlīyāhu) and does not admit any kind of forgiveness. Averroès, Commentaire 2, 121.
752 Dwight M. Donaldson, Studies in Muslim Ethics (London: SPCK, 1953), 47.
754 MCAR 1.13.6, Averroès, Commentaire 2, 116.
required corporal punishment to be executed based on the condition of removal of property from a private place (ḥirz).\footnote{Cf. ibid.}

Also, jurists have insisted that an important dimension to adjudication is determining whether the theft was based on intention, and committed freely (mukhtār), rather than under compulsion.\footnote{Cf. ibid.} Similarly, Ibn Rushd insists on the condition of choice on the part of the person who commits these offenses, as is stipulated in Islamic jurisprudence for cases of theft, and illicit sexual intercourse. Consequently, Ibn Rushd demands that judges must be certain that the definition of the committed act reflects the intention of the accused. It is paramount, therefore, to clearly separate the act of theft and that of merely taking something, which could imply that the person had the intention of returning it. Under this prism, he adds that the defendant must be careful about admitting to the definitions of these offensive acts of theft or illicit sexual intercourse, for that would leave no room for being pardoned. Therefore, instead of admitting a case of theft conditioned with hirz, the defendant should admit taking something without fulfilling the hirz condition (MCAR 1.13.6).\footnote{Averroës, \textit{Commentaire} 2, 115-116.} In other words, the intentions of those committing offenses must be carefully checked against the offenses’ definitions before punishment is determined, as hudūd punishment is judged appropriate based on the magnitude of the committed injustice, but the application can be avoided if the action was not conditioned by a clear intention. In presenting these clarifications about what makes an action unjust, on the basis of intention and choice, as well as its correspondence with the exact definition of certain written laws, shows how Ibn Rushd is drawing from cases of hudūd to define the parameters of unjust acts.
Ibn Rushd also discloses how the intention can serve as a basis to determine whether certain acts are minor or major injustices. Thus, he furnishes examples of major injustices on the basis of the written laws. These types of injustices cannot be subject to forgiveness. Ibn Rushd references an area of injustice, already noted by Aristotle, regarding unethical exchanges between people, such as betraying the trust of someone, breaking up an oath, revoking a covenant, slandering and/or rejecting testimony, and false testimony (MCAR 1.14.9). On this topic, Aristotle mentions breaking “oaths, promises, pledges, or rights of intermarriage between states.” Ibn Rushd takes a different approach, and frames these examples, instead, in Islamic law terms: betraying the trust of people (ghadr al-amānāt); breaking an oath (fujūr al-aymān), and revoking a covenant (naqḍ al-‘uqūd). To these, he also adds cases of false-testimony (shuhadā’ al-zūr), and the refusal to bear witness. These cases have major bearings, for these offenses are grounded in written scriptural injunctions, in these three Qur’anic verses

“Believers, do not betray God and the Messenger, or knowingly betray [other people’s] trust in you.”

“Honour your pledges: you will be questioned about your pledges.”

“O you who believe, be upright for God, and (be) bearers of witness and Justice.”

These types of offenses have major bearing on the course of justice in Islamic jurisprudence. In fiqh, the rules of evidence employed by judges comprise: the acknowledgment of the defendant, the deposition of testimonies, and the oaths of the

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759 Averroës, Commentaire 2, 122
762 Qur’an 17: 34, ibid.
763 Qur’an 5:8, ibid.
parties or their refusal to take an oath. Ibn Rushd himself explains in his *Jurist Primer* the basic doctrine judges use to render judgment: “a judgment may be based on (one or more of) four things: testimony, oath, refusal to take an oath, and confession. It may also be based on a combination of these things” The fact that testimony and oaths play an important role in Islamic law explains why, for Ibn Rushd, these are matters of major injustice: because these are the main proofs used in the court, any act of breaking an oath, refusing to bear witness, or giving false testimony impedes and upsets the administration of justice. Other examples of unjust actions against written laws that cannot be subject to forgiveness, Ibn Rushd names killing children and women; and corruption, which causes perversion in political governance.

Ibn Rushd links the human intention associated to acts to the jurisdiction of the unwritten laws and specifically states that the worst injustice is the one inflicted against the unwritten laws. In differentiating between unintentional error and intentional transgression, Ibn Rushd also delineates the boundaries of justice, which he defines on the basis of the realm of the unwritten laws (the worst transgression is intentional). In his discussion of the different types of injustice, Ibn Rushd specifies that the worst transgression is that against the unwritten laws:

Injustice against unwritten laws, I mean the transgression of these laws, is more supreme than an injustice against the written law. And this is because the unwritten laws are like something that

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765 See BM trans. 2: 556.

constrains man to follow, as a natural thing to him, like filial piety and thanking the benefactor. Whereas the written laws, is not naturally associated to man and when he transgresses the written law in a way of committing a repulsive injustice, that is a big injustice such as killing children and women. And imposing a fine that it is not prescribed in the written law is a big injustice and because of this we have the strongest causes of corruption of governments [fasād al-riā’īsāt].

In admitting that transgressions against the written and unwritten can produce major injustices, he alludes, as already mentioned, to the examples of killing women and children, and to corruption in political rule as cases of extreme injustice on the basis of the written laws. Still, he affirms that the most extreme injustice is the one against the unwritten laws. He basis this verdict on the natural inclination that we have toward unwritten laws such a thanking the benefactor and filial piety as the basis for the value of good and bad. Consequently any act against the unwritten laws is considered against this natural inclination. This further affirms that in the unwritten laws the amount of good and bad is always in harmony with human acts. Consequently, a transgression of the unwritten is the worst, because it is not only transgression of what is determined as based on ruling only. It is transgression of the ethical view of what is good and bad. On this basis, Ibn Rushd also qualifies a transgression against the unwritten laws as higher in its degree of injustice on a basis of the natural dimension of the unwritten laws. The weight of such injustice stems from the compulsion that is inflicted on a person against natural inclinations, such the thanking the benefactor and filial piety.

Looking closely into some of the examples discussed above, Ibn Rushd categorizes certain offenses as major injustices on the basis of unwritten law. As a pertinent example, Ibn Rushd raises the case of injustices against sacred places of

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767 MCAR 1.14.11, Averroës, Commentaire 2:120-121.
worship (buyūt Allāh), including burglarizing them, and decries attacks against virtuous people. He mentions how committing disgraceful acts against the sanctity of God reflects the power of evil (sharr). In such cases, when the person has fulfilled the ultimate end of evil, there remains no room for pardon or forgiveness to his or her acts. This example also echoes a Qur’anic saying on the power of evil in those who attack God and His sacred places, as found in the following sūra: “Who could be more wicked than those who prohibit the mention of God’s name in His places of worship and strive to have them deserted? Such people should not enter them without fear: there is disgrace for them in this world and painful punishment in the Hereafter.”

In consequence, attacks against sacred places are deemed a particularly despicable act, for which Ibn Rushd compels judges to apply sanctions, by considering it a matter of public interest. This reference to fulfilling the highest aim of evil, again, hinders the recourse to forgiveness under unwritten laws. This echoes the examples he gives of corrective accountability hisba, which calls for addition of bad to the written laws. Instead of attenuating the written laws, this case requires harshening the written laws for the sake of public interest. Along the same line, Ibn Rushd apprehends attacks against the Prophet or virtuous people. For this addition, he refers to Mālik b. Anas (the eponym of one of the four the main schools of Islamic law, the Mālikī school), who stipulates that an indignation against those who offend the morality of Prophet by saying, in a metaphorical sense, that his clothing is filthy “zirrahu wasikh.” For this, Mālik called for the execution of such offenders.

Another example that epitomizes a major injustice is the persecution of virtuous people, for which Ibn Rushd refers to jurists as examples, specifically Mālik b. Anas and the

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768 The Quran 2:114, trans. Abdel Haleem.
disciples of Jesus. The inclusion of Mālik, refers to his persecution, when accused of sympathizing with the Alides during a tension that arose as Muḫammad and Ibrāhīm b. ʿAbdullāh rebelled against the Abassid caliph al-Manṣūr. Specifically, when Muḫammad in 145/762 declared himself the ruler of Median, Mālik issued a fatwa stating that allegiance to al-Manṣūr was not binding, because it was enforced under compulsion. After the rebellion was crushed (in 147/763), Mālik was flogged by the governor of Medina, Jaʿfar b. Sulaymān, which caused a dislocation of his shoulder. This case, like those above, can be seen as an offense against sanctity or virtue, in this case of a virtuous person. Such acts are associated with an attack against the sacred, either the sacredness of place of worship or the sanctity of the prophet or a virtuous person, and so cannot be subject to an act of forbearance. It behooves the judge to pass harsh sanctions for the sake of public interest.

To sum up, Ibn Rushd seeks to anchor the moral boundaries based on natural justice, which encompasses both the written and unwritten within the Islamic normative framework. In so doing, Ibn Rushd provides concrete examples from Islamic norms to submit moral boundaries under the teleological scope of the obligatory. Then, he demarcates the scope of injustice between minor and major injustices on the basis of intention and choice. He also adds here that there are some transgressions of written laws that are vile, major injustices such as killing children and women, or imposing an illegal fine – which he calls the strongest causes of corruption of governments.

In this way, Ibn Rushd concludes that a transgression of the unwritten laws is a higher form of injustice than a transgression of written laws. Establishing injustice
against the unwritten laws as of higher magnitude than other injustices asserts that Ibn Rushd is adamant about setting the parameters for moral boundaries based on the natural view of the unwritten laws. Thus the unwritten laws remain as the driving force for going beyond justice, something the written laws cannot accomplish. Drawing from Islamic legal cases, Ibn Rushd implies that sharī’a offers a concrete application of natural justice, which articulates how moral boundaries are formed. Ibn Rushd’s account of the major injustices serves as a guideline to show which transgression cannot admit forgiveness, and also to show the limits of forgiveness of transgression against the written or the unwritten laws (see table below).

### Table 8: List of major injustices

<table>
<thead>
<tr>
<th>Examples of major injustices</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Depriving someone of the compensation- earned from his [or her] labor (salb al-insān qūtihi) (MCAR 1.14.2).</td>
</tr>
<tr>
<td>2. Affront against sacred places and virtuous people (MCAR 1.14.2-.1.14.3).</td>
</tr>
<tr>
<td>3. Taking someone’s money and torturing [him or her] (MCAR 1.14.4).</td>
</tr>
<tr>
<td>4. Torturing virtuous people</td>
</tr>
<tr>
<td>E.g. Mālik Ibn Anas, the disciples of Jesus (MCAR 1.14.5).</td>
</tr>
<tr>
<td>5. Initiating a new type of injustice e.g.: Cain and Abel (MCAR 1.14.6).</td>
</tr>
<tr>
<td>6. Injustice against those who are trying to bring good things to people e.g: lawgiver (MCAR 1.14.7).</td>
</tr>
<tr>
<td>7. Imposing obligatory harsh punishment in the written laws, such as throwing people to beasts in certain nations (MCAR1.14.8).</td>
</tr>
<tr>
<td>8. Inflicting injustice on one’s kin or people from one’s own environment (MCAR1.14.9).</td>
</tr>
<tr>
<td>9. Betraying the trust of people, breaking an oath, revoking a covenant; slander and rejection of testimony, and false testimony (MCAR1.14.9).</td>
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</tbody>
</table>

### B. Discretionary practices and Qur’anic ethic under natural justice

Aside from using Islamic legal norms, Ibn Rushd also relies on more general ethical concepts to demonstrate how natural justice is implemented from a Qur’anic point
of view. Ibn Rushd furnishes some examples of the discretionary practices of subtraction and addition; in the context of taking a corrective measure by either addition or subtraction of the amount of good or bad associated with an act and its consequences based on the degree of injustice the act represents. In examining these examples, Ibn Rushd again draws heavily on Qur’anic ethics to ground natural justice within an Islamic normative framework.

As Ibn Rushd identifies a finite quantity of good and bad in the written laws which requires the addition to (al-ziyāda) or subtraction (nuqṣān) on the basis of the unwritten laws,\textsuperscript{772} he illustrates different subcategories of the unwritten laws and specifically employs Qur’anic concepts in MCAR 1.13.9.\textsuperscript{773} Such illustration discloses how the different processes of addition and subtraction are aimed at either mitigating harsh laws or making lax laws more severe. Based on his calculations of good and bad, Ibn Rushd is able to outline these tangible illustrations:

1. Equation 1: addition (+) to the amount of good (al-khayr) in particular-written law= beneficence (iḥsān)

2. Equation 2: addition (+) to the amount of bad (al-sharr) in particular-written law= corrective accountability (ḥisba)

3. Equation 3: subtraction (-) of the amount of bad (al-sharr) in particular-written law = forgiveness (ṣufḥ), forbearance (ḥilm), and toleration (iḥtimāl)

In the first equation, he proposes the notion of iḥsān. This concept is derived from the root of excellence or perfection and is also well known as a Qur’anic concept. God

\textsuperscript{772} MCAR 1.13.9, Averroës, Commentaire 2, 115-116.

\textsuperscript{773} Ibid.
exhorted people to good deed and active virtue in this verse: “Verily Allah commands justice (ʿadl), the doing of good (iḥsān), and giving to one’s near relatives; he forbids acts of wickedness, vice (munkar), and lust (baghāʾ).”\textsuperscript{774} This reference to being good to one’s kin also corresponds to the earlier example in Ibn Rushd, which identifies the unwritten law with being good to one’s parents. As argued by Izutsu, the verb form ahsana (inf. iḥsān) is an important ethical concept in the Qur’an, but he distinguishes between two types of ‘goodness’, one that is toward God and corresponds to piety, and one that is toward humans and is often motivated by forbearance, or hilm.\textsuperscript{775} This human-directed goodness can be seen in the following Qur’anic passage: “Hurry towards your Lord’s forgiveness and a Garden as wide as the heavens and earth prepared for the righteous, who give both in prosperity and adversity, and repress their anger, and pardon people -God loves those who do Good [al-muḥṣini].”\textsuperscript{776} Izutsu explains that helping the needy, controlling anger, and forgiving wrong inflicted on one together encapsulate the notion of hilm, while also pertain to iḥsān.\textsuperscript{777} This suggests that while iḥsān is the general framework of doing good, hilm here is linked to rectifying some non-beneficial situation, such as repressing rage and pardoning a wrongdoer.

The second equation refers to the case of addition of bad (sharr) to the written law. Again Ibn Rushd furnishes us with another example from Islamic legal practice, that of ḥisba.\textsuperscript{778} The meaning of the verb form of ḥisba, (ḥasaba), is to calculate, which might fit this context of adjusting the quantity of good and bad. A better explanation of the noun

\textsuperscript{775} Qur’an 3: 133-135; Izutsu, Ethico-Religious Concepts, 225.  
\textsuperscript{776} Ibid.  
\textsuperscript{777} Ibid.  
\textsuperscript{778} MCAR 1.13.9, Averroës, Commentaire 2, 116-117.
form of *ḥisba* can be found in its Qur’anic meaning and its institutional dimension in Islamic law. While the term *ḥisba* itself is not used in the Qur’an, it is often employed to denote the Muslim responsibility “to enjoin good and forbid evil.”\(^{779}\) This call to enjoin good and forbid evil permeates a number of divine injunctions in the Qur’an, such as the following call to the believers to be “a community that calls for what is good, urges what is right, and forbids what is wrong: those who do this are the successful ones.”\(^{780}\)

Also, *ḥisba* is used to refer to the institution of public morality and the function of the *muḥtasib* who oversees public moral behavior, particularly in the market.\(^{781}\) Taking *ḥisba* as the outcome from an addition to the amount of bad from the particular-written law in order to intensify lax laws reveals that it is probably used in rather abstract terms relating to the Qur’anic injunction of promoting good and forbidding evil to imply the corrective accountability of the law to maintain public interest. In this abstract sense, *ḥisba* is related to the justice of the unwritten laws.

Finally, in the last equation, Ibn Rushd refers to subtraction from the amount of bad (*al-sharr*) in the written law. The means to achieve this subtraction would be forbearance (*ḥilm*), forgiveness (*ṣafḥ*), and toleration (*iḥtimāl*).\(^{782}\) He seems to equate forbearance, forgiveness, and toleration, seeing them as different names (*asmā’*) for the same effect, in the sense that all result in subtraction from the badness of too-harsh laws. In fact, in the next reference, he defines *ḥilm* by giving an example from *ḥudūd* application, which stipulated cutting off the hand of the thief for committing the crime of theft. Here (*MCAR* 1.13.12), he explains: “In fact, a person becomes forbearing only in

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\(^{779}\) The call for enjoining good and forbidding evil is linked to various scriptural references, such as that seen in Qur’an 3:104.

\(^{780}\) *The Qur’an* 3: 104, trans. Abdel Haleem.

\(^{781}\) A.S. Bazmee Ansari, “Hisba,” *EI2*.

\(^{782}\) *MCAR* 1.13.9, Averroës, *Commentaire* 2, 116-117.
things that are suitable [yajmul] to forgiveness [ṣafḥ].” This notion was important in Arab culture even before Islam; hilm was associated with a praiseworthy quality that went back to an old Arab virtue often associated with muruwwa. Pellat defines this notion hilm as “A complex and delicate notion, which includes a certain number of qualities of character or moral attitudes, ranging from serene justice and moderation to forbearance and leniency, with self-mastery and dignity of bearing standing between these extremes.” Among Arab tribes, this notion was deemed to be the highest quality of a tribal leader. Izutsu defines it as the freedom from being moved or stirred up on the smallest provocation, equating it to Greek Ataraxia. Both Goldziher and Izutsu have studied the term hilm, underlining the ethical claim that with the rise of Islam, this notion gained a different denotation, for it became associated with its antithesis, ignorance or jahl. Consequently, Goldziher argues that while hilm does not appear in the Qur’an, the notion of halīm is evincive. Thus, he argues, when Islam came, as a new religion, it “desired the triumph of a hilm superior to that known by Arab paganism.” This understanding of the notion of hilm could confirm the value of this virtue, which bears a quantitative connotation and prompts praise. As already mentioned, Ibn Rushd refers to the case of a ruler dispensing with the application of ḥudūd of theft in Islamic law, by abstaining from amputating someone’s hand if the act of theft were related to food, as an example of hilm. In fact, along the same lines of thought, the third Islamic caliph, ʿUmar b. al-Khaṭṭāb (r. 634-644) was reported to have suspended the application of

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784 Pellat “Hilm” EI2.
786 Izustu (ibid., 68-69) defines this as the central point of the Islamic moral system.
788 MCAR 1.13. 12, Averroès, Commentaire 2, 118.
physical punishment for theft during the time his community was hit by a famine. This corroborates claims that Islamic rulings such as *ḥudūd* were subject to correction in some instances.

In all three applications of corrective law suggested above, Ibn Rushd defines the written law as a determined law with a specific intended application, which is why it is at risk of falling short in some cases of applying justice equitably, possibly leading to undesired outcomes of the law that contradict the unwritten law (*MCAR* 1.1.3.2). Thus the written law is sometimes in need of the superlative value to justice added by the unwritten law. Ibn Rushd’s illustration of the different possibly necessary applications of the unwritten laws relies on Qur’anic virtues such as *ḥisba, iḥsān, ḥilm, ihtimāl* and *safḥ*, which all come to support this necessity of applying the law in only praiseworthy ways. It is the idea of leniency that is emphasized by *safḥ, ihtimāl, and ḥilm; iḥsān* is what is praiseworthy for aiming at going beyond what is just (*MCAR* 1.13.11 and 1.15.5). This also affirms that, for Ibn Rushd, while *iḥsān*, or beneficence, is associated with doing good in general, in the case of an injustice, the act of beneficence is manifested through forbearance or any act of pardon. This becomes more tangible when we look at Ibn Rushd’s list of premises of how to bid for one’s forbearance, as well as the limits of the applicability of such bids.

(2) Building on Aristotle’s discussion of equity, Ibn Rushd also provides a list of premises to be used by the accused to bid for forbearance (*ḥilm*), forgiveness (*safḥ*), and

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789 This example is noted in Anver M. Emon, *Islamic Natural Law Theories* (Oxford: Oxford University Press, 2010), 34.  
790 For more on the implementation of *ḥudūd* in Islamic law see Intisar Rabb, *Doubt in Islamic Law* (New York: Cambridge University Press, 2015).  
791 Averroès, *Commentaire* 2, 113.  
792 Averroès, *Commentaire* 2, 117 and 124.
mercy (raḥma) in (1.13.15- 1.13.26). In Aristotle’s discussion, equity was notable for how it bids us to be merciful and to consider the intention of the lawgiver rather than the letter of the law, the choice of the action, and the past actions of the offenders in order to make room for pardon. Within the same discussion, he also calls for being patient, settling disputes by negotiation, and giving preference to arbitration over litigation. On the same points, Ibn Rushd follows Aristotle’s outline to provide a list of eleven premises:

1. The first premise that can be used by he who seeks forgiveness is to bid the complainant to emulate the model of the lawgiver in his forgiveness (safḥ) and mercy (raḥma).

2. To bid the complainant to follow the intent of the lawgiver instead of the letter of the law [ẓāhir lafẓ al-shārī’].

3. To bid the complainant to consider the intention [niyya] and choice [ikhtiyār] of the act, not just the act in itself.

4. To invite the complainant to judge the offender based on all his [or her] past recurrent acts and not on the one exception.

5. To bid the complainant to consider the wrongdoers’ future good acts as an act of intercession by good deeds to occlude the bad deeds.

6. To bid the complainant to consider the wrongdoers’ past good actions

7. To bid the complainant to consider some of the past good actions done by the wrongdoer toward the complainant.

793 Averroès, Commentaire 2, 118-120.
8. To bid the complainant not to rush in taking a decision upon suffering an injustice, for this unjust act could be an impetus to prompt some good consequence.

9. To bid the complainant to be indulgent and not to be too keen on investigation.

10. To bid the complainant to elevate himself above litigation and punishment.

11. To remind the complainant that toleration (iḥtimāl) and forgiveness (safḥ) are excellent virtues and that one should emulate the bearers of the virtue of forbearance (al-ḥulamā’).

These premises echo the outline of Aristotle’s concept of equity but also build on the concepts of ḥilm, safḥ, iḥtimāl, and, here, mercy (raḥma), is used as parameters for biding the person against which an injustice has been inflicted to go beyond seeking written justice to instead pardon the wrongdoers. This is a clear invitation to embrace the virtue of ḥilm, which also echoes the Qur’anic verses that call for emulating outstanding virtues: “A paradise as wide as the heavens and the earth is prepared for those who fear [God], the god fearing who expend [in alms] in prosperity and adversity, and repress their rage, and pardon men, for God loves the muḥsinīn (III, 127-128 /133-134).” Here, God commands man to alms-giving, repressing their anger, and pardoning men. This call for emulating the muḥsinīn bears the resonance with Ibn Rushd’s call to emulate al-ḥulamā’. Here, it seems, as noted earlier, Ibn Rushd conceives of this application of equity as something that goes beyond written justice, something that is praiseworthy and should be emulated. This, as noted by Izutsu, also affirms the affinity between iḥsān and ḥilm. In other words, iḥsān as being good in general, being beneficent, or doing good by itself, is not always related to the rectification of a non-beneficial situation. But in the presence of injustice, beneficence can result in equitable outcomes, a process primarily articulated

through the concepts of *ḥilm, safh, ihtimāl,* and *raḥma.* In so doing, Ibn Rushd is able to demarcate clearly what Aristotle defined as equity, but in a more tangible fashion drawn from Qur’anic ethic. Still, the application of *ḥilm* is subject to limits, for Ibn Rushd also sketches out a list of acts that cannot be subject to pardon or mercy. After outlining the premises that can be used to bid for *ḥilm,* Ibn Rushd presents concrete cases of scenarios, which cannot admit *ḥilm,* which relates to the major injustices on the basis of the written and the unwritten laws. As already established, Ibn Rushd gives some examples around the Islamic normative framework, all the while maintaining, as shown above, that the strongest injustice is the one that transgress the unwritten laws.

To give a concrete view of the undetermined nature of the unwritten laws, Ibn Rushd draws from discretionary practices, Qur’anic ethic, and again relies on definitions of major injustices based on Islamic normative context, to outline the different subcategories of natural justice. This suggests that Ibn Rushd seeks to ground natural justice and its corrective function around Qur’anic ethical principles. A similar approach can also be seen in his attempt to establish the validity of both the written and the unwritten laws using the general notion of the intention of the lawgiver but relying, again, on examples from the Islamic legal context.

C. Negotiating justice and the intention of the lawgiver

Another framework that Ibn Rushd chooses to anchor natural justice within the scope of Islamic jurisprudence can be unraveled under his outline of the different arguments for both the written and the unwritten laws. Ibn Rushd sketches how, depending on the matter one hopes to establish, one can implement *ijtihād* through
appealing to either the written or the unwritten laws. As already noted,796 these arguments are mostly grounded under the scope of topics and seem to comply with the epistemological scope of the unexamined opinion. I shall limit my attention, here, to how Ibn Rushd grounds Aristotle’s natural justice under the framework of what is known in Islamic jurisprudence as the objectives of the law or maqāṣid al-sharī‘a.

In outlining different argument for both the written and the unwritten laws, Ibn Rushd draws on the capacity of topics to argue for contraries. Illustratively, Ibn Rushd provides eight arguments against using the written laws, lest it went against the matter one hopes to establish. Five arguments against using the unwritten laws, are given instead, if, similarly, the matter that needs to be established contradicts the unwritten laws. To corroborate his arguments, Ibn Rushd draws his examples from universal principles of Islamic legal maxims. These are known as qawā‘id fiqhiyya: general rulings or general abstractions formulated in epithetical statements meant to express the objective of the law. To be more specific, Ibn Rushd gives concrete value to this function, using some theoretically abstracted precepts or maxims derived from rules of jurisprudence.797

In her work Maṣlaḥa and the Purpose of the Law, Felicitas Opwis defines these as follows:798

“Legal precepts, as used in this study, are inductively extracted from rulings expressed in the revealed texts or articulated based on them by authoritative figures of a school of law. They are formulated as snappy maxims, brief assertions or questions that sum up the rationale behind rulings given to a variety of cases but which can be subsumed under that common rationale.”799

796 Cf. chapter 3 in this dissertation.
799 Ibid.
These legal precepts or maxims have authoritative value to summarize the rationales of rulings from different cases. Also, as explained by Opwis, these legal precepts have an important function in systematizing the law as they provide ground for how different cases can lead to different precepts. This process, Heinrichs explains, contributes to the ultimate creation of a contradiction-free system of law.\textsuperscript{800} Also these legal maxims are part of what is known in Islamic jurisprudence as the objectives of the law (\textit{maqāsid al-sharī'a}).

In tackling arguments for the unwritten laws, in \textit{MCAR} 1.15.5, Ibn Rushd advocates that fulfilling what is obligatory hinges on the written law, thus, he who limits himself to the written law does not generate any praise.\textsuperscript{801} To illustrate his point, he refers to the example of fulfilling the religious obligation of alms-giving (\textit{zakāt}) in Islam to point that fulfilling this obligation does not make a person generous. I would like to examine this stance against a comparable Islamic legal maxim, which asserts that “acts are judged by their goals and purposes” (\textit{al-umūr bi-maqāṣidihā}).\textsuperscript{802} More to the point, this legal precept is often touted in relation to religious duties, commercial transactions, and crimes, and has been used by jurists to distinguish between theft and inculpable appropriation of property on the basis of intention. Parallel to this, fulfilling an obligatory action, for Ibn Rushd, does not qualify one as generous, in the same way as keeping possession of property with the intention of protecting it does not make one a thief.

Another argument for the unwritten laws, which alludes to Islamic legal maxims is found in \textit{MCAR}1.15.7. Here Ibn Rushd refers to the limitation [\textit{mashaqqa}] of the written law that, unlike the unwritten law, goes against the nature of people. This, I argue, resonates

\textsuperscript{800} Cf. Opwis, \textit{Maslaha}, 138-139.
\textsuperscript{801} Averroës, Commentaire 2, 124.
\textsuperscript{802} Kamali, “Legal Maxims,” 83.
clearly with the legal maxim in Islamic jurisprudence that states “hardship begets facility” (al-mashaqqa tajlib al-taysir).\textsuperscript{803} This maxim, which is based on a Qur’anic verse on how God does not inflict hardships, is used to make concessions on certain written laws or religious duties on the basis of necessity, which can be based in part on such human limits as sickness or disability.\textsuperscript{804} This legal maxim, as Kamali explains, is often related to another maxim which holds that necessity makes the unlawful lawful.\textsuperscript{805} In jurisprudence, this practice could lead to granting a legal permission (rukhṣa), such as drinking wine or eating meat from dead animals (al-mayta) out of necessity.\textsuperscript{806}

In \textit{MCAR}1.15.8, Ibn Rushd maintains that in some cases abandoning the use of the written laws can be more beneficial and can bring an addition of good.\textsuperscript{807} For given the determined nature of the written laws they cannot be appropriate to every person or every time. In contrast, the unwritten laws can be adjustable to different people and times. This again corresponds to an Islamic legal maxim, this one affirming that one cannot deny the change of rulings on the basis of the change of time: “\textit{la-yunkar taghyīr al-ahkām li-taghayīr al-zamān}.”\textsuperscript{808} It might be important to note, however, that in Islamic jurisprudence, this maxim is mostly intended to new cases of interpretation, \textit{ijtihād}.\textsuperscript{809}

Finally in \textit{MCAR} 1.15.12, Ibn Rushd discusses cases of contradiction between the written and the unwritten, or between two written laws, where one cannot resolve the contradiction, specifically based on an ambiguity in terms of doubt (shakk or shubha).

\textsuperscript{803} This is related to the Quranic saying “God intends for you ease and he does not intend to put you in hardship” (2:185); see ibid., 87.

\textsuperscript{804} Cf. ibid., 87.

\textsuperscript{805} Ibid., 88.

\textsuperscript{806} \textit{DFF} ed. al’Alawī, 60.

\textsuperscript{807} Averroës, \textit{Commentaire} 2, 125.

\textsuperscript{808} Muḥammad al-Ghuzzā, \textit{Al-wajīz fi idāh qawā’id al-fiqh al-kulliyā} (Bayrūt: Mu’assasat al-Riṣāla, 2002), 310.

\textsuperscript{809} Cf. ibid., 310-311.
Referring to the method of Muslim jurists, Ibn Rushd suggests that, in some cases, the jurist is bound to defer judgment.\textsuperscript{810} Specifically, this suggestion also echoes another legal maxim, which calls for deferring judgment in cases where the evidence cannot be established in relation to ḥudūd application, known as “ître al-ḥudūd ‘inda al-
shubuhāt,” or “waive the ḥudūd on the basis of doubt.”\textsuperscript{811} In her study of this maxim, Fierro shows how it came to be established as a prophetic hadith for abstaining from rendering judgment, mainly in cases of ḥudūd; she also shows how Ibn Rushd, in his BM, refers to the Ḥanafis for a case of shubha concerning the application of talion (qiṣāṣ) for murder, and noted the use of this maxim as a prophetic saying.\textsuperscript{812}

Ibn Rushd also provides arguments for the written laws when the matter one seeks to establish accords with the written laws and has recourse to the same repertoire of legal precepts. In his first argument MCAR 1.15.14, he unravels how in some cases the written law can be more appropriate. Specifically, he explains that the unwritten law therefore is in need of being deduced (istinbāt); as it varies in terms of its topics and its time and place. Accounting for the undetermined nature of the unwritten law, Ibn Rushd suggests that in some cases the written law, which is already known, can be admitted.\textsuperscript{813} This resonates with a legal maxim known as “lā masāgh lil-ijtihād bi-wūjūd al-naṣṣ,” meaning that ijtihād does not apply in the presence of textual evidence.\textsuperscript{814} Then in MCAR 1.15.17, Ibn Rushd explains that the written laws are prescribed by the lawgiver because of his knowledge of the public interest (maṣāliḥ). Taking the analogy of the doctor, he

\textsuperscript{810} MCAR 1.15.12, Averroës, Commentaire 2, 63.
\textsuperscript{812} Ibid. For more on this, see Intisar Rabb’s study (Doubt in Islamic Law) of this Legal precept, “Idra’ū’ al-
ḥudūd bi- al-shubuhāt,” “in cases of criminal law.
\textsuperscript{813} MCAR 1.15.14, Averroës, Commentaire 2, 126.
\textsuperscript{814} Kamali, “Legal Maxims,” 81.
explains that undermining the written laws can cause more harm than ignoring a doctor’s prescriptions. This articulation of the purpose of the law around the concept of public interest on the basis of not inflicting harm is also derived from a legal maxim that states “let there be no infliction of harm nor its reciprocation” (la-ḍarar wa la-ḍirār). This maxim is often used to explain that the purpose of Islamic law is to generate benefit to the community, and therefore the creation of any harm should be avoided.

In framing the different arguments for both written and unwritten laws, Ibn Rushd aims at grounding this discussion in the intention of the lawgiver and the objectives of the law (maqāṣid al-sharī’a) which echoes the jurist’s references to key Islamic legal maxims. This line of argumentation, which gives supporting arguments for the application and evaluation of both written and unwritten laws, connects many of its premises to Islamic legal maxims, in a rhetorical move, which provides a persuasive source of influence in articulating judicial decision-making and interpretation of the law.

In erecting moral boundaries of injustice around the theory of law, Qur’anic ethical value, and finally the objectives of the law, Ibn Rushd is not only grounding Aristotle’s natural justice within Islamic normative and legal practice, he is also clearly suggesting that sharī’a has both the written and the unwritten. He displays an efficient framework to negotiate justice under the epistemological scope of rhetoric, which, as already explained, relies on the jurist’s capacity to discern it. Such position will be also corroborated in his legal works both FM and BM.

815 Ibid., 85.
816 Cf. ibid., 80.
II. Natural Justice within sharī‘a in Ibn Rushd’s legal works

To attest to Ibn Rushd endorsement of natural justice within the normative framework of sharī‘a in his legal works, I first examine a number of instances, from both in DFF and KM, in which Ibn Rushd engages with the views of Muslim theologians in debates over moral theories. These show Ibn Rushd’s rejection of the moral theories of qubḥ and ḥusn of the Ash‘arites and Mu‘tazilites’s stances, to remain consistent with his practical view of natural justice. Furthermore, Ibn Rushd overtly recognizes natural justice, in BM and FM, and more importantly, he places an emphasis on the jurists’ responsibility to discern it.

A. Ibn Rushd’s position on qubḥ and ḥusn

The question of moral theories in Islamic thought focuses on the debate of good and bad (qubḥ and ḥusn). This couplet, qubḥ and ḥusn, is often used to refer to the ethical debate in Islamic theology between its two main schools, the Mu‘tazilites and Ash‘arites.817 The Mu‘tazilites’ school of theology holds that God and human beings are bound by a single code of moral values; moral values, therefore, in their view, are independent from the revelation. In other words, good and bad are intrinsic attributes of acts; and human reason, unaided by the revelation, can discern whether acts are good or bad.818 In the field of Islamic studies, the Mu‘tazilites’ position is often perceived as an objective rational one, and, for some, has been seen as grounds for the Islamic theory of

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natural law. This position is often contrasted with the Ash‘arites’ theistic subjectivist view, which maintains that moral values can only be determined by the revelation. Specifically, the Ash‘arites felt that binding God and humans to a single, shared code jeopardizes God’s omnipotence. Ibn Rushd does not seem to adhere to either position, but rather distances himself from this debate. However, he does make a brief statement on the question, in his *DFF* and *KM*. First, in *DFF*, he makes the following statement to describe the positions of the Mu‘tazilites and the Ash‘arites:

The definition of status, according to traditionalists, is the discourse of the law for those who are liable in front of the law [mukallaf] on the basis of an injunction or an omission. When such discourse is absent, one cannot attach any attribute, whether pertaining to good or bad, to the act. On this basis, good and bad are not essential attributes of acts. As for the Mu‘tazilites, they held that good and bad are essential attributes of acts. A part of these are apprehended based on the necessity of the intellect, such as lying and thanking the benefactor, others by association to law, such ritual purity or prayer for the words ingrained in them which help one refrain from obscenity and cleanliness. Other than describing the respective views of Mu‘tazilites and Ash‘arites, Ibn Rushd does not engage with either position, and opts to rather assert that this discussion is outside of the scope of the principles of jurisprudence. In so doing, Ibn Rushd remains faithful to his

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819 Anvor Emon, in his book *Islamic Natural Law Theories*, traced a natural law theory in both jurists adherents of Mu‘tazilite and Ash‘arite schools of theology, deeming nature to be a basis for rational inquiry fusing acts and values. He argued that Mu‘tazilites’ commitment to universal and objective ethics is to be seen in the concept of *ibāḥa* (presumption of permissibility in behavior) and the capacity of *‘aql* (reason) to captivate ethical obligations. God’s act of creation is always toward the good and cannot change the value of acts. Thus, human reason, unaided by the revelation, is deemed able to discern norms of behavior liable for either punishment or reward. Opposing Mu‘tazilites’ hard naturalism to the position of the Ash‘arites, he held that the voluntarist theological commitment of Ash‘arism pushed them to regulate the scope of reason under the concept of *maslahat* (public weal) and *maqasid al- sharī‘a* (the overall objective of the divine law) but they still accepted the role of reason, which earned them the title soft naturalists.


821 *DFF* ed. al-‘Alawi, §11, 41.
outline of the division of the sciences at the beginning of his treatise, which sets law as a practical science, which has action at its end:

…a knowledge that has action as its end. This can be universal and remote in terms of its utility to action, or particular [close in its terms of its utility to action], such as the sciences of legal norms (ahkām), prayers, and alms taxes, as well as similar particulars (juʿıyyāt) of religious duties (farāʿid) and practices (sunna). Under the universal is the science of principles of jurisprudence (ilm al-uṣūl) whose branches (furūʿ) rest on the scripture, the prophetic tradition, and the consensus as well as the knowledge of legal norms that are ascertained absolutely from these principles, their different divisions, and what follows from their being legal norms (ahkām).822

He divides laws into two types: the particular, pertaining to rituals and duties, and the universal, comprising the principles of jurisprudence. Thus one can infer that, within this division, he makes no room for theological questions. Still, Ibn Rushd makes a consequential comment on the Muʿtazilites’ view later:

As for the Muʿtazilites, they proved that good and bad are essential attributes to things on the basis of agreement of the wise to talk about them in a non-relative way, such as the goodness of telling the truth and badness of lying on the basis that these are reputable propositions which are widely accepted [mashhūrāt] and agreed upon. But it appears that although it is possible for intelligibles to be widely accepted, this cannot be the other way around.823

Ibn Rushd observes that what the Muʿtazilites consider rational objective propositions are, in fact, just widely accepted propositions pertaining to ethical maxims, such as telling the truth being good and lying being bad. To this list, thanking the benefactor and filial piety could be added. Furthermore, Ibn Rushd reminds us that while intelligibles can gain wide acceptability, the situation cannot be reversed. In other words, he is calling attention to the fact that mashhūrāt cannot be systematically seen as intelligibles. Thus, he remains

822 DFF ed. al-ʿAlawi, §2, 34.
823 DFF ed. al-ʿAlawi, §12, 42.
consistent to the position he outlines in the *MCAR*, where he asserts that ethical maxims are associated to the true widely accepted premises.

Furthermore, Ibn Rushd also strongly rejects the Ash’arites in his *KM*, leveling strong criticism both on rational and scriptural grounds:

Concerning justice [*al-‘adl*] and injustice [*al-jūr*] as applied to God the Glorious, the Ash ‘arites have maintained an opinion that is very foreign to reason and scripture... For they have said that the unseen world is different in this respect from the visible world, because, they assert, the visible world is characterized by justice and injustice only by reason of a prohibition of religion against certain acts. Thus a man is just when he does something which is just according to the Law, while he is unjust if he does what the Law has laid down as unjust. But they say: As for Him [God] who is not under obligation and does not come under the prohibition of the Law, in His case there does not exist any act which is just or unjust, or rather all His acts are just’. And they are forced to say that there is nothing just in itself and nothing unjust in itself.

As seen here, Ibn Rushd expresses his dismay at an argument, which defines acts as just or unjust based exclusively on the scripture. Instead, he holds that it is self-evident that justice is good, and injustice is evil, and rejects associating injustice with God. To achieve this purpose, he justifies why God had to create evil in certain people. He explains that evil is required in God’s creation, for its existence is due to the necessity of matter. Consequently, I deduce that, in debating moral theories, Ibn Rushd remains consistent with his philosophy of law and ethics, which affirms the contingency of evil and admits that the basis of moral theory cannot be associated to theoretical rational truth, but remains, instead, within the scope of the praiseworthy premises.

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B. Natural justice in Ibn Rushd’s legal works

Along with his critical attitude toward theological moral theories, Ibn Rushd asserts the necessity of natural justice within shari‘a and is clearly calling the attention of the jurists to its importance to fulfill justice. In his appropriation of Aristotle’s natural justice, in both his BM and FM, Ibn Rushd decidedly assigns to the jurists the responsibility of considering the practical value of natural justice.

First, in the last book of BM, within Kitāb al-aqdiyya (the book of judges), and after his discussion of the doctrine of proof and the basis for Qādīs’ adjudication, Ibn Rushd closes up his discussion by underlining that jurist need to apply what he calls “the legitimate practical law”(al-sunna al-mashrū‘a al-‘amaliyya), which he defines as follows:

It is necessary, before this, to know that the legitimate practical law [al-sunan al-mashrū‘a a; amaliyya] aiming at the purpose of excellences [al-maqṣūd minhā huwa al-faḍā’il al-nafsaniyya]. Some of them refer to respect, to whom it is due, and to the expression of gratitude [thanking the benefactor], to whom that is due. The ritual acts [al-ibādāt] are included in this category. These are the laws which are honored [al-sunnan al-karamiyya] …Some of the laws [sunan] relate to the excellence called continence [‘iffā], and are of two kinds: laws laid down about food and beverages, and laws laid down about marital affairs. Some laws [sunan] refer to the requirement of justice [‘adl] and abstention from injustice [jūr]. These are the categories of laws that require the maintenance of what is just in financial dealings, and the maintenance of what is just in what relates to human bodies. Related to this category are (the aḥkām of) retributive justice [qiṣās], wars, and punishments, as the maintenance of justice is the aim of all of these. Among them are laws laid down for individual integrity, and laws laid down for all kinds of wealth and its valuation through which is intended the attainment of the merit called Liberality [al-sakhā‘], and the avoidance of the meanness called parsimoniousness [bukhl]. Alms giving [zakāt] is included in this category from one aspect, and is included in the communal sharing of wealth from another;
same is the case with charity [sadaqāt]. There are laws laid down for political organization, which is the condition for human life, and the preservation of his theoretical and practical excellences, and these laws are expressed under the scope of governance [ri‘āsa]. It is for this reason that these laws should be upheld by the imamates and the guardian of religion. Among the important laws for political organization are those related to love [al-maḥaba] and hate [al-baghḍa‘], and to cooperation in instituting all these laws [sunan], which is called forbidding evil and enjoining good [al nahy ‘an al-munkar, wa- al-amr bil-ma‘ruf], and which is love and hate, that is religious, which occurs either due to the deficiency [ikhlāl] of these laws or due to misjudgment of sharī‘a [sā‘ al-mu’taqad fī-sharī‘a]. Most of what the jurists mention in the Jawāmi‘ among their books is that which deviates from the four categories that are the excellences of continence, the excellence of justice, the excellence of courage, and the excellence of liberality, and the ritual acts (‘ibāda) which are like conditions for establishing [tathbīt] these excellences. The Book of Judgments is now complete, and with its completion is completed the entire manual. Praise be to Allah, as is His due, many times over.826

This condensed statement, which comes as a conclusion to Ibn Rushd’s compendium, bears clear parallel to his conception of natural justice, as he acknowledge the two varieties to natural justice outlined in Aristotle’s natural justice and he himself adopted in MCAR as illustrated in the following table.

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826 BM trans. 6, 572 (slightly modified); BM ed., vol. 6, 238-239.
First, Ibn Rushd follows the same subdivision of natural justice, one that is meant for supplementing the infinite good and bad, which he defines in *BM* under excellences, and specifically associates it to what he calls *al-sunan al-karāmiyya* which is a reference to ethical maxims. To these, he also associates thanking the benefactor. Ibn Rushd also outlines the different excellences such as *‘iffa* (abstinence), *‘adl* (justice), *shajā’a* (courage), and *al-sakhā’* (generosity), also discussed in *MCAR*. Under excellences, Ibn Rushd also sets religious rituals and underlines their virtuous aim. As for his discussion of the different excellences, Ibn Rushd follows the same line of thought presented in his *MCAR*, as he associates the different types of laws with different excellences, such as connecting the value of laws related to eating and drinking to the excellence of continence, and of laws related to money, bodies, *qaṣāṣ*, wars and criminal punishment to justice. Then, he relates the law of *jihād* to the excellence of courage and presents almsgiving and sharing money as the basis of the excellence of liberality.

Second, he admits the corrective function of natural justice. Specifically Ibn

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827 BM ed. 6, 238-239.
Rushd talks about political laws which he correlates to *al-riʿāsa* set by the *imām* or the guardian of religion, and, similarly, he admits the role of these to correct any deficiency (*khalal*) in relation to the value of good and bad, and specifically notes the example of *ḥisba*. He outlines the need for this type of excellence in establishing laws in cases of the deficiency of existing law or misjudgment of that law.

Among the important laws for political organization are those related to love [*al-maḥaba*] and hate [*al-baghza*], and to cooperation to institute of all these sunan, which is called to forbid evil and enjoin good [*al-nahy ‘an al-munkar, wa- al-amr bil-ma'ruf*] and which is love and hate, that is religious, which occurs either due to the deficiency [*ikhlāl*] of these laws or due to misjudgment of *shariʿa* [*sūʿ al-mu’taqad fī al-shariʿa*].

Ibn Rushd’s reference to deficiency or misjudgment corresponds to his justification, in *MCAR* 1.13.10, of the necessity of the corrective function of the unwritten laws. Both references clearly admit the deficiency of law or undue generalization, which requires a correction of law to fulfill the aim of excellence and establish good governance. Here, Ibn Rushd calls for a partnership to establish laws, and attaches to this idea the notion of *ḥisba*, which is also found in his *MCAR* 1.13.9 as a materialization of the correction of law, specifically an addition to the amount of bad (*al-sharr*) in particular-written law.

This leads me to conclude that Ibn Rushd, here, does not limit himself to anchoring the quality of good and bad in relation to the *maḥmūdāt* which he identifies here as *al-sunan al-kaʿāmiyya*, but adds the rituals to further cement this inclination meant to supplement the written justice. Thus, he draws from Islamic rituals, which he also associates to the aim of the different excellences as illustrated in the following table.

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828 *BM* trans. 6, 572 (slightly modified).  
829 Averroës, *Commentaire 2*, 117.
Table 10: The rapport between excellences and laws

<table>
<thead>
<tr>
<th>Types of Laws</th>
<th>Excellences effected in practice by laws</th>
<th>Opposite Excellences</th>
</tr>
</thead>
<tbody>
<tr>
<td>Thanking the benefactor</td>
<td>to establish excellences</td>
<td>Human nature: appeal to what is opposite to excellent virtues</td>
</tr>
<tr>
<td>‘ibādāt</td>
<td>tathbīt</td>
<td></td>
</tr>
<tr>
<td>Law related to eating, drinking, and marriage</td>
<td>Continence</td>
<td>Obscenity</td>
</tr>
<tr>
<td>‘iffa</td>
<td>fujūr</td>
<td></td>
</tr>
<tr>
<td>Laws related to money bodies, wars and criminal punishment, ‘uqūbāt</td>
<td>Justice</td>
<td>Injustice</td>
</tr>
<tr>
<td>‘adl</td>
<td>jūr</td>
<td></td>
</tr>
<tr>
<td>War</td>
<td>Courage</td>
<td>Cowardice</td>
</tr>
<tr>
<td>Jihad</td>
<td>shajā’a</td>
<td>Jubn</td>
</tr>
<tr>
<td>Zakāt</td>
<td>Liberality</td>
<td>Parsimoniousness</td>
</tr>
<tr>
<td>Ishtirāk al-amwāl</td>
<td>sakhā’</td>
<td>danā’a</td>
</tr>
</tbody>
</table>

This link between thanking the benefactor and ritual acts is not something unique to Ibn Rushd. In his article "Two theories of the obligation to obey God’s commands,” Aron Zysow discusses the roots of the notion of thanking the benefactor in Islamic thought among theologians in the context of the basis of divine obedience. According to
Zysow, the Ash‘arites provided a prudent answer, propounding that, given that there is no moral order independent of the revelation, we are bound to obey God’s command out of prudence.830 Another answer was presented by some Mu‘tazilites’ circles suggesting the rational obligation of gratitude to the benefactor (shukr al-mun‘im)831 is a moral justification for divine obedience. Zysow ascribes this theory to Abu al-Qāsim al-Ka‘abī.

In fact, the Başrān branch of the Mu‘tazilite school seemed to relate the ritual act of the revealed law to the gratitude to a benefactor, as they argued that such views are to be performed out of respect and self-abasement, as was the case with gratitude. This position is also found in Saadia Gaon (d. 942) who, according to Zysow, also linked the theory of gratitude to the law of prayer – thus, he specifically linked this obligation of gratitude to reason, but asserted that we need prophets to delimit it in terms of utterance, time, and manner. Ibn Rushd also associates thanking the benefactor to ritual acts, but does not admit the Mu‘tazilites’ position on the rational ground for divine obedience, for as already shown, thanking the benefactor falls within the realm of praiseworthy premises under the scope of rhetoric, specifically the unexamined opinion. It should suffice here to highlight that Ibn Rushd saw the purpose of ritual acts, including thanking the benefactor, as specifically to establish excellences, as he explains at the end of his statement. This corresponds to his position in the MCAR where he calls for establishing shared just excellences on the basis of rhetoric, as he holds a pessimistic view of human nature for humans’ inclination toward the opposite of just actions.

One last important point needs to be noted here: that Ibn Rushd concludes his

831 Ibid.
legal compendium with this discussion of natural justice in sharī‘a is a clear call for the jurist to the importance of natural justice; after all his compendium is written as the jurist primer.

I would like, lastly, to add that a similar view on the need for practical application that aims to fulfill the excellences outlined is also found in his _FM_ where he asks:

To how many jurists has jurisprudence been a cause of diminished devoutness and immersion in this world! Indeed, we find most jurists to be like this; what their art requires in essence is practical excellence [al-faḍīla al-amaliyya]. Therefore, it is not strange that there occurs, with respect to the art requiring scientific excellence, what occurs with respect to the art requiring practical excellence.\(^{832}\)

In this statement, Ibn Rushd seems to level criticism at jurists, reminding them of the importance of practical excellences in their practical art. This reference to practical excellence can be read in relation to his exposition in _BM_ which admits natural justice in relation to excellences, and asserts its practical dimension. Another important point Ibn Rushd makes in _FM_ seems to correspond to his conception of natural justice within the framework of sharī‘a: that consensus is possible in the practical aim and the connection between sharī‘a and practical philosophy. One final dimension in _FM_ which accords with his conception of natural justice, mainly in relation to his view of the jurist’s capacity to actualize it. Ibn Rushd in _FM_ asserts the necessity to know syllogistic procedures based on the organon that is the different logical arts.\(^{833}\) This is not to mean that legal argumentation uses demonstrative syllogism, as he already noted that the jurist uses a presumptive syllogism. This dilemma can be resolved when one recognizes that Ibn Rushd sets the unexamined opinion as the ultimate criteria. Therefore, a jurist can use

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\(^{833}\) _FM_, ibid., 3.
dialectical or even sophistical arguments, as long as it is under the realm of the
unexamined opinion, it remains under the presumptive scope of rhetoric. This is not
surprising after what has been discussed on how Ibn Rushd highlighted the necessity of
topics in discerning natural justice.

In first reaffirming the necessity of inscribing a practical dimension to law to
achieve excellence for the sake of justice, and then rejecting both the scriptural and
rational grounds for ethics, Ibn Rushd holds fast to the practical view of ethics in Islamic
jurisprudence conceived within the political and epistemological view of rhetoric. From
this standpoint, Ibn Rushd anchors the conception of justice in the mechanism of
rhetorical procedures such as widely accepted premises, the value of topics, and
testimony. In so doing, Ibn Rushd clearly anchors ethic under Islamic jurisprudence
Revisiting Ibn Rushd’s political philosophy from the perspective of Islamic jurisprudence allows this study to fulfill the following outcomes: First, it redefines the nature of the relation between sharī’a and rhetoric in Ibn Rushd’s works; second, it identifies a conception of natural justice in both Ibn Rushd’s political and legal philosophy; and lastly, it reassesses the relation between sharī’a and philosophy in Ibn Rushd’s thought. Under this prism, I argue that Ibn Rushd’s philosophy of law recognizes the contingent attributes of Islamic law which he associates with the realm of opinion—that is rhetoric—and not with truth. This epistemological view of law makes room for a corrective notion that I call natural justice within the interpretive framework of sharī’a. This understanding forges a dynamic view of sharī’a and links it to practical philosophy.

First, the study shows how in associating law with rhetoric, the scope of opinion, Ibn Rushd underlines both the presumptive and the practical aim of legal argumentation to eliminate injustices. To be more specific, I unravel how Ibn Rushd argues that people’s adherence to sharī’a is not associated to its rationally demonstrative argumentative certainty, but rather to its practical outcome. Such practical outcome is conveyed through rhetorical argumentation. Here I underline the influence of Arabic rhetoric, which helped Ibn Rushd to construct the rhetorical argumentative basis of sharī’a on the efficiency of its argument as it came to establish a normative framework for a political community.
Second, the present study shows how Ibn Rushd’s philosophy of law and ethics is self-contained within an argumentative process under the epistemological scope of rhetoric. Such a process unravels a negotiation of justice through the rectification of the written laws based on an addition or subtraction of the value of good or bad against possible deficiency associated with the contingent nature of human actions. While people have a natural inclination toward admitting the value of exceptional acts associated with ethical maxims such as thanking the benefactor and filial piety, it is the qualified jurist who has the aptitude to discern a universal matter of justice based on individual legal reasoning. For the jurist’s individual legal reasoning to be publically endorsed, Ibn Rushd suggests the use of the unexamined opinion. Finally, I conclude with examining how Ibn Rushd anchors natural justice in the theory of law, Qur’anic ethic and objectives of the law in *MCAR*, but tries in his *BM* to further cement the Islamic legitimacy of natural justice by linking it to the aim of Islamic rituals.

Taking such an outlook, Ibn Rushd adopts a very utilitarian view of both law and ethics, one which highlights practical efficiency and makes a clear rupture with theology. To be more precise, he eradicates theology from his conception of sharī‘a, both as a basis of adherence and as a ground for moral theory. While he draws on Qur’anic ethical values, Ibn Rushd makes no room for direct divine intervention in ethics in terms of divine mercy or grace. This understanding of sharī‘a, which relies on its efficiency as a basis for adherence and its practical value to fulfill justice, could suggest a global political project which aspires to universalize sharī‘a. In fact, this appropriation of natural justice within the context of Islamic law opens the question of whether this corrective dimension could lead to a developmental view of law toward the best regime or not.
Curiously, Ibn Rushd makes an intriguing statement in his *Commentary to Plato’s Republic*, where he alludes to a proximity between Islamic law and what is translated as ‘human laws’ which could fulfill wisdom. In depicting such scenario, he points to the political situation under Islamic law and then concludes that if such a situation were to remain for an infinite time it might be possible for the city to materialize. The fact that this commentary is only recovered in translation remains a challenge to discerning what Ibn Rush meant by ‘human laws,’ but as he relates this to fulfilling wisdom, it could imply a proximity to what he called unwritten laws in his *MCAR and MCNE*. This claim could be a ground for a developmental view of Islamic law, and deserves further attention and examination.

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834 Cf. Averroes’ *Plato’s Republic*, 75.
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