

Toward our Reformation:

From Legalism to Value-Oriented
Islamic Law and Jurisprudence

TOWARD *our*
Reformation • FROM
LEGALISM *to*
VALUE-ORIENTED
ISLAMIC LAW *and*
JURISPRUDENCE



Mohammad Omar Farooq

IIIT Books-In-Brief Series

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.

FROM LEGALISM TO VALUE-ORIENTED
ISLAMIC LAW AND JURISPRUDENCE

Mohammad Omar Farooq

Abridged by Wanda Krause

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978-1-56564-674-2

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The IIIT Books-in-Brief Series is a valuable collection of the Institute's key publications written in condensed form designed to give readers a core understanding of the main contents of the original. Produced in a short, easy to read, time-saving format, these companion synopses offer a close, carefully written overview of the larger publication and it is hoped will stimulate readers into further exploration of the original.

In **Toward Our Reformation**, the author contends that at the heart of the Muslim predicament lies ignorance and/or a lack of commitment to core Islamic values. Mohammad Omar Farooq advocates for a return to what he calls a "value-oriented" approach. We learn that what we consider to be the Shari'ah today is actually an original hub enveloped in a labyrinthine shroud of scholastic views and deductions, which in effect serves to hinder the development of Muslims. He argues that to extravagantly rely on questionable hadith and fallacious implementation of *ḥudūd* law betrays the spirit of the Qur'an and the Prophet's message. The consequence is a blatant abuse of Muslims. The author explores this misapplication of *ḥudūd* law and, therefore, this abuse.

The book consists of five chapters. After the introductory first chapter, chapter two focuses on the Shari'ah and explores issues concerning misconceptions about the term as well as the propensity towards legalism. Chapter three focuses on Hadith, examining certain vital issues, and concludes with the documentation of the problems concerning the misuse of Hadith in deriving or formulating laws. Chapter four deals with the subject of *ijma'*, where most of the claims concerning it are demonstrated to be unfounded and untenable based on a consistent lack of consensus regarding almost all aspects of *ijma'* as a source of Islamic jurisprudence. Chapter five, on *qiyās*, deals with the many conceptual problems of the misapplication of this tool in Islamic legal promulgation. Finally, chapter six emphasizes that an empirical foundation is critically needed to render balance to Islamic law once

again, by balance meaning that text-orientation be duly matched by life-orientation, in today's sense. The author explains that the prevailing conditions of the Muslim world cannot change unless Muslim thought and understanding of the foundational sources of Islam first change.

Abridged Edition of Mohammad Omar Farooq's Original

*TOWARD OUR REFORMATION: FROM LEGALISM TO
VALUE-ORIENTED ISLAMIC LAW AND JURISPRUDENCE*

ISBN hbk: 978-1-56564-372-7

ISBN pbk: 978-1-56564-371-0

2011

Chapter One

Introduction

People want to be informed with accurate information for virtually everything that interests them. Islam places supreme emphasis on its followers being informed, educated, probing, discerning, and enlightened. Islam insists that believers exercise their critical faculties and not be senseless adherents. Further, it strongly repudiates those who indiscriminately follow in the footsteps of their forefathers, blindly emulating without knowledge or understanding of what they are doing or practicing. Indeed, the Qur'an asserts that true faith is preceded by or based on knowledge and understanding. The teaching of the Prophet Muhammad (ṢAAS),* is also unambiguous with regard to this, emphasizing the search for knowledge. Indeed, of all the concerns that are regarded as obligatory (*fard* or *wājib*) for Muslims, seeking knowledge and gaining an education is one for which the word *fard* has been specifically employed.

Most educated Muslims know that the foundational sources of Islamic law are primarily four in number: the Qur'an, Hadith (prophetic narrations), *ijma*^c (consensus) and *qiyās* (analogical reasoning). Indeed, throughout Islamic history our noble scholars and jurists searched for answers openly and encouraged people to ask questions, as part of the Islamic tradition.

However, as time wore on scholars began to feel uncomfortable thinking openly, which was further exacerbated by the existence of a limited methodological toolbox, re-emphasized as such, over the centuries. Due to factors both internal as well as external, over a long

* (ṢAAS) – *Ṣallā Allāhu ‘alayhi wa sallam*: May the peace and blessings of God be upon him. Said whenever the name of the Prophet Muhammed is mentioned.

period of history Islamic civilization began to become decadent. And as it declined, gradually, in a fiercely competitive, contested and even violent environment, western civilization came to dominate. As western forces ruthlessly colonized the Muslim, as well as rest of the world, western laws and codes supplanted Islamic legal institutions and frameworks.

This situation is further exacerbated by the revivalist fervor to establish or implement the Shari'ah over the populace, often misconstrued and misrepresented as Islamic law. Even in countries that are constitutionally not based on religious law, the general culture and social environment is conditioned by the sway of Islamic law over the general Muslim population.

How ironic that despite the great value placed on intellectual endeavor throughout our previous centuries, rates of illiteracy in the Muslim world stand at some of the highest known today. Fundamental knowledge and understanding of the Islamic faith, which Muslims are supposed to follow, uphold, and invite others to, has become negligible. One of the major reasons for this tragic state of affairs is the failure of common Muslims to develop within themselves a critical mindset, intellectually disciplined to think, reflect, judge, and reason. The limitation of the methodological toolbox based on these foundational sources, as they have been traditionally utilized, is explored in this book.

Regardless of what the mirror reflects back towards us and toward our reformation (*iṣlāḥ*), we must always bear in mind the following: (a) As human beings, we have enormous potential to change our lives, and the Qur'an emphatically reminds us that we must do our part in initiating change, beginning with ourselves (*Sūrah al-Ra'ad*, 13:11); (b) We should be equipped with the balanced and wholesome guidance contained in the Qur'an and the legacy of the Prophet, with which we can overcome any deficiency we have or challenge we face; and (c) We should have the desire to make a positive difference to the world in which we live in the spirit of *iṣlāḥ*.

This book is intended to empower ordinary Muslims to better understand the issues and problems affecting them from an Islamic perspective by demonstrating the ways in which they can more effectively link with the Qur'an and the legacy of the Prophet to chart a superior future for the Ummah to better serve humanity. The issues raised in this book

have not been identified because of their polemical importance. Rather, the real problems and challenges facing the Muslim world – poverty, deprivation, illiteracy, instability, authoritarianism, exploitation, injustice, economic inequality, violence, human rights deviations, women’s rights deficiencies, technological and economic backwardness, dependence on the West, and so on – do not make a happy picture. There must be a reason and there has to be a solution.

As a product of independent inquiry in Islamic law and jurisprudence, it offers a past-enriched perspective that is respectful of what has been accumulated as knowledge and wisdom over the centuries, every bit as much as it aims to be forward-looking in regard to provoking a discourse that hopefully will usher in a better future.

Chapter Two

Shari‘ah, Law and the Qur’an: Legalism vs. Value-Orientation

For, there can be no doubt that the true Shariah (as propounded by the Qur’an and the Prophet and understood by his Companions) is now almost hidden in a maze of scholastic views and deductions – a super-structure of subjective opinions accumulated in the course of centuries and now clothed in the garb of fictitious “authority”.¹

Is there a true Shari‘ah, as argued by Muhammad Asad in the quote above? How the Shari‘ah is understood and the inclination towards legalism are facets debated and explored followed by a discussion on the importance of value-orientation and key principles concerning this. Today, the center of human civilization has shifted completely away from the Muslim world to the West. At the same time, many Muslim-majority countries² are leaning toward traditional Islam by way of implementation of the Shari‘ah. The more a country leans this way, the more not just the West, but conscientious Muslims around the world, become anxious. Additionally, many Muslims, throughout the Muslim world as well as in the West, also seem disillusioned, impatient or even agitated. In view of these changing circumstances, there is a dire need to ask what this means and how the way the Shari‘ah is understood and perceived affect us in our contemporary time.

A concept can be distorted by way of misperception, misunderstanding, misapplication, or misuse. The way the Shari‘ah has been distorted is through the association with its partial and discriminatory implementation through dictatorial, authoritarian or hereditary rule, often applied to the general, largely poor, populace, while those in power or the wealthy are immune to the harsh punishments. The Shari‘ah projects have basically meant the institution of *hudūd* punishments intended to implement Shari‘ah law by enforcing punishments mentioned in the Qur’an and Sunnah. In practice, these are a sham as well as a gross violation of the spirit of justice that Islam demands. Illustrative is the Hudood Ordinance implemented for adultery which has in places resulted in the outrageous imprisonment of rape victims with the ever-present possibility of conviction for even capital punishment.³

However, the solution is not simply to discard the notion or term altogether but rather to purge it of misunderstanding, clarify the abuses, and ensure that the praxis of faith conforms reasonably and conscientiously to the claimed ideals. It is the contention of this chapter that there exists a fundamental misunderstanding concerning Islam and the Shari‘ah. Some illuminations with respect to the Shari‘ah as relates to contemporary issues are offered.

Highly reputed scholars who are committed to transforming Muslim thought, among the laymen, journalists, and demagogues often equate the Shari‘ah to Islamic law. This is due to the fact that quite often people’s applied efforts are a reflection of their contemporary understanding, regardless of what may have been the formulations of the past. Another reason is that the later period of classical Islamic discourse employed the term Shari‘ah without explication, in the probable assumption that the term was known and understood. Even though the notion of its definition was absent in the earliest of classical discourse, the use of the term Shari‘ah has only become widespread in the modern era.

The Shari‘ah is often thought to be divine. According to the Merriam-Webster Dictionary, the word “divine” means: “of, relating to, or proceeding directly from God.”⁴ So, the question is, is the Shari‘ah something that has come directly from God? The answer depends on how the scope of the “Shari‘ah” is defined. If the Shari‘ah is equivalent to Islamic law (*fiqh*) then it cannot be considered divine. *Fiqh* or Islamic law is, after all, mostly a human construct. Even though one of the *uṣūl* (source methodologies), the Qur’an, is divine, the other sources –

Hadith, *ijmaʿ* (consensus) and *qiyās* (analogical deductions) – are not sacred. Thus, in the sense that the Shariʿah is commonly used, where the details of the laws are not derived from a divine origin, but instead from less divine (Hadith)⁵ and human derived (*ijmaʿ* and *qiyās*) sources – it is not divine.

The Shariʿah is often thought to be immutable. Such assertions are, however, simply vacuous, emotional, and indefensible claims. Such understanding is reflected in the historical development of the Shariʿah as a rigid body of theological dogmas and legal codes. The Shariʿah is not immutable because there have been variations to it under the guidance of different messengers, such as prophets Moses, Jesus and Muhammad. While many traditionalists have elevated the Shariʿah to a sacrosanct level and effectively consider it immutable, many Islamic jurists have conversely recognized that a vast portion of it is changeable, subject to circumstances and situations as per the principle: “Rulings change according to time and place.”⁶

The Shariʿah is often thought to be the same as Islam and a complete code of life. Several scholars have represented Islam as a “complete code of life”, suggesting that Islam has guidance for the full spectrum of life and that there is an implication of a solution for every issue, situation, or problem. Also implied is the notion that since Islam is a self-contained, self-sufficient way of life, Muslims should not seek answers elsewhere. However, Islam is not a manual dealing with every contemporary problem or issue that Muslims may encounter. It stands to reason that if, indeed, all the problems and solutions were known, or easily deducible, the condition of the Muslim world would not be so miserable and deplorable. A fundamental pitfall of Muslim thought has been its over-reliance on its sacred texts. Such rigidity in Islamic thought has led to sterility and stagnation in Muslim thought. Islam is not like a dictionary; rather, it is more like an alphabet (building blocks of language). Many words are available for consultation in the dictionary and those words not already formed will be based on the alphabet.

The Shariʿah is often confused with “law”. Furthermore, the equation drawn between the Shariʿah and Islamic law represents a profound confusion regarding Islam. If, as is the case, the Shariʿah relates to the entire spectrum of life, then it stands to reason that it cannot all be concerned with law. For example, ablution, prayer, fasting, etc. are not legal matters at all. Turning every aspect of Islamic guidance into law is therefore inconsistent with Islam. Despite the fact that the verses of

the Qur'an dealing with legal matters constitute a rather small portion of the whole, legalistic tendencies still manage to reduce the Qur'an to a series of laws. Converting everything into a matter of law, however, adds an undue burden of rigidity to life inconsistent with humankind's *fiṭrah* (innate human nature). The Qur'an urges believers to focus on avoiding the big sins (*kabā'ir*). This does not mean that God's adherents should treat other sins lightly, but neither should everything be considered a simple matter of law.

The Shari'ah is often enforced over its entire spectrums without distinctions, such as between prayer or crimes. Implementation of the Shari'ah is usually discussed within the context of enforceable laws. Indeed, the most immediate manifestation of such implementation tends to be "enforcement" of the penal codes known as the *ḥudūd* – specific punishments prescribed for certain offenses in the Qur'an (murder, adultery, theft, etc.). As above, equating the Shari'ah to Islamic Law is simply erroneous because Islam, in the comprehensiveness of its guidance, not only covers law but also values, principles, rituals, etc. Therefore, not all aspects of Islam are enforceable by human authority. God is not interested in enforcing, for example, prayer and fasting or in turning society into a police state to ensure the conducting of these practices after all. The Prophet's mission was no more than conveying the message. If, indeed, he is not the manager (*musaytir*) of people's affairs, then his followers cannot assume a duty larger in scope.

The Shari'ah is often thought to provide clear and unambiguous guidance over the entire spectrum of life. This is a simplistic view. In matters concerning injunctions, the Qur'an is explicit and categorical. However, implementation of its ordinances is not straightforward, unless one adopts a straight-jacket approach that often yields outcomes contrary to the intent (*maqāṣid*) of Islam. Consider the following examples. The Hudud Laws in Pakistan, promulgated under a military dictator, have served to imprison – and incarcerate – many female victims of rape. Though miserable victims of a vile crime, scores of women have been imprisoned or prosecuted for their part in it under this version of the Shari'ah.⁷

Another example in Muslim societies is the man's unilateral, arbitrary, unregulated divorce of a wife through the instant pronouncement of the triple-*ṭalāq* (divorce), often leading, in turn, to the female spouse being forced out of her home. Conversely, the process of divorce

prescribed by the Qur'an is wise, balanced and sensitive to factors involving both spouses. However, gross versions of the Shari'ah (confused with Islamic law) have validated such un-Islamic practices. Nevertheless, most schools of Islamic thought have validated them under the influence of legalism.

Legalism can be understood as a fixation on laws, codes of conduct, or legal ideas, without balancing with the mercy and grace of God. In the centuries since the time of the Prophet, Muslim societies tended towards legalism reducing everything down to black and white, right and wrong, or permissible and impermissible. Legalism makes people self-righteous while it induces in them a judgmental trait towards their fellow human beings. Legalism creates an environment where people are constantly worried about being improper, culminating in hair-splitting efforts over highly minute details of life. However, God does not intend that this world should be a place of perfection. More important is facilitating the human connection to and bonding with the Creator.

The Qur'an specifies few legal injunctions and offers much more in the way of guidance. Because the Prophet facilitated the appropriate value-orientation, there was law but no legalism, and Islam is not intended to be an exclusively text-oriented belief. The discourse that constitutes Islamic jurisprudence is already experiencing the call toward value-orientation. An orientation in the literature includes *maqāṣid al-shari'ah* (higher objectives of the Shari'ah), identified as the preservation and protection of the *dīn* (faith; religion), life (*nafs*), family system (*nasl*), intellect (*ʿaql*), and wealth or property (*māl*).⁸

The value-oriented perspective advocated here is somewhat more nuanced. Some introduce the *maqāṣid* as simply representative of values. The traditional *maqāṣid* hierarchy makes other components, such as life, family, intellect and property, to be subservient to belief. In addition, the main modes of *ijtihād*, including jurisprudence that is value-oriented, are based on a text-oriented approach. Thus, it is rather through self-critical discourse, creative and constructive intellectual rejuvenation, moral and religious clarity that is simple as well as unambiguous, a dynamic problem-solving and value-oriented approach rooted in the Qur'an, and inspired and guided by the Prophetic legacy, that Muslims will be enabled to better fulfill their duty to themselves, to humanity and above all to their benevolent Creator.

Value-Orientation

A society's real character is a reflection of its values and principles. A legal system and environment also reflects the values and principles that a given society upholds. To place laws above, or delink them from, values leads to legalism, this is akin to putting the cart before the horse. Khan aptly invites Muslims to: "Treat Islam as a *fountain of values* that guide conduct rather than a system of ready-made solutions to problems."⁹ So, what are the essential values that Muslims must uphold and integrate into their thought process, culture and legal framework? The following are illustrative and by no means exhaustive:

1. *Fundamental Human Dignity (Each Human As A Person, Not An Object Or Commodity)*

God has sanctified each one of us at the human level, and Muslims should be at the forefront in upholding the fundamental right of human dignity (*Sūrah al-Nisā'*, 4:1).

2. *Justice*

Islam's emphasis on justice (fairness) is unequivocal. It sets a standard that is much higher compared to any other ideology or religion, exhorting its adherents to stand forth for justice even if this entails acting contrary to one's own interest (*Sūrah al-Nisā'*, 4:135).

3. *Equality (and Non-Discrimination)*

Whether in terms of Muslim or non-Muslim, male or female, black or white the value-oriented norm of Islam is equality. In this world, human beings all are equal, especially in terms of those rights relating to life, honor and property. Whatever good or virtue Muslims possess is rewarded by Allah in the life hereafter. At the human level though, each must regard the other as equal.

4. *Freedom*

That the edifice of Islam is based on free choice not coercion is one of the pivotal aspects of the value-orientation approach. If Islam is to become relevant once again there must be recognition of the foundation of free choice for those who embrace the belief. When the Prophet and his nascent community faced severe and persistent persecution Allah emphatically reminded the Prophet to cherish freedom. Subject to the usual parameters that apply in any healthy and functional society, no-one has the right to remove the fundamental right to choice and freedom. Probably the biggest and broadest area relating to choice and

coercion involves the role of the state in Islam. In light of the experience with Islamic law and its incorrect application, many Muslims, as well as most non-Muslims, now have tremendous reservations about Islamic law, or the mixing of political power with religious authority. Muslims need to present a better, functioning model of state and governance in accordance with the values and principles of Islam.

5. *Universal Moral Values (Ma'rūf)*

You are indeed the best community that has ever been brought forth for [the good of] mankind (*al-nās*): you enjoin the doing of what is right (*ma'rūf*) and forbid the doing of what is wrong (*munkar*), and you believe in God. Now if the followers of earlier revelation had attained to [this kind of] faith, it would have been for their own good; [but only few] among them are believers, while most of them are iniquitous. (*Sūrah Āl Imrān*, 3:110)

The Qur'anic call toward *ma'rūf* and away from *munkar* relates to moral values in the universal sense. Both *ma'rūf* and *munkar* have a broad range of meanings and a clear understanding of these two concepts is critical to a Muslim's life.

6. *Humanity-Orientation and Global Belonging*

At one level all humans belong to a family. At another they belong to a nation or country. On a quite different level the Muslims belong to the Muslim Ummah. At yet another level all belong to humanity. None of these senses of belonging necessarily need conflict with each other. One's family and nation are often not choices of one's own; individuals are born into them, belonging to a family and circle of relatives through biological and other bonds. National belonging is becoming more fluid at this juncture with the greater global mobility of people. Nevertheless, it is quite possible to maintain ties to the part of the world one originates from without conflict while remaining loyal to the place of permanent residence. Muslims need to make this clear to the people of the countries to which they emigrate. Muslims must seek common ground concerning worthy causes. Muslims should be at the forefront of fostering the spirit of global belonging.¹⁰

7. *Representation and Participation (Shūrā)*

Consultation or *shūrā* is a vital process and important institution in Islam and critical in a value-oriented context. Different levels of relationship in Islam are based on consultation rather than on coercion

or imposition. Thus, the concept of governance, administration and leadership is participatory – meaning that those who are affected by the decision have the right to be duly consulted.

8. *Rule of law*

The essence of the rule of law in Islam is summarized according to four points:

- (a) Equality of all before the law, with no-one being above it, where the laws are based on objective, accessible rules;
- (b) An independent judiciary;
- (c) Enforcement of the law is civil and non-partisan;
- (d) Conflict resolution occurs either through the legal system, the political system or both without involving violence on the part of the citizens or State.

9. *Seeking Common Ground for Mutual Good*

It is a common human tendency to emphasize and exaggerate differences more than commonness. Muslims are no exception to this. Islam invites people to the pristine truth, and whenever appropriate and possible, it also seeks to identify and build on common ground.

10. *Rejection of Violence As Normal*

In Islam peace and non-aggression are the norms. Islam rejects violence in the form of unjustified aggression, but does not proscribe violence in the form of justified use of force. However, the only form of violence permissible is in self-defense, without its initiation, without committing excesses, and subject to strict guidelines as part of the rule of law. Otherwise, it is never permissible for Muslims to engage in violence, especially in a vigilante manner.

11. *Non-judgmental*

As Allah's judgment will be in place in the life hereafter it is important that all verdicts concerning matters of worship should be deferred to Allah alone and Muslims must not judge their fellow human beings in this regard.

12. *Emphasis On Substance Over Form*

'Faith' has become a mere figure of speech, a mere empty word devoid of that spark of *enthusiasm* which in the early days of our [Islamic] history inspired the Muslims to imperishable deeds of cultural and social achievement. No doubt, Islam is still alive as an *emotion*. It is

alive in the instinctive love of countless millions of people who vaguely feel its principles are 'right': but only very few of them grasp those principles intellectually and are able, or genuinely prepared, to translate them into terms of practical life.¹¹

This is a fundamental problem facing Muslims today; substance, in terms of the underlying spirit or value, has become delinked from forms and rituals. Thus, memorization of the Qur'an is hugely emphasized in preference to studying and understanding its message.

13. Embracing Life-Experience As Part of the Collective Learning Curve

Contrary to the traditionalist understanding and approach, Islam is not intended to be an exclusively text-oriented belief. In attempting to understand this world God appears to want humans to benefit from the experience of life. He commands man to travel, see and learn about history. Rather than burying one's head in sacred books the faculties have been called upon to observe, think and reflect on reality.

This list of values is by no means exhaustive. The values and principles above are based directly on the Qur'an which are elaborated upon and duly corroborated in the book. These should be among the essential parameters guiding the derivation and establishment of Islamic laws originating from non-Qur'anic sources. When sources other than the Qur'an, including the Hadith, conflict with these clear principles (as the deliverer of God's final message the life of the Prophet cannot contradict the Qur'an) these principles or values must be given precedence. Furthermore, laws and codes, as required, must not be approached in an atomistic manner as per the experience of legalism. Therefore, without compelling evidence to the contrary, any laws and codes derived via human agency must not violate or compromise Qur'anic principles.

Chapter Three

Islamic Law and the Use and the Abuse of Hadith

The Qur'an is the fountain source of Islam. The second source of Islam is the Sunnah, which delineates the Prophet's way of life, the example he set before us in his attitudes, actions and sayings, and which forms the framework of the faith. Discussion here will examine some vital issues pertaining to the subject of *aḥādīth* and discuss some of the

problems concerning the misuse of hadith in deriving, formulating and validating laws.

For the sake of simplicity and clarity, the terms Hadith and Sunnah are used here interchangeably. The Sunnah should be understood as meaning “a normative, model behavior and an exemplary conduct, and that in its primary sense it means ‘the setting up of an example.’”¹² However, there are some generally misunderstood positions regarding the *aḥādīth*/Sunnah.

Among these positions, there is one that assumes that if a hadith quotes the Prophet, this indicates something the Prophet had said exactly. However, readers may form the justifiable impression that the exact word of the Prophet is provided in a hadith without the clarification that the passage concerned is generally paraphrased. Not every Hadith collection points out the variation. Variations in a narration do not allow the exact words used by the Prophet to be confirmed. A second notable position is that *ṣaḥīḥ* (authentic) reports can be found in any Hadith collection (except those specifically compiled from inauthentic hadith for comparison).

There are six canonical collections collectively known as the *al-Ṣiḥāḥ al-Sittah*. However, highly-skilled experts of Hadith confirm that even within al-Bukhārī’s collection, not all the reports are beyond dispute. Furthermore, even *ṣaḥīḥ* hadith are subject to various interpretations, and human interpretations are fallible. Thirdly, there is a prominent notion that no contradiction exists between narrations of hadith. However, there are many examples of hadith, e.g. those involving the subject of *ribā* (usury), that are contradictory.

Fourthly, there is the belief that the Hadith literature provides knowledge or information that is certain or definitive. Actually, only *mutawātir bi al-lafẓ* hadith (continuously recurrent, verbatim report from numerous narrators) yields certainty of knowledge. Even *mutawātir bi al-maʿnā* (by meaning) does not yield certainty of knowledge. In fact, the number of *mutawātir bi al-lafẓ* is just a handful (merely in the teens) as confirmed by the Hadith scholars. Thus, almost the entire Hadith literature is composed of *āḥād* (non-*mutawātir*) narrations that yield probabilistic knowledge and, as such, do not yield certainty of knowledge. Additional circumspection is a must when utilizing these to formulate laws, codes and dogmas. Yet, the majority of the Islamic scholars hold the view that *āḥād* hadith can be used to derive binding laws or codes.

As such, it is important to address the use and abuse of hadith in the formulation and validation of Islamic laws. The development of a legalistic tendency has several consequences. The splintering of various *madhhabs* (schools of jurisprudence), although beneficial in some respects, has more essentially led to the fragmentation of Muslim society. The second and more important consequence of this trend relates to the many laws promulgated in the name of Islam that demonstrate a clear gender-bias, as well as promoting other unfair tendencies inconsistent with the Islamic principle of equity and fairness. This latter point requires some elucidation.

The Prophet ordered regular and unhindered female participation in *masjid*-centered life. However, in most Muslim-majority countries and, in fact, even in Western countries, women are not seen participating in large numbers during congregational prayers (*salah*) held within the mosques because of the restrictive and non-facilitating environment. If, for some reason, men have to “tolerate” the presence of females, the men make it quite difficult and uncomfortable for them. Let us look at two hadiths that are resorted to:

Abdullah ibn Mas‘ud: The Prophet (s) said: “It is more excellent for a woman to pray in her house than in her courtyard, and more excellent for her to pray in her private chamber than in her house.”¹³

Narrated by ‘Ayesha: Had Allah’s Apostle known what the women were doing, he would have forbidden them from going to the mosque as the women of Bani Israel had been forbidden. Yahya bin Said (a sub-narrator) asked ‘Amra (another sub-narrator), “Were the women of Bani Israel forbidden?” She replied, “Yes.”¹⁴

Even as a *ṣaḥīḥ* (but not *mutawātir*) hadith (‘Abdullāh ibn Mas‘ūd’s report), this fact does not yield the certainty of knowledge required to ensure the veracity of the Prophet’s speech on the matter. Contradicting this tradition are numerous reports, which state that women used to participate in the mosques both regularly and in large numbers. Therefore, either the participating women in question did not care about the Prophet’s instructions to them (even in his own presence) or they understood the hadith quite differently.

As for the second of the two narrations, although this hadith appears in *Ṣaḥīḥ al-Bukhārī* it is not a statement that originates from the Prophet. In fact, it is merely the opinion of a Companion (although a

great and particularly close Companion who happened to be the wife of the Prophet). In the technical Islamic jargon, this type of narration is called *athar*. However, even though highly respected and revered – quite deservedly so – among the Muslims as a Companion, narrator of hadith and his wife, it still constitutes only a lone opinion which did not emanate from the Prophet’s mouth. There is absolutely no corroborating information, statement or report from the same period which indicates that women were committing egregious acts in the mosques. Yet, these have had a profound effect on Muslim culture leading to gross restrictions on the public participation of women.

In another example for consequences of such trend, women are barred from leadership positions. One solitary (*āḥād*) report from Abū Bakrah (not to be confused with the first *Khalīfah* Abū Bakr) has resulted in the rigid orthodox position whereby women are barred from exercising executive leadership:

Narrated by Abū Bakrah: During the battle of Al-Jamal, Allah benefited me with a Word (I heard from the Prophet). When the Prophet heard the news that the people of Persia had made the daughter of Khosrau their Queen (ruler), he said, “Never will succeed such a nation as makes a woman their ruler.”¹⁵

However, the individual, Abū Bakrah, is known to have received the punishment reserved for committing false testimony.¹⁶ Moreover, this hadith does not meet the standards established by al-Bukhārī himself though he included it in his collection. The Qur’an discusses the story of Balqīs, the Queen of Saba’ (Sheba) without any hint of negativity about women’s leadership whatsoever. Yet, this solitary (*āḥād*) report of so dubious and disputed an origin has established the sweeping and often strict prohibition of women’s leadership.

One of the most glaring examples of the abuse of hadith concerns the punishment of apostasy.¹⁷ One verdict for apostasy (*riddah*) is that it is not only a punishable act, but an act punishable by death [though in reality many leave the faith freely and without penalty]. One particular report in relation to this position on apostasy is: “Kill the one who changes his religion (*man baddala dinahu faqtuluhu*).”¹⁸ This happens to be an *āḥād* or solitary hadith. There is no hadith attesting to the established Prophetic practice that demonstrates this particular act of punishment solely for those who committed apostasy and, in fact, the Prophet demonstrated the opposite. Surely, if the penalty of death was

valid, and being so grave a matter, the Qur'an would have addressed it, and it also does not. The Qur'an quite categorically affirms the freedom of faith. Yet, although thankfully this trend is changing, many scholars have set aside the higher Qur'anic principle in favor of a solitary hadith.

Despite the painstaking contribution of our scholars to research and sift through the treasure of Hadith, the fact remains that Hadith generally yields only probabilistic knowledge. Hence this body of literature, the Hadith we have today, needs to be used more as a source of information, as well as moral inspiration and wisdom, while a much more restrained approach needs to be taken when the Hadith literature is used to arrive at laws or codes that have a direct and serious impact on the life, honor and property of people. This restraint is even more important in case of laws or codes that might result in discrimination and injustice.

Chapter Four

The Doctrine of Ijma[؎]: Is there a Consensus?

Ijma[؎] or consensus is one of the four sources of Islamic jurisprudence. The Qur'an and the Sunnah are the two primary and foundational sources of Islam, while ijma[؎] and *qiyās* (analogical reasoning) represent two secondary sources. From dogma to norms to laws and codes, ijma[؎] is recognized to have a pivotal place in Islamic discourse and socio-religious unity. Discussion deals with the subject of ijma[؎], where most of the claims concerning it are demonstrated to be unfounded and untenable based on a consistent lack of consensus regarding almost all aspects of ijma[؎] as a source of Islamic jurisprudence.

Despite the well-established position of ijma[؎] in Islamic jurisprudence, ordinary Muslims are generally unfamiliar with the reality that ijma[؎], as an authority or source of Islamic jurisprudence, stands on rather thin ice. While ijma[؎] has to an extent played an integrative role in Islamic legal discourse, it has also contributed to some entrenched divisiveness. But even more importantly is the existence of abuses of ijma[؎], in terms of it being used as a frequently cited tool to quieten opponents or to allow abuse to occur through the frequent claim of ijma[؎] applying to something where no ijma[؎] is apparent. This issue is

vital, because traditional opinion considers that if there is an *ijma*^c on something, whether referring to dogma or legal issues, it is binding upon the Muslims.

The following are some examples where it has been a common practice among Muslim scholars and jurists to claim consensus (*ijma*^c): the pronouncement of *ṭalāq* (divorce) three times at one sitting is valid; *tarāwīḥ* prayer is 20 *rak*^c*ah* long; women's leadership is prohibited; *talfīq* (mixing of opinions of different *madhhabs*) is invalid; and many others.

First, the problem with *ijma*^c begins with the definition of the term. There is no *ijma*^c (consensus) on the definition of *ijma*^c. In fact, the issue of the definition of *ijma*^c was not raised until the time of Imam Shāfi'ī (d. 820 CE). It was not until the end of the tenth century that attempts by various scholars to deal with the definition of *ijma*^c began to appear. There have been many scholars who disagree with the criteria for defining *ijma*^c. The Companions themselves did not display a high level of consensus on a wide variety of issues so as to qualify these as *ijma*^c (*ijmā' al-ṣaḥābah*).

Second, there is no consensus about what source its authority is derived from. Some scholars attempted to identify the relevant sections of the Qur'an that support its status as one of the final authorities of Islamic jurisprudence. At the same time, notable scholars have countered the claim. The most commonly quoted hadith adduced in support of *ijma*^c has been that the Prophet said: "My community (Ummah) will not agree on an error."¹⁹ But, variations of the same hadith have also been reported in other collections. A fundamental problem with this or other *aḥādīth* mentioned in support of *ijma*^c is that the traditions in question are not *mutawātir* and thus do not yield certainty of knowledge, whether in terms of the actual text or their meaning and implication. As mentioned above, except in the case of a few narrations, most are not *mutawātir* (instead the vast majority are *āḥād* – solitary narrations) and even if authentic (*ṣaḥīḥ*), their actual status is probabilistic to varying degrees.

The doctrine of *ijma*^c played a vital role in the emergence of *madhhabs* (schools of jurisprudence), representing a systematization of both the methodology and corpus of laws, codes and dogmas. Diversity of thought and room for disagreement can represent dynamism in certain respects. However, it was deemed desirable that broad agreement or

near-consensus should crystallize in each *madhhab* concerning various aspects of worship and rituals. But, this does not mean that issues concerning whether *tarāwīḥ* prayer corresponds to eight or 20 units, or whether ‘*āmīn*’ should be said aloud in congregational prayer, have been resolved across the *madhhabs* even over the course of fifteen centuries.

In fact, the systematization of laws and codes has contributed toward rigidity and intolerance at the inter-*madhhab* level. For instance, although according to the Ḥanafīs a marriage between a Ḥanafī male and a Shāfi‘ī female is valid, according to the Shāfi‘ī school it is invalid.²⁰ Elements of Islamic laws and codes have become inconsistent not just with the contemporary era, but also with the very principles and values of Islam that such laws and codes are supposed to uphold. Another important aspect pertinent to *ijma‘* that requires critical attention is that the process of *ijma‘* cannot be elitist and people whose lives are going to be affected by any decision or policy must be consulted in establishing an *ijma‘*. Of course, it would be impractical for the entire Ummah to be directly involved in such a process of approval. But this is precisely where the principle of *shūrā* becomes relevant. Both *shūrā* and the issue of *ijma‘* have to be reconciled and integrated to devise a representation-based decision-making process, so as to provide functionality and dynamism. In line with this thought, a law becomes Islamic rather when it meets the following conditions: (a) the formulation of the law is rooted in the foundational sources of Islam, (b) it is derived with explicit attention to the *maqāṣid* and values of Islam, and (c) the adoption and enactment of the law by the society is through *shūrā*.

Ijma‘ has played an important role in the history of Islam and does have relevance to some aspects of jurisprudence. The argument of this chapter, however, is that Muslims neither need nor should claim divine sanctity for a concept that simply does not possess such agreed upon sanctity. Furthermore, as explained, there is hardly anything, except concerning a few broad and basic matters, on which there actually exists an *ijma‘* or consensus. Thus, Muslims need to be circumspect in accepting any claim which presents as proof the validity of having an *ijma‘*. Accordingly, conscientious Muslims need to rededicate themselves to practicing Islam and living their lives in line with a dynamic, problem-solving method and value-orientation, instead of blindly adhering to rigid dogma or self-indulgent legalism.

Chapter Five

***Qiyās* (Analogical Reasoning) and some Problematic Issues in Islamic Law**

Scholars of Hadith have performed a most invaluable service in establishing the Hadith collections and developing methods for their authentication. Individual hadiths in themselves are neither divine nor infallible. Even more removed from a divine origin are the other two sources of Islamic law – *ijma*^c and *qiyās*. *Qiyās* is the fourth source of Islamic fiqh and otherwise valid and useful tool of Islamic jurisprudence. Discussion here on *qiyās*, deals with the many conceptual problems and disturbing examples of the misapplication of this tool in Islamic legal promulgation.

In many cases, when our jurists confronted new situations, they successfully and effectively applied *qiyās* to seek new solutions. As Muslims, we all benefit from their precious and noble contributions in this regard. Neither the Qur'an nor the Sunnah/Hadith covers every situation that its adherents might encounter. This is where *qiyās* or analogical reasoning, where “the root meaning of the word ... is ‘measuring,’ ‘accord,’ and ‘equality,’”²¹ appears. “*Qiyās* mean[s] to seek similarity between new situations and early practices, especially those of the Prophet.”²² However, *qiyās* has been a mixed blessing.

Similar to the faulty methodologies and categorizations we saw with *ijma*^c, the claim that is also made of the Companions' consensus concerning *qiyās* is also untenable. Many of the Companions applied what they knew to situations that were unknown yet similar to prior established positions and, thus, in this way what was practiced amounted to *qiyās*. However, to claim that the Companions of the Prophet knew this constituted *qiyās*, deliberated accordingly and reached a consensus thereafter is difficult to support. There is no verse in the Qur'an that the scholars have been able to agree upon which can be clearly discerned as acting as the basis of *qiyās*. Likewise, scholars use the Sunnah, through the Hadith collections, to establish additional textual justification for *qiyās*, but there is no real justification that is agreed upon either.

The relationship between *ijma*^c and *qiyās* is a close one. However, for the result of an analogical deduction (*qiyās*) to be broadly accepted, it also has to be validated by *ijma*^c. Herein lies an anomaly in reasoning.

Even though those who follow the four main Sunni schools of thought generally accept *qiyās* as one of the four sources of Islamic jurisprudence, there is considerable disagreement about what *qiyās* constitutes, its scope, the method of its validation. Little consensus exists concerning *qiyās*. Each school prefers its own definition, possessing its own special emphasis or nuance. For instance, for al-Shāfiʿī, *qiyās* and *ijtihād* are synonymous, while for other scholars this is not the case. The common denominator in all cases between the four schools involves identifying the *ʿillah* (effective cause of the law). Just as the consensus that *qiyās* constitutes a valid methodology of Islamic jurisprudence does not exist, so are there similar problems concerning the consensus over what constitutes an *ʿillah*, how it is derived and even how it is validated.²³

Another problem with *qiyās* as a source methodology and authority in Islamic jurisprudence is that it is seriously compounded by a lack of agreement concerning the relationship between the *aṣl* (the original case) and the validity of *qiyās*-based rules so derived. *Qiyās* constitutes a speculative proof as it is based on fallible human reasoning. Thus, when infallible divine sources and fallible temporal sources become part of a single toolkit, unless an appropriate level of conscious humility regarding human fallibility is taken into due consideration and explicitly acknowledged, excesses can occur.

There are further ways in which the application of *qiyās* is problematic, as in, for instance, with *Kafāʾ* or *Kufūʾ* (equality in marriage). The fact that prospective partners in marriage should share as much in common with each other or originate from as comparable a background as possible is a simple matter of common sense. However, transforming the entire matter into a legal requirement and treating specific violations of it as an issue of legal intervention by family members and the *Qāḍī* (judge), is illustrative of a legalistic tendency. Referencing Ḥanafī texts, *al-Hidāyah*, by Marghīnānī (d. 1197 CE),²⁴ “...in confirming a marriage and establishing its validity; for if a woman should match herself to a man who is her inferior, her guardians have a right to separate them, so as to remove the dishonor they might otherwise sustain by it.”²⁵

The problem with this passage is the direction that something is a “requirement” of marriage when neither the Qurʾān nor the Sunnah specifies any such thing. Moreover, the imputation that the guardians of the two prospective marriage partners can legally intervene through the court system to have the marriage dissolved if the marriage does

not meet these requirements is unwarranted. Textual proof is provided: “‘Ā’ishah reported that the Prophet (s) said: ‘Choose for your sperms the best women, marry with comparable [in Arabic, *akfa*’] and make proposal of marriage to them.’”²⁶

The narration constitutes neither *mutawātir bi al-lafẓ* (the exact words) nor *bi al-ma‘nā* (the exact meaning). Had the narration been accorded the category *ṣaḥīḥ* – otherwise known as authentic hadith – even then in this case certainty of knowledge is not yielded. However, a bigger problem is the fact that the hadith is not even *ṣaḥīḥ*. Furthermore, aside from this hadith, trawling through Hadith literature reveals the absence of any other narrations concerning this subject. Only speculation can explain the invention of a law, deduced from this narration, the violation of which can be subject to legal intervention. What the relevant scholars then did was to stretch the issue of equality to a level such that it fell within the realm of *qiyās*, even though this type of argumentation is supported neither by the Qur’an nor the Sunnah.

The idea of “equality” is turned on its head, contradicting the pristine Islamic principles and value of justice and egalitarianism. In responding to further sections of the *al-Hidāyah* text, if a woman is an adult and desires the marriage despite the obvious disparity, surely this should be her prerogative. The need for professional equality is not a strict requirement. What is particularly objectionable in the tract is an identification of barbers, weavers, tanners etc. as being involved in degrading professions. In fact, there is no evidence anywhere that the Prophet made any pronouncements denigrating any particular profession; rather, he recognized and honored honest labor. In fact, in his last sermon the Prophet demolished all discriminatory and unjust notions when he said:

All mankind is from Adam and Eve. There is no superiority of an Arab over a non-Arab, or of a non-Arab over an Arab, or of a white man over a black man, or of a black man over a white man, except in terms of *taqwā* (piety) and good action.

Incredibly, the segment dealing with this topic from *al-Hidāyah* begins with the prefatory remark: “*Kafat*, in its literal sense, means equality.”²⁷ However, legal analysis and reasoning flipped the issue of equality into an endorsement of inequality. What was supposedly formulated to protect the rights and status of women and their families instead ensured their inferiority. How the scholars can transform an issue of

equality into one involving the alleged inferior status is through the unwarranted embellishment of *qiyās*.

The chapter provides detailed illumination of several other important issues where application of *qiyās* has gone haywire.

Chapter Six

Islamic Fiqh (Law) and the Neglected Empirical Foundation

We need to be asking a host of different pertinent questions around the reasons why there is so much injustice and decadence in thought in Muslim societies and communities. Decadence has gradually crept in and now Muslim societies are virtually dysfunctional and, due to internal as well as external factors, unable to solve most of their problems on their own, never mind being able to compete with the developed world. For example, why the gap between existing Islamic laws and the reality on the ground in terms of solving problems and upholding the Islamic principles of justice and balance? Why are many Muslim women revolting against some of the key provisions in the classical laws, turning instead towards secular laws? Why are Muslim societies encumbered with the problem of widespread poverty and destitution, out-dated education, as well as technological backwardness?

It is important to grasp that in attempting to gain an understanding of these issues, the fact needs to be recognized that Islamic law or fiqh lacks a systematic empirical foundation (the term empirical here must not be confused with the narrow sense of empiricism – the practice of relying on observation and experiment alone). Discussion here deals with a pivotal aspect of Islamic law and jurisprudence, namely the fact that Islamic law and jurisprudence lack an adequate empirical foundation, “empirical” in today’s sense.

Text-centeredness or text-orientation has not only been hugely responsible for the loss of dynamism of Islam and its laws, but it has also led to those non-Muslims who have studied Islam to be vulnerable to misunderstanding the belief and prone to misinterpreting it. Traditional Islam is reductively legalistic, encapsulated in layers of primary, secondary and tertiary texts, very often disconnected from the stark realities of life. Just as research or empirical work conducted to fully

appreciate a problem before formulating or enacting a law is virtually absent in this context, there is also an absence of research or empirical work geared towards determining the effects and consequences of particular legal formulations and enactments.

A case in point is the social implications of traditional inheritance. The Shari'ah stipulates that surviving family members and relatives have designated shares, determined exclusively in reference to the textual sources. However, there are no modern studies to investigate the impact of these laws on particularly women, who generally constitute one of the most vulnerable segments of society. Men can easily walk away from family relationships and obligations; also known is the fact that women cannot. It is deemed, and argued, that a woman will always have the support of someone – her father, husband, brother, son, or the government and society. But there is no way to begin to appreciate the misery and vulnerability of many women, especially those among the poor, without pertinent empirical social studies to explore the nature and extent of the problem arising from the rigidity of the inheritance laws.

An ivory tower approach, which merely focuses on formulating and enacting laws whilst ignoring the principles of the Qur'an and Sunnah, is one that can lead to misery for many. Those qualified to do so need to study what happens in real life, to real life people, to determine why a serious gap exists between the reality and the higher objectives of laws. It is only then they will be able to address the gap.

Another example includes the polemics of Islamic economics and finance. Due to the dichotomy between religious and secular education, few Muslim jurists and scholars are adequately familiar with the field of modern economics and finance. This shortcoming apparently does not deter them from issuing *fatāwā* (juristic opinions from a religious perspective) on the subject, nonetheless. Although empirical studies by the proponents of Islamic banking and finance exist, there are two major problems regarding the attitude of the scholars concerned. Firstly, they commonly fail to disclose that for most of the time the four sources – Qur'an, Hadith, *ijma'* and *qiyās* – are referred to only speculatively, leading to probabilistic knowledge, and thus any subsequent fatwa is nothing like a Divine commandment; rather, these are no more than Qur'an and Sunnah-informed, human constructs. Secondly, the same experts fail to acknowledge the existence of empirical studies that counter their claims. Because they are not

familiar with the importance and role of empirical work, the religious jurists and scholars are prone to making uncorroborated claims, most often without specific empirical proof.

Empirically it is noteworthy that if both profit and interest incomes accrue more to the rich, then focusing attention exclusively on interest is misplaced. Some of the commonly propagated ideas about public finance in an Islamic state is utterly simplistic. For example, expecting the believers to open up their coffers anytime the government wants is unrealistic. And advocating zakah as a means to meet government needs, especially at this time when every Muslim polity has been anything but Islamic and where there is considerable disagreement about whether zakah can be paid individually or must be institutionalized – especially through the government – is not reasonable or practical either. Requiring banks to offer interest-free loans to the government would be objected to and scoffed at even by the existing Islamic financial institutions and may lead to a run on their reserves as people attempt to remove their cash if, indeed, the policy is ever successfully implemented. As a last resort, printing currencies and notes as and when needed, and other things remaining the same, is a simple invitation to economic disaster. Indeed, not only are many jurists prone to writing in an uncorroborated manner about their own field, Islamic Fiqh, but also about other areas (for example, economics) about which they have yet to demonstrate expertise.

Balancing a text-oriented approach with a life-oriented approach requires that we explore, understand and determine the social realities, processes and changes in a meaningful way. Muslims need to embrace empirical methods and, at the same time, avoid falling into the trap of empiricism – the theory that holds that the origin of all knowledge is sense experience. Indeed, a stumbling block for many Muslims in appreciating the relevance of the empirical approach is the narrow western notion of empiricism (relying on experience or observation alone). The first step in solving any problem is to thoroughly grasp and understand its nature and extent. This requires inductive research and study. In this context, Muslims need to gain a sound understanding of not only the Sunnah of the Prophet, but also the *sunnat Allāh*: God has put in place certain laws (*sunnat Allāh*) guiding all natural as well as social processes that, according to the Qur'an, do not change.²⁸

So far, we have identified three defining conditions for Islamic law: (a) that the formulation of the law must be rooted in the foundational

sources of Islam, (b) it is derived with explicit attention to the *maqāṣid* and values of Islam, and (c) that the adoption and enactment of the law by society be through *shūrā*. In light of this chapter, those conditions need to be more nuanced, as follows: A law is to be considered Islamic when all three of the following conditions are met: (a) the formulation of the law is rooted in the foundational sources of Islam, with life-oriented, empirical due diligence, (b) it is derived with explicit attention to the *maqāṣid* and values of Islam, and (c) the adoption and enactment of the law by the society is through a process of *shūrā*.

Chapter Seven

Conclusion: Toward Our Reformation

Today we face a number of challenges in the Muslim world. The people of some countries are facing a horrible conflict as part of an international power play involving oil. In other parts of the Muslim world, occupation or effective control by unfriendly forces persists. Illiteracy and poverty are particularly rampant in Muslim-majority countries. In other parts, sectarian violence continues; in general, the physical abuse of women is common; though not exclusive to Muslims, ‘honor killing’ of women still occurs; in the heartland of Islam, women still cannot drive in the name of Islam. Even in ‘progressive’ Muslim-majority countries, a Muslim spouse can be served a triple (irreversible divorce) message through SMS on a cell phone. In the West, there are many mosques where Muslim women are not welcome.

Many of these issues are matters, which concern the prevailing socio-cultural-political environment. However, the Muslim mind and the present culture are entrapped in the current dysfunctional and stagnant situation, because of the deeply conditioned traditional religious understanding and devotion that exists, made possible by inappropriately projecting back to textual sources in general and extravagant use of hadiths, sometimes questionable hadiths, in particular for support and evidence.

Firstly, Shari‘ah, as it is commonly used, is a misleading term as so many extraneous attributes like divinity, sacredness and immutability are assigned to it. When, in a reductionist manner, the Shari‘ah is equated with Islamic law society suffers from legalism. Detachment from the spirit, goals (*maqāṣid*), or normative principles of Islam not only involves loss of social dynamism, but also overwhelmingly

burdens the lives of the masses with troublesome literalist and absolutist interpretation. Secondly, the Qur'an is the culmination of all the divinely revealed texts throughout human history. It occupies a central and unrivalled position in Islam. The Prophet himself could not contradict it. Thus, nothing else negating the Qur'an can be used and adduced in support of a doctrine, law or code – a crucial point that is generally acknowledged by all Muslims, but routinely ignored in practice.

Thirdly, the Prophetic legacy, or Sunnah, is also vital to Muslims and the Islamic way of life. The Prophet is identified in the Qur'an as the exemplary model. However, as demonstrated in chapter three, the traditional view of the hadith also indefensibly exaggerates the source, in terms of placing it on a par with the Qur'an, when some measure of divinity is claimed in this regard. Fourthly, the commonly held views about *ijma*^c are untenable and exaggerated. Not only does no *ijma*^c exist about the definition of the term itself, there is hardly any aspect of *ijma*^c about which any consensus arises. Many legal verdicts, for which an *ijma*^c is advanced, reflect a unique socio-historical context going all the way back to the time of the Prophet and his Companions, even though the particulars or details of any aspect of law may not be universally applicable throughout time.

Fifthly, *qiyās* has become yet another seriously abused tool of Islamic jurisprudence. Any law that is derived through analogical deduction must not be claimed to be divine, thereby requiring Muslims to treat it as sacrosanct. Sixthly, the received corpus of Islamic law does not possess an empirical foundation, and the vital role of research, concerning the pertinent matters required to understand and analyze a problem both before and after the formulation and enactment of a law, is currently absent.

Again, law should only be regarded Islamic when all three of the following conditions are met: (a) The formulation of law must be rooted in the foundational sources of Islam, according to a life-oriented, empirical approach where due diligence is rigorously practiced; (b) it is derived with explicit attention to the *maqāṣid* and values of Islam; and (c) the adoption and enactment of law by the society through a process of *shūrā*.

Seeking constructive transformation is a dynamic and exciting challenge. In pursuit of success both in this life and in the life hereafter,

Islam invites everyone to constantly seek positive change – change that helps improve individuals at all levels, while positively touching the lives of others. Of course, change begins at home; with us in the first instance. Those who appreciate and seek such change in a proactive manner – not reactionary (as happens now) – will not only change themselves, but also, in the process, effect changes in others.

The Author

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Notes

- ¹ M. Asad, *This Law of Ours and Other Essays* (Gibraltar: Dar Al-Andalus, 1987), p.28.
- ² In keeping with the pluralistic norm and heritage of Islam, as exemplified by the Charter of Madinah formulated under the guidance of the Prophet, instead of identifying a state as a “Muslim country” the term “Muslim-majority country” is preferred.
- ³ For pertinent information and analysis of this unislamic and inhuman experience, see M. O. Farooq, “Rape and Hudood Ordinance: Perversions of Justice in the Name of Islam,” (2006), <http://www.islamicity.com/articles/Articles.asp?ref=IC612-3179>. [Accessed on June 21, 2007]; A. Quraishi, “Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective,” *Michigan Journal of International Law* (18) (1997), pp.287–320; A. Jahangir and H. Jilani, *The Hudood Ordinance* (Lahore, Pakistan: Rhotus Books, 1990).
- ⁴ Merriam-Webster Dictionary, <http://www.m-w.com/dictionary/divine>. [Accessed November 29, 2006].
- ⁵ We need to be extremely careful using terminology such as divine and be crystal clear as to what this means in practice and what this refers to. Traditions of the Prophet cannot be given the undisputed authenticity of the Qur’an. The Qur’an stands unique and alone and not on a par with anything else.
- ⁶ Arabic original, *Taghayyur al-Aḥkām bi Taghayyur al-Zamān wa al-Makān*. M. Zahraa, “Characteristic Features of Islamic Law: Perceptions and Misconceptions,” *Arab Law Quarterly* 15 (2) (2000), pp.168–196, quoting Ibn al-Qayyim al-Jawziyyah, *I’lām al-Muwaqqi’īn ‘an Rabb al-‘Ālamīn* (Beirut: Al-Maktabah al-‘Aṣriyyah, 1987), vol. 3, pp.14–70.
- ⁷ M. O. Farooq, “Rape and Hudood Ordinance: Perversions of Justice in the Name of Islam” (2006).
- ⁸ I.A.K. Nyazee, *Islamic Jurisprudence (Usul al-Fiqh)* (Islamabad, Pakistan: Islamic Research Institute, 2000), p.39; also, p.202.
- ⁹ M. Khan, “The Priority of Politics,” *Boston Review* (April/May 2003), <http://www.bostonreview.net/BR28.2/khan.html>. [Accessed October 7, 2006].
- ¹⁰ M. O. Farooq, “The Spirit of Global Belonging: Perspectives from Some Humanity-Oriented Icons,” (2006), http://www.nazrul.org/works_on_nazrul/articles/global-belonging.doc. [Accessed June 21, 2007].
- ¹¹ M. Asad, *This Law of Ours*, pp.30–31.
- ¹² M. Y. Guraya, *Islamic Jurisprudence in the Modern World* (Lahore, Pakistan: Sh. Muhammad Ashraf, 1993), p.76.

- ¹³ A. Hasan, (trans.), *Sunan Abu Dawud*, (1990), vol. 1, kitāb al-Adab, hadith no. 570.
- ¹⁴ M. M. Khan, (trans.), *Sabīh al-Bukhārī*, vol. 1, hadith no. 828.
- ¹⁵ M. M. Khan, (trans.), *Sabīh al-Bukhārī*, vol. 9, hadith no. 219.
- ¹⁶ F. Mernissi, *Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam* (Reading, Massachusetts: Perseus Books, 1987), pp.49–61, citing Ibn al-Athīr, *Usd al-Ghābah*, vol. 5, p.38.
- ¹⁷ Editor's note, please also see AbdulHamid AbuSulayman, *Apostates, Islam & Freedom of Faith: Change of Conviction Vs Change of Allegiance*, Occasional Paper No. 22, (Malta: IIIT, 2013).
- ¹⁸ M. M. Khan, (trans.), *Sabīh al-Bukhārī*, vol. 9, hadith no. 57. For a list of other sources where this hadith appears and a critical analysis of it, see A. Shafaat, "The Punishment of Apostasy in Islam (Part II): An Examination of the Hadiths on the Subject," http://islamicperspectives.com/PunishmentOfApostasy_Part2.html. [Accessed October 29, 2006].
- ¹⁹ M.T. Ansari, (trans., with introduction and notes), *Sunan Ibn-e-Majah* (New Delhi, India: Kitāb Bhavan, 2000), vol. 5, kitāb al-Fitan, hadith no. 3950, p.282.
- ²⁰ B. M. Dayal, (trans., with introduction and notes). *The Durr-ul-Mukhtar: M. Ala-ud-din Haskafi* (New Delhi, India: Kitāb Bhavan, 1992), vol. 2, p.351; also see in this book the next chapter on *qiyās* for more details.
- ²¹ M. Muslehuddin, *Philosophy of Islamic Law and the Orientalists* (New Delhi, India: Taj Company, 1986), p.140.
- ²² A. AbuSulayman, *The Islamic Theory of International Relations: New Directions for Islamic Methodology and Thought* (Herndon, Virginia: International Institute of Islamic Thought, 1987), p.66.
- ²³ N. Shehaby, "Illa and Qiyas in Early Islamic Legal Theory," *Journal of American Oriental Society* 102(1) (Jan-Mar, 1982), pp.27–46.
- ²⁴ The translation of the edition of *al-Hidāyah*, from which the extract has been taken, is poor and composed in archaic English. Also, transliteration of some of the terms and names are not easily recognizable. Hence, some substitutions or annotations have been made to ensure that the excerpts in question are more understandable.
- ²⁵ C. Hamilton, *The Hedaya or Guide: A Commentary on the Mussulman Laws*, (trans., with introduction and notes) by Al-Marghīnānī, 2nd edn. (Karachi, Pakistan: Darul Ishaat, 1989), p.110.
- ²⁶ Ansari, (trans.), *Sunan Ibn-e-Majah*, vol. 3, hadith no. 1968.
- ²⁷ C. Hamilton, (trans.), *The Hedaya*, 1989, p.110.
- ²⁸ M. O. Farooq, "Development Demystified: An Islamic Perspective," paper presented at the First Conference of NAAMPS, April, 9-11, 1993, Chicago, Illinois.

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Shah Abdul Hannan, Former Chairman, Islami Bank Bangladesh; Former Deputy Governor, Bangladesh Bank

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Dr. M.N. Siddiqi, Professor Emeritus, Department of Business Administration, Aligarh Muslim University, India

Some of the chapters make very painful reading indeed. But that is what is out there in reality. The author is only holding a mirror to our face. [The crisis we are facing today] is what comes out of a methodology that neglects the *Maqasid al-Shari'ah*, relying exclusively on fiqh rulings given hundreds of years ago in a different social milieu. Some stocktaking is seriously overdue.

