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978-1-107-04068-7 - The Shari'ah and Islamic Public Law in Time of War and Peace

M. Cherif Bassiouni

Excerpt

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## Introduction

Islam remains misunderstood by many in the West because it has not been part of the Western cultural tradition. Negative perceptions are enhanced by Western popular reactions to abhorrent practices committed by some Muslims, even when those practices clearly contradict the teachings of Islam.<sup>1</sup> Western perceptions, however, do not usually take into account the differences between Western and Muslim societies in terms of human, social, and economic development. The latter societies are still struggling with their relatively recent emergence from colonization and the negative influences of Western neo-imperialism that have kept nondemocratic forms of government in place for nearly a century since the dismantling of the Ottoman Empire in 1922 CE.<sup>2</sup>

<sup>1</sup> It should also be noted that in some societies, as a result of both ignorance and Islamophobic tendencies, there has been a totally unwarranted and unjustified concern that Muslims will attempt to introduce the *shari'ah* into domestic legislation. This is particularly so in the United States, where it is sometimes said by critics that the estimated 6 million Muslim Americans might influence federal and state laws to adopt the *shari'ah*. In recent years, many U.S. state legislators have lobbied for laws or constitutional amendments barring courts from applying international, Islamic, or *shari'ah* law. Such a constitutional amendment passed in Oklahoma in 2011. In January 2012, however, a federal appeals court struck it down, stating that appellants “did not know of even a single instance where an Oklahoma court had applied *shari'ah* law or used the legal precepts of other nations or cultures, let alone that such applications or uses had resulted in concrete problems in Oklahoma.” (ACLU, Press Release, *Court Upholds Ruling Blocking Oklahoma Sharia and International Law Ban*, January 10, 2012.) Most of the concern surrounds the notoriety of the penalties for *hudud* crimes, which are only applied in a handful of Muslim states. Moreover, only three *hudud* crimes include the death penalty (which is still legal and practiced in the United States), only one prescribes stoning to death (which is part of the Judeo-Christian tradition as well). A handful of states include stoning as a punishment in their codified laws, including Pakistan, Saudi Arabia, Sudan, the United Arab Emirates, Yemen, and parts of Nigeria; however, the actual practice is very rare. In recent years, isolated cases of stoning have taken place in Afghanistan, Iraq, Mali, Nigeria, Somalia, and Sudan.

<sup>2</sup> See, e.g. M. SÜKRÜ HANIOĞLU, *A BRIEF HISTORY OF THE LATE OTTOMAN EMPIRE* (Princeton, USA: Princeton University Press, 2008); DONALD QUATAERT, *THE OTTOMAN EMPIRE, 1700–1922* (Cambridge, UK: Cambridge University Press, 2d ed., 2000).

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Contrary to what many in the West believe, Muslims have suffered the most themselves from the wrongful, violent practices and erroneous or misleading religious beliefs held by some Muslims. This is evident in that fact that, since World War II, the number of Muslims killed by Muslims far exceeds the number of Muslims killed by non-Muslims.<sup>3</sup> Consider, for instance, that since 2003 in Iraq it is estimated that more than 300,000 Muslims and as many as 20,000 Christians have been killed by Muslims in a sectarian struggle that cannot find any justification under the respective sects' best interpretations. Prior to that, during Saddam Hussein's rule, another 300,000 Muslims were killed by Muslims, and in the Iran-Iraq war of the 1980s, an estimated 1 million Muslims from these two countries were killed, including from the use of chemical weapons.<sup>4</sup> The same is true in Afghanistan, where an estimated 400,000 Afghan and Pakistani Muslims have been killed by other Afghan and Pakistani Muslims since the Russians withdrew in 1989. Even though the Taliban and others today claim to fight against a foreign occupier, the number of Afghan Muslims killed by the Taliban is far greater than the total number killed by Western foreign occupiers. Similarly, when Bangladesh declared its independence from Pakistan in 1971, nearly 1 million Bengali Muslims were killed by pro-Pakistan Muslim forces.<sup>5</sup> What is presently happening in Syria is the most recent glaring example of Muslims' violations of the *shari'ah* and Islamic law (*fiqh*),<sup>6</sup> as well as secular international humanitarian law (IHL) and international human rights law (IHRL).<sup>7</sup>

Contemporary post-conflict and transitional justice approaches to accountability and the rejection of impunity – which prevent states from providing blanket amnesties and pardons for those who have committed serious transgressions against others, irrespective of their nationality, gender, religion, or other differences – are in conformity with the *shari'ah* and Islamic law.<sup>8</sup> Suicide bombings; the killing of non-combatants; and particularly the indiscriminate killing of civilians, including

<sup>3</sup> See THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE (M. Cherif Bassiouni ed., 2 vols., Antwerp, Belgium: Intersentia, 2010); CHRISTOPHER MULLINS, ARMED CONFLICTS INVOLVING MUSLIM STATES AND THE VICTIMIZATION THEY PRODUCED AMONG MUSLIMS, reprinted in Appendix B.

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> See Chapter 2.

<sup>7</sup> For a history of violations against civilians during the ongoing brutal crackdown of the Bashar al Assad regime in Syria, see the various reports of Human Rights Watch, available at: <http://www.hrw.org/middle-eastn-africa/syria>.

<sup>8</sup> *Post-conflict justice* and *transitional justice* are terms that have emerged only in the past two decades. They encompass a number of modalities that address post-conflict and/or transitional societal phases in which human harm has occurred, and the needs of a given society to find a new path intended to bring about peace, reconciliation, restoration of victims' rights, prevention of recurrence of prior human rights violations, and democratic governance and other goals pertinent to that society. Because each conflict is *sui generis*, the modalities applicable to each post-conflict and/or transitional society are necessarily different, as is the combination of these modalities. The essential difference between post-conflict justice and transitional justice is not so much about modalities and methods, but about the social contexts in which they are applied and the goals and objectives pursued in the context of each society to which these modalities and methods are to be applied.

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women and children; hors de combat such as the sick and the injured; the destruction of religious places; and torture are prohibited in Islam, and there are no excuses or justifications for them (see Chapter 4). These acts are criminal under the *shari'ah* and Islamic law, and no amount of doctrinal rationalization by certain politically motivated or insufficiently informed Muslim theologians and political activists can alter this conclusion. Islam rejects the postulate that the ends justify the means because it is a religion grounded in values that require that ends and means conform to its specific dictates, and to its higher values and principles.<sup>9</sup> Any cursory reading of the *Qur'an* leads to this conclusion, notwithstanding the *fatāwa* (plural of *fatwa*) of politically motivated religious and political leaders, most of whom are unqualified to issue any edict whatsoever.<sup>10</sup> Violent conduct toward Muslim and non-Muslim civilians are contrary to Islam, whether they are committed by groups such as the Shabaab in Somalia,<sup>11</sup> the Boko Haram in Nigeria,<sup>12</sup> the Ansar Dine in Mali,<sup>13</sup> the Taliban in Afghanistan,<sup>14</sup> or suicide bombings by Palestinian freedom fighters.<sup>15</sup>

<sup>9</sup> The dictum is attributed to NICCOLO MACHIAVELLI, *IL PRINCIPE: LE GRANDI OPERE POLITICHE* (G. M. Anselmi & E. Menetti trans., 1992).

<sup>10</sup> The issuance of a *fatwa* has several substantive requirements, but more importantly, the scholar issuing it must possess a number of qualifications. The late Osama bin Laden, like so many other political/religious chieftains of movements throughout Muslim societies, did not meet these qualifications. These abuses exist throughout the Muslim world. Recently, an Egyptian cleric purporting to speak on behalf of the Fatwa Committee of Egypt's highest Islamic authority, Al-Azhar, publicly pronounced that fighting against protesters who oppose the Muslim Brotherhood, even to death, is a righteous act. The Islamic Research Academy of Al-Azhar publicly condemned the unofficial *fatwa*. See *Egypt's Al-Azhar Condemns Cleric Speaking in its Name*, AL-AHRAM ENGLISH, August 16, 2012. This phenomenon of pseudo-*fatwas* prevailed between the 1960s and 1980s in Egypt with jihadist groups who justified assassinations and attacks on foreign tourists.

<sup>11</sup> See, e.g., HUMAN RIGHTS WATCH, *NO PLACE FOR CHILDREN: CHILD RECRUITMENT, FORCED MARRIAGE, AND ATTACKS ON SCHOOLS IN SOMALIA* (February 20, 2012).

<sup>12</sup> See, e.g., *Attacks Tied to Islamist Sect Kill at Least 30 in Nigeria*, N.Y. TIMES, October 20, 2012, available at <http://www.nytimes.com/2012/10/21/world/africa/attacks-tied-to-islamic-sect-kill-at-least-30-in-nigeria.html>. During October 2012, there were reports of several attacks by the Boko Haram against Muslims and non-Muslims. Twenty-seven were reported killed in the second week of the month, and another thirty in the third week. The violence is ongoing.

<sup>13</sup> See, e.g., Adam Nossiter, *Saying Mali is "Our Country," Militias Train to Oust Islamists*, N.Y. TIMES, August 5, 2012, available at <http://www.nytimes.com/2012/08/06/world/africa/mali-militias-poorly-armed-but-zealous-to-oust-islamists.html>.

<sup>14</sup> See *THE TALIBAN AND THE CRISIS OF AFGHANISTAN* (Robert D. Crews & Amin Tarzi eds., Cambridge, USA: Harvard University Press, 2009). See also Atia Abawi, *Afghan Woman Whose Nose, Ears Cut Off Travels to U.S.*, CNN.COM, August 4, 2010, available at <http://edition.cnn.com/2010/WORLD/asiapcf/08/04/afghanistan.mutilated.girl.update/index.html>. The story recounts the story of a sixteen-year-old girl named Aisha, who was sold into marriage of an abusive Taliban fighter to pay off a family debt. Aisha ran away from her husband, and – when she was found – she was tried before a court, which sentenced her to having her nose cut off and left in the mountains to die. She survived, and subsequently traveled to Los Angeles for reconstructive surgery. See also *Reports of the Independent Expert, United Nations Commission on Human Rights, on Human Rights in Afghanistan*, U.N. Doc. A/59/370 (September 21, 2004), U.N. Doc. E/CN.4/2005/122 (11 March 2005).

<sup>15</sup> See ROBERT PAPE, *DYING TO WIN: THE STRATEGIC LOGIC OF SUICIDE TERRORISM* (New York, USA: Random House, 2005).

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Over the past few decades, there have been all too many unqualified and self-declared *fatwa*-makers who have distorted the *shari'ah* and Islamic law to serve their purposes.<sup>16</sup> Among their work products is the *Layha* (regulation) issued by the Taliban in Afghanistan, which purports to embody the *shari'ah* and Islamic law as understood in the *Sunni Hanafi* school of thought.<sup>17</sup> However, the *Layha* only partially conforms to the *shari'ah* and Islamic law according to the standards of the *Hanafi* scholar al-Shaybānī, the first to codify the “law of war” in Islam.<sup>18</sup> The *Layha* also justifies suicide killings, which is prohibited in Islam, as it is a crime for a person to commit suicide or to kill indiscriminately through that act.

The Muslim world must assume its responsibilities, not only in terms of progressively developing its laws and legal systems, but also in ensuring accountability and ending impunity for protagonists in conflicts occurring within their societies. This has not yet occurred, although there is a strong awakening, particularly after the “Arab Spring” of 2011. However, accountability for the principal actors of fallen regimes is as of yet highly symbolic.<sup>19</sup> The Muslim world does not have to wait for the Western world to impose upon it the post-conflict and transitional justice mechanisms that it finds most appropriate given its own cultural experiences. In the absence of any similar mechanisms developed in Muslim societies, however, the outcome will invariably entail the imposition of Western techniques and modalities. This is not to say that contemporary Western post-conflict/transitional justice is inherently troublesome or offensive to the Islamic culture or to the *shari'ah* and Islamic law; on the contrary, they are completely compatible. However, if Islam was able to create many novel approaches to problems between the eighth and twelfth centuries CE, as reflected in the *shari'ah* and Islamic law, why can Muslim societies not pick up where they left off and develop their own contemporary mechanisms and techniques? In fact, there are important Islamic practices that are sorely lacking in contemporary Western post-conflict justice, including victim compensation, notwithstanding the United Nations Basic Principles and Guidelines on the Right

<sup>16</sup> For emphasis, the term *fiqh* is repeated to signify what Islamic law includes. *Fiqh* also subsumes *‘ilm usūl al-fiqh*, the science of the methods of interpretation of the law, see Chapter 1, Section 5.

<sup>17</sup> The *Hanafi* is one of the four *Sunni* schools of thought, and is the one followed in Afghanistan. See Muhammad Munir, *The Layha for the Mujahideen: An Analysis of the Code of Conduct for the Taliban Fighters Under Islamic Law*, 93 INTERNATIONAL REVIEW OF THE RED CROSS 81 (March 2011).

<sup>18</sup> Muhammad ibn al-Hasan al-Shaybani (b. 749, d. 805), was an early Muslim jurist from Iraq, and father of international law in Islam. His treatise *AL-SIYYAR AL-KABIR*, was written at the end of the eighth century CE. A modern translation is *THE ISLAMIC LAW OF NATIONS: SHAYBANI'S SIYYAR* (Majid Khadduri trans., Baltimore, USA: Johns Hopkins University Press, rev. ed., 2001).

<sup>19</sup> Egypt has prosecuted and convicted its former president, Hosni Mubarak, and a court of law sentenced him to twenty-five years of imprisonment. See M. Cherif Bassiouni, *Chronicles of Egypt's Revolution, Egypt Updates*, February 11, 2011 to present, available at: <https://twitter.com/cherifbassiouni>. Tunisia tried and convicted its former President, Zine al-Abidine Ben Ali, in absentia with a sentence of thirty-five years in prison. Ben Ali has been living in Saudi Arabia since his ouster in January 2011. See Tarek Amara, *Tunisia's Ben Ali Sentenced in Absentia to 35 Years in Jail*, REUTERS, JUNE 20, 2011, available at <http://www.reuters.com/article/2011/06/20/us-tunisia-benali-trial-idUSTRE75J2A020110620>.

to a Remedy and Reparation for Victims.<sup>20</sup> Victim compensation is a mechanism that is ingrained in the *shari'ah* and Islamic law, and should be implemented in post-conflict situations in Muslim societies.<sup>21</sup> Similarly, de jure or de facto amnesties or pardons, or the impunity from which political and military leaders have benefited in post-conflict and transitional situations, is completely incompatible with the *shari'ah* and Islamic law. There is no reason why Muslim societies should not develop their own institutions and mechanisms to provide accountability for those who have committed crimes under the *shari'ah* and Islamic law, in accordance with contemporary international criminal law (ICL).

Over the past century, Muslim societies have had to grapple with a number of fundamental issues that they have not yet been able to resolve, including how to adapt the needs of modernity to Islam and vice versa. For too many Muslims, the very juxtaposition of the words "Islam" and "modernity" is anathema. Muslim reformists, particularly those who use science as a way of demonstrating the need for change, are derogatorily referred to as *'ilmānī* (scientific) by the Muslim masses and some Muslim scholars, with the implication that they border on the heretical.<sup>22</sup> Yet the *Qur'ān* refers to the word *'ilm* 880 times in positive terms. For all practical purposes, anyone who does not accept the vision of Islam that was fixed by the twelfth century CE,<sup>23</sup> and urges progressive theological and legal interpretation of the norms of the *shari'ah* and Islamic law, is viewed as deviant, a heretic, or even a *kāfir* (an unbeliever, or one who rejects God or denies the truth revealed by God).<sup>24</sup>

In addition to a combination of socioeconomic factors, there are two principal reasons for this contemporary phenomenon that links theological and legal doctrinal developments to political violence in the Muslim world. The first reason is that the level of knowledge about Islam among the masses in the Muslim world is not only basic, but in some social contexts, primitive. This is essentially because of a deficit in these societies' human development, which allows misleading teachings of Islam

<sup>20</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006). See also M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUMAN RIGHTS LAW REVIEW 203 (2006).

<sup>21</sup> See Chapter 3, Section 4.2, on *qishās*, or crimes against the person that allow for the application of talion justice, or compensation and forgiveness by the victim.

<sup>22</sup> The term is also used to describe Muslim secularists.

<sup>23</sup> Note that progressive, open theological thought in Islam had frozen by the twelfth century CE in most parts of the Muslim *ummah*, except in Andalusia where it survived for almost another century. There too, however, it varied from region to region as Andalusia became fragmented, and different areas were lost from Muslim control at different times. See, e.g., W. MONTGOMERY WATT & PIERRE CACHIA, *A HISTORY OF ISLAMIC SPAIN* (Piscataway, USA: Transaction Publishers, 2007); HUGH KENNEDY, *MUSLIM SPAIN AND PORTUGAL: A POLITICAL HISTORY OF AL-ANDALUS* (London, UK: Longman, 1997); JAMIL M. ABUN-NASR, *A HISTORY OF THE MAGHRIB IN THE ISLAMIC PERIOD* (Cambridge, UK: Cambridge University Press, 3d ed., 1987).

<sup>24</sup> This is no different than the position of certain orthodox Jews and fundamentalist Christians with respect to anyone of their faith who does not accept literal interpretations. This analogy does not, however, justify any such theological approaches.

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by unqualified *mullahs*, *imāms*, *sheikhs*, and other (self-) titled religious “leaders.”<sup>25</sup> They are more likely political actors seeking to advance their views by propagating erroneous notions of Islam that the largely ignorant masses are ready to accept and follow, than true religious scholars. Suffice it to observe that self-styled exponents of this view of the *shari'ah* are doing this right now in places such as Somalia, Nigeria, Mali, and Afghanistan,<sup>26</sup> as well as in countries that have achieved some progress in human development, such as Egypt.<sup>27</sup> The same is true for Muslim communities in India and Pakistan, and particularly those in Waziristan on the border between Pakistan and Afghanistan. Recent examples of this politicized view of Islam is apparent in the violent anti-American protests that occurred in nearly twenty Muslim countries, including the attack and murder of the U.S. Ambassador to Libya, J. Christopher Stevens on September 11, 2012 – all in response to a video posted online defaming the Prophet Muḥammad.<sup>28</sup> No matter how egregious and insulting the film is, it does not justify violence against U.S. diplomats and others who were killed and injured or the destruction of foreign property, as this is prohibited by the *shari'ah* and Islamic law.<sup>29</sup>

Another clear indication of the distortion of Islam is a recent event that took place in Pakistan. The Taliban in northwest Pakistan's Swat Valley believe that Islam forbids girls to go to school. A fifteen-year-old girl, Malala Yousafazi, who spoke out publicly against the Taliban in her region hindering the education of young girls, was gunned down while riding in a school van. The Taliban sought her out and shot with the intent to kill, using Islam as their justification.<sup>30</sup> She was critically injured, as were two of her classmates. This conduct has no basis in Islam and is in fact a crime under the religion. Regrettably, all too few Muslim theologians, intellectuals, and political leaders raise their voices in opposition to these practices.<sup>31</sup>

<sup>25</sup> This is evident in Arab Muslim states. See UNITED NATIONS DEVELOPMENT PROGRAM, ARAB HUMAN DEVELOPMENT REPORT (2011). It is also evident in those failed and failing states that are predominantly Muslim, such as Afghanistan and Somalia.

<sup>26</sup> See *supra* notes 11 to 15.

<sup>27</sup> See *supra* note 11. This situation has spilled into anti-Coptic extremism that has manifested itself in nearly ninety incidents since 1971. This includes attacks against churches and persons. See M. Cherif Bassiouni, *Egypt Update No. 12*, December 5, 2011, at 7–10, available at: <https://twitter.com/cherifbassiouni>; Human Rights Watch, Press Release, *Egypt: Investigate Violence Against Coptic Christians* (October 10, 2011).

<sup>28</sup> See Peter Baker & Mark Landler, *U.S. is Preparing for a Long Siege of Arab World Unrest*, N.Y. TIMES, September 15, 2012, available at <http://www.nytimes.com/2012/09/16/world/middleeast/us-is-preparing-for-a-long-siege-of-arab-unrest.html>.

<sup>29</sup> M. Cherif Bassiouni, *The Protection of Diplomats under Islamic Law*, 74 AMERICAN JOURNAL OF INTERNATIONAL LAW 609 (1980), reprinted in INTERNATIONAL LAW AND ISLAMIC LAW 243 (Mashood A. Baderin ed., Surrey, UK: Ashgate Publishing, 2008).

<sup>30</sup> See Robert Mackey, *Pakistani Activist, 15, is Shot by Taliban*, N.Y. TIMES, October 9, 2012, available at <http://thelede.blogs.nytimes.com/2012/10/09/pakistani-activist-14-shot-by-taliban>.

<sup>31</sup> This was also at issue in Iran in 1979 when elements of the Revolutionary Guard seized the U.S. embassy in Tehran, and held fifty-two diplomats hostage for 444 days. This writer opposed the practice, see

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This is violence in the name of Islam; but it is not violence allowed under Islam. All of these acts of violence, whether against Muslims or non-Muslims, violate the *shari'ah* and Islamic law. Additionally, religious leaders have rarely condemned these actions, and when they have done so, it has been done quietly. As stated earlier, there are also other sociopolitical reasons for this violence, including ignorance, poverty, frustration, anger, and political objectives. But much of it is also because of the low level of knowledge among those who are, or claim to be, Muslim scholars and whose teachings are contrary to Islam, or at least contrary to a better and more enlightened understanding of Islam. This is not only by contemporary standards, but by the standards established by the Prophet in Madinah between 0 and 10 AH / 622 and 632 CE and reinforced by the practice of the Muslim *ummah* over the following 200 years.

The second reason, which relates to theological and legal doctrinal developments, is that the extraordinary intellectual and scientific development that had blossomed in the Islamic *ummah* during its “Golden Age” from the eighth to the twelfth centuries CE came to an end with the Mongol and Seljuk invasions that devastated what was left of the Abbasid period.<sup>32</sup> Beginning in the tenth century CE, however, *Sunni* scholars became concerned with the influx of new knowledge systems and their respective methods that came from other civilizations.<sup>33</sup> This influx was an inevitable consequence of the Muslim expansion into southern Europe, Persia, and India, as well as the migration of ideas, intellectual systems, and their methods from Greece and Byzantium. These intellectual systems and their methods had an impact on exegesis and hermeneutics within the *ummah*, thus causing concern in the more conservative Muslim theological community, in particular those who came from

Bassiouni, *The Protection of Diplomats under Islamic Law*, supra note 29. The International Court of Justice upheld the U.S. position and condemned Iran. See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1985 I.C.J. 3 (May 24). More recently, again in Pakistan, two parents murdered their teenage girl with acid for having looked at a boy who passed their home. The parents claimed that the girl's death was necessary to preserve the honor of the family. Zulfiqar Ali, *Girl killed in Pakistani-administered Kashmir acid attack*, BBC NEWS, November 1, 2012, available at: <http://www.bbc.co.uk/news/world-asia-20173484>.

<sup>32</sup> See Appendix A. The exact years considered to comprise the “Golden Age” of Islam, and in what part of the Muslim *ummah*, varies amongst historians. Most, however, agree that it includes the Abbasid period (in Iraq, 132–655 AH / 750–1258 CE), the Fatimid period (in Egypt, 296–566 AH / 909–1171 CE), and the Andalusian period (in Spain, 138–633 AH / 756–1236 CE). Political scientists see the Abbasid period as the most relevant (with some adding the preceding Syrian Umayyad period from 40–132 AH / 661 to 750 CE), relegating the two others to the level of side shows.

<sup>33</sup> These scholarly books trace the origins and evolution of Islam and Islamic law, including the internal and external factors that had an impact on this evolution: WAEL HALLAQ, *THE ORIGINS AND EVOLUTION OF ISLAMIC LAW* (Cambridge, UK: Cambridge University Press, 2005); YASIN DUTTON, *THE ORIGINS OF ISLAMIC LAW* (New York, USA: Routledge Curzon, 1999); JONATHAN P. BERKEY, *THE FORMATION OF ISLAM: RELIGION AND SOCIETY IN THE NEAR EAST 600–1800* (Cambridge, UK: Cambridge University Press, 2003); BERNARD G. WEISS, *THE SPIRIT OF ISLAMIC LAW* (Athens, USA: University of Georgia Press, 1999).



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Arabia. These theological conservatives saw the outcomes of intellectual openness as causing Islam's splintering into different religious movements. The *Sunni* / *Shi'a* split that resulted in the rise of the Umayyad dynasty in the eighth century CE,<sup>34</sup> and such movements as the *Khawārij* and the *Mu'tazila*<sup>35</sup> were sufficient reasons for conservative scholars to pull back the reins on intellectual openness, thus leading to rigid literalism in interpretation, and to the denial of the role of reason as the framework for interpretation, or even as a method of interpretation. A summary by a contemporary non-Muslim expert states:

The schools [of thought] varied in the amount of leeway they allowed in interpreting *Sharia* (Islamic law) and whether they believed those interpretations could be made by individual scholars or had to be endorsed by a consensus of scholars. The Malikis and the Hanbalis read the scripture and *hadith* quite literally, scorning the use of human reason as it was employed by the other two, more interpretive schools. The Hanafis used analogy and reason, especially in untangling conflicting statements attributed to the Prophet. The *Shafis* sought to concentrate on the most authentic oral reports and looked to find a consensus among scholars on interpretive rulings. The issue was – and still is – extremely important, because such interpretations became part of the *Sharia*, which Muslims consider to be the divinely revealed law of Islam.

In the tenth century, orthodox Sunni *ulama* argued that there had been enough of this independent reasoning and warned that it could not continue without distorting Islam. They maintained that the *Sharia* was completely and finally assembled within three centuries of Muhammad's death and it was time to "close the gates of *ijtihad*," or rational interpretation. This argument gained ground and was finally formalized in the fourteenth century, when Sunni *ulama* agreed that contemporary questions could be answered only by a literal reading of the *Sharia* and not by new interpretation.

But many Muslim reformers, from the eleventh century on, objected to such a "mechanistic," literal approach to scripture and argued that the schools of law were too rigid in defining *Sharia*. Much debate has centered around the *hadith*, with reformers questioning the vast number of oral histories, the often conflicting interpretations of the *hadith*, and the *ulama*'s ability to verify the Prophet's sayings as they were passed down through the ages by his friends, his family, and community members. Reformers in the past, and especially in the nineteenth century, attempted to portray the *hadith* as parables, not to be construed as religious doctrine or law – and certainly not to be used to diminish the exercise of God-given reason in addressing

<sup>34</sup> See, e.g., LESLEY HAZLETON, *AFTER THE PROPHET: THE EPIC STORY OF THE SHIA-SUNNI SPLIT* (New York, USA: Anchor Books, 2010).

<sup>35</sup> See, e.g., RICHARD M. FRANK, *EARLY ISLAMIC THEOLOGY: THE MU'TAZILITES AND AL-ASH'ARI*, TEXTS AND STUDIES ON THE DEVELOPMENT AND HISTORY OF KALAM (Suifey, UK: Ashgate Publications, 2007); RICHARD C. MARTIN, MARK R. WOODWARD, & DWI ATMAJA, *DEFENDERS OF REASON IN ISLAM: MU'TAZILISM AND RATIONAL THEOLOGY FROM MEDIEVAL SCHOOL TO MODERN SYMBOL* (London, UK: Oneworld Publishers, 1997).



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contemporary challenges. Different approaches to *Sharia* not only divided *Sunni*, but also sharpened the divisions between *Sunni* and *Shii*, because the *Sunni* believe the *Sharia* is complete, while the *Shii* consider it evolving jurisprudence.<sup>36</sup>

In the twelfth century CE, the development of theological and legal doctrines were stopped in their tracks for all practical purposes.<sup>37</sup> Since then, there has been an almost constant avoidance of progressive legal methods, approaches and techniques.<sup>38</sup> This regression was opposed slightly by progressive scholars between the tenth and twelfth centuries CE, particularly those who had settled in Andalusia,<sup>39</sup> but conservative scholars deemed it more important, as they saw it, to preserve the unity of Islam through orthodoxy than to achieve theological and legal progressive development. This trend was even then referred to as *uṣūliyya* (fundamentalism), which included the rejection of reason as a method of interpretation.<sup>40</sup> But what was acceptable in the tenth to twelfth centuries CE, reflecting a relatively limited gap

<sup>36</sup> VARTAN GREGORIAN, *ISLAM: A MOSAIC, NOT A MONOLITH* 25–26 (Washington, USA: Brookings Institution Press, 2004).

<sup>37</sup> See Chapter 1.

<sup>38</sup> One of the most influential thinkers of the time, whose views are followed by contemporary *Salafī*, is Ibn Taymiyya (661–728 AH / 1263–1328 CE). See YOSSEF RAPOPORT & SHAHAB AHMED, *IBN TAYMIYYA AND HIS TIMES* (New York, USA: Oxford University Press, 2010); IBN TAYMIYYA, *TAQĪ AL-DĪN AḤMAD, KITĀB AL-IMĀN [BOOK OF FAITH]* (Kuala Lumpur, Malaysia: Islamic Book Trust, 2009); MUḤAMMAD BIN SĀLEH AL-<sup>c</sup>UTHAYMĪN, *SHARḤ KITĀB AL-SIYĀSSA AL-SHAR<sup>c</sup>IYYA BĪ SHEIKH AL-ISLĀM IBN TAYMIYYA [Explanation of the Book on the Religious Policy According to Sheikh al-Islam Ibn Taymiyya]* (Makkah, Saudi Arabia: Dār al-Imān al-Mujaddad li al-Ṭibā<sup>c</sup>a wa al-Nashr, 2004); WAEL HALLAQ, *IBN TAYMIYYA AGAINST THE GREEK LOGICIANS* (Oxford, UK: Oxford University Press, 1993); <sup>c</sup>ALI IBN MUḤAMMAD AL-MĀWARDĪ, *AL-AḤKĀM AL-SULTĀNIYYA [The Ordinances of Government]* (E. Fagan trans., *Les Status Gouvernementaux et Règles de Droit Public et Administratif*, 1915).

<sup>39</sup> On al-Farabi see, e.g., ABU NASR AL-FARABI, *ON THE PERFECT STATE* (Richard Walzer trans., Chicago, USA: Kazi Publications, 1998); AL-FARABI, *LA CITTA VIRTUOSA* (M. Campanini trans., BUR Biblioteca Univ. Rizzoli, 1996); D. Black, *Al-Farabi, in HISTORY OF ISLAMIC PHILOSOPHY* 178–97 (Oliver Leaman & S. Nasr eds., London, UK: Routledge, 1996). On Ibn Sina (Avicenna), see *AVICENNA (IBN SINA) ON THEOLOGY* (A. J. Arberry trans., Chicago, USA: Kazi Publications, 2007); SHAMS INATI, *IBN SINA AND MYSTICISM: REMARKS AND ADMONITIONS* (London, UK: Kegan Paul International, 1996); Shams Inati, *Ibn Sina, in HISTORY OF ISLAMIC PHILOSOPHY* 231–46 (Oliver Leaman & S. Nasr eds., London, UK: Routledge, 1996); IBN SINA, *REMARKS AND ADMONITIONS, PART ONE: LOGIC* (Shams Inati trans., London, UK: Kegan Paul International, 1984); IBN SINA, *THE LIFE OF IBN SINA: A CRITICAL EDITION AND ANNOTATED TRANSLATION* (W. Gohlman ed. & trans., Albany, USA: State University of New York Press, 1974). On Averroes, or Ibn Rushd, see IBRAHIM NAJJAR, *FAITH AND REASON IN ISLAM: AVERROES' EXPOSITION OF RELIGIOUS ARGUMENTS* (London, UK: OneWorld Publications, 2001); IBN RUSHD, *KITAB FASL AL-MAQAL [On the Harmony of Religion and Philosophy]* (G. Hourani ed., Leiden, The Netherlands: Brill, 1959); IBN RUSHD, *AVERROES' COMMENTARY ON PLATO'S REPUBLIC* (E. Rosenthal ed., intro, & trans., Cambridge, UK: Cambridge University Press, 1978); IBN RUSHD, *AVERROES' TAHAFUT AL-TAHAFUT [The Incoherence of the Incoherence]* (M. Bouyges ed., Beirut, Lebanon: Dar al-Mashriq, 1992); IBN RUSHD, *LE LIVRE DU DISCOURS DECISIF [The Book of Decisive Discourse]* (M. Geoffroy trans., Flammarion, Paris, France, 1996); and IBN RUSHD, *L'INCOERENZA DELL'INCOERENZA DEI FILOSOFI [On the Perfect State]* (M. Campanini trans., Turin, Italy: Unione Tipografico-Editrice, 1997). See also IBN KHALDUN, *AL-MUQADDIMAT* (F. Rosenthal trans., 3 vols., Princeton, USA: Princeton University Press, 1958).

<sup>40</sup> See Ibn Taymiyyah and al-Mawardi, *supra* note 38. This rejectionism was also because of several methods of analysis based on Greek methods that were then lumped under the heading of *kalam*. See

of two centuries, can hardly be deemed acceptable now when the gap is more than twelve centuries, particularly the rejection of reason based on scientific knowledge.<sup>41</sup>

The rigidity that developed between the tenth and twelfth centuries CE is also attributed to the closing of the door of *ijtihad*, which is a method of intellectual reasoning based on analogy, logic, and the purposes and policies of the *shari'ah* with respect to facts that have not been previously addressed.<sup>42</sup> This occurred because Muslim theologians felt both comfortable with what was and safe from having to face anything new that they might not be able to address. As history has taught us, there is nothing more fearsome and challenging than change.<sup>43</sup> Even today, classic Muslim theologians are anchored in the knowledge of what was because it offers a sense of security and ensures the continuity of what they know and from which they can derive power and wealth.

Paradoxically, during its "Golden Age" between 750 and 1258 CE, Islam opposed these regressive conceptions and offered a beacon of enlightenment to Western civilization.<sup>44</sup> One contemporary scholar aptly summarized it:

The early, formative period of the Muslim empire was followed by the Abbasid Caliphate (750–1258), named after Caliph Abu al-Abbas al-Saffah, who claimed descent from an uncle of Muhammad's. He transferred the seat of power from Damascus to Baghdad and inaugurated what is known as the Golden Age of Islamic

HARRY AUSTRYN WOLFSON, *PHILOSOPHY OF THE KALAM* (Cambridge, USA: Harvard University Press, 1976).

<sup>41</sup> For example, the simple question of determining the correct times for the five daily prayers could be easily answered by following the cycle of sunrise to sunset. However, such a method does not apply above the Arctic Circle or below the Antarctic Circle, or in outer space. Although this question may not pose many difficulties to most Muslims, it is nevertheless the method by which one reaches a solution to a practical question that is being posed. If one adopts a method based on reason for purposes of determining prayer time, which is self-evident, then surely one should be able to adopt the same method based on reason for so many other questions pertaining to the exigencies of modernity. As someone who has traveled to both the Arctic and the Antarctic and who prays five times a day, this writer simply divided the day into twelve-hour cycles and determined a reasonable space of time between morning, noon, early afternoon, sunset, and night prayers. A similar question arose when a Muslim Malaysian astronaut asked for a *fatwa* to know what times he should adhere to for prayer while orbiting the earth in outer space. The *Salafi*, for example, consider that to be a proper adherent of Islam one must follow what they consider to be the *sunna* and wear a certain type of *jalaba* and a certain type of sandal, which they believe (without proof) that the Prophet wore during his lifetime. My guess is that if the Prophet lived in Chicago, as this writer does, or in Alaska or Norway, he would have probably worn shoes, woolen socks, and warm clothes, which do not allow the air to penetrate. This is not to begrudge the *Salafi* for choosing their own garb, it is simply that this writer opposes the imposition of their garb on others, particularly when it goes against reason in certain environments.

<sup>42</sup> See, e.g., IMRAN A. NYAZEE, *THEORIES OF ISLAMIC LAW: THE METHODOLOGY OF IJTIHAD* (Chicago, USA: Kazi Publications, reprint 1995).

<sup>43</sup> See MACHIAVELLI, *IL PRINCIPE*, *supra* note 9.

<sup>44</sup> But see *supra* note 33. The overlap between the eighth and twelfth centuries CE for purposes of distinguishing the "Golden Age" and the regressive period has to do with location. By the tenth century CE, regressive trends were visible all over the *ummah*, but mostly in Makkah and Madinah. They became dominant across the *ummah* by the twelfth century CE, except for certain intellectual circles in Iraq, Egypt, and Andalusia, where the "Golden Age" continued into the mid-1200s CE.