

On the Development of Islamic Jurisprudence

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This article examines the state of Islamic jurisprudence with regard to many sensitive issues, such as the status of women and minorities in Islam, Islam and Democracy, *hudud* punishments. The author explores the current state of Islamic discourse on jurisprudence and identifies three approaches—traditional, secular and reformist. The paper explores the positions of the traditional ulama and the reformist mujtahids on the mentioned topics and finds the reformist position more sensible and closer to the position of the Qur'an and Sunnah. This paper while advocating neo-ijtihād, makes an impressive case for the merits and Islamic credibility of the reformist jurisprudence.

Flexibility and the Law

The purpose of law is to serve the functioning of society. If it fails in this task, it will quickly be overtaken by the normative power of the factual. Such a law will no longer be applied integrally by the courts but will gradually be replaced by modern usage. In the West, for instance, this is the case in criminal law with respect to blasphemy, homosexuality, and adultery. Consequently, new laws frequently endorse and confirm mere customs already widely practiced. Thus, newly promulgated laws may be outdated as they enter into force.

Apart from this aging process, legal systems are constantly called upon to regulate newly emerging areas of human activity, e.g., commercial and criminal use of the Internet; the cloning of plants, animals, and human beings; ski traffic on Alpine slopes; or traffic in space.

The great legal systems in the tradition of Roman Law and Anglo-Saxon Law know how to cope with new exigencies. Islamic Law, too, in spite of being based on divine sources, must respond to the challenges of the pres-

ent. The question is only whether the contemporary guardians of Islamic Law are up to that task.

Its handling will have implications far beyond the juridical domain. In fact, the degree of flexibility accorded to their jurisprudence by Muslim legal thinkers may well decide the fate of Islam as a religion, especially in the West. While Islam should not be seen as an almost talmudic lawyers' religion, it cannot be denied that Islam is not only a faith of high spirituality but also an integral project for society as a whole. Thus, a qualified Imam is, of necessity, also a qualified *mufti*. Therefore, the chances of propagating Islam are narrowly linked to its legal development.

Three Approaches, One Concern

Finding themselves in a unique situation, how do Muslim intellectuals—jurists and theologians—judge the malleability of their positive laws? Evidently, this depends on their overall attitude toward the Islamic heritage as a whole. Therefore, one can divide Islamic thinkers, including “Islamists,” into the following three categories: “orthodox” traditionalists (also called normativists), secularized modernists (also called acculturalists), and sincerely fundamentalist reformers (also called neonormativists).

Traditionalists underscore the two Qur’anic verses which announce the completeness and finality of the Islamic revelation:

We have neglected nothing in the Book (6:38)

and

Today I have perfected your way of life (5:3).

On this basis they conclude that the Shari’ah has ruled on each and everything, once and for all. They also underline that the first Muslims, the Companions (*Sahaba*) and the Followers (their immediate successors), were best qualified for understanding and interpreting the prophetic message of Islam.

This viewpoint is problematic because it tends to consider as sacred and immutable not only the primary and secondary sources of Islam—the Qur’an and Sunnah—but also the entire edifice of Muslim jurisprudence, constructed over some 900 years through methods like analogy (*qiyas*) and consensus (*ijma’*) of the legal profession (*fuqaha*), and even through legislation derived from principles like public interest (*maslaha*). Typically, traditional jurists consider the entire body of fiqh, i.e., medieval Islamic Law in its entirety as Shari’ah, and thus divine.

To be sure, traditionalists at times engage in efforts at new interpretation (*ijtihad*), but they tend to proceed as if the access (the famous *bab al-ijtihad*) to that activity was still barred or limited to imitation (*al-taqlid*). As a consequence, they are likely to consider any systematic reform effort as inadmissible innovation (*al-bida'*). This attitude is, however, not just stubborn but honorable indeed: It has probably saved Islam from disappearing altogether under the colonialist onslaught when Muslim people tenaciously clung to their traditions.¹ Yet, this defensive attitude is not really workable under the present conditions of a worldwide expansion of Islam. It also overlooks that Islamic Law in the Middle Ages, due to its six or seven diversified schools (*madhāhib*), was anything but monolithic.² In fact, the great founding doctors of Islamic Law had all been autocritical and more sceptical about the finality of their judgments than their followers.

At the other extreme one finds modernists, among them a number of former Marxists (e.g., Bassam Tibi), Arab nationalists, and social anthropologists (e.g., Aziz Azmeh and Talal Asad). Most of them would like to rid themselves of the entire normative apparatus of Islam. Some, like Mohamed Arkoun, arrogantly even claim to “rethink Islam.”³

Among these intellectuals are the following:

- those who flatly deny that the Qur'an contains precise norms for a concrete project of society—but only large guiding principles.
- those who maintain that the Qur'anic norms (which they accept as existing) were only meant to regulate the earliest Islamic community, the one in Madinah, and are no longer relevant and binding. The eternal Qur'anic message according to them is restricted to theological (and perhaps moral) truths.
- others, including Roger Garaudy, who try to reduce to a minimum the legal content of the Shari'ah by denying offhand the normative quality of the Sunnah or by rejecting many relevant *ahadith* as “spurious.”

These are obviously attempts at making Islam acceptable in the West at any price—according to its criteria and its secularist definition of religion: a sentimental, private affair, reduced to some rituals and without any significance for public life.

Members of this school of thought in Europe call for a totally assimilated Euro-Islam which resembles the Occidental way of life and value system so much that it can no longer hope to make a contribution toward the healing of a Western civilization in deep crisis. Theirs is an emasculated

Islam—without the Shari‘ah or any other legal framework and without any clear project for society. Theirs is no longer a religion of whom one could say: *inna ad-din ‘ind Allah al-Islam* (Surely the way of life with Allah is Islam) (3:19).

In contrast, there is a group of reform-minded, neonormativist Muslim scholars who deserve the honorific title “fundamentalist” since they are trying to return to *al-tanzil*, i.e., the pristine earliest sources of Islam. From among them mention might be made of the late Muhammad Asad, Taha Jabir al-Alwani, Muhammad Said al-Ashmawy, Rashid al-Ghannoushi, Hassan and Maher Hathout, Alija Izetbegovic, Jeffrey Lang, Fathi Osman, Yusuf al-Qaradawi, Mohamed Talbi, and Hassan Turabi. They are all intellectual heirs of the Salafiyya movement as represented by Muhammad Abduh and Rashid Rida earlier this century inasmuch as they all aim at the reform (*iṣlah*), renewal (*tajdid*), renaissance (*ṣahwa*), and awakening (*nahda*) of Islam through a juridical reconstruction based on the very roots of their religion.

In doing so, members of this school of thought emphasize that Allah, via His revelation, has only regulated what He wished to regulate so that there are lacunae which man may regulate himself—or leave unregulated. In terms of linguistics, the reformers mentioned are all aware that any lecture of a text amounts to interpretation so that pure literalism is impossible.

As frequently proposed by Muhammad Asad,⁴ the reformers distinguish clearly between the Shari‘ah, divine law in the narrow sense, and fiqh, while proceeding from divine sources essentially to a human product. In the tradition of Ibn Hazm, the most brilliant legal mind in Andalusia, Asad formulated: “Thus, it is the *nusus* [text] of the Qur’an and Sunnah—and only these—that collectively constitute the real, eternal Shari‘ah of Islam.”⁵

From this point of view the Shari‘ah has only two components: the strictly legal verses of the Qur’an—some 200 having been identified—dealing with family law (including marriage, divorce, and orphanage), the law of inheritance, as well as rules concerning the status of minorities, civil and criminal procedure, penal law, economics, and the administration of the community; and the authentic, normative *ahadith* (exclusively) of the Sunnah of the Prophet, based on the divine command to accept his life as a model.⁶ Excluded from the Shari‘ah are thus, for instance, mere nonbinding recommendations; personal idiosyncrasies; technical, agricultural, and medical skills of the time, and military tactics.

It goes without saying that the reform movement has to engage in a renewed assessment of the rich heritage of the Hadith, applying methods of modern semantics, and historical and contextual critique and remaining

aware of the fact that somebody ready to forge or manipulate the *matn* (textual content) of a tradition will certainly also have been ready to do the same to its *isnad* (chain of transmission).⁷ It certainly is not part of Islamic doctrine to accept as *sahih* (sound) everything found in the collections.

Basically, the reformers resist a traditionalist tendency to attribute to the Sunnah—secondary source of Islam, in response to divine inspiration (*wahy*) formulated by Muhammad—the very same status enjoyed by the Qur'an, the revealed primary source of Islam, considered to be Allah's own word. The reformers view such elevation of status as misguided, if only because, in contrast to the Qur'an, the Sunnah can never fully escape questions of authenticity.⁸ Therefore, the reformers, even in theory, exclude the possibility that a Qur'anic verse might be abrogated by the Sunnah.

In short, the reformers resist the recognizable trend to "sacralize" Islamic Law (*fiqh*)—the entire grandiose and imposing edifice of Islamic jurisprudence. This is not to deny that the founders of the Islamic schools of law—a genius like Al-Shafi'i and devout masters like Abu Hanifa, Ahmad Ibn Hanbal, Malik b. Anas, Zayd b. Ali, or Jafar al-Sadiq—were pious, conscientious, and competent. Therefore, it would be insane to discard the fruit of their erudition.⁹ But it would also be a grave error to overlook that their viewpoints, legal solutions, and *futawa* (legal decisions)—often so diverse—were the end product of *human* efforts, reflecting their particular situation, at a particular time, and thus cannot be considered *eo ipso* as faultless and unchangeable.

Thus from the reformers' point of view, it is necessary and legitimate for each new generation of Muslim jurists to struggle for a reformulation of Islamic legal doctrine by applying the original Shari'ah and its principles (*maqasid*) to new issues and contemporary problems.¹⁰ Their vision is not an Islam assimilated to Western civilization but an Islam as a constructive alternative, ready to integrate into the modern world as a cultural unit which is, and is to remain, different and specific. If this vision becomes true Islamic jurisprudence, it could become so dynamic that Islam might become *the* religion of the 21st century.

Theory and Practice

The vision just painted will remain unconvincing unless illustrated by concrete examples of *neo-ijtihad*. Given the Western fascination (and Muslim preoccupation) with the status of women in Islam, that is where one ought to begin.

The Status of Women

It is comforting to know that in Islam there is no difference between the genders as far as their ontological and theological status is concerned. In real life, the relationship between husband and wife is, however, frequently based on a hierarchy, husbands acting as if they enjoyed genetic superiority and were placed “above” their wives. This attitude is anchored in the traditional understanding of the following verses:

Men are the protectors and maintainers of women because Allah has given the one more (strength) than the other, and because they support them from their means. Therefore the righteous women are devoutly obedient, and guard in (the husband’s) absence what Allah would have them guard. . . . (4:34)

. . . but men have a degree (of advantage) over them. (2:228)

They are often read as if the Qur’an was exclusively addressed to men,¹¹ and it is neglected that according to the Qur’an husband and wife are to be “garments” for each other (2:187). Until recently, verse 4:34 was indeed understood to mean that men were the bosses—at best, the “custodians” who were “in charge of women.”¹²

In the meantime, as reflected in many more recent Qur’an translations, the key sentence in verse 4:34—*ar-rijal qawwamuna ‘ala n-nisa*—is understood quite differently, saying no more than that “men shall take full care of women”¹³ or that “men are the protectors and maintainers of woman,” respectively.¹⁴ And verse 2:187 is summarily dismissed nowadays in this context because it does not deal with civil status at all but only with a technicality of the law of divorce.¹⁵

In other words, *ijtihad* with respect to verse 4:34 is preparing no less than a revolution in traditional family relationships since there is no longer any question of seeing husbands placed *above* women but only, if needed, for physical and financial protection, *in front* of them. In fact, in accordance with verse 3:195 reform jurists increasingly insist that the equal status of men and women and their dependency on each other be translated into reality.

Polygyny

In real life there is probably less legally sanctioned polygyny in the Muslim world than *de facto* polygyny in the Occident. The difference is thus mainly a statutory one, residing in verse 4:3. The possibility of polygyny cannot be eliminated from Islamic Law. Indeed, this latitude is impor-

tant in situations of extreme shortage of men or in case of terminal illness of young mothers. In 1945, when about 6 million German men had been killed during World War II, some German women were ready informally to share husbands.

Curiously, Muslims hardly ever cite verse 4:3 from its beginning. Normally, its initial words “If you fear that you shall not be able to do justice to the orphans” are simply dropped as if they did not constitute an essential legal condition for what follows: “marry women of your choice, two, three, or four.” Also the next sentence of the same verse is not very popular: “But if you fear that you cannot deal justly (with them), then only one . . .” Nor is verse 4:129 quoted frequently. No wonder, by stating the obvious—“And you are never able to do justice between wives, even if it is your ardent desire”—this verse seems to eliminate whatever latitude is hidden in verse 4:3.

Against this doctrinal background, reform-minded Muslims conclude that the institution of the *harem* in Islam had never been legitimate.¹⁶ They now teach that polygyny is an exception for exceptional situations, exclusively permitting multiple marriages with widowed mothers of (semi-) orphaned children,¹⁷ with orphans, and for the purpose of taking care of orphans.¹⁸

Hijab

Many Muslims are unaware of the fact that the famous *ayat al-hijab* in verse 33:33 contextually only refers to the dwelling of the Prophet and to his wives, *al-ummahāt al-mu'minin*. Here, the Qur'an institutionalized the separation of the private quarters from the official ones within the residences of public personalities, as it is still practiced by heads of State and ambassadors in order to protect the privacy of their family life.

From here, through a double deduction, Islamic jurists arrived not only at gender segregation but at the virtual seclusion of Muslim women in general not only within their abodes but in the street as well—and their total coverage, even of their faces.

Under the weight of critique from reformers as far apart as Hassan Turabi¹⁹ and Aga Khan III, this practice is becoming much rarer, even within Saudi Arabia since most ulama now do admit that there is no valid legal basis for the demand to cover a woman's face, totally or partially.²⁰ On the contrary, Muslims are beginning to recall that women, at the time of the Prophet, participated in warfare, commerce, and religious instruction and that the women of Madinah, without any form of segregation, had taken the *bay'a* (oath of allegiance) which permitted the *hijra*.

Women's Islamic Dress

The large majority of previous and contemporary ulama teach that Muslim women when leaving their homes must loosely cover their bodies, except for their faces, hands, and feet. In fact, there is only one hadith in which the Prophet indicates, by gestures alone, to Asma bint Abu Bakr what the women's *'awra* ("nakedness," that which is to be covered) is to be.²¹

Given *la guerre du foulard* (the war of scarves) in France in 1989, and the discrimination felt by Muslim women in the West simply for covering their hair, it is entirely normal that modern-day Muslim lawyers tackle this issue in their attempt to draw the correct line between Islam as a religion and Islam as a civilization. Thus Hassan Turabi and others concluded that women's Islamic dress code is a moral recommendation (*mustahib/man-dub*) and not a legal obligation (*wajib*).²² Others, like Hamza Kaïdi, expressed the view that Muhammad had only meant to set a maximum limit, asking women as a minimum not to cover their faces, hands, and feet.²³

Muhammad Asad in his seminal Qur'an translation showed a more circumspect approach and arrived at more nuanced solutions. According to him, the Qur'anic verses in question (33:59 and 24:31) make allowance for limited cultural flexibility. The first of these says:

O Prophet! Tell your wives and daughters and the believing women that they should draw over themselves some of their outer garments [when in public]: this will be more conducive to their being recognized [as decent women] and not molested. (33:59)

The second of these verses adds:

And tell the believing women to lower their gaze, to be mindful of their chastity, and not to display their charms [in public] beyond what may [decently/normally] be apparent thereof [*illa ma zahara minha*], and that they draw their head-coverings [khumur] over their bosoms . . . (24:31)

Asad argues that in Oriental antiquity women for climatic reasons—wind, dust, and sun—usually wore a large cloth attached to their hair, without necessarily covering their breasts. The legislative purpose of the quoted *ayat* thus was not to cover women's hair and their bosoms but only the latter, *no matter how*. According to him there is much wisdom in the flexibility of the formula: It assures that women's primary and secondary characteristics will always have to be covered while taking into consideration

which degree of coverage of a woman's hair is considered "decent" in different civilizations, at any given time.²⁴ In short, Asad would allow Muslim women to uncover their hair in places like contemporary Central, Western, and Northern Europe (but not necessarily in the Mediterranean area), in the United States, and in sub-Saharan Africa; for civilizations where women have always covered their hair Asad would argue that it would be indecent to discontinue.²⁵ For him the hadith reported in Abu Dawud's collection, to this day, determines what can become "apparent" of a woman in the Muslim Orient.

Female Testimony

According to verse 2:282, the testimony in court of two women equals the testimony of a single man. Traditionally, this unequal treatment is justified with the emotional impact on women of their menstrual cycles and of other physical phenomena limited to women, like pregnancy and postnatal syndromes. This might temporarily interfere with their perceptive capabilities.²⁶

Reform-minded jurists suspect that this line of argumentation hides gender discrimination because men, too, can be physically or emotionally handicapped. In their view, the issue in question is not one of sex but of sheer competence. If a mere housewife is called to give witness in questions of high finance, a Western court as well might not attribute much value to her testimony. In contrast, if in a commercial case a real career business woman appears in court, there should be no inhibition, in a Shari'ah court, to give her full confidence.²⁷

Women's Rights to Vote and Be Elected

The traditional (over)interpretation of the *ayat al-hijab* has had very adverse effects for the mobility of Muslim women and their chances of participation in public affairs. This, as well as the sound emphasis on the central role of women as mothers, had the effect of virtually eliminating women from public function in the Muslim world—despite opposite historical examples (Khadija, 'A'isha, and Umm Salama). Reformists therefore make a special effort to give women their (creative) place in the world at large. Already many leaders of the Muslim youth movements are women. In this context it is of singular importance that the Egyptian Muslim Brothers reaffirmed the right of women to vote in political elections and to pose their candidatures, thus following both Hassan al-Turabi and Shaykh Rashid al-Ghannoushi.²⁸

Women in Government

Few other sayings of the Prophet of Islam are as popular (among men) as the one, often attributed to Abu Bakr al-Siddiq, according to which countries run by women will not prosper.²⁹ However, there are quite a few problems with this hadith, beginning with the fact that it was not reported by the first Caliph but by Abu Bakrah, a much less reputable companion.³⁰ It is legitimate to ask whether the Prophet could have pronounced such a fundamental rule only once, and only in the presence of a single, rather unimportant companion. Suspicions increase when one learns that Abu Bakrah never related this saying until at least 25 years after the event. When he finally did, it came very handy politically: during the Battle of the Camel, in 656, when he sided with 'Ali and thus against 'A'isha, commander-in-chief on the other side.

The historical event which had prompted the Prophet to say what he did was the coming to power under tumultuous circumstances of an Iranian princess. It is therefore possible to wonder whether the saying in question was normative or rather only informative.³¹ None of the doubts raised suffices individually to invalidate a hadith accepted by Al-Bukhari.³² But one can hardly escape the conclusion that collectively the doubts raised justify a measure of distrust. Like Hassan al-Turabi and Fathi Osman I would therefore not consider the reported saying as an unqualified obstacle against the employment of women in government and administration, as professors, judges, policewomen, and soldiers, if they so desire.³³

Female Circumcision

Female circumcision, no matter to which degree, is a grave violation of the corporal integrity of women resulting in bodily injury, and thus it is not an Islamic institution. Like male circumcision, it has no basis in the Qur'an and only a flimsy grounding in the Sunnah, as interpreted in those few Muslim countries where the vice has been, and still is, committed: Egypt and the Sudan. This custom could never enter the body of Islamic Law because Islamic jurisprudence rejects the very notion of customary law that might infringe on the Qur'anic Shari'ah. Therefore, it is good news for all reform-minded Muslims that the Supreme Court of Egypt recently upheld the prohibition of female circumcision as pronounced by the Minister of Health.³⁴

After the place of women in Islamic life, it is certainly Islamic criminal law which fascinates and scandalizes Western media. Many Muslims, too, seem to be preoccupied with permanently trying to distinguish between what in their life and circumstances, food and entertainment, is *halal* and

what is *haram*. It is therefore natural that modern *mujtahidun* also focus on this field. In this context, some wonder whether the punishments foreseen in the Qur'an in keeping with the linguistic meaning of *al-hudud* (borderline, limits) might be understood not as minimum but as maximum penalties.³⁵

Apostasy

Not during the early years of Islam but during the course of its subsequent history, people were executed for having left the fold of Islam (*ar-ridda*). This was in contradiction to the behavior of the Prophet who never pronounced a death sentence against someone solely for leaving Islam. It seems that the capital punishment for apostasy was deduced from (5:33) which deals with "those who wage war against Allah and His Messenger and strive with all their power to spread corruption on earth," which admittedly can be done not only with a weapon in hand but with a desktop PC.

Today, an increasing number of *fuqaha* share the emerging consensus that their medieval predecessors had failed to distinguish between high treason—for which crime verse 5:33 foresees capital punishment—and mere intellectual desertion of Islam—for which neither the Qur'an nor the Sunnah foresee punishment in this world.³⁶

These jurists point out that the Qur'an describes many cases of apostasy without pronouncing a worldly punishment for it. They also maintain today that the fundamental commandment of tolerance, *la ikraha fi din* (2:256), governs intra-Muslim relations as well (and not only relations with the People of the Book as believed by their predecessors).³⁷

Stoning of Adulterers

The Bible, in chapter 22,20–22 of the 5th Book of Moses (Deuteronomy), commands that adulterers be stoned. This norm would have been automatically incorporated into Islamic Law if the Qur'an in (24:2) had not treated the very same crime in the greatest of detail. Significantly, *al-Nur* (surah 24) does not prescribe capital punishment but reads: "The woman and the man guilty of fornication, flog each of them with a hundred stripes." It should therefore have been clear that the Bible, in this particular respect, had been abrogated by the Qur'an.

Nevertheless, and despite the extremely strict rules of evidence in criminal procedure, since the reign of 'Umar ibn al-Khattab, adulterous couples have been stoned in Muslim countries, and still are from time to time. In fact, 'Umar even talked about a (suppressed?) *ayat al-rajm*³⁸ and proceed-

ed to stoning as a punishment on the basis of a single case of stoning tolerated by the Prophet.³⁹

Reform-minded jurists are now calling attention to the fact that the companions were unable to recall the essential detail of whether verse 24:2 had been revealed before or after this case. Some also invoke the basic principle that, at any rate, the Sunnah could not abrogate a specific ruling of the Qur'an. As a result, the conviction is spreading that Islam never justified the stoning of adulterers.⁴⁰

Democracy and human rights are a third field of major concern, both for critics and defenders of Islam.

Democracy

When Islam was born, there were no democracies on this earth, nor were there any to appear for the next 1,000 years. The Qur'an—like all Scriptures—deals with issues of family and community—*al-ummati al-islamiyyah*—and not with the organization of a State, be it a monarchy or a republic. Islam cannot prosper without an Islamic community guided by the Shari'ah, but it can prosper without a State.⁴¹ The notion of a national State is at any rate un-Islamic.

Against this background, some contemporary traditionalists consider a democracy a *kafir* system.⁴² In their direction, Shaykh Yūsuf al-Qaradawi remarked: "People who say such things neither understand Islam nor democracy!"⁴³ Fathi Osman, for whom democracy is the only system which can guarantee the protection of human rights, counters, "To contrast Islam and democracy is not fair to one or the other," adding, "The *shura*-democracy polemics have to be settled once and for all!"⁴⁴

Both authors are right because even in the Islamic federation of Madinah one can find astonishingly modern roots for the later development of an Islamic democracy, to wit:

- equal rights for all Muslims and elimination of racism;
- each Muslim is a viceregent of God on earth (35:39), (Hassan al-Turabi is fond of pointing out that therefore the seat of political authority is the people);⁴⁵
- institution of Amir as head of State (no government by committee);
- obligation of the ruler to consult with the ruled⁴⁶ (More and more contemporary Muslim scholars consider the result of these consultations as binding on the ruler);⁴⁷
- independence of the Shari'ah and fiqh from both government and parliament as a basis for the separation of powers; and

- protection of religious minorities.

In addition, much can be made of the extraordinary fact that the first *khulafah* (following different procedures) have been *elected* at a time when no other ruler on this globe assumed power on the basis of a vote. On such foundations one can indeed build a democratic, pluralistic, federative Islamic republic, subject to separation of power and the rule of law, including the protection of minorities.

It seems that traditionalists reject democracy mainly for psychological reasons. Alas, most imperialist colonialists presented themselves as democrats. If that is the stumbling block, why not follow Shaykh Mahfoudh Nahnah's suggestion to speak of *shuracратиyya* instead?

More important still, the idea of people's sovereignty is seen to clash with the supreme sovereignty of Allah. Of course, no Muslim (and no Western democrat either!) can accept the notion that a parliament was entirely free to legislate, no matter what, no matter how. Basically, Muslim legislators are not supposed to create law but to find it, i.e., to act on the basis of pre-existing divine law, namely the Shari'ah. At the same time, the slogan *al-hakimiyya li'llah*, while true, is of little practical consequence because it always takes people to translate Allah's will into norms and policy.

Islam is compatible with a democratic system for two other reasons:

- (i) According to most democratic constitutions there are certain institutions, procedures, or values which cannot be changed even by parliamentary consensus decisions. In that vein, in an Islamic republic the core of the Shari'ah would be considered off-limits to legislation.
- (ii) Islamic fiqh has always defined Shari'ah-free areas which could be regulated by the Amir at his discretion, like *ta'zir* norms in penal law. Well, wherever there is such latitude for *ijtihad* in practical matters—whether to build a road or not, here or there—there is the same amount of latitude for Muslim legislation.⁴⁸ An Islamic supreme court, composed of *fuqaha*, would assure compliance also of trivial matters with the *maqāsid* of the Shari'ah. As envisioned by neonomativists, an Islamic republican government would not be reserved for the ulama but could be “laic.” A (Sunni) Islamic republic should therefore not be called a “theocracy.”

Human Rights

Traditionalist lawyers mainly confront a psychological barrier. Like Roman Law before it and Anglo-Saxon Law after it, Islamic Law did not establish a hierarchy of norms. For a Muslim, it is indeed inconceivable to distinguish between Qur'anic commands of a higher and of a lower legal status. Equally important, Muslim lawyers hesitated, and still do, to consider human beings as the seat of inborn rights since all claims that can validly be made are conferred by Allah, and only by Him.⁴⁹ If a person has a "human right" to live, this can only be understood by Muslims as a *reflex* of the general command not to kill. Therefore *human rights* actually are *divine rights*.

Of course, the old compendiums and restatements of Islamic Law, like the Scriptures, did not employ the modern category of human rights. For this reason alone, perhaps Muslim lawyers missed the boat when the West began to develop the idea of supreme universal human rights and started to promulgate human rights charters. At the same time, it would have been easy for creative ulama to prove that the Shari'ah was the first "human rights" code inasmuch as it had guaranteed, for 14 centuries already, virtually all the classical concerns of the human rights movement, including the rights to life; corporal integrity; freedom of speech, conscience, and movement; the right to own property and to marry; and the prohibition of discrimination on the basis of race, color, religion, or sex.

In fact, there are only two notable differences between the rights afforded the human being in Islamic Law and human rights law in the West:

1. To be a Muslim under Islamic Law corresponds to being a "citizen" elsewhere. Therefore, Muslim human rights experts can explain why it is legitimate to accord certain civil rights, like claims to inheritance, to Muslims only.
2. Islamic Law allows for a limited legal differentiation between men and women inasmuch as this is only, and properly, based on biological differences. Muslim jurists can make a good case when pointing out that these are not discriminatory measures, even though they may violate the ideological Western fiction of legal gender identity.

History has always been characterized by massive human rights violations, before and after the famous United Nations universal human rights declaration. The nineteenth century has been especially infamous for that. Given human nature, this may not be entirely unavoidable. But an eternal divine human rights code, imposed by Allah on mankind, is certainly less

likely to be ignored than a charter drafted by, and at the disposition of, diplomats.

Therefore, as to this subject, Muslim jurists should no longer play hide and seek.

Minorities

The Qur'an laid the basis for a historically unique legal protection of religious minorities (*dhimmi*), a status of semi-autonomy which still surpasses modern concepts. Under Islam, such minorities can organize, practice their religion, even in public, and be exempt from military service.⁵⁰

In this context, the *mujtahidun* are facing two questions today: whether to extend this protection from the *ahl al-kitab* (mainly Jews and Christians) to atheists and agnostics, and whether to confer citizenship on non-Muslims residing in an Islamic State.

Traditionalists tend to deny that latter question because fully equal treatment of Muslims and non-Muslims in an Islamic State seems to defeat the very idea of such a State.⁵¹ Muslim reformers, on the other hand, advocate equal citizenship for all people within national boundaries—equal taxation, equal access to public office,⁵² and equality as to military service—this being but a natural consequence of the undeniable (un-Islamic) development of modern nation-states.⁵³ This is defensible from my point of view because the *dhimmi* status can be seen as an obligatory *minimum* of protection, not as a barrier against extended protection (via citizenship) if *dhimmi* are opting for it.

As far as the tolerance of atheists and agnostics is concerned, Muslim reformists like to quote from the Qur'an:

Yet whenever any of the messages of your Lord reaches them, they turn away from it. And so they reject the truth now that it has reached them. But in time they will understand what it was that they used to make fun of.

The process thus described presupposes that atheists and agnostics are given the chance to grasp the truth sometime in the future and are tolerated until then.

Jihad

In the Arab-Muslim world one still runs into modern literature using outdated medieval concepts like *dar al-harb* and *dar al-Islam* for the analysis of the relationship between the East and the West.⁵⁴ Traditionalists also seem to have difficulties when asked to admit that the rules of military

jihad,⁵⁵ which in the Middle Ages corresponded to the Christian notion of *sacrum bellum* (holy war), might have become obsolete in our nuclear era. Worse, for all too long, traditional Muslim jurisprudence had failed to distinguish between those rules of military jihad which allowed the opening of hostilities (what the Romans had called *ius ad bellum*) and the rules of warfare as such (what the Romans had labeled *ius in bello*), like the famous Verse of the Sword (9:5). As a result, Islam appeared more aggressive than warranted.

Today, a new consensus gradually seems to have emerged, strictly based on the Qur'an and Sunnah, according to which the Shari'ah properly understood allows only military defense and armed resistance against brutal repression, provided it is opportune under humanistic and tactical aspects.⁵⁶

The examples so far given deal with new insights into old issues. But there is also a growing need for *ijtihad* with regard to entirely new questions, e.g., occasioned by medical and technological progress like surrogate motherhood, in-vitro fertilization, ovum donation, organ transplantation, and cloning. Thanks to the Islamic Legal Academy in Jiddah, an O.I.C. suborganization,⁵⁷ and individual *ijtihad*, as by Dr. Hassan Hathout,⁵⁸ much progress has been made.

In particular, it seems to be agreed that

- organ transplantation is legitimate, provided no commercial sale is involved;
- artificial insemination is legitimate, provided the technique involves only husband and wife;
- cloning of human beings is illegal; and
- plastic surgery is legitimate if it helps to overcome mental agony.⁵⁹

Objections Anticipated

This article may cause some misunderstandings in view of the fact that I offered fourteen rather topical examples for a modern *ijtihad* leading to changes of legal doctrine, as if it were the desperate aim of neo-*ijtihad* to move closer to Western concepts. It can be alleged that in all fourteen cases solutions were found within the framework of *al-usul al-huquq*, the Qur'an and the Sunnah. Johann Wolfgang von Goethe said that "one must acquire one's heritage in order to [fully] possess it." This is what neo-*ijtihad* is about. It should not be seen as a sign of one-sided adaptation when Islamic and Western legal positions frequently coincide. On the contrary, since all

legal systems supposedly take human nature into account (as created by Allah), it would be strange indeed if the Islamic and the Western legal systems were to clash in most respects. Finally, it would certainly have helped to avoid misunderstandings if I had pointed out that the so-called traditionalist and the so-called reformist *mujtahidun* agree much more than they differ. For example, their views usually are identical with respect to the following issues: role distribution within the family; unilateral divorce (*talaq*); inadmissibility of legal adoption; the law of inheritance concerning brothers and sisters; death penalty for certain crimes; prohibition of abortion, except to save the mother; condemnation of illegal sex; rejection of drug use and the consumption of pork, no matter how small the quantity; refusal to accept homosexual "orientation" as an option; compulsory military service; and disapproval of secularization.

Given such large common ground the traditionalist and reformist Islamic scholars are in fact sitting in the same boat, serving the same purpose: the advancement of Islam. I hope, therefore, that they will also respect each other, knowing that eternally immutable in Islam is only its theology (*al-aqida*), the rules of worship (*al-'ibada* and *al-mu'amalat*), and divine law, but not *fiqh*.

Notes

1. See Greg Noakes, "Stupid Peasants and Stubborn Muslim," *Iqra* 18(2) (April 1998): 15, 16, 24, for the thesis that the ultra-conservative, supposedly stupid Muslim of the colonial era was actually a clever peasant.

2. According to Muhammad Asad in *This Law of Ours and Other Essays* (Gibraltar, 1987), 20, "there is practically not a single problem of law, great or small, on which the various schools and systems fully agree." This situation is beautifully illustrated by Ibn Rushd in *The Distinguished Jurist's Primer* (*Bidayat al-Mujtahid*), vols. 1 and 2 (Reading: Garnet Publication, 1994/1996).

3. *Rethinking Islam* is the title of one of his books (Boulder, Co.: Westview Press, 1994).

4. Muhammad Asad, *This Law of Ours and Other Essays*, 23–24; Muhammad Asad, *The Principles of State and Government in Islam* (Gibraltar 1980), 11–16.

5. Muhammad Asad, *The Principles of State and Government in Islam*, 13.

6. Verses 4:59,65,80; 33:21. Muhammad Shahrouh in "The Divine Text and Pluralism in Muslim Societies," *Muslim Politics Report*, 12 (March/April 1997): 3, suggests that the behavior of the Prophet might have been only one of several acceptable modes. In the final analysis, this view leads to a total rejection of the Sunnah as an obligatory model, at least in some respects.

7. Critical analysis of the content (*matn*) of *ahadith* is no novelty in Islamic scholarship. Khaled Abu el-Fadl in *The Authoritative and the Authoritarian in Islamic Discourse* (Los Angeles: MVI, 1997), 53–54, stresses that it was always accepted in principle to invalidate a hadith on the basis of grammatical or historical errors or conflict with the Qur'an or observed laws of nature.

8. The Hadith collection was pursued mostly during the Abbasid era, i.e., with a considerable time lag—an activity frowned upon by 'Umar ibn al-Khattab.

9. For that reason Yusuf al-Qaradawi in *Islamic Awakening between Rejection and Extremism* (Herndon, Va.: IIIT, 1987), 145, insists that only qualified *fuqaha* are entitled to work for an enlightened fiqh.

10. For a history of this "neo-ijtihad" see 'Abd al-Rahim, *The Development of Fiqh in the Modern World* (Kuala Lumpur: International Islamic University, 1996); also see Anver Emon in El-Fadl, *The Authoritative and the Authoritarian in Islamic Discourse*, 18; Iyad Hilal, *Studies in Usul ul-Fiqh* (Walnut, Ca.: n.p., n.d.), 198; Fathi Osman, *Sharia in Contemporary Society—The Dynamics of Change in the Islamic Law* (Los Angeles: MVI, 1994), 31, 50.

11. This was the complaint made by Dr. Amina Wadud during a seminar of the Harvard Center for Islamic Legal Studies, on March 30 and 31, 1997. See *Harvard Islamic Legal Studies Programme* 2(2) (November 1997): 2.

12. For this attitude see the Qur'an translations into English by Marmaduke Pickthall and Rashid Said Kassab; the translations in French by Cheikh Si Hamza Boubakeur, Muhammad Hamidullah, Denise Masson, Sadok Mazigh, O. Peste/Ahmad Tijani and M. Savary; and the translations in German by Lazarus Goldschmidt, Max Henning, Rudi Paret, Muhammad Ahmad Rassoul, and Friedrich Ruckert.

13. Muhammad Asad, *The Message of the Qur'an* (Gibraltar, 1980), 4:34; as well as Fathi Osman, in his lecture in London, on July 6, 1996, on "Human Rights on the Eve of the 21st Century," 16 (manuscript).

14. This translation was championed by Yusuf 'Ali and has been adopted by the official Saudi Qur'an translation into English and Al-Hilali/Muhsin Khan. T.B. Irving translates "Men should support women"; Jeffrey Lang in *Struggling to Surrender* (Beltsville, Md.: amana publications, 1995), renders "Men are charged with the full maintenance of women." Similar are the translations into French by Jacques Berque and into German by Ahmad von Denffer, Theodor Khoury, and by S.K.D. Bavaria Verlag.

15. See Muhammad Asad, *The Message of the Qur'an*, 2:228, note 218.

16. See Alija Izetbegovic, *Declaration islamique* (anonymous edition, 1970).

17. This is the restricted view, e.g., of Hamza Kaidi, "Le Coran a l'Usage de Femmes," *Afrique Magazine* 60(113) (May 1994).

18. Jeffrey Lang, *Struggling to Surrender*, 163.

19. Hassan Turabi, *Islam, Democracy, the State and the West*, ed. Arthur L. Lowrie (Tampa, Fl.: WISE, 1993), 36.

20. The World Association of Muslim Youth (WAMY) continues to ask for the total coverage of women, based, however, on its reading of 4:34; see "The Significance of the Hijab," *Islamic Future* 13(69) (March 1997): 2.

21. Abu Dawud, hadith no 4092.

22. Hassan Turabi, *Islam, Democracy, the State and the West*, 23, 36; Rabah Stambouli, "La femme dans le Coran," *Horizons* 9/10 (March 1990).

23. Hamza Kaidi, "Le Coran a l'Usage de Femmes."

24. Muhammad Asad, *The Message of the Qur'an*, 24:31, notes 37 and 38; 38:59, note 75.

25. Jeffrey Lang, *Struggling to Surrender*, 172–175, distances himself from Asad's line of thought, qualifying it as the very type of adaptation to Western civilization that he had condemned in his *Islam at the Crossroads* (Lahore, 1934).

26. Shamshad M. Khan, *Why Two Women Witnesses?* (London: TaHa, 1993), 6, 8, 10.

27. See for this view Muhammad Asad, *The Message of the Qur'an*, 2:282; Fathi Osman, *Muslim Women* (Los Angeles: Minaret, n.d.), 39; Fathi Osman, *The Children of Adam—An Islamic Perspective on Pluralism* (Washington: Georgetown University, 1996), 50; Jeffrey Lang, *Struggling to Surrender*, 165–167; and Rashid al-Ghannoushi, op. cit., 193.

28. See Hassan Turabi, *Islam, Democracy, the State, and the West*, 46; the relevant official declarations of the Ikhwan al-Muslimun have been published in *ENCOUNTERS* 1(2) (September 1995): 85–89.

29. *Lan yuflihu qaumun wa lau amruhum imra'ah*, Sahih al-Bukhari, no. 7.099.

30. This confusion still exists with the World Association of Muslim Youth (WAMY): *Islamic Future* 13(74) (October 1997): 5.
31. Fathi Osman, "Human Rights on the Eve of the 21st Century," 51, considers the hadith to be informative only.
32. Jeffrey Lang, *Struggling to Surrender*, 169–170, remains neutral.
33. See, e.g., Hassan Turabi, *Islam, Democracy, the State, and the West*, 47–48.
34. *TIME*, January 12, 1998.
35. This is the daring approach of Shahrour, op. cit., 7.
36. See Muhammad Said al-Buti, *Jihad in Islam* (Damascus, 1995), 155–160; Hassan Turabi, *Islam, Democracy, the State, and the West*, 41–42; Fathi Osman, *The Children of Adam*, 30–31; Jeffrey Lang, *Struggling to Surrender*, 196–199; and Adil Salahi, "Apostasy and Punishment," *Arab News* (February 26, 1993): 9.
37. See Muhammad Said al-Ashmawy, *L'Islamisme contre l'Islam* (Paris, 1989), 38; Aziz Azmeh, *Islam and Modernities* (London/New York: Verso, 1983), 13; and Fathi Osman, "Islam and the Freedom of Faith," *ARABIA* (June 1985): 10, and (November 1985): 13.
38. Sahih al-Bukhari, no. 8.817.
39. Abu Dawud, hadith no 4405; Sahih al-Bukhari, no. 8.805 and 8.810.
40. Muhammad Said al-Ashmawy, *L'Islamisme contre l'Islam*, 38; Rabah Stambouli, "La femme en Islam," *El-Moujahid* (February 2/3 1990).
41. For Hassan Turabi, society is the primary institution of Islam, *Islam, Democracy, the State, and the West*, 23–24. Mustapha Cherif, "Islam et Choix de Societe," *El-Moujahid* (July 25, 1988): 12, does not see Islam linked to any specific type of social organization.
42. See Abdul Rashid Moten, "Democracy and Shura-based Systems," *ENCOUNTERS* 3(1): 3–20; Azam Tamimi, "Democracy in Islamic Political Thought," *ENCOUNTERS* 3(1): 21–44, gives a historical overview of the Islamic democratic discourse.
43. Interview with *Al-Sharq al-Awsat*, February 5, 1990.
44. Fathi Osman, "Human Rights on the Eve of the 21st Century," 24 and 43.
45. Hassan Turabi, *Islam, Democracy, the State, and the West*, 25.
46. Verses 3:159 and 42:38.
47. Muhammad Asad, *The Principles of State and Government in Islam*, 52; Hassan Hathout et al., *In Fraternity—A Message to Muslims in America* (Los Angeles: Minaret, 1989), 8. Abu A'la al-Maududi accepted the binding nature of *shura* toward the end of his life. Jeffrey Lang and Azzah Y. Al-Hibri in "Islamic Constitutionalism and the Concept of Democracy," *Case Western Reserve Journal of International Law* 24(1) (1992), remain sceptical.
48. Fathi Osman, *Sharia in Contemporary Society—The Dynamics of Change in the Islamic Law* (Los Angeles: MVI, 1994), 76.
49. Neil Hicks, "Islam and Human Rights," *Muslim Politics Report*, no. 12 (March/April 1997).
50. Muddathir 'Abd al-Rahim, *Islam and Non-Muslim Minorities* (Penang: JUST, 1997), describes the history of the *dhimmi* statute.
51. Muhammad Asad, *The Principles of State and Government in Islam*, 40; Muhammad Said al-Buti, *Jihad in Islam*, 114–140. After some hesitation, Mustafa Mashhur, amir of the Egyptian Muslim Brothers, supported the preservation of the Egyptian citizenship of Copts; see *Frankfurter Allgemeine Zeitung*, April 19, 1997.
52. Fathi Osman in *The Children of Adam*, 51, mentions non-Muslim cabinet ministers, judges, and army officers.
53. Rashi al-Ghannoushi, op. cit., p. 193; Fathi Osman (note 52), pp. 20, 24–26; Fathi Osman, *Human Rights*, 19.
54. For an extended discussion of the issue, see Jeffrey Lang, *Struggling to Surrender*, 183–189; Jeffrey Lang, *Even Angels Ask* (Beltsville, Md.: amana publications, 1997), 116–136.
55. This section does not deal with the so-called greater (moral) jihad.

56. This view is shared by Hassan Hathout, *Reading the Muslim Mind* (Plainfield, In.: American Trust, 1995), 100; Fathi Osman, *Jihad, a Legitimate Struggle for Human Rights* (Los Angeles: Minaret, 1991); Jeffrey Lang, *Struggling to Surrender*, 183–189; and Jeffrey Lang, *Even Angels Ask*, 116–136.

57. Important in this context was its 4th session February 6–11, 1988, leading to resolution 1/4/08-88.

58. Hassan Hathout, *In Fraternity—A Message to Muslims in America*, 120, 125–127, 129. In contrast to the Jiddah Academy he is against any form of genetic engineering, whether plants or animals.

59. For details see *Islamic Future* 13 (1997/1998), 72: 4, and 78: 8, and 80: 13.