MUSLIM FAMILY LAW REFORM: TOWARDS AN ISLAMIC METHODOLOGY

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The twentieth century represents a period in history as critical as any yet encountered by Islam. The central problem in this century is modernization and the key questions revolve around the phenomenon of change: political, economic, social and legal. From the standpoint of Islamic modernism, the central practical concern has been the reform of Muslim family law.

Family law is the heart of the *Sharī'ah* and that part of Islamic law which has remained in force to govern the lives of over 500 million Muslims throughout the world. Classical Muslim family law provided a very comprehensive approach to the major aspects of family life — marriage, divorce and inheritance, that was basically in tune with medieval Muslim society. As long as the structure of Muslim society remained unchanged Islamic law could generally meet the needs of its times. Thus, during the long span of ten centuries, the classical view of law reigned throughout Muslim society, and Muslim family law remained operative until contemporary times.

However, this situation has been abruptly challenged in the modern period as Muslim societies have sought to harness modern technology and industrialization. The results of these new developments have led to profound social changes, among them changes in family structure and most especially in woman's status and role in society. Although these have not yet permeated all of society, their progress has been sufficient enough to warrant reforms in the laws of marriage, divorce and inheritance so that law might more fully reflect the application of *Qur'ānic* values to social needs today.

Reinterpretation and reform have occurred in the areas of both substantive law (*furū'al-fiqh*) and jurisprudence proper(*uṣūl al-fiqh*). In the name of social progress reformers have struggled to draft family law legislation that will more equitably meet the social and economic

needs of individuals in modern Muslim society. However, salutary as substantive legal change has been, and noble though the reformers' motives have seemed, their solutions have often been of an *ad hoc* and piecemeal nature and their legal methodology has been not only indirect but, at times, quite questionable.

In order to justify their reforms before the vast majority of the community, Muslim reformers sought to place their legal reforms under the umbrella of *taqlīd*. Thus they utilized devices such as *takhayyur* and *talfīq*. However, from a juristic point of view, they often created more problems than they resolved.

Takhayyur (selection) refers to the right of a Muslim to select and follow the teaching of a law school other than his own with regard to a particular legal transaction. Although usage of *takhayyur* was restricted to the predominant opinion of another law school, reformers extended its scope to include the adoption of an individual jurist's opinion from the past.[1] This innovation constituted a clear though unacknowledged departure from traditional usage. Furthermore, whereas *takhayyur* required the selection and following of the teaching of another law school *in toto*, some reformers felt free to settle for partial or piecemeal compliance.[2]

The employment of *talfīq*, a variation of *takhayyur*, constituted a more serious breach of the Islamic legal tradition. *Talfīq* (patching together) refers to an eclectic process by which the views of various schools or jurists were combined to form a single rule of law.[3] The reformer's use of *talfīq* is more problematic for two reasons: first, traditionally a condition for the practice of *takhayyur* was that an individual not combine the teachings of different schools or jurists and second, the product of such a "patching together" produced a substantive legal change which neither school had intended[4] and which was in fact at odds with the doctrines of all four Sunnī schools.

The major problem with these inconsistent and even contradictory procedures employed by reformers is not that passage will be impossible, but that their utilization of these devices does not assure a consistent body of law and more importantly, hinders the acceptance of legal reforms by the majority of the community. While reformers, wishing to avert outright popular resistance to their changes, have usually claimed the sanction of tradition for their reforms, traditionists (conservatives) have had little difficulty refuting these claims.[5] The result of a deficient and

contradictory legal methodology has been public demonstrations against and resistance to reform proposals and the retardation of family law reforms. This is a most unfortunate situation, for the true effectiveness of existing reforms is dependent upon their acceptance and practical implementation by the entire Muslim community,not only by the relatively small "progressive" leadership but, most importantly by the *'ulamā'* and the masses who follow them. Thus, legal reforms must be rooted in a consistent Islamic rationale, one which would demonstrate a solid link of continuity between modernist change and past tradition, and yet make possible the creative adaptation of Islamic law to the needs of Muslim society. Jurisprudence, the legal principles and methods underlying the reforms, must play a key role in formulating any legislation since it alone can assure both inner consistency and historical continuity with the Islamic tradition. Therefore, while strict adherence to the doctrine of *taqlīd* will not facilitate the creation of adequate legal reforms, neither will piecemeal legislation resting on questionable claims of *taqlīd*. Temporary patch work may satisfy immediate needs; however, in the long run a systematic legal methodology is necesary.

It is not sufficient to claim the right and even the duty of exercising *ijtihād* in bringing about needed change. For while many reformers have taken this position ,few have concretized and applied the usage of *ijtihād* through the development of a systematic methodology for reform. Two essential questions must be answered in constructing such a method: How are the material sources (i.e. the *Qur'ān* and *Sunnah*) to be utilized in legal reform? Does traditional Islamic jurisprudence offer other principles that may be validly applied today to implement reform? This study will explore the possibility of drawing on the Muslim legal tradition to develop a systematic methodology for law reform. While relying on the best of scholarship, it will especially emphasize an examination and evaluation of Muslim modernist writers for whom this problem is both academic and existential. In addition, the application of this legal methodology in the contemporary situation will be concretized through illustrations.

Taqlīd vs. Ijtihād

The classical theory of law presented a very definitive picture of the formation of law, both as to its jurisprudential method (*uṣūl al-fiqh*) and the branches of substantive law themselves (*furū'al-fiqh*) The four sources of law were the *Qur'ān, Sunnah, qiyās* and *ijmā'*. They produced

a body of law consisting of religious observances (*'ibādāt*) and social relations, (*mu'āmalāt*) of which family law is a major part. By the end of the fourth/ tenth century the consensus (*ijmā'*) of scholars concluded that the basic rules of law had been discerned, and so in the future, the task of jurists would be to follow the teachings of the great *Imāms* of the past. Thus, the gates of *ijtihād,* of free interpretation, were closed, and *taqlīd* or imitation reigned. Down through the ages, with few exceptions, the consensus of medieval jurists affirmed the fact of the completeness and authoritativeness of *fiqh* in the four Sunnī schools for all times. The law was complete; there was no need for change.

With the closing of the doors of *ijtihād* came the end of the creative activity during the golden age of Islamic jurisprudence. It was followed by what a noted Muslim jurist has called "the era of sterility,"[6] which has lasted to the present time.

This state of affairs continued for such an extended period of time mainly because Islamic society had also been stable and static. No social forces and few individuals challenged the authority of *taqlīd* or the medieval legal manuals. One noteworthy historical exception, however, is Ibn Taymiyya (d. 728/1328), the noted Ḥanbalī jurist who claimed his own right of *ijtihād.* Others did not follow his lead until the advent of pre-modernist movements in the eighteenth century, including those led by Muḥammad ibn 'Abd al-Wahhāb in Arabia (d. 1206/1792) and Shāh Walīyyullāh of Delhi (d. 1176/1762) who also rejected the blind following of medieval jurists and asserted their right to *ijtihād.* Their general plan was to renew the Muslim community by going back to the primary sources, the *Qur'ān* and *Sunnah* of the Prophet. Their efforts provide a principal legacy to Muslim modernism in the late nineteenth and twentieth centuries.

At the centre of the struggle for legal modernization is the doctrine of *taqlīd.* The great Egyptian modernist Muḥammad 'Abduh wrote in the late 1900's of the disease of *taqlīd* which afflicted many Muslims.[7] 'Abduh often argued that Islam had freed Muslims from blind imitation and enjoined the reasoning of *ijtihād:*

> . . . the *Qur'an* directs us, enjoining rational procedure and intellectual inquiry .... It forbids us to be slavishly credulous and for our stimulus points to the moral of peoples who simply followed their fathers with complacent satisfaction and were finally involved

> in an utter copllapse of their beliefs and their own disappearance as a community.... It (*taqlīd*) is a deceptive thing, and though it may be pardoned in an animal is scarcely seemly in man."[8]

A similar attitude toward the continued right to *ijtihād* was voiced by the principal reformers in India-Pakistan, by Aḥmad Khān in the nineteenth century and in the twentieth century by the most celebrated Muslim modernist of Pakistan, Muḥammad Iqbāl, (1875-1938) when he wrote:

> The closing of the door of *Ijtihād* is pure fiction suggested partly by the crystallization of legal thought in Islam, and partly by that intellectual laziness which, especially in the period of spiritual decay, turns great thinkers into idols.[9]

The influence of the doctrine of *taqlīd* in legislative reform can be seen in the indirect and often inconsistent legal techniques employed by modern Egyptian jurists to provide a *taqlīd* facade and thus avoid the charge of practicing *ijtihād*. Another manifestation of *taqlīd's* power occurred in Pakistan when the 1955 Commission on Family Law Reform claimed to possess the right to *ijtihād*. Their claim resulted in a swift and strong reaction from the majority of the *'ulamā'* and conservative forces, which delayed any family law legislation until 1961.

The Distinction Between Sharī'ah and Fiqh

The dependence of modern legislators during the first half of this century upon *taqlīd* is directly related to an important distinction, often blurred even in modern times, between *Sharī'ah* and *fiqh*. *Sharī'ah* is the Divine Law while *fiqh* is the product of human understanding that has sought to interpret and apply the Divine Law in space time. As K. Fārūkī points out,

> . . . the difference between *sharī'ah* and *fiqh* (is) betwen the Divine Law as it is and the Divine Law as human beings understand it.[10]

It is the confusion of this distinction between *Sharī'ah* and *fiqh*, reinforced by the doctrine of *taqlīd*, that has led to the overly sacrosanct attitude toward the *fiqh* of the ancestors. An awareness of the profound difference between the perfection of the *Sharī'ah* and the imperfection of man's comprehension and application of it is well-illustrated by the reluctance of

many early jurists to accept the office of *qāḍī*, a judicial office that would make them responsible before God not only for the interpretation but also for the application of law.

The Uṣūl al-Fiqh and Reform

The Qur'ān

The primary textual sources of the law are the *Qur'ān* and *Sunnah* and it is to these that reformers must address themselves. As the very word of God, the *Qur'ān* is the fundamental textual souce of the *Shari'ah*. Not a comprehensive legal manual but rather an ethico-religious revelation, its primary legal value is as the sourcebook of Islamic values, from which the specific regulations of substantive law (*furū'al-fiqh*) are derived through human effort.

The primary area of concern in the relationship between the *Qur'ān* and legal reform is exegesis. The distinctive emphasis which emerges in modernist writings is the necessity to get at the motive, intent or purpose behind *Qur'ānic* passages. This approach is characteristic of contemporary Muslim writers such as Ismā'īl Rāgī al-Fārūqī and Ṣubḥī Maḥmaṣānī.[11] It reasserts the original influence of *Qur'ānic* values in the early development of law and, as such, seeks to renew the process by which *Qur'ānic* values were applied to newly-encountered social situations in the first centuries of Islamic legal history. However, the stagnation in the development of law as a result of *taqlīd* and the demands of a rapidly-changing society require once more, as in the formative period, substantive legal reforms to meet the needs of the Muslim family. Therefore, a clear grasp of the content of the Divine Will as expressed in the *Qur'ān* and as applicable today is imperative. The fundamental questions facing Muslims today are those that confronted the early jurists: "What is the morally imperative which the *Holy Qur'ān* had brought from God? How does it read when translated into the language of obligation pertinent to the concrete situation of real life?"[11a]

The possibility of *Qur'ānic* norms providing a complete basis of legal reform has also been recognized by N.J. Coulson, one of the foremost Western authorities on Islamic law who has written: "... the *Qur'ānic* precepts are in the nature of ethical norms—broad enough to support modern legal structures and capable of varying interpretations to meet the particular needs of time and place."[12] By far the soundest and most

effective methodology for a reinterpretation and application of Islamic law based on the *Qur'ān* is an axiological systematization of the *Qur'ān* as suggested by Ismā'īl al-Fārūqī.[13] The task of Muslim exegetes is a systematic study of the value system of the *Qur'ān* and the hierarchization of its ethico-religious values. This method would resolve the problem of *naskh*[14] as well as supply a reasonable explanation for the claim of the comprehensiveness of the *Qur'ān*. Most importantly, it would provide a context within which one could understand the value of specific *Qur'ānic* regulations. Emphasis would be shifted beyond the specific regulations to its intent, to the value it sought to uphold. Ismā'īl al-Fārūqī has written that the:

> . . . real existents in the *Holy Qur'ān* must be that of an example, an explanation or clarification, of an instance, real and historical, to be analyzed so as to reveal the realization or violation of the ethico-religious principle in question.[15]

Thus a *Qur'ānic* prescription has two levels of importance — the specific injunction or command, whose details may be relative to its space-time context, and the ideal or *Qur'ānic* value, whose realization the specific regulation intends to fulfill. Since the task of the Muslim community is the realization of *Qur'ānic* values, the goal of jurists is to insure that *fiqh* regulations embody these *Sharī'ah* values as fully and perfectly as possible. This axiological approach would, for example, resolve a particularly timely problem in family law reform, viz., the equality of the sexes. Verses from the *Qur'ān* have been used by different factions to support woman's subservience to men on the one hand and to defend her rights of equality on the other. This seeming contradiction can be resolved by an analysis of the relevant *Qur'ānic* verses. One can reduce the concerns of these verses to two basic categories: the ethico-religious and the socio-economic.

On the ethico-religious level, the positions of men and women are on an equal standing, both as to their religious obligations toward God and their peers as well as their consequent reward or punishment:

> The Believers, men and women, are protectors one of another: they enjoin what is just, and forbid what is evil; they observe regular prayers, practice regular charity, and obey God and His Apostle. On them will God pour His mercy....God hath promised to believers men and women, gardens under which rivers

> flow, to dwell therein, and beautiful mansions to dwell in gardens of everlasting bliss....(*Qur'ān* LX:71-72)[16]

In the socio-economic sphere, scholars of Islam agree that a major concern of the *Qur'ān* was the betterment of woman's position by establishing her legal capacity, granting her economic rights (dower, inheritance, etc.) and thus raising her social status. However, some scholars also cite *Qur'ānic* verses whose traditional interpretations support what today would be an inequitable position for women. In this regard, perhaps the most commonly cited verse is *Qur'ān* IV:34 which some interpret as indicating men's priority over women.[17]

> Men are in charge of women, because Allah hath made one to excel the other, and because they spend their property (for the support of women)... [18]

However, the "priority" attributed to men over women is best understood as "responsibility" which reflects the socio-economic context of Arabian society during the Prophet's time. Thus, men, by virtue of their roles as protectors and maintainers of their families, enjoyed a higher status within the family. This understanding of man's role is illustrated by another translation of the same *Qur'ānic* verse:

> Men are the protectors and maintainers of women because God has given the one more (strength) than the other, and because they support them from their means....[19]

The resolution of the dilemma caused by this verse in modern times can be found by applying the aforementioned principle of the hierarchization of *Qur'ānic* values. The moral and religious equality of the sexes before God is a most complete statement and represents the highest expression of the value of equality. Furthermore, the ethico-religious equality of women is independent of, and not subject to, change of social situation. This value, then, enjoys a higher degree of priority over any value that is dependent upon a changing social context.[20]

On the other hand, the assertion of man's "priority" in the sense of "responsibility" for woman reflects his superiority over her by virtue of her socio-economic dependence upon him in a particular form of society. Thus, the traditional interpretation of man's priority mirrored the influence of customary practice upon some exegetes. However, when the

social situation of women changes, as it has for increasing numbers of women in the twentieth century, they will no longer necessarily be dependent upon their husbands for maintenance and protection. Consequently, the concept of "priority" of husband over wife in the socio-economic sphere is subject to change.

The two prime areas of family law affecting women's equal rights today are divorce and polygamy. Both provide excellent illustrations of the use of *Qur'ānic* values in justifying legal reform. While Islam recognized the necessity of divorce, it did so reluctantly, viewing divorce as last resort where the marriage contract has been strained to its limits. The existence of these values in early Muslim society is demonstrated by *ḥadīths* such as: "Get married, and do not divorce; indeed, divorce causes the Throne of God to shake!"[21] or "God has showered curses on those men and women who make frequent use of divorce for the sake of sexual enjoyment."[22]

The religious and social equality of women with men is a theme well-documented in the *Qur'ān*. Equality is specifically affirmed in the area of divorce as seen in the following *Qur'ānic* verse: "And women shall have rights similar to the rights against them, according to what is equitable... " (*Qur'ān* II:228). While this verse recognizes equal rights of divorce for women, no *Qur'ānic* verse supports the license of divorce presently awarded to males.

Equality of divorce rights is further exemplified in *ḥadīth* literature. The *Sunnah* of the Prophet embodied in these *ḥadīths* provides a record of the Muslim community's lived experience of *Qur'ānic* values. Where possible, then, while grounding legal changes in *Qur'ānic* values, reformers can also utilize the traditions of the Prophet to ascertain how these values were understood and thus exemplified through the actions of the Prophet. One noteworthy tradition dealing with women's rights to dissolution is that of 'Ā' ishah, the wife of the Prophet, who reported:

> A girl came and stated that her father had given her in marriage and told her to wait till the Prophet arrived. When the Prophet came, I told him the full story of the girl. He at once sent for the father of the girl and enquired of him whether the facts stated were true, after which he told the girl that she was at liberty to choose or repudiate her husband. The girl replied saying that she chose to

retian her marriage, and that she wanted only to know whether women had any rights in the matter.[23]

The very form of this *ḥadīth* reveals its didactic intent — that of affirming women's right of divorce. Another illustration of women's right to a dissolution of an unfavourable marriage is cited in a report from Mālik and Abū Dā'ūd. "The wife of Thābit bin Qais, Ḥabībah bint Sahl.... told the Prophet 'I and Thābit cannot pull together.' When Thābit came the Prophet said to him: 'This is what your wife says about you, so leave her.'"[24] These *ḥadīths*, which reinforce the *Qur'ānic* teaching regarding women's right to divorce, provide an Islamic rationale for legal reform in divorce that will enjoy the twofold support of the traditionally-acknowledged material sources of Islamic law, the *Qur'ān* and the *Sunnah* of the Prophet.

To implement this legal reform, citing the inequitable situation that has resulted from the male's abuse of *ṭalāq*[25] and basing oneself on *Qur'ānic* values, a strong case can be made for establishing equal divorce rights by taking away the male's extra-judicial rights of repudiation and equalizing the option to exercise divorce by requiring that all divorce suits be subject to the courts. *Qur'ānic* support for this arrangement may be found in the *Qur'ān's* "Arbitration Verse."[26]

In addition, based on *Qur'ānic* values, arguments for the restriction and even the prohibition of polygamy are also possible. The *Qur'ān* had introduced reforms in pre-Islamic Arabian practice by limiting the number of wives permitted a man to four, but even this permission was contingent upon the just treatment of each wife: "Marry women of your choice, two, three or four. But if ye fear ye shall not be able to deal justly (with them) then only one." (*Qur'ān* IV: 3). Taking into consideration the social situation in which this verse was written, namely the time following the battle of Uḥud, 3/625 which had caused the deaths of a substantial percentage of Muslim men and thus numerous unprotected widows and children, an argument could be made that the social context of these *Qur'ānic* times made it difficult to go beyond the limitation of four wives. Thus, one could still conclude that the ideal of the *Qur'ān*, as seen in the *Qur'ānic* value of impartiality, is monogamy.[27] Therefore, the *Qur'ānic* value of "equal justice" for each wife can be used as the criterion for restricting polygamy. In order to create a legal regulation reflecting this value, a married man wishing to take another wife might be

required to demonstrate to the courts his ability to treat his wives equally in terms of finances and in love and affection.

Moving even further, the absolute prohibition of polygamy may be based on the requirement of impartiality and the impossibility of its full realization today. *Qur'ānic* support for this contention is also available. In addition to *Qur'ān* IV: 3, a corollary verse states: "Ye are never able to be fair and just as between women, even if it is your ardent desire." (*Qur'ān* IV: 129) Therefore, an Islamic defense of the above legal changes in divorce and polygamy could be based upon the argument that a necessary continuation of the task of Muslim jurisprudence is to insure that the laws of *fiqh* fully express *Qur'ānic* values.[28] In effect, then, these reforms may be viewed as taking those *Qur'ānic* values which traditionally had been regarded as moral exhortations for the Muslims' personal conscience and assuring their realization by incorporating them as legal conditions.

The Sunnah of the Prophet

As has already been indicated in examples of *ḥadīths* regarding marriage and divorce, an axiological approach can also be validly applied to the second material source of law — the *Sunnah* of the Prophet. The *sunnah* also provided those Islamic values which permeated the development of classical legal theory. To focus once more on these ideals, freeing them where necessary from the limitations of specific details which reflect the space-time context of early Islamic society, would enable the reapplication of these *sunnah* values in contemporary Muslim society.

The validity of this method is justified by an appreciation of the historical development of *sunnah* and *ḥadīth*. Twentieth century scholarship has, in fact, demonstrated that the development of Islamic jurisprudence in general and *sunnah* in particular was a much more dynamic and creative process than classical theory would suggest. Indeed, at the centre of the creation of Muslim law by jurists and *qāḍīs* was the application of Islamic values to the concrete social situations facing the community on a wider scale than had ever been imagined. Thus, a more accurate historical view provides a corrective for misconceptions regarding the formation and nature of Islamic law. This results, as will be seen, in a rationale or methodology more conducive to Muslim family law reform.

Although the classical theory of *sunnah* and *ḥadīth* has predominated up until modern times, twentieth century Orientalist scholarship

has questioned the authenticity of the Prophetic *Sunnah*. Drawing on the investigations of I. Goldziher, D.S. Margoliouth and C.S. Hurgronje,[29] Joseph Schacht in his *Origins of Muhammadan Jurisprudence* concluded that the bulk of the Prophetic *Sunnah* could not be considered authentic in the classical sense.[30] Schacht's study led him to believe that very little information about the Prophet, outside of the *Qur'ān*, was handed down from the past. He maintained that what is called *Sunnah* of the Prophet is not the words and deeds of the Prophet, but apocryphal material i.e. the "living tradition of the ancient schools of law" which originated from customary practice and individual reasoning and was back-projected in the second/eighth century to a more authoritative source: first the Successors, then the Companions and finally to the Prophet himself.[31]

Schacht's thesis, then, is that the term *Sunnah* of the Prophet actually developed for the first time in the second/eighth century under the influence of the Traditionalist Movement and the aegis of al-Shāfi'ī who was the first major jurist to limit the term *sunnah* to the verified *Sunnah* of the Prophet, i.e., his model behaviour. Thus, Schacht maintains, the use of this term actually gave legal authority to later customary practices and traditions. Therefore, he claims, what is called *Sunnah* of the Prophet is not a reliable source of Prophetic norms.

Schacht further held that because al-Shāfi'ī had won great status for the *Sunnah* of the Prophet as a material source of law, he had essentially excluded those traditions of the early schools that many believed were true manifestations of the Prophetic *Sunnah*. As a result, many jurists recognized the need to justify and authenticate those traditions they favoured. Thus, the 50-year period following Shāfi'ī's death witnessed a sudden burgeoning of stories (*ḥadīth*) about the Prophet's actions which came about in one of two ways: first, by the original creation of new *ḥadīths* which were actually contemporary interpretations about what the Prophet would have said or done about some problem, or, second, by the projection of *sunnahs* originating from the Companions or Successors back to the most authoritative source, the Prophet himself.[32] On the basis of his research, Schacht finds evidence of legal traditions going back only to 100/722 and not as traditionally maintained, to the time of the Prophet.[33]

The central problem that Schacht's thesis seems to have created for Islamic jurisprudence involved the normativeness of the *Sunnah* and thus its reliability as a source of law. However, upon closer examination, one

realizes that the findings of Schacht, if correctly understood, present a dynamic picture of the development of Islamic law which demonstrates the viability of the sources of Muslim jurisprudence in developing an effective methodology for change.

Much of the misunderstanding about *sunnah* results from its long and various usage in history. The original meaning of the base root of the word, *sanna*, is "to open or pave a road, to introduce or set an example." The secondary meaning is "to follow."[34] *Sunnah* in the sense of first introducing a precedent and second following that precedent was used even in pre-Islamic times. Labīd b. Rabī'ah in his famous Mu'allaqah says "(He) comes from a tribe for whom their ancestors have left a normative behaviour; every people has its *Sunnah* and its originator."[35]

Thus, *sunnah* in pre-Islamic times referred to the customary practice of the people. However, with the advent of Islam, while some pre-Islamic customs were rejected, most continued — some reformed, some supplemented, and others approved either expressly or tacitly, so that in any case, as Aḥmad Ḥasan observes, all bear the "hallmark of the Prophetic sanction."[36] Thus they could never again be merely the customs of pre-Islamic days because tribal practices and beliefs (i.e. customs) had been modified by the *Qur'ān* and by the example of the Prophet. In addition Muḥammad's judgment's attitudes and conduct revealed *Qur'ānic* values in concrete form as he lived daily in the community. This concrete revelation set new precedents to be followed—the Prophetic *Sunnah*. These precedents were acted upon and further developed as future generations set their own examples or *sunnahs*. It is in this sense that Abū Yūsuf in his *Kitāb al-Kharāj* (chapter on *Ṣadaqāt*) asks the Caliph Hārūn al-Rashīd "to introduce some good *sunnahs*."[37] The values of the Prophetic *Sunnah* permeated early Muslim society both in themselves (i.e. Muslim works and deeds) and as ideals in light of which new practices were judged and either accepted or rejected.

But just how the reality of the *Sunnah* of the Prophet had been operating through the early genertions must yet be explained. As has been said, the term "*sunnah*" has been used throughout history to describe a number of phenomena. Thus far, we have discussed the meanings or usages of the term *sunnah* as precedents established by the ancestors in pre-Islamic Arabia as well as the Prophetic *Sunnah* or Muḥammad's ideal conduct that superseded and modified the pre-Islamic customs. This

led to the *sunnah* or exemplary behaviour of the earliest genertions (the Companions) in the Islamic community, the behaviour that grew out of the precedents set by the Prophet. To this list, for further clarification, we must add the *sunnah* of the next generation, the Successors, which consisted of their interpretations of law based on the living tradition of the earlier generations and the *ḥadīth*. In addition, the interpretations of early jurists in this period who reasoned on the basis of *Sunnah* differed. Disagreement about which incidents in the Prophet's life were more significant to a certain problem and their application naturally led to regional interpretation, and so regional *sunnah* developed. All, however, were ultimately based on Prophetic *Sunnah*.

A significant point to remember is the fact that in early thought *Sunnah* of the Prophet was far from being differentiated from the *sunnahs* that followed, the *sunnahs* of the Companions or of the Successors. People who believed that they were following the Islamic norm would naturally equate the Prophet's *Sunnah* with their own. Thus, for example, the early Madinese community viewed itself as the community of the Prophet, having lived directly under the Prophet and his Companions. Quite naturally, they would equate their way of life with the *Sunnah* of the Prophet and would never have occasion to draw distinctions.

Throughout early history Prophetic *Sunnah* served as the point of reference for Companions, and through their example, for the Successors who followed. The admissibility of an action was judged in the light of the Prophetic ideal, *sunnah* values. This understanding of Prophetic *Sunnah*, while it adds a more dynamic and creative dimension to the theory developed by medieval Muslim scholars, comes to the same conclusion in its emphasis on the importance of *sunnah* as a material source of law. The normativeness of *sunnah* as a source of Islamic values remains, while a more historical and developmental understanding emerges.

Like the traditional understanding of Prophetic *Sunnah*, the classical idea of *ḥadīth* literature as bonafide reports that convey the Prophet's *Sunnah*, has been the subject of considerable controversy. Modern Orientalist scholarship, following its theory regarding the development of *Sunnah*, has maintained that most, if not all, of the traditions ascribed to the Prophet were actually written much later and therefore, lack authenticity. In fact, this analysis of *ḥadīth* leads to the question of whether the Traditionists regarded the *ḥadīth* as strictly historical. Many *ḥadīths* themselves seem to almost openly admit the formulation of new traditions. Consider,

for example, the tradition in which the Prophet says: "Sayings attributed to me which agree with the *Qur'ān* go back to me whether I actually said them or not," or the *ḥadīth* in which the Prophet says, "whatever of good saying there be, I can be taken to have said it."[38]

These *ḥadīths* and many others evidence concern not for strict historicity but rather for sound interpretation of *Qur'ānic* norms. In keeping with this line of thought, Fazlur Rahman calls the *ḥadīth* "the *Sunnah Ijtihād* of the first generations of Muslims,"[39] or in another place, a "gigantic and monumental commentary on the Prophet by the early community" which "constitutes an epitome of the wisdom of Classical Muslims."[40]

Thus, despite the lack of historicity (in its strictest sense) of some *ḥadīth*, they still represent the Prophet-directed vehicle for the sound interpretation and application of *Qur'ānic* norms. As such, they provide a rich source of Islamic values as lived and realized by the early community. As H.A.R. Gibb has observed:

> . . . study of the *ḥadīth* is not confined to determining how far it represents the authentic teaching and practice of Muḥammad and the primitive Madinan community. It serves also as a mirror in which the growth and development of Islam as a way of life and of the larger Islamic community are most truly reflected.[41]

In conclusion, while the result of twentieth century critical studies does render an interpretation of the historical development of *sunnah* and *ḥadīth* which differs from the classical theory, yet this does not constitute a threat to Islam. Rather, a reinterpretation of the formation and nature of Islamic jurisprudence emerges. The result is a dynamic picture of the ongoing process of Islamization which is reflected in the *ḥadīth* collections of the *Sunnah* of the Prophet. This same traditional methodology (i.e. as newly understood) presents a viable method for contemporary legal reform. That process which was essentially formulated to meet the needs of the classical period and was unfortunately "frozen" by the "closing of the door of *ijtihād*" and ascendancy of *taqlīd* can now be continued once more. An integral part of this new attempt at Islamization can be the employment of the traditional method of ensuring that legal reforms be formulated in light of *Qur'ānic-Sunnah* values.

Ijtihād, Ra'y and Qiyās

In addition to the two material sources of Islamic law, the *Qur'ān* and *Sunnah*, the classical sources (*uṣūl al-fiqh*) included *qiyās* and *ijmā'*.

As with the textual sources, the fuller historical persepctive available today enhances their viability as mechanisms for contemporary legal reform by showing their original dynamic nature which had long been forgotten.

As we study the development and usage of *qiyās*, we must place it within the general context of the development of *ijtihād*, of which it is a part. *Ijtihād* means "self-exertion," to exert oneself in understanding and interpreting the *Sharī'ah*. During the period of the early development of Islamic Law (the late Umayyad Period), the *ijtihād* was *ijtihād al-ra'y*. the exercise of "opinion" by the early *qāḍīs* (judges).

Ra'y meant "... the calm formulation of a (sound) opinion in contradistinction to *hawa* meaning a rash opinion formed under the influence of passion or prejudice."[42] The history of Islamic law shows that ra'y played an important role in the decisions of the early *qāḍīs* and the functioning of the ancient schools of law. The task of the early *qāḍīs* was the application of local law. Basing themselves on the customs of their local as well as *Qur'ānic* norms and available *Sunnah*, the *qāḍīs* would render their opinion via legal decisions. Thus, the legal decisions of the courts were almost totally dependent upon the personal discretion of each *qāḍī* both as to his understanding of local law as well as the extent of his application of *Qur'ānic* norms.

Ra'y also played an important role in the early development of the ancient schools of law during the early second/eighth century; *ra'y* is especially associated with the schools of Iraq. Critical of many of the legal practices of Umayyad courts, pious Muslims began to review existing legal practice in the light of *Qur'ānic* norms. This process of systematic Islamization of local law received a special impetus and official sanction when the 'Abbāsids came to power in 750 A.D. The jurists of the early law schools also empolyed *ra'y* in the formulation of new rules. Finding themselves a century after the Prophet in a socio-economic situation quite different from that of seventh century Arabia, often the task of the Iraqians involved the formulation of Islamic solutions for new problems. Thus, reason was employed to extend divine prescriptions to novel situations. In time, the Iraqian use of discretion became progressively more systematic and disciplined by the use of *qiyās*, analogical reasoning.

Throughout the dynamic processes described above, the major activity which emerges is reason's application of *Sharī'ah* values derived from the *Qur'ān* and *Sunnah*. These were a determining factor in *qāḍī*

decisions, and most importantly, constituted the ultimate standard for the process of Islamization undertaken by the ancient schools of law. Furthermore, *Shari'ah* values continued to occupy a central role in the drafting of Islamic solutions for newly encountered problems: first, in the use of *ra'y* and even more consistently and systematically, with the development of *qiyās* (*ijtihād al-qiyās*). The role of *Shari'ah* values in the process of *qiyās* has aptly been summarized by K. Fārūkī in this way:

> . . . *qiyās* is the deduction, from a *shari'ah* principle, of the *ḥukm*, or *shari'ah* value, applicable to a new problem.[43]

Istiḥsān and Istiṣlāḥ

The use of reason, in fact, stretched beyond the *ijtihād al-qiyās* which came to be the only form recognized by classical theory, for Islamic jurisprudence was concerned with insuring the *Qur'ānic* emphasis upon human welfare, justice and equity.[44] Some means had to be provided to guarantee that if the letter of the law arrived at through *qiyās* resulted in a harsh or rigid conclusion, the spirit of the law could be restored. This was done through the following forms of *ijtihād: istiṣḥāb* (presumption of continuity), *istiḥsān* (juristic preference), and *istiṣlāḥ* (public interest). The latter principles seem best-suited for contemporary legal reforms for they provide a greater scope for the exercise of *ijtihād* and clearly put into perspective the ends of law. *Istiḥsān* and *istiṣlāḥ* would provide the principles for legal adaptation and change through judicial and legislative means, respectively. *Istiḥsān* is a principle associated especially with the Ḥanafī school. It was used to achieve equity when strict analogical reasoning (*qiyās*) led to an unnecessarily harsh or rigid result. Proponents of this principle could cite the *Qur'ān* to support their position:

> "Those who listen to the Word and follow the best (*aḥsanahu*) meaning in it: These are the ones whom God has guided and those are the ones endowed with understanding." (*Qur'ān*, XXXIX:18).

The employment of this principle by justices in courts of law can do much to facilitate the equitable application of Islamic law to the needs of Muslims. For all practical purposes, such an application has existed in one area of the Muslim world — India-Pakistan. Here the justices, while acknowledging their obligation to apply Islamic law in family law cases, have asserted their right to depart from the letter of the law where justice and equity warrant.

An example of the possible use of *istiḥsān* by the courts occurs in custody and maintenance cases. Islamic law sets down rather precise prescriptions regarding the custody and maintenance of a child. However, the presumption is that the welfare of children is always in the custody of the prescribed relatives. For example, the law prescribes that a girl should remain with her mother until puberty, at which time she goes to the custody of her father. But what if either parent is an unfit guardian? The recognition of a judge's right to exercise *istiḥsān* in custody cases insures equity by allowing the welfare of the minor to prevail over the letter of the law.

The employment of the *Mālikī* principle of *istiṣlāḥ* as a source of contemporary legal reform has been championed by Muḥammad 'Abduh and his follower, Muḥammad Rashīd Riḍā[45] and their Salafīyyah movement.[46] The traditional Mālikī position was that *mu'āmalāt* (social relations) regulations of the *Qur'ān* and *Sunnah* had rational connotations and that God's purpose in revealing them was the promotion of human welfare. Thus, a jurist should select an interpretation which best accorded with the public interest (*maṣlaḥah*).

'Abduh and Riḍā extended this concept so that where social needs were not covered by specific *Sharī'ah* texts, a jurist using his reason might interpret the law in light of the public interest. The result was a method (*istiṣlāḥ*) by which Islamic law might continuously and comprehensively be adapted to changing societal needs.

Istiṣlāḥ can function today in two instances: first, when conclusions arrived at through *qiyās* seem contrary to public interest; second, where a social need exists and the interest involved has not been covered by any specific *Sharī'ah* texts. This latter usage would be the more prevalent in modern Muslim law reform. Therefore, the intorduction of legislation would be possible provided such legislation is in the public interest and in harmony with the spirit of the *Sharī'ah*, i.e., *Sharī'ah* values. The result is a comprehensive methodology for reform which provides the recognition of the sociological dimension of law as well as its Islamic valuational or axiological character. While this approach differs somewhat from classical jurisprudence (law as the product of the *Qur'ān* and *Sunnah* texts and analogical deductions, based on these texts), it is, in fact, more in accord with the actual history of Islamic law in which historical and sociological influences played an important role.

One result of this use of *istiṣlāḥ* is a greater emphasis on the probability of law rather than its infallibility. The greater recognition of the use of reason, in determining the more equitable solution in light of public interest and its concordance with *Sharī'ah* values, underscores the time-space limitations of the substantive laws of *fiqh*.

The employment of *istiṣlāḥ* as outlined above would resolve a juristic difficulty caused by the position of Pakistani reformers on the Commission of 1955. Their advocacy of a right to *ijtihād* based solely on social need and the lack of a *Qur'ānic* injunction against it failed to call forth any Islamic rationale. However, the same results could be achieved by the advocacy of the principle of *istiṣlāḥ*. Its use would result in the more positive emphasis of looking to the revealed texts for *Sharī'ah* values to support the legislation rather than the negative criterion of lack of *Qur'ānic* injunction. In addition, use of the criterion of public welfare means recognition that should the interests of the community necessitate change, the law can adapt itself. The result would be a truly dynamic and comprehensive law.

The Egyptian reform that sought to protect the rights of orphaned grandchildren of the deceased,[47] provides another good illustration of the possible use of *istiṣlāḥ*. In drafting their reform legislation, Egyptian reformers took a circuitous route and avoided a direct change in the law of inheritance. Since they could find no traditional authority to ostensibly follow, they indirectly provided for orphaned grandchildren by introducing the concept of "obligatory bequest" in the law of testamentary disposition.

However, a more direct reform in the law of inheritance itself could have been achieved by a twofold argument which satisfied the two criteria for the exercise of *istiṣlāḥ*, i.e., public welfare and consonance with the spirit of the *Qur'ān*. First, the general welfare of Muslim society requires the rectificaton of this deficiency in the law of inheritance so that the rights of orphaned grandchildren are protected. Second, such a change is in harmony with the spirit of the *Qur'ān* in which the welfare of orphans is a prominent theme.[48] In addition, the general intent of the *Qur'ān* regarding inheritance is to protect inheritance rights, as witnessed by the "inheritance verses,"[49] and not to deprive someone of his share.

Ijmā'

Because of its role in closing the door of *ijtihād, ijmā'* has often been associated with the stagnation of *taqlīd*. Such an understanding can

be deceptive if *ijmā'* is understood as an unchanging Islamic institution from earliest times. In fact, the concept of *ijmā'* enjoyed a complex history of formulation, best characterized as a living creative process.

The earliest stage of *ijmā'* was that of the period immediately after the Prophet when almost every Muslim had been a "Companion" of the Prophet. During this time, *ijmā'* functioned not as a conscious concept but rather as the agreed-upon practice of the Muslim community living in accordance with the *Qur'ān* and the example of the Prophet. This same situation held true for the next two generations, that of the "Successors" i.e. the *tabi'īn* (Companions' children) and the *tābi'ī al-tābi'īn* (Companions' children's children).

With the passage of time, the community grew and spread geographically. Muslims increasingly found themselves in new social situations faced with many new problems. It was during this period that the early law schools developed and that *ijmā'* as a formal legal principle emerged. Political and juristic leaders of the early communities in Madinah, Iraq, Syria etc. exercised *ijtihād* in light of *Qur'ānic* values to determine new modes of action. The agreed-upon practice of these leaders (*imāms*) constituted the *ijmā' al-a'immah*, i.e. the consensus of the leaders. Early *ijmā'*, then, provided the Muslim community with a living instrument for revision and growth in the creation of fresh law to fit changing times. Thus, in the ancient schools of law, the relationship between *ijtihād* and *ijmā'* was an ongoing dynamic process, moving from individual opinion to community approval to accepted practice, to difference of opinion if conditions changed, and therefore to reinterpretation of *ijtihād,* and *ijmā'* again.

Thus, *ijmā'* contributed to the great diversity of interpretation and doctrine in the Muslim community, a diversity which, inevitably clashed with the strong *Ḥadīth* Movement in the second/eighth century,[50] with its successful drive for uniformity both in the sources of law and in the substantive law itself. The more regional *ijmā'* practiced by the early schools (i.e. *ijmā' ala'immah*) was strongly condemned by al-Shāfi'ī who had recognized only the consensus of the entire Muslim community as valid, and thus insistently told the differing schools that they did not have agreement (*ijmā'*) but rather disagreement (*iftirāq*). Al-Shāfi'ī's conception of *ijmā'* is radically different from that of the early schools. For them, *ijmā'* was not al-Shāfi'ī's theoretical and, practically speaking, unworkable source of law which required a total (100%) agreement of all Muslims. The

ijmā' of the early schools, linked as it was with *ijtihād* in a dynamic dialectical process, provided a powerful means for the adaptation of law to changing circumstances. But with the increasing power of the *Ahl al-Ḥadīth* and the consequent rejection of original interpretations of the law through *ijtihād,* the organic inter-relationship of the two was severed and *ijmā'* was isolated. No longer in dynamic tension with fresh *ijtihād,* it became a principle of rigid approval which, once made, was now considered forever binding.

In the final classical theory of Islamic law, established in the fourth/tenth century, the agreed-upon doctrines of the schools were considered fixed, unchangeable. Henceforth, jurists were to practice *taqlīd* and follow the established principles of their individual schools. Thus the "closing of the door of *ijtihād*" in the medieval period, which had its authoritative basis in the consensus of the scholars of the time, was the prime cause for the general loss of dynamism.

A noteworthy exception in this process of legal stagnation was al-Ghazzālī (d. 505/1111). He recognized the consensus of the *'ulamā'* (*ijmā'al-'ulamā'*) of a generation as a source of law and thus continued to acknowledge the possibility of a living consensus. However, the process of legal stagnation was not to be reversed. Under the impact of the Mongol invasions of the seventh/thirteenth century and their threat to the survival of the Muslim community, the *'ulamā"s* agreement that *ijmā'* consisted solely in the *ijmā'* of the past was solidified. Thus, with finality, the door of *ijtihād* was closed and remained closed until modern times.[51]

Modernist Muslim thought has sough to restore *ijmā'* to its rightful place and thus re-establish the dynamic dialectic of the *ijtihād-ijmā'* relationship. Muḥammad 'Abduh, the "Father of Muslim Modernism," who was a strong advocate of the role of reason and thus the right of *ijtihād,* viewed *ijmā'* as a consensus of reason which can reasonably be presumed free from error.[52] However, 'Abduh's concept of *ijmā'* is less dogmatic than the traditional notion. His idea of freedom from error is more the presumption of a reasonable possibility, where the agreement of a generation's most learned (*mujtahidūn*) is obtained, than of an absolute infallibility.[53] Thus, for example 'Abduh recognized the right of future generations, in view of changed circumstances, to reinterpret *fiqh* regulations. In this way, the dynamic relationship between reason (*ijtihād*) and *ijmā'* as collective reason or a consensus of reason is restored.

Many modernists follow 'Abduh's position *vis a vis ijmā'* and the question of its infallibility. In essence, no denial of the value and binding power of *ijmā'* exists relative to the generation in which it occurred. For indeed, the function of *ijmā'* is to serve as a brake and a safeguard on individual subjective *ijtihād* (which by itself is no more than fallible conjecture (*ẓann*) and to either reject it as erroneous or approve it as applicable for Muslim society. The concept of *ijmā'* that modernists reject is an unlimited or absolute infallibility which denies that such an *ijmā'* is open to question and change in future generations as societal circumstances change.[54]

Among reformers in the Indian subcontinent, a progressive reinterpretation of *ijmā'* has occurred in an attempt to adapt it to the needs of contemporary Muslim society. Ameer 'Alī (1849-1928) had advocated the broadening of the notion of *ijmā'* beyond the classical limitation to the learned *'ulamā'*) and its incorporation within the constitutional government of a modern state.[55] This general notion has become progressively more developed in the writings of Pakistani reformers such as Muḥammad Iqbāl (1875-1938), considered by many to be the most outstanding twentieth century modernist of India-Pakistan, and Kemāl Fārūkī, a contemporary Muslim legal scholar.

Iqbāl described *ijmā'* as "perhaps the most important legal notion in Islam."[56] He recommended the transferral of *ijtihād* "from individual representatives of schools to a Muslim legislative assembly... "[57] Thus the *ijmā'* of the community would be equated with the consensus of the legislatures of modern Muslim states.

Fārūkī takes Iqbāl's ideas and develops them even further for some very basic and specific questions exist. In what sense are legislators qualified to exercise *ijtihād* for the community? By traditional standards, many, if not most of the legislators would lack the qualifications of a *mujtahid.* Furthermore, what percentage of the vote of a legislature would constitute an *ijmā'?* And finally, in modern times, how can the consensus of a national legislature be equated with the consensus of the *ummah* of which Pakistan is only a part?

Fārūkī answers these in the following way: first, in an age of specialization, the possibility of an individual possessing all the qualifications of a *mujtahid* seems doubtful. Therefore, an alternative possibility would be a "collective group of *mujtahīdūn*" who are specialists in the required

fields.[58] Besides the *'ulamā'*, scholars in other fields related to social and legal change such as sociology and economics would be included because of the bearing of their respective disciplines on law reform. This *Ijmā'* Committee would be elected by an electoral college selected by popular vote. The committee would be charged with deciding the admissibility of legal drafts. The emphasis, therefore, would be shifted from the great *mujtahid* of a specific law school to a collective *ijtihād* exercised not retrospectively but prospectively.[59]

Secondly, Fārūkī points out that the percentage for an *ijmā'* should represent "the great majority" (75%) and not merely a "bare majority," (51%)[60] and finally, he would regard the *ijmā'* of Pākistan as a local *ijmā'*, binding on the community, and would leave the question of the relationship of different local *ijmā'* decisions to the *ijmā'* of the entire Muslim community to future resolution.[61]

What emerges from these suggestions by Fārūkī is a reinterpretation of *ijmā'*, and one which is significantly different from that of traditional Islam. Indeed, the transition from a retrospective to a prospective *ijmā'* involves a substantial reinterpretation. The change is so radical in comparison to the traditional (retrospective) understanding of *ijmā'* that besides the ideational question regarding the propriety of any longer calling it *ijmā'*, from a practical point of view, its acceptance by the majority of Muslims seems very doubtful. Iqbāl's first suggsetions regarding *ijmā'* occurred over 40 years ago and Fārūkī's refinements were expressed over 12 years ago and yet neither concept of *ijmā'* has been implemented within Pakistan. From a traditional point of view, it might be said that their *ijtihād* has failed to survive the test of the *ijmā'* of the community.

Effective change need not necessitate this total reorientation of *ijmā'*. The main suggestions of Iqbāl regarding the transfer of *ijtihād* to a legislature and of Fārūkī concerning the mechanics of this legislating *ijtihād* can be used productively for dynamic legal changes to meet societal needs. At the same time, the difficulties which their method raises can be circumvented by equating the resulting social legislation with a collective *ijtihād* alone and not *ijmā'*. Thus, Fārūkī's *Ijmā'* Committee might be viewed more properly as an *Ijtihād* Committee and the legislation drafted and enacted as a collective *ijtihād*. While the particular forum for *'ulamā'* and other specialists' input might vary, the recognition of resultant legislation as a collective *ijtihād* is sound. It is at this point that the dynamic

relationship of *ijtihād* and *ijmā'* can be restored.

A retrospective *ijmā'* provides the test of time and community experience which an *ijtihād* must undergo in order that its long-range value be accepted by the community. If the new legislation does not survive the questioning and debate within the community, it will be repealed and replaced. In contrast, should it survive this test, then its recognition will be established. However, it is importnt to note that even this fresh *ijmā'* may in the future be subject to renewed *ijtihād* as the dialectical process continues.

An illustration will serve to clarify this process and its importance. The question of polygamy has been a major issue in twentieth century Muslim family law reform. Reformers in Egypt and Pakistan (as in most Muslim countries) have attempted to restrict the exercise of polygamy through legislation based on their interpretation of *Qur'ānic* values which conclude that monogamy is the *Qur'ānic* ideal and thus should be the community norm. The reform called for would constitute a significant departure from traditional Muslim social and legal practice. Furthermore, it means serious change affecting husbands, wives and children. Therefore, the acceptance of monogamy as a long-range religious norm must be approached cautiously. To equate a legislative change enacted at a particular point in history by a single act of a legislative group with the *ijmā'* of the community is a drastic step. The passage of such legislation may be due to fortuitous circumstances in which a strong minority legislates a position repugnant to the majority. Such reform legislation may be repealed soon afterwards, or simply ignored by the majority of the population. Equating such an activity with *ijmā'* would reduce it to a meaningless concept.

Historically, it is possible to view the question of polygamy *vis a vis* monogamy in the contemporary Muslim world as a juncture in the *ijtihād-ijmā'* dialectic. Throughout the twentieth century, reformers have called for change. This became concretized in draft legislation such as that submitted to and approved by the Egyptian Cabinet in 1927 but vetoed by King Fuād. In 1953 *Article* 17 of the *Syrian Law of Personal Status* enacted the first law restricting polygamy. Since then other countries such as Pakistan have passed similar legislation. However, the most sweeping legislation occurred in 1957 when *Article* 18 of the *Tunisian Law of Personal Status* decreed that "polygamy is prohibited."[62]

The debate regarding polygamy versus monogamy in the Muslim world today continues. Personal as well as collective (legislative) *ijtihād* has offered two basic positions — restriction of polygamy or prohibition of polygamy. These are juxtaposed to the traditional *ijmā'* supporting the right of polygamy. Out of this protracted debate, the trend seems to be leading toward a new *ijmā'* in the near future.

Custom[63]

In seeking an Islamic rationale for contemporary legal reforms, besides the official sources of Islamic jurisprudence, there are "extraneous sources" (from the classical viewpoint) which nevertheless have in fact contributed significantly to substantive law. By far the most important of these is customary practice. A study of the role of custom provides a fuller picture of the sources of the material content of law, helps to explain the existence of certain attitudes more evident in classical family law, and again underscores the creative and dynamic historical process which produced Islamic law.

Although not officially and theoretically recognized, customary law played a key role in the development of Islamic law. Custom (*'ādah*, *'urf*) in pre-Islamic Arabia, as in many early traditional societies, served as law. For the majority of the Arabs — the Bedouins and the minority sedentary populations who inhabited towns such as Mecca and Madinah — custom, the body of unwritten rules which had been developed and passed down through the generations, provided the positive laws of their society. Normative legal custom constituted the *sunnah* (path or way) of the tribe.

The advent of Islam signalled a profound and radical change in Arabian society. Yet, while recognizing the introduction of new beliefs, regulations and institutions, a good deal of the Islamic way consisted of a reform of existing customs and a continuance of that which was not in need of specific reform. Thus, customs which were not in conflict with *Qur'ānic* or *Sunnah* texts, or were not deemed contrary to the spirit of the *Shari'ah*, became part of the content of *fiqh*. There are numerous ways in which custom became incorporated into Islamic law, among them, the procedures of the *qāḍīs* (judges), the content of traditions (*ḥadīth*), the Mālikite regard for the *ijmā'* of Medina, and the *fatwas* of the *muftīs*. In the early courts of the Umayyad and early 'Abbāsid periods, *qāḍīs* in rendering a decision would look to the *Qur'ān* and *Sunnah* for guidance, but where no relevant

texts were found, they would then resort to the custom of their community. An example from the sphere of family law is the division of dower (*mahr*). The practice was to separate the dower into two parts, the first paid immediately, the other deferred usually until the ending of the marriage. In situations in which the proportionate amounts had not been stipulated in the contract, the allotment was usually determined on the basis of local custom following the maxim "Custom ranks as a stipulation."[64] This same maxim has been recognized in modern times in the *Majallah*[65] (*Ottoman Civil Code*): "A matter recognized by custom is regarded as if stipulated by agreement." (Article 43)[66]

A second avenue for the entrance of custom into Islamic law is the tradition (*ḥadīth*) literature. Following the usual classification of the *Sunnah — al-sunnah al-qawliyah*, sayings of the Prophet, *al-sunnah al-fi'liyah*, his deeds, and *al-sunnah al-taqrīriyah*, it is this last category, comprising actions performed in the presence of the Prophet without his disapproval, which as F.B. Ṭyabjī says, "... must obviously represent largely the original customs and usages of the pre-Islamic Arabs.[67]

The *ijmā'* of Mālik, which was restricted to that of the Madinan community, is indicative of another historical source for custom. Where no explicit text existed, the customs of the Madinese were regarded as a legal source. Besides the importance of the Prophet's community, this Mālikī concept also reflects the early tendency for the *ijmā'* to be a local geographical consensus (the *ijmā'* of Kūfah, Baṣra, or Madinah) which became the *sunnah*, ideal pattern of behaviour of each local school. For example, the Ḥanafī doctrine of marriage equality (*kafā'ah*) which required that the husband be the equal of his wife in a number of respects, among them lineage, financial standing and profession, is peculair to the Ḥanafī school and reflects the practice of a more socially-stratified society than Madinah, indeed, of society in which class consciousness had been present throughout a millennium of Persian history.[68]

A final historical source for the incorporation of custom in law was the *fatwās* (opinions) of *muftīs* (legal consultants). A *fatwā* is an opinion on a point of law rendered by a *muftī* in response to a question submitted to him by a private individual or by a *qāḍī*. The need for the office of *muftī* existed from the earliest period of legal-development. Due to the phenomenal expansion of Islam, the Islamic community found itself mingling with new cultures, novel ideas and new problems. Thus, there were myriad occasions necessitating refrence to competent legal scholars. As

law developed and became increasingly complex, these legal specialists became increasingly important. Where a specific revealed text did not provide an answer to the legal problem before them, *muftīs* adopted or modified customs of the day in light of *Sharī'ah* values. As the times and their customs changed, so too might the substance of the *fatwā*. As S. Maḥmaṣānī points out:

> Examples of changing *fatwās* and rules with regard to positive legal matters are beyond calculation. These included what later Ḥanafī jurists observed, namely that the founders of the schools had based many of their *fatwās* upon customs prevalent in their days, so that if those customs had been different their *fatwās* would have been different also.[69]

Although the function of the *muftī* was essentially private, and so a *fatwā* was not legally binding, yet it could be utilized by a *qāḍī* and incorporated in his decision. More importantly, when a *fatwā* issued by a *muftī* on a new problem became recognized by the *ijmā'* of the scholars of a school, it was incorporated in the handbooks of the school.[70] Finally, compilations of the responses of noted *muftīs* came to be reckoned among the important authoritative legal references complementing the standard *Sharī'ah* manuals.

Although not officially recognized by classical theory, customary practice, then, did form a substantial part of Islamic law. This realization should assist reformers in three ways. First, it underscores the extent to which custom did contribute to the body of substantive law and so the inclusion of modern social standards or customs can be viewed as consistent with the manner in which law had been formulated to meet particular social needs in the past. Sceond, it demonstrates the process of Islamization of this customary law and therefore lays the foundation and provides the method for the replacing of old customs with newly Islamized customs appropriate to changed social situations. Third, it emphasizes the extent to which *fiqh* was influenced by fallible and mutable human understanding both in its content (since custom is the non-revelational product of a human society) and method (the reason of the *qāḍīs, muftīs,* and jurists of the law schools whose decisions incorporated custom in law). This makes the distinction between *Sharī'ah* and *fiqh* that much clearer to all who still do not distinguish the immutable and the sacrosanct in Islamic law from the fallible, the particular and the human.

Conclusion

For the first time in almost ten centuries, major changes have been effected in Muslim family law. However, despite this movement, serious methodological problems, affecting the long range consistency, credibility and implementation of legal reforms exist. At the heart of this difficulty is the question of continuity in change as movement occurs from a traditional society and its parallel family laws to the new demands of the modern period. While reformers have often been satisfied with paying lip service to the tradition as they sought to provide an Islamic facade for their legal drafts, this approach is neither satisfactory nor necessary.

The complex origins of Islamic law, long forgotten by the traditional picture of classical theory, have resurfaced and, if properly interpreted, provide a historical justification for Muslim family law reform. More importantly, a new understanding of law's development demonstrates that the traditional sources (*Qur'ān, Sunnah, qiyās, ijmā'* and *ijtihād*) are fully capable of again providing the methods for reform.

To once more realize the divine imperative in history, the Muslim community possesses its immutable source — the *Qur'ān*. Their constant and firm belief that this sourcebook of Islamic values is the very revealed word of God provides Muslims with the finished categories upon which to base their legal reform. *If Qur'ānic* values are applied correctly, Muslim society can accommodate social change in the twentieth century while it also re-establishes its link with the history of the Islamic tradition. Furthermore, the task of reassessing the role of the *Sunnah* and its utilization in legal reform will not be a novel endeavour. Voices calling for a historical critique and re-evaluaton of the *ḥadīth* have existed for over two centuries going back to premodernist reformers such as Muḥammad 'Abd al-Wahhāb. Moreover, twentieth century Muslim scholarship has made great strides in providing critical studies of the *ḥadīth* literature.

However, the successful implementation of the last two sources of legal reform will provide the greatest challenge for contemporary Muslim society in the context of socio-political problems in Muslim countries today. The two most important variables affecting the use of *ijtihād* and *ijmā'* are education and governmental stability. The basic fight against illiteracy as well as the struggle to reform the educational systems of both secular and religious institutions is essential. Intertwined here is the complex problem of insuring that the educational system incorporates the

best of both scientific knowledge and religious values. For such an education will be a key factor in assuring the expertise necessay for a wise exercise of *ijtihād* by reform-minded leaders and an enlightened community consensus (*ijmā'*) which keeps pace with social change.

Secondly, the political status of Muslim countries must enjoy stability so that governmental legislation may effectively institutionalize social change through legal reforms and consequently recast and remould social and judicial institutions to provide for the individual and collective needs of Muslims in a modernizing society.

The new legal and social problems existing today call for a renewal of the early glorious history of Islam and a continuance of the process of Islamization. Through such a process, Muslims can again produce a law derived from divine revelation that meets the needs of an Islamic society in the twentieth centurny.

NOTES

1. For example Articles 2 and 3 of Egypt's *Law No*: 25 *of* 1929.
2. For example, in Pakistan the use of *takhayyur* in adopting Mālikī law was far less consistently followed in drafting the *Dissolution of Muslim Marriages Act* of 1939 than similar Egyptian legislation of 1920 and 1929. Pakistan's law departed from Mālikī opinion regarding the scope of its definition of desertion, the length of the maintenance period, the cumulative nature of maintenance, tne detailed procedures governing arbitration in maltreatment cases, and the form of judicial divorce.
3. Cf. also N.J. Coulson, *A History of Islamic Law*, (Edinburgn: Edinburgh University Press, 1964), pp. 197 ff. for a perceptive treatment of the functioning of this device in modern legal reform.
4. *Article* 17 of Egypt's *Law of Waqf of* 1946 fused the differing positions of the Mālikī and Ḥanbalī schools and produced a new regulation foreign to both schools.
5. Criticism has not been restricted to Muslim traditionists. Joseph Schacht, a noted Western scholar of Islamic law, has characterized the legal method of reformers as "... unrestrained eclecticism." "Problems of Modern Islamic Legislation", in *The Modern Middle East*, ed. by Richard H. Nolte, (New York: Atherton Press, 1963), p. 190.
6. Ṣubḥī Maḥmaṣānī, *Falsafat al-Tashrī' fī Al-Islām*, (Leiden: E.J. Brill, 1961), p. 39.
7. Muḥammad 'Abduh, *The Theology of Unity* (*Risālat al-Tauḥīd*) trans. by Isḥāq Musa'ad and Kenneth Cragg, (London: George Allen and Unwin, 1966), p. 66.
8. *Ibid.*, pp. 30-40.

9. Muḥammad Iqbāl, *The Reconstruction of Religious Thought in Islam* (rpt., Lahore: Sh. Muḥammad Ashraf, 1971), p. 178.
10. Kemal Fārūkī, *Islamic Jurisprudence* (Karachi: Pakistan Publishing House, 1962), p. 104; cf. also pp. 18-19, and A.A.A. Fyzee, *Outlines of Muḥammadan Law*, 3rd ed. (New York: Oxford University Press, 1965), p. 21.
11. Ismā'īl Rāgī al-Fārūqī, "Towards A New Methodology of *Qur'ānic* Exegesis, *Islamic Studies*, I (March, 1962), 35-52. Cf. also S. Maḥmaṣānī, "Muslims: Decadence and Renaissance," *Muslim World*, 44 (1954), 192-193 and *Falsafat al-Tashrī'*, p. 109.

11a Ismā'īl Rāgī al-Fārūqī, "Towards a New Methodology," pp. 36-37.

12. Coulson, *A History of Islamic Law*, p. 225.
13. Ismā'īl Rāgī al-Fārūqī, *On Arabism, 'Urubah and Religion*, (Amsterdam: Djambatan, 1962), pp. 175-176. Cf. especially I. R. al-Fārūqī's "Toward a New Methodology," pp. 35-52.
14. *Naskh* refers to the suppression or abrogation of one *sharī'ah* rule by a later one where divergent regulations exist.
15. I.R. al-Fārūqī, "New Methodology for *Qur'ānic* exegesis," p. 39.
16. Unless otherwise specified, all *Qur'ānic* references are from *The Holy Qur'ān (Text, Translation and Commentary)*, ed. 'Abdullah Yūsuf 'Alī, (Beirut: Dār al-Arabia, 1968). Cf. also *Qur'ān* III: 195; IV: 32; IV: 124; V: 41; 24:2; 28:6.
17. Cf. ,for example, Gustave E. von Grunebaum, *Medieval Islam*, (Chicago: University of Chicago Press, 1946), pp. 174-175; and A.A.A. Fyzee, *A Modern Approach to Islam* (Bombay: Asia Publishing House, 1963), p. 103.
18. *The Meaning of the Glorious Koran*, trans. by M. Marmaduke Pickthall, (New York: Mentor, n.d.), p. 83.
19. *Qur'ān*, IV: 34. *The Holy Qur'ān: Text, Translation and Commentary*, trans. by 'Abdullah Yūsuf 'Ali, p. 190.
20. The religious obligations incumbent upon man and woman equally belong to the *'ibādāt* (religious duties due God) regulations which are not subject to change. In contrast, matters of the socio-economic sphere belong to *mu'āmalāt* (social relations, transactions) which are subject to change.
21. As cited in Muḥammad 'Abdul-Raūf, *Marriage in Islam*, (New York: Exposition Press, 1972), p. 14.
22. As cited in M. Maẓheruddīn Ṣiddiqī, *Women in Islam*, (Lahore: Institute of Islamic Culture, 1952), p. 78.
23. As cited in Ṣiddiqī, p. 60.
24. *Ibid.*, p. 80.
25. Unfortunately, the *Qur'ānic* concern for women's rights and for her just treatment in marriage and divorce was not directly translated into law because of the strong influence of customary practice. Therefore, while morally (before God) a man is bound to treat his wife justly, legally his right to divorce is unfettered and has led to many abuses. For example, in the *ṭalāq al-bid'ah*, a disapproved but legal practice,

a husband may legally divorce his wife instantly without stating any grounds and without even notifying her of his action.

26. "If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, God will cause their reconciliation..." (*Qur'ān*, IV: 35).

27. Both Muḥammad 'Abduh of Egypt and Aḥmad Khān of India-Pakistan have used *Qur'ān*, IV: 3 as an argument for monogamy as the *Qur'ānic* ideal.

28. S. Maḥmaṣānī in writing of the reasons for the decline of Muslims underscores the failure of some early jurists to incorporate *Qur'ānic* values in law as fully as possible: "However some jurists were influenced by dominant pre-Islamic customs... and declined to apply in such cases the rulings imposed by the teachings of religion. If they had done so, giving religious and ethical principles more consideration, along with as much implementation in law as had been possible, their attitude would have been closer to the spirit of Islamic jurisprudence and teaching." (Maḥmaṣānī, "Muslims: Decadence and Renaissance," *Muslim World*, 44 (1954), 199.

29. I. Goldziher, *Le dogme et la loi de l' Islam*, trans., by F. Arin, (Paris: Paul Geuthner, 1920); D.S. Margoliouth, *The Early Development of Mohammedanism*, (London: Williams and Norgate, 1914), pp. 65-98; C. Snouch Hurgronje, *Selected Works of C. Snouch Hurgronje*, ed. by C.H. Bousquet and Joseph Schacht, (Leiden: E.J. Brill, 1957).

30. The significance of Schacht's views lies in the fact that he is considered by many to be the most influential Orientalist in the field of Islamic law in the twentieth century. He has deeply influenced Western scholarship through his long teaching career and his many publications on Islamic law, including the pioneering works, *Origins of Muhammadan Jurisprudence* (Oxford: Oxford University Press, 1950) and *Introduction to Islamic Law*, (Oxford: Oxford University Press , 1964).

31. Joseph Schacht, *Origins of Muhammadan Jurisprudence*, pp. 138-176.

32. *Ibid.*, p. 140.

33. Although some of Schacht's findings are very helpful for more fully understanding the creative role of the community in the development of Islamic law, some remarks regarding the excesses of his conclusions are necessary. To state that no tradition goes back prior to 100/722 creates an unwarranted vacuum in Islamic history. From a critical academic viewpoint, to consider all *ḥadīth* apocryphal until they are proven otherwise is to reverse the burden of proof. Rather, a *ḥadīth* accepted for over ten centuries should stand until proven otherwise. This sifting process, while more laborious than Schacht's approach, seems sounder scientifically. Secondly, the "first century vacuum" theory does violence to the deeply ingrained sense of tradition in Arab culture which all scholars, both Muslim and Orientalist, have acknowledged. As Fazlur Rahman notes: "The Arabs, who memorized and handed down poetry of their poets, sayings of their soothsayers and statements of their judges and tribal leaders, cannot be expected to fail to notice and narrate deeds and sayings of one whom they acknowledged as the Prophet of God." [Cf. Fazlur Rahman, "Sunna and Ḥadīth, "*Islamic Studies*, I, (June, 1962), 4]. And finally, Schacht's thesis fails to explain away the science of *ḥadīth* verification with its specific

and detailed criteria for establishing authority. While no method is foolproof, the wholesale inaccuracy that Schacht and those who follow him in this matter unfairly attribute to this Muslim science is unjustified.

34. According to Ibn Manẓūr in his *Lisān al'Arab* as cited by Muḥammad Y. Guraya, "The Concept of the *Sunnah*: A Historical Study", *Islamic Studies*, XI (March; 1972), 15.

35. Aḥmad Ḥasan, "The Sunnah: Its Early Concept and Development." *Islamic Studies*, VII (March, 1968), 47.

36. *Ibid.*, p. 49.

37. Rahman, "Concepts Sunnah, Ijtihād and Ijmā' in the Early Period", *Islamic Studies*, I (1962), p. 5.

38. Goldziher, *Muslim Studies*, II, p. 56.

39. Rahman, "Sunnah and Ḥadith," p. 13.

40. *Ibid.*, p. 31.

41. Gibb, *Mohammedanism*, p. 86. Cf. also John Alden Williams, *Islam*, (New York: George Braziller, 1962), p. 58.

42. Fārūkī, p. 141. Cf. also D.B. Macdonald, *Development of Muslim Theology, Jurisprudence and Constitutional Theory*, (rpt; Lahore: Premier Book House, 1964), p. 86. It should also be noted that in later terminology *ra'y* came to mean arbitrary or personal opinion in contradistinction to the more disciplined *qiyās*.

43. Fārūkī, p. 147.

44. Cf. for example, *Qur'ān*, VII: 29; XVI: 90; LVIII: 25.

45. Cf. for example, Muḥammad Rashīd Riḍā, ed., *Al-Manār* (35 vols., Cairo: Dār al-Manār, 1898-1935), IV, 858-860; *Yusr al-Islām wa Uṣūl al-Tashrī' al-'Āmm* (Cairo: Dār al-Manār, 1928), p. 73 ff.

46. The Salafiyyah Movement was the reform movement initiated by Jamāl al-Dīn al-Afghānī (1839-1897) and carried on by 'Abduh and his disciple Riḍā.

47. *Article* 76 of the *Law of Testamentary Dispositions* of 1946.

48. Cf. for example, *Qur'ān*, II: 220; IV: 2, 6, 10, 127; XVII: 34.

49. *Qur'ān*, IV: 11-12, 176.

50. A movement which arose in reaction to the increasing diversity of legal doctrine within the schools of law. In contradistinction to those jurists who claimed the right to reason for themselves (*ahl al-ra'y*), members of this movement insisted upon the exclusive authority of the prophetic tradition (*ahl al-ḥadīth*).

51. Maḥmaṣānī, *Falsafat al-Tashrī'*, p. 93.

52. *Al-Manār*, V, pp. 181-182.

53. J. Jomier, *Le commentaire coranique du manār*, (Paris: Maison-neuve, 1954), p. 193.

54. Cf. for example, Fārūkī, *Islamic Jurisprudence*, p. 67 ff. and especially p. 156.

55. Ameer 'Ali, *The Spirit of Islam* (London: Oxford University Press, 1922), pp. 251, 278-279.

56. Iqbāl, *Religious Thought in Islam*, p. 173.

57. *Ibid.*, p. 174.
58. Fārūkī, p. 87 and pp. 163-164.
59. *Ibid.*, p. 83 and especially pp. 153-165.
60. *Ibid.*, p. 163.
61. *Ibid.*, p. 157.
62. J.N.D. Anderson, *Islamic Law in the Modern World* (New York: New York University Press, 1959), p. 49.
63. Although customary practice and its Islamization may be treated within the section on *ijtihād*, for the sake of clarity, separate consideration seems warranted.
64. Coulson, *A History of Islamic Law*, p. 144.
65. *Majallah* was entirely derived from Ḥanafī law and codified between 1869 and 1876 for use in courts of the Ottoman Empire.
66. As quoted in Maḥmaṣānī, *Falsafat al-Tashrī'*, p. 133.
67. F.B. Ṭyabjī, *Muḥammadan Law: The Personal Law of Muslims* (Bombay: M. Tripathi and Company, 1940), p. 7.
68. Coulson, *A History of Islamic Law*, p. 49.
69. Maḥmaṣānī, *Falsafat al-Tashrī'*, p. 108.
70. Schacht, *Introduction to Islamic Law*, pp. 74-75.

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