Religious Revivalism or Reformation: Islamic Law in Modern Times
An Essay in Honor of Ayatullah Mutahhari

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It is indeed an honor and a privilege to participate in the conference of and submit a chapter to honor one of the greatest scholars of modern times, Ayatullah Murtada Mutahhari. Since the events of September 11, 2001, there has been much debate in Muslim circles regarding the question of reformation in the Muslim world. More specifically, questions that have been posed include: how can a religion, which is believed to be immutable and constant, regulate and serve the needs of a changing community? How can a legal system that was formulated in the eighth and ninth centuries respond to the needs of twenty-first century Muslims? Is there a need for reformation in Islam? If so, where should it begin and in which direction should it proceed? These are some of the most challenging questions facing contemporary scholars of Islam.[1]

Some scholars have suggested that reformation should be interwoven with the re-examination of the pivotal roles of *sunna* and *hadith*.[2] Others have suggested that there is a need to revisit Islamic law as it was formulated in the classical period of Islam and to reexamine the traditional exegetical literature. This suggests that reformation in Islam should be based not only on changing institutions, but also on a re-evaluation of traditional sources and hermeneutics. The recently published book titled 'Progressive

[1] In this paper, I will use the term reformation to refer to the re-examination and reinterpretation of both traditional Islamic law and classical exegesis.

[2] See Daniel Brown, *Rethinking Tradition in Modern Islamic Thought* (Cambridge: Cambridge University Press, 1999).

Muslims' is a clear attempt at seeking alternative interpretations of Islam and at refuting the views of those who present a static and monolithic Islam.[3] In order to examine the question of reformation in Islam, it is essential, at the outset, to discuss the development and evolution of Islamic law in the classical period of Islam, i.e., the seventh to the tenth centuries. Thus, initially, I shall present a brief overview of the classical exposition of Islamic law, the various factors that shaped the formulation of the law, and then explore some of the possible venues in which reformation can take place in contemporary times.

Islamic Law in the Eighth and Ninth Centuries

With the establishment of the Umayyad dynasty in the seventh century, Muslims were living under rulers who were not regarded by many as the proper authority to create the Qur'anic ideal of a just social order. It was at this time that the office of a definitive group of scholars interested in recording traditions took shape. Many successors (*tabi'un*) to the Prophet are mentioned as having acumen in juridical matters. These experts in the legal field tried to define and expound Islamic legal doctrine especially on issues that pertained to rituals, inheritance, marriage, divorce etc. The early scholars in the legal field formed the provenance of the *fuqaha*' - a group of scholarly elite who specialized in the study of Islamic legal science, the *shari'a*.

Initially, the jurists were private individuals who were keen to discern God's intent on a particular ruling. The goal of the jurists' endeavor was to reach an

[3] See also Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse, Syracuse University Press, 1990).

understanding of the *shari‘a*, i.e., to comprehend in precise terms the law of God. Guided by a corpus of precepts and laws and their own independent reasoning, the jurists, especially in the ‘Abbasid period, attempted to construct a legal edifice by developing and elaborating a system of *shari‘a* law binding on all Muslims. They began to interpret and develop Islamic law, invoking various hermeneutical principles like *maslaha* (derivation and application of a juridical ruling that is in the public interest), *qiyas* (analogy), *ijtihad* (independent reasoning), *istihsan* (preference of a ruling which a jurist deems most appropriate under the circumstances), and other innovative interpretive principles to respond to the needs of the times and to go beyond the rulings stated in the revealed texts, i.e., the Qur’an and *sunna*.

Gradually, the jurists constructed a program for private and public living centered on the *shari‘a*. The *shari‘a*, as articulated by these jurists, became a structured normative praxis and a comprehensive system that governed personal and public demeanor.

The Schools of Law (*Madhahib*)

Increased legal activities by the *fuqaha*’ led to the development of ancient schools of law in different parts of the Islamic world. Initially, the schools of law did not imply a definite organization or strict uniformity of teachings within a school. Derivation of legal rulings (*ahkam*) was contingent on local circumstances and the deployment of various hermeneutical tools. However, this factor led to the emergence of differences between the centers regarding the law.

In Medina, the *sunna* was informed not only by transmitted reports from the Prophet but also by the agreed practices of the community. The local character of the

traditional practices was partially incorporated in the Medinese concept of prophetic *sunna*. Thus, as a source of authority, prophetic *sunna* was one among other forms of *sunna*. As a matter of fact, preference was frequently given to local practice over reports of prophetic practice, since, it was argued by the scholars of Medina, that contemporary practice could interpret or supplement earlier precedence. This view is corroborated by ‘Abd al-Salam b. Sa‘id Sahnun (d. 840), a prominent scholar of Medina. Referring to the textual transmission of the *sunna*, he states, “Only what is corroborated by practice is followed and considered authoritative.”[4] The view that there were different conceptions of the *sunna* is further substantiated by a letter written by Ibn al-Muqaffa’ (d. 756) to the caliph al-Mansur (d. 775). He states that some judges claim to follow the *sunna* but in reality they followed their own predilections in the name of the *sunna*.[5] Evidently, the *sunna* was fluid in the early period, and did not necessarily reflect prophetic practices.

The divergent concept of the *sunna* is corroborated by the fact that in his *al-Muwatta*’, Malik b. Anas (d. 795) often transmits earlier or contemporary Medinese practice on a legal point thereby accentuating the authority of Medinan practices. He also cites different reports on the practices of the Prophet to vindicate his own legal opinion. He then accepts or rejects these in the light of his own reasoning and the practices of Medina.[6] This selective process can be corroborated from his frequent usage of the statement, “This is the opinion that we (the people of Medina) hold.” The term that Malik

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[4] Brannon Wheeler, *Applying the Canon in Islam*: *The Authorization and Maintenance of Interpretive Reasoning in Hanafi Scholarship* (Albany: SUNY, 1996), 31.

[5] See ‘Abd Allah b. al-Muqaffa’, “Risala fi al-Sahaba,” in *Rasa‘il al-Bulagha* (Cairo: 1946), 3rd ed., 126-27.

[6] See Liyakat Takim, *The Heirs of the Prophet: Charisma and Religious Authority in Shi‘i Islam* (Albany: SUNY, forthcoming 2005), chapter one.

often invokes ('*indana*' - that we have recourse to) refers to the views of the jurists of Medina.[7] In essence, Maliki jurisprudence attempted to forge a closer link to practical considerations by attaching greater weight to social customs than jurists in other areas did.

In contrast to the Malikis, the jurists of Kufa saw their interpretations based on reasoning (*ra'y*) as an equally authoritative factor in the decision of a point of law. The *ra'y* of a scholar was partially incorporated by Abu Hanifa (d. 767) as an important element in jurisprudence. He is reported to have stated, "I refuse to follow the followers (*tabi'un*) because they were men who practiced *ijtihad* and I am a man who practices *ijtihad*."[8] The jurists of Kufa also used *qiyas* (analogy) in the extension of prophetic practice and often formulated the law on rational grounds as opposed to ruling on the basis of transmitted practice that purportedly reflected prophetic practice.

Thus, the authority of Abu Hanifa was also constructed on how he determined, based on his reasoning, which precedents were most consonant with what was known of the general outlines of prophetic practice and the circumstances surrounding its implementation.[9] His authority was further predicated on his exercise of juristic reasoning in the solution of problems that were not explicitly treated in revelatory texts.

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[7] For other examples of statements that refer to the opinions of Medinese jurists, see Wael Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge, Cambridge University Press, 2001), 33.

[8] Hallaq, *Authority, Continuity and Change*, 27. The followers (*tabi'un*) were members of the generation of Muslims that followed the Companions of the Prophet. The term is also used to refer to those Muslims who knew one or more of the Companions but not the Prophet himself.

[9] Wheeler, *Applying the Canon*, 40-41.

The views of another prominent jurist of the time, Muhammad b. al-Idris al-Shafi‘i (d. 820), differed considerably from those of Medina and Kufa. Shafi‘i contended that the personal opinion of the jurist must arise within, rather than outside of, the perimeters of prophetic *sunna*. Focusing on the famous Qur’anic verse ‘Obey God and His messenger’, Shafi‘i further circumscribed the definition of the *sunna*, restricting it to a textual and transmitted record of prophetic practice. The Medinese and Kufans would have to base their rulings on a universal standard, the *sunna* as reported in accredited traditions.

Recognizing the presence of spurious traditions, he stipulated strict conditions for the acceptance of traditions. By insisting on the *sunna* of the Prophet, Shafi‘i nullified the concept of the local practices and arbitrary reasoning. Through his efforts, the four schools came to subscribe to a common theory of the sources of law (Qur’an, tradition, consensus, and analogy).

In contrast to the other schools of law, the main thesis of the people of tradition (*ahl al-hadith*) was that traditions transmitted from the Prophet and his companions superseded local traditions and legal injunctions that were derived independently of revealed sources. They produced traditions to vindicate their views and based their legal system on the Qur’an and traditions purportedly transmitted from the Prophet. Even though many of these traditions were spurious, the *ahl al-hadith* spurned all forms of reasoning and some jurists like Ahmad b. Hanbal (d. 855) even claimed that weak traditions were better than human reasoning.

Circumstances that led to the rise of the schools of law in Sunnism also precipitated a concurrent need for a Shi‘i school. The Shi‘i imams elaborated their

understanding of the law and established paradigmatic precedents for the situations they encountered. Knowledge, interpretation, and articulation of the law meant that the imams became the main source of religious authority in Shi‘ism. During the period when the imams were with them, the Shi‘is accepted their pronouncements as the only valid source of law after the Qur’an and the *sunna* of the Prophet. The imam was believed to be the final enunciator of the law, occupying the same position as the Prophet himself did. Since the imam is also believed in Shi‘ism to have inherited the comprehensive authority of the Prophet, the *sunna* of the imam is seen to be as binding as the *sunna* of the Prophet himself. As Shi‘i theology posited the imam to be divinely appointed (*nass*), endowed with divinely inspired knowledge (‘*ilm*), and infallible (*ma‘sum*), the authority of the imam supersedes the authority of local practice or speculative reasoning. The emergence of a distinct Shi‘i school of law should thus be viewed as the result of the Shi‘is’ self-understanding of the nature of religious leadership and their confinement of juristic authority to the imams.

Usage of various hermeneutical devices, exposure to diverse cultural influences, and a variegated understanding of the sources, derivation, and contents of the *sunna* were important factors that precipitated differences between the schools and impacted the rulings that were issued by them. The jurists’ function extended beyond the interpretation and explication of texts. Invoking principles such as *maslaha* (enacting a legal point that is most conducive to the welfare of the community), analogy, reasoning, and other innovative interpretive devices, they were able to go beyond the texts that had empowered them. By the ninth century, through the efforts of jurists like Shafi‘i, the view that the authority of the prophetic *sunna* overrode other forms of *sunna* had become

firmly entrenched in the sources of Islamic law. Through their assiduous efforts, the jurists were recognized as the authoritative interpreters of the law.

The Formulations in the Juridical Literature

On many occasions, the formulations of the classical jurists varied considerably from the Qur'anic pronouncement on the same issue. For example, the Qur'an allowed the evidence of non-Muslims when no Muslim was available to witness the will of a Muslim who died on a journey (5:106). Abu Hanifa, however, rejected the evidence of non-Muslims in this case and Abu Yusuf (d. 798) declared the Qur'anic passage to have been abrogated by verse 65:2. The Medinese jurists went even further, rejecting the evidence of non-Muslims altogether, even against one another.[10] Gradually, a series of restrictions were regulated so as to enforce Muslim supremacy and to reflect the inferior status and identity of non-Muslims.

Several discriminatory measures such as the prohibition against building new churches or repairing old ones were enacted. The jurist Muhammad b. 'Abdun (d. 1100), for example, states in his treatise that priests must be forcibly circumcised simply because they persist in following the example of Jesus Christ who was circumcised. A Jew or Christian should not be allowed to dress like an important person. A Muslim may not wash a Jewish or Christian toilet.[11] Other jurists held that Muslim authorities may prohibit *dhimmis* (the people of the book) from marrying Muslims. *Dhimmis* were to

[10] See Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Oxford University Press, 1950), 211-12.

[11] John Alden Williams, *Themes of Islamic Civilization* (Berkeley: University of California Press, 1971), 159-60.

wear distinctive clothing, more specifically, special emblems on their clothes as a token of their inferior or different status.

They were to live in houses that were smaller than Muslim houses. They were not permitted to ride a horse, which was a public proof of one's affluence. Most schools, apart from the Hanafis, paid a lower blood price for a *dhimmi* who was killed. Zamakhshari says that *jizya*, the tax that was levied on the people of the book, should be taken from them with belittlement and humiliation. The *dhimmi* is to come walking, not riding. When he pays the *jizya*, he shall be slapped on the nape of his neck.[12] Others added symbolic acts of humiliation – for example that the *dhimmi*'s hand was to be lower than the tax collector's hand when he pays the *jizya*. These regulations were incorporated in the jurisprudence as a divinely sanctioned system of discriminatory provisions.[13] Not all jurists agreed with such acts of humiliation. Abu Yusuf, for example, states that *dhimmis* should not be treated harshly or humiliated, rather, they should be treated with considerable leniency.[14]

Such discriminatory regulations contravene the spirit of peaceful coexistence and egalitarianism in the Qur'an. The tendency among jurists of the eighth and ninth centuries was to seek justification for the discriminatory rulings by claiming that the unbelievers had chosen to refuse the offer to convert. Hence, their inferior status was the product of their own choice.

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[12] Bernard Lewis, *The Jews of Islam* (Princeton: Princeton University Press, 1984), 15.

[13] For other restrictions and acts of humiliation inflicted on the *dhimmis* see, Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore: The Johns Hopkins Press, 1955), 197-98.

[14] Abu Yusuf, *Kitab al-Kharaj*, 122-25.

The differences that the classical formulation in Islamic law engendered manifested themselves with respect to laws regarding women too. Emerging in the cosmopolitan and pluralistic milieu of Kufa, Hanafi law puts men and women on the same footing with regard to their ability to conclude important transactions, including marriage. In Kufa, a girl who had reached the age of puberty and could manage her own affairs was allowed to get married without the consent of her guardian. Reflecting the patrilineal and more traditional outlook of Medinan society where the male members of a tribe decided on and concluded the marriages of women, Malik insisted on the need for a guardian to conduct such a marriage. The other Sunni schools of law also require the permission of the guardian to conclude a marriage of a girl unless she is not a virgin. This is a good example of how local circumstances engendered variations in the legal positions adopted by the different schools of law.[15]

Other differences between the schools occur also in the laws pertaining to the judicial rights of a woman to seek divorce. Abu Hanifa refused a judicial divorce unless the husband is impotent or has other personal defects. Thus, factors such as the failure to provide maintenance, intermittent absence, continuous physical abuse, or life imprisonment do not provide grounds for a judge to dissolve the marriage because divorce is seen as the husband's prerogative.

In this instance, Maliki law accords more rights to the woman. She can ask for a divorce due to the husband's desertion, failure to maintain her, cruelty, sexual impotence or chronic disease. Maliki law also recognized judicial divorce on the grounds of a

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[15] See Muhammad Maghniyya, *The Five schools of law*, Qum 1995. Liyakat Takim, "Women, Gender, and Islamic Law" in *Encyclopedia of Women and Islamic Cultures* (Koninklijke, Brill N.V., 2004).

husband's injurious treatment of his wife. Maliki law went further stating that if the differences are irreconcilable, the court may finalize the divorce even without the husband's consent. The other schools of law allow a woman to demand *talaq* (divorce) on certain grounds like not providing maintenance, physical abuse or prolonged imprisonment leading to hardship for the wife.

Differences between the schools also arose over the question of a missing husband. Maliki law was more favorable to women in this instance. Malik held that the wife of a missing husband may seek a judicial separation after a four-year waiting period. If he does not reappear within this time, she will observe the '*idda* (waiting period) of a widow and is then free to remarry. The Hanafis, Shafi'is, and Hanbalis, on the other hand, state that the wife of a missing husband may not remarry as long as he may be considered alive based on the average life span of a person. The Hanafis fix this at one hundred and twenty years, the Shafi'is and Hanbalis at ninety years. Such laws reflect the patrilineal character and male dominance of eighth-ninth century Arabian society when many of the juridical rulings were formulated.[16]

Differences in the legal field existed among Shi'i jurists too.[17] The existence of disparate Shi'i traditions and the concomitant divergent rulings in the Shi'i jurisprudence were acknowledged by Muhammad b. al-Hasan Tusi (d. 1067) who states, "I have found them [the Righteous Sect] differing in the legal rulings (*ahkam*). One of them issues a *fatwa*, which his contemporary does not. These differences exist in all chapters of

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[16] Ibid.

[17] In this paper, the term Shi'is will be used to refer exclusively to the Twelver Shi'is. Thus, it will not include a discussion on other Shi'i groups like the Zaydi and Isma'ili Shi'is.

jurisprudence from those concerning the laws on ritual purity (*al-tahara*) to the chapter on indemnity (*al-diyat*) and on the questions of worship….."[18] Tusi was complaining about the differences (*al-ikhtilaf*) in the religious practices of the righteous sect, which he identified to be the Shi'is. According to Tusi, the differences between the Shi'i jurists were greater than the differences between Abu Hanifa, Shafi'i, and Malik.[19]

It is important to note that the juridical manuals were composed in the male-dominated centers that excluded female voices in Islamic legal discourse. Women had little say in relation to the laws on marriage, divorce, inheritance, female testimony etc. Consequently women's issues have depended on 'representational discourse' conducted by male jurists who interpreted and articulated the rulings related to women. Moreover, patriarchal structures of Arab culture that prevailed in the eighth and ninth centuries were often incorporated in the emerging juridical literature. These were significant factors that influenced how women were treated in the juridical discourse.

Ijtihad and Reformation

The preceding discussion suggests that Islamic law developed in a particular milieu and that Muslim jurists developed different stratagems in order to respond to the juristic challenges of their times. The discussion also suggests that there is a need for the laws to be reexamined and reformulated so as to respond to the needs of contemporary times. It is within the framework of Islamic jurisprudence that the discussion of reformation in Islam and the role of *ijtihad* in the reformation process are predicated.

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[18] Muhammad b. al-Hasan Tusi, '*Uddat al-Usul* (Tehran, 1983), 354.

[19] Ibid., 358.

Ijtihad is a rational process that attempts to extrapolate juridical injunctions from the revelatory sources. In his discourse on *ijtihad*, the late Imam Khumayni urges the theological centers to promote *fiqh* (jurisprudence) in a better form. He states that the seminaries should bear in mind that domestic and foreign problems will not be resolved by sufficing with a presentation of impractical theories and an expression of impractical generalities and views.

By stressing that *ijtihad* should be optimally pursued in the theological centers by the *fuqaha*' and religious scholars, Imam Khumayni hints at the deficiencies of the *ijtihad* prevalent in the theological centers and at its inadequacy to meet the different and complex needs of human communities in the contemporary era. Thus, it is correct to state that he advocated a kind of dynamic, revisionist *ijtihad*. He further states that the modern jurist should always hold the pulse of the community's future reflections and requirements with profound foresight and insight.[20] As Ayatullah Mutahhari poignantly asks, "if a living mujtahid does not respond to modern problems, what is the difference between following a living and a dead [religious authority]"?[21]

It is important that contemporary juridical discourse be engaged in issues such as ownership and its boundaries; land and its division into spoils and public wealth; farming and *mudariba* (collaboration), renting and mortgage; penance and blood money; civil laws; cultural issues and various arts such as photography, painting, sculpture, music, theatre, movies, calligraphy, etc. Islamic jurisprudence should also be concerned with

[20] The discussion is based on an email received. The lectures of Imam Khumayni were translated by al-Sayyid Muhammad al-Hijazi.

[21] Hamid Dabashi, *Theology of Discontent: The Ideological Foundation of the Islamic Revolution in Iran* (London: New York Press, 1993), 164.

discussions regarding the preservation of the environment, expanding or nullifying some decrees at various times and places; legal and international issues and their adaptation with the precepts of Islam; the limits of individual and social liberties; the manner of observing religiously prescribed acts in space travels and movement against or along the earth's rotation etc. If some issues were not discussed in the past or did not have applicability, Imam Khumayni states that the *fuqaha*' should now make provisions for them. Thus, he continues, "If, in the past, some issues were not set forth or were irrelevant, the *fuqaha*' should now speculate about them."[22]

According to the contemporary jurist Ayatullah Mohagheg Damad, since civil rules are variable, Islamic laws must change accordingly. Thus, in our own times, Islamic legal rulings must be reinterpreted based on the principle of harm and benefits and other principles established in *usul al-fiqh* (the science of inferring juridical rulings from textual and rational sources). Stated differently, there is a need to enact laws that are conducive to the welfare of the community even though such laws are not found in earlier texts. Due to such principles, Islamic sacred sources have to be read in different ways. Thus, for example, based on the principle of *la darar wa la dirar* (there is neither harm nor injury in Islam), an Islamic government can override private ownership. He suggests the need to enact wide-ranging reforms based on the needs of the time.[23]

As an example of the possible re-interpretation of the law, Mohagheg Damad states that in the Qur'an we encounter the phrase addressed to men concerning their marital life:

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[22] The discussion is based on an email I received.

[23] Ayatullah Muhaghegh-Damad, "The Role of Time and Social Welfare in the Modification of Legal Rulings," in *Shi'ite Heritage: Essays on Classical and Modern Traditions*, edited by Lynda Clarke (Binghamton: Global, 2001), 218.

"Live with them in accordance with that which is recognized as good (*al-ma'ruf*)" (4:19). The Qur'an indicates that cohabitation in what is perceived as "good" is the foundation of Islamic family law and the foundation of individual laws pertaining to the rights of married women. In the past, when social and economic lives were much different and women were confined at home without economic responsibility or the need to earn a living, this Qur'anic phrase had a particular meaning. Damad asks, "Does cohabitation in accordance with that which is recognized as good have the same connotation today?" In the past, maintenance (*nafaqa*) that was payable to the wife if she was divorced was calculated by the jurists at a very low rate." This rate is contingent on the needs of the time.[24]

Mohagheg Damad continues, "If, for instance, one of the imams had been asked a thousand years ago about the maintenance due to a woman after divorce, he might have mentioned clothes, a dwelling, or food, basing that on the standard of living at that time. Maintenance consisted of something like the fixed payment mentioned above. Neither the education of women nor means of transportation was as important as it is today. Thus, maintenance is an external and not an objective standard. On the other hand, "marriage in accordance with that which is recognized as good" is a general legal rule *(hukm)* of the *shari'a*, and since times always change and social and economic conditions evolve, the Qur'an here lays down a standard whose criteria are subject to change."[25] Stated differently, the maintenance of divorced woman must now include not only food and shelter, it must also award the wife back pay for housework she has done and other benefits that she had to

[24] Ibid.,

[25] Ibid., 219.

forgo so as to look after the children. In addition, due to the different roles of women today, the costs of transportation and education must also be taken into account.

Mohagheg Damad further argues that what were once private rights have now become of general or public relevance. Until recently, the concept of labor relations was unknown and the relationship between an employer and employee was conducted entirely on the basis of a contract of hire. That is, a contract was concluded strictly on the basis of hire of labor for wages, with no government oversight. Now, however, the private rights of employer and employee have become public rights. Government intervention has now resulted in labor laws limiting the freedom of both parties. The rationale is that if a worker is allowed to enter into a contract as an agent, he is liable to get himself into a situation in which he eventually becomes disabled and possibly a burden on society. Thus, in the interests of the community, the head of society can intervene and limit the freedom of the parties to conclude a contract. This is one example of a shift from private to public rights.[26]

Ayatullah Mohaqqeq Damad also maintains that laws pertaining to slavery have to be radically reformed. He states that since the international community has agreed to abolish slavery, the institution has disappeared. It is now necessary to conclude that slavery is also forbidden by Islamic law, for the basis of application of the law of slavery has changed. The jurist cannot claim that since in the past prisoners of war were enslaved, they must be enslaved today too. Islamic countries have readily signed the international conventions on slavery, and the abolition of slavery is not in any way inconsistent with Islamic law.[27]

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[26] Ibid.

[27] Ibid.

Reforms in Iran have also been suggested in the realm of the penal code. Ayatollah Dr. Seyed Mohammad Bojnourdi, a former member of the Supreme Judicial Council in Iran, believes that the current method of administering certain Islamic punishments will weaken Islam and present a distorted image of the religion to the world. He proposes that in the execution of Islamic punishments, it would be better to take advantage of the views of psychologists, sociologists and other experts. Ayatollah Bojnourdi also believes that when the twelfth Imam, the Mahdi (peace be upon him) reappears he will guide mankind towards humanity and Islam through cultural means, reasoning, and logic instead of resorting to force.[28]

Bojnourdi further states that the criterion in the Islamic penal law is based on the principle of "elimination of obscene deeds." It is not mandatory, he argues, to resort to punishment if someone commits an offense, since the principle in Islam is based on correction and development of mankind. "The life style of the Holy Prophet (peace be upon him) and Imam 'Ali (pbuh) attest to the fact that at the time of punishment, they would first resort to admonition and guidance in order to lead the convict to repent. In many cases, punishment would be averted if the offender repented"[29] Thus, in many cases of punishment, if the convict repents prior to the approval of the case by the court, the responsibility of the court to look into the offense would be dropped as well."

Bojnourdi further maintains that if the process for execution of penalty results in the denigration of Islam and causes the people, especially the youth, to demean the religion, then the process should then be revised so that no causes of such denigration would

[28] Based on an email I received.

[29] Ibid.

remain. If certain punishments such as flogging in the public create a negative impression regarding Islam, such a practice should be abandoned. This is because the preservation of the dignity and prestige of Islam is the prime task and a duty that has priority over other obligations.

Bojnourdi further states that in 1981-82, he talked to Imam Khumayni about the issue of *rajm* (stoning to death). He told the Imam that under the status quo, *rajm* would cause the weakening of Islam and others would use it as a tool to mock the religion. Not only had *rajm* lost its intended effects, but it had also allowed people to ridicule Islam. Therefore, other options had to be sought in order to substitute it. The Imam stated that as *rajm* at that time was destroying the image of Islam, courts had to be instructed not to issue the verdict but issue other options such as death penalty. Bojnourdi continues, "I even told the Imam that when applying the *rajm*, there is a possibility for the convict to come out of the pitch and escape. If the death penalty were to be enforced, escape would not be possible. I asked what had to be done in that case and the Imam stated that the convict should be guided towards expressing penitence so that he/she would be pardoned."[30] Bojnourdi is clearly concerned to promote a more positive image of Islam so as to counter-act its negative portrayal in popular culture. Since flogging is considered a form of torture, jurists should think of other options that could be applied.

Reforms in Women's Issues

Other jurists in Iran have also come up with reinterpretation of tradition laws. In 1999, a senior cleric, Ayatollah Yusuf Sanei, said there should be nothing to stop a

[30] Ibid.

woman from becoming the supreme leader or president. He also said it was wrong not to allow women to become judges or to accept them as full witnesses in courts. In recent years they have been brought back to the judiciary in an advisory capacity. Laws have recently been passed allowing women to join the police force and women are now even allowed to attend and play football.

According to Ayatullah Sanei, "..since the subject [women's situation] has changed, the framework of civil laws must change too. Our current laws are in line with the traditional society of the past, whereas these civil laws should be in line with contemporary realities and relations in our own society."[31] Sanei states that, even without a marriage contract, a woman can unilaterally annul a marriage if she feels she cannot live with a man. She can simply annul the marriage without the need for a formal divorce although it is better for her if the *talaq* is recited. "Islam does not say that a woman must stay and put up with her marriage if it is causing her harm – never." The problem, according to Sanei, is that the laws are still in the process of evolution.[32]

According to Sanei, in response to a question posed, Imam Khumayni stated that a husband should be persuaded to grant a divorce if his wife seeks it. If he refuses that request, then the divorce can be effected with the permission of a judge.[33]

Such concepts clearly represent a major break from the current understanding in the laws of divorce among many jurists. Indeed, Sanei is forced to admit that there are

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[31] Ziba Mir-Hosseini, *Islam and Gender: The Religious Debate in Modern* Iran, Princeton: Princeton University Press, 199), 160.

[32] Ibid., 162

[33] Ibid., 165

petrified fossilized devout ignoramuses[34] who prevent such reforms in the law to take place. More recently, the Iranian parliament approved a bill, which would grant women equal inheritance rights to men. Under the proposed law, a woman would take all her husband's estate in the absence of other heirs, instead of only half the estate as at present. The law is one of several, including blood money and sworn testimony, which gives women half the legal value of men. Currently, the state takes half the couple's estate if a husband dies in the absence of other heirs. When wives die in the same circumstances, husbands are entitled to the entire estate.

Ayatullah Mutahhari was also concerned about the need to reform. He suggested changes in the way the religious tax, the *khums*, was collected and disbursed. He proposed the establishment of a collective fund to which all religious contributions would be made and from which, under the supervision of first-ranking clerics, every religious authority would receive a sum "proportionate to the service he provides."[35] Mutahhari was also critical of the way the seminaries were run, the fact that there were no entrance examinations and the misuse of the clerical robe as a status symbol.[36]

Jurists in other countries have also engaged in their own reinterpretation of the law. The Lebanese scholar Ayatullah Fadlallah is popular with the youths because his religious edicts (*fatawa*) are more pragmatic and lenient. He allows the shaving of the beard. He argues that the ruling given by classical scholars regarding the requirement of keeping a beard has to be properly contextualized. Their edict was predicated on the need

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[34] Ibid., 160.

[35] Dabashi, *Theology*, 171.

[36] Ibid., 168-69.

to differentiate between Muslims and Jews. This, Fadlallah says, is restricted to cases in which Muslims are in a minority and others in a majority. He further states: "It is understood from the *hadith*[37] that the prohibition of shaving the beard was contingent on a time-related issue at the beginning of the Islamic message."[38] Fadlallah also differs from many other jurists in that he allows playing chess.[39] His liberal views can be discerned from the fact that he even allows men and women to masturbate provided it does not lead to ejaculation.[40]

Ayatullah Seestani was asked whether it was permissible to rely on DNA test results that indicate a child was born out of wedlock. Even though there is no authoritative precedence in the normative texts, Seestani says: "Whosoever shall attain certainty through other means, be it through blood test or any other means, should feel free to act upon it." Seestani cautions that such a test is not a legitimate means to determining adultery and that the Islamic penal code will not be applicable based solely on DNA results.[41]

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[37] In the Shi'i context, the term *hadith* refers to the sayings of the Prophet and the Imams.

[38] Ayatullah al-'Uzma al-Sayyid Muhammad Husayn Fadlullah, *World of Our Youth*, translated by Khaleel Mohammed, (Montreal: Organization for the Advancement of Islamic Learning and Humanitarian Services, 1998), 226.

[39] Ibid., 225. Most jurists prohibit playing chess as it was used as a gambling tool.

[40] Ibid., 257.

[41] *Current Legal Issues According to the Edicts of Ayatullah al-Sayyid 'Ali al-Seestani* (London: Imam 'Ali Foundation, 1997),48.

Conclusion

The validity of Islam at all times is a familiar slogan among Muslims. However, the concept of the universality of Islam encourages rather than restricts its capacity to encompass different societal orders. Had this not been the case, Islam could not have spread so far and survived the vicissitudes of different milieus. Hence, it is imperative that Muslims review and revise the law in keeping with the dictates of their changing circumstances.

Reforms such as those that have been suggested above are possible only if Muslims able to speak their minds and discuss things openly. In many countries, I believe we have an emotional rather than rational Islam. The Islam practiced by many Muslims is one that seeks excuses than solutions to contemporary problems.

The challenge for Muslims in contemporary times is to recover the tolerance and means for peaceful coexistence through the Qur'an rather than the juridical and exegetical understanding which were formulated to assert the subjugation of the "other" in a particular historical context. As they engage in a re-examination of traditional exegesis, the point of departure for Muslims has to be the Qur'an itself rather than the multi-faceted and multi-layered scholarly discourse that has accumulated since the eighth century.

Muslims need to also differentiate more clearly between the sacred scripture and its later exegesis that is imbedded in many sacred texts. Scholars need to explain to the Muslim community that much of the exegetical literature was formulated in a particular context. Thus, there is a need to reformulate or reinterpret the traditional exegesis. This exercise is contingent on recognizing that Muslims are not bound to erstwhile juridical or

exegetical hermeneutics. Hence, there is a need for Muslims to separate the voice of God from the voice of human beings, and to differentiate between the Qur'anic vision and the socio-political context in which that vision was interpreted and articulated by classical and medieval exegetes.

Muslims are also confronted with the challenge of contextual hermeneutics in dealing with the pronouncements of the Qur'an on specific legal issues like warfare, slavery, and gender issues. Verses must be understood taking into account the particular conditions in which they were revealed. Returning to the Qur'an and prophetic traditions in their proper historical context is often circumvented by the juridical interpretations that promoted the hegemonic interests of the Islamic state ignoring, in the name of Islam, the ecumenical and universal message of the Qur'an.

Stated differently, Muslims need to go beyond the classical formulations. Furthermore, Muslims must articulate a comprehensive legal system that will incorporate notions of dignity, freedom of conscience, rights of minorities, and gender equality based on the notion of universal moral values.

A major impediment to this approach is that many Muslims reject the argument that the juridical decisions were interwoven to the political, cultural, or historical circumstances in the eighth century. They refuse to acknowledge that while the Qur'an is a fixed text, the interpretive applications of its revelations can vary with the changing realities of history. Traditionalists maintain that Islamic law, as it was formulated by the jurists in the first three centuries of Islamic history, was in strict conformity with the divine will expressed in the Qur'an and the tradition. Thus, normative textual sources are treated as timeless and sacred rather than anchored to a specific historical context. This

contention of the traditionalists is challenged by the fact that there was much disputation on what constituted the divine will among the classical jurists themselves and that they proffered a wide range of views on the issues they were confronted with.

Such topical issues are important in conveying the view that far from being a static and rigid tradition, there is much discourse within the Muslim community and that the community is attempting to distance itself from the extremist and even archaic articulation of Islam. It is only through such self-critique and an admission of past failings that reformation can generate a fresh understanding of Islamic revelation and Prophetic practices.