Revivalism or Reformation: The Reinterpretation of Islamic Law in Modern Times

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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 requirements 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 authenticity and 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 re-examine 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 Muslims' is an 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

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[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).

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

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 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

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Syracuse University Press, 1990).

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* (approbated practices of the Prophet).

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 outlined above. 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), an administrator to the caliph al-Mansur (d. 775). In response to the prevailing diversity in the application of Islamic law, 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 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*."[6] 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.[7]

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

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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] Hallaq, *Authority, Continuity and Change* (Cambridge, Cambridge University Press, 2001), 7. 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.

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

the general outlines of prophetic practice and the circumstances surrounding its implementation.[8] His authority was further predicated on his exercise of juristic reasoning in the solution of problems that were not explicitly treated in revelatory texts.

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. 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.

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

Circumstances that led to the rise of the schools of law in Sunnism also precipitated a concurrent need for a Shi‘i school.[9] 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

[9] 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.

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]

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

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

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.[11] In the Shi'i school of law, the guardian's consent is required only if the girl is a virgin. However, a few Shi'i jurists held that a girl who has never been married but is intellectually mature can marry whomever she wishes even without her guardian's consent.[12]

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 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

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

[12] Muhammad b. Jamal al-Din Makki al-'Amili (al-Shahid al-Thani), *al-Lum'a al-Dimishqiyya*, ed. Muhammad al-Kalantar, 10 vols. (Beirut: Dar Ihya' al-Turath al-'Arabi, 1983), 5/116.

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.[13]

Differences in the legal field existed among Shi'i jurists too. 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 jurisprudence from those concerning the laws on ritual purity (*al-tahara*) to the chapter on indemnity (*al-diyat*) and on the questions of worship….."[14] Tusi was complaining about the differences (*al-ikhtilaf*) in the religious practices of the righteous sect, which he

[13] Ibid.

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

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.[15]

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 the Reformation Movement

As I have stated, Islamic law developed in a particular milieu in which Muslim jurists developed different stratagems in order to respond to the juristic challenges of their times. Some contemporary Muslim scholars have argued that there is a need to articulate a jurisprudence that addresses contemporary concerns and issues. They argue that what is essential to a proper understanding of Islam is not the letter of the text but instead the spirit of the Qur'an and the Prophetic tradition. They maintain that there is no single, valid interpretation of the Qur'an or the *hadith*.[16] It is within the framework of Islamic jurisprudence that the discussion of reformation in Islam and the role of *ijtihad* in

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[15] Ibid., 358.

[16] Mehran Kamrava, "Introduction:Reformist Islam in Comparative Perspective," in Mehran Kamrava ed., *The New Voices of Islam: Rethinking Politics and Modernity* (Berkeley and Los Angeles: Univ. of California Press, 2006), 15.

the reformation process are to be predicated.

Ijtihad is a rational process that attempts to extrapolate juridical injunctions from the revelatory sources. More specifically, *ijtihad* is seen as a jurist's exertion of his mental faculties to arrive at an absolute proof based on the interpretation and application of the authoritative sources of Islamic law: the Qur'an, *sunna*, and *ijma*' (consensus of the scholars). The purpose of the exercise is to arrive at a legal injunction that reflects God's will.

Many Muslim scholars have argued for a renewed *ijtihad*, keeping in mind the dictates of contemporary times. In his discourse on *ijtihad*, Ayatullah 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, 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. 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.[17] 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]"?[18]

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

[18] Hamid Dabashi, *Theology of Discontent: The Ideological Foundation of*

Ayatullah Khumayni also states that 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 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, 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."[19]

Other Shi'i scholars have also argued that changes in the conditions of time and place require a re-examination of laws formulated in the classical period of Islam, the eighth – tenth centuries. Ayatullah Shabistari states that a new *ijtihad* is required, one that goes beyond *fiqh* and *usul* and embraces subjects such as society, history, economics, politics, and psychology.[20] To derive these laws, he argues that Muslim thinkers need to construct a comprehensive theory of human nature and social change. Shabistari goes on to state that even the questions we pose today have to change according to the realities of

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the Islamic Revolution in Iran (London: New York Press, 1993), 164.

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

[20] Ayatullah Muhammad Mujtahid Shabistari, "Religion, Reason and the New Theology," in *Shi'ite Heritage: Essays on Classical and Modern Traditions*, edited by Lynda Clarke (Binghamton: Global, 2001), 249.

the time.

According to Shabistari, "Today, an important part, or perhaps most, of the problems we must deal with are "novel matters" *(mustahdathat).* Whereas once the question to be answered was whether the pledge of allegiance *(bay'a)* of "those who loose and bind" was a legitimate basis of authority, the novel matters we need to take into account today are popular elections and revolutions. Long ago, the crucial question was if it was permissible for a ruler to delegate power to governors and viziers, today the question is if any ruler can enjoy a monopoly of power. Whereas once the jurists concerned themselves with which person should rule and what his qualifications should be, today we must ask ourselves how those in power must rule. Instead of asking if it is permissible for the ruler to fix the value of currency, we should study how economic planning and free enterprise can be reconciled. Whereas once the jurist may have been called on to define the duties of the public inspector *(muhtasib),* the crucial question in our time is, 'Does the state have the right to maintain influence over every aspect of the life of its citizens?' In the past, jurists were concerned with defining the boundaries of the domain of Islam and the "domain of war" *(dar al-Islam, dar al-harb),* but today we must ask ourselves if it is permitted to violate the sovereignty of any people or nation. Rather than repeating old arguments about the duty to learn a profession, we should be examining the effect of an industrial economy on spiritual values. We must search the Qur'an and *sunna* for solutions to contemporary problems such as these. This is what is meant by the universality of Islam, otherwise, Islam belongs to the Hijaz."[21]

[21] Ibid., 256.

Jurists who argue for the reformulation of Islamic laws also maintain that the interpretations of Islamic revelation were interwoven to the specificity of those times and places. Jurists can only pronounce general principles, not rulings that are to be enforced at all times and places. They also argue that hermeneutical principles within *ijtihad* allow for a different understanding of the Islamic message. For the reform-minded jurists, it is essential that Muslims continue to review and revise the law in keeping with the dictates of their changing circumstances.

In Shi'i circles, there have been important voices calling for a radical rethinking of the religious tradition. Many of these have emerged after the Iranian revolution in 1979. Such formulations have come from religious intellectuals like 'Abdolkarim Soroush, but importantly, others emanate from within the religious seminaries itself.[22] Scholars like Ayatullah Sanei, Ayatullah Jannati, Ayatullah Mohagheg Damad, Hujjatul-Islam Muhsin Sa'idzadeh and Mohsen Kadivar have called for a reevaluation of traditional juridical pronouncements on many issues. As a matter of fact, in my discussions with some *maraji*',[23] I detected a distinct silent revolution within in the seminaries in Qum. The views of the *maraji*' are, on many important issues, polarized. Sa'idzadeh, for example, has argued that laws pertaining to women and the apparent lack equality with men are products of the Islamic hermeneutical tradition which has favored men. For Sa'idzadeh, such laws are amenable to change.[24]

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[22] Muhammad Qasim Zaman, *The 'Ulama' in Contemporary Islam: Custodians of Change* (Princeton: Princeton University Press, 2002), 186.

[23] The term *maraji'* refers to the most learned juridical authority in the Shi'i community whose rulings on Islamic law are followed by those who acknowledge him as their source of reference or *marji'*.

[24] Muhammad Qasim Zaman, *The 'Ulama' in Contemporary Islam*, 186.

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.[25]

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: "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.[26]

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[25] 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*, 218.

[26] Ibid.,

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."[27] 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 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

[27] Ibid., 219.

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.[28]

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 Shi'i Imam, the Mahdi reappears he will guide mankind towards humanity and Islam through discourse, reasoning, and logic instead of resorting to force.[29]

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 and Imam 'Ali 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"[30] 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."

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[28] Ibid.

[29] Based on an email I received.

[30] Ibid.

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 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 also states that in 1981-82, he talked to Ayatullah Khumayni about the issue of *rajm* (stoning to death). He told the Khumayni 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."[31] 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.

[31] Ibid.

Reforms in Women's Issues

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

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."[32] 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.[33] According to Sanei, in response to a question posed, 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 affected with the permission of a judge.[34]

Within the Qum seminary, Sanei is considered as one of the most controversial jurists. His reform-minded views can be discerned from some of the questions I posed to

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

[33] Ibid., 162

[34] Ibid., 165

him when I met him in 2004.[35]

Question: Do you consider non-Muslims impure? What is your edict about having a meal with them?

Answer: All humans are pure. No one is unclean unless they have found the truth in Islam; nevertheless, express hostility against it. Such a person is exceptionally rare and should be given the benefit of the doubt. Thus, all non-Muslims including Hindus, Fire worshipers, Cowdasists, and so on are pure. 'Impure ' has only been associated with atheists in Quran. God commands atheists to be away from the Holy Mosque. An atheist is a person whose soul has grown into impure. The soul's impurity arises when somebody ascribes partners to God while he knows God is the absolute one. When ascribing partners to God through neglect, a man is not an atheist, but is unenlightened. In view of taking food, they are as respectable, as Muslim meal mates. All people, Muslim or non-Muslim, should call God's name, when slaughtering animals for food; otherwise, the food is not clean.

Question: Is the slaughtered animal by non-Muslim clean?

Answer: It makes no difference; only God's remembrance and mention is necessary, no matter what language or religion he has. If you are doubtful about God's mention at the time of slaughter by a non-Muslim, the food is impure. At Muslims' market, it is clean.

Question: Does this all include Jews too?

Answer: Certainly, yes. You can ask him to mention God's name at slaughter, and the

[35] It should be noted that not all the points that I discussed with Sanei have been documented at this site. Some of the questions I posed have been rephrased. The following are excerpts from our conversation. Details can be found at:
http://www.saanei.org/page.php?pg=showmeeting&id=22&lang=en

food is clean.

Question: What is your attitude in general towards non-Muslims? Are their good deeds acceptable by God?

Answer: I am of the opinion that the outcome of good deeds and eschewing evil according to one's understanding will be paradise. Regardless of the religion they practice, owing to the fact that they are convinced by the righteousness of their ideology without the slightest doubt, they get what they deserve. God says: 'Good deeds will be rewarded ten times as much as they deserve, and evildoers will be given punishment which fits the evil; you shall not be unfairly treated.'…..In some Qur'anic verses, faith is a vital prerequisite for paradise, which I interpret as sincere belief in the goodness of one's deeds not belief in God. Strong belief is associated with the mental serenity, and it contributes to spiritual development. However, someone with a sense of being under compulsion can never be consistent in doing good deeds and improve. Neither identification nor label, i. e. Christian, Muslim, or Buddhist is the requirement for paradise, but indeed good deeds are. An agnostic involved in his skepticism cannot believe in God or a Prophet. Neither do Christians put trust in Prophet Mohammad. It would be utterly inconceivable if God called for a particular identification on the Doomsday. Would it be unfair? Quran says reassuringly: "God shall not be unfair to any of his creatures." Similarly, evil doing mortifies human soul, which will result in hell. It makes no difference which religion or belief you have, but which deeds you perform. If doubt is cast upon the authenticity of his ideology, one has to seek the truth; otherwise he is guilty of laxity.

Question: What is your view on women's rights?

Answer: Women do have equality in all rights except inheritance which is half as much as men, but I consider it fair, and I have given elaborate explanation on this issue.

Question: Are they regarded equals in giving testimony?

Answer: They have equality. In ' The Cow', the second chapter of the Qur'an, two women are found necessary to testify in the court of law where one man suffices. The reason is one of them can serve as a reminder to help vivid remembrance. There, we come to understand that women are more likely to forget a past event in this special case. Now, this Qur'anic verse was revealed with relevance to commercial affairs. Having few social associations, women mostly did not know much about financial and commercial subjects. To guarantee a fair judgment, two women would testify. Similarly, to provide assurance, the testimony of two men is essential when they are more likely to forget a past event than women are. The criterion is knowledge and awareness. Both men and women can be of equal number when they have equal knowledge**.**

Question: what is your verdict on blood money for women?

Answer: I regard men and women equals in the following cases: blood money, retaliatory punishment, appointment as a judge, and even being an expert on jurisprudence.

Question: Can I follow a female expert on Muslim law?

Answer: It is like other fields of science; the foremost criterion is expertise.

Question: what is your perspective upon stoning as a punishment?

Answer: Regardless of what is being enforced in Islamic countries presently, there are two jurisprudential answers two this question.

1) Some great experts believe fixed Islamic penalties can not be enforced at Occultation Time (when Imam Mahdi is absent.)

2) In Islam, legal procedure concerning punitive law is so constraining that we cannot prove a wrongdoing such as fornication. Legal sanctions cannot be executed until hard proof is submitted. As far as fornication is concerned, four just people should have witnessed the sexual intercourse vividly. It would be impossible unless wrongdoers committed this action in public. We can also prove a suspect's guilt when he makes the confession of fornication for four times, and also when his confession derives from the pangs of conscience; the evildoer wants to set himself free from sin. The confession should not be extracted under pressure in prison. When Imam Ali was at realm of his Islamic State, a woman came to him for the penalty to be executed after she had committed fornication. The woman visited Imam Ali three times, and each time was told to leave by Imam Ali. She was pregnant when she came the fourth time, therefore, Imam Ali postponed the penalty until the child was born. Having given birth to her baby, she was told to leave until the child could distinguish good from bad. In fact, Imam Ali never wanted to enforce the law. It was his unique policy to stop corruption. Here, we come to the understanding that the judge cannot put the pieces together and state the fixed penalty of stoning against the suspect. In such cases, we can only enforce some discretionary punishments. In conclusion, there should be some corrections in the legal procedures."

In essence, Sanei maintains that women can be judges, their testimony is equal to that of men, the blood money to be paid for killing of a woman is equal to that of killing a man, and that salvation is not restricted to Muslims. Another mujtahid, Ayatullah Jannati allows women to be not only *mujtahids* but also a source of reference (*marji*‘ *al-taqlid*) i.e., she can issue juridical rulings that both men and women can follow. Other scholars have allowed women to be a *mujtahid* but not a *marji*‘.

Ideas like those expounded by Ayatullahs Sanei, Boujnardi, Jannati and Mohaqqeq Damad clearly represent a major break from the current understanding in the laws of divorce among many jurists. Sanei has gone further than most other scholars. In my discussions with him in Qum, 2004, he allowed women to lead men in prayers, even in a public setting. Most *maraji*‘ have insisted that only men can lead other men in prayers. Sanei admits that there are petrified fossilized devout ignoramuses who prevent such reforms in the law to take place.[36]

Shi‘i jurists in other countries have also engaged in their own reinterpretation of the law. The Lebanese scholar Ayatullah Fadlallah is popular with the youth 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 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

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[36] Ziba Mir-Hosseini, *Islam and Gender*, 160.

[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.

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]

Salvation and Religious Pluralism

Reformation has not been restricted to the juridical field. Some Muslim scholars have challenged previous interpretations on key issues in the Qur'an. For example, many contemporary jurists have extended salvation to non-Muslims. Coexistence in a pluralistic milieu is often militated by an exclusionary vision that denies salvific space to those who do not share that particular religious tradition. Such exclusivist claims have been regarded as necessary instruments for the self-identification of a group against other claims of absolute truth. In their understanding of the Qur'an, classical exegetes posited an exclusionary vision of the other. These exegetes are important to us to consider because, through them, the Qur'an spoke to millions of Muslims, both in the past and in present times. In an attempt to demonstrate the preponderance of the new faith, Muslim

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[40] Ibid., 257.

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

exegetes deemphasized the ecumenical passages in the Qur'an that appeared to offer salvation to other monotheistic traditions.

The pluralistic outlook of the Qur'an is expressed by verse 2:62 and 5:69, which provide salvation to, "whoso believes in God and the Last Day among the Jews, the Christians, and the Sabeans." The exegetes of the Qur'an sought to invalidate the claims of previous scriptures so as to circumscribe the ecumenical thrust of verses like 2:62 by resorting to various hermeneutical devices. For example, they appealed to the *naskh* (abrogation) principle. Other commentators limited the application of the verse by assigning the reason for its revelation to a specific group of people. The third approach has been to limit the verse to a strictly legalistic interpretation and the fourth has been to restrict the universality of the verse until the coming of Islam. Thereafter, it was applicable only to those who hold the faith of Islam.[42]

In their desire to restrict salvation to Muslims, a number of Muslim commentators have invoked 3:85 which states that, "whoso desires another religion than Islam, it shall not be accepted of him. In the next world he shall be amongst the losers." The verse has been interpreted in the previous and modern commentaries as abrogating 2:62 which, as noted, offers salvation to the people of the book.

It is plausible to maintain that in verse 3:85 the Qur'an is using the word *islam* in a generic sense, i.e. indicating the act of submitting to God rather than referring to the seventh-century institutionalized religion. This view becomes even more plausible when we examine the two verses preceding verse 3:85 both of which indicate that the generic rather than the historical understanding of *islam* is being used. Thus, verses 3:83 and 3:84

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[42] See Mahmoud Ayoub, *The Qur'an and Its Interpreters* (Albany: State University of New York Press, 1984), 1:110.

state, "Do you seek another religion apart from the religion of God while to Him submits (*aslama*), willingly or forcibly, whoever is in the heavens and on earth and to Him they shall be returned? Say, We believe in God and what has been revealed to us and what was revealed to Abraham, Isma'il, Isaac, Jacob, and the tribes. We believe in what Moses, Jesus and [other] prophets have been given from their Lord, we do not differentiate between any of them, we submit to Him (*nahnu lahu muslimun)*." In both verses, the word *islam* is used in the sense of submission to the one Lord rather than the religion brought by Muhammad.

Similarly, in other passages, Noah, Abraham, Moses, and other prophets are quoted as exhorting their followers to become Muslims. (2:132, 10:72, 10:84), i.e., to submit to the one Lord. The Prophet himself is asked to invite the people of the book to this common belief, i.e. the worship of one God and not to associate anyone with Him" (3:64). Muslim exegetes, on the other hand, construed the same word (*islam*) in verse 3:85 as referring to the historical religion brought by Muhammad. Hence, after the coming of the Prophet, Islam is assumed to have nullified previous revelations. The universal discourse of the Qur'an that defined a believer as responding to two main beliefs: "belief in God and the last day" was undermined by this interpretation.

It is to be noted that the classical exegetes disagreed on the idea of the supersession of the Abrahamic religions. Tabari (d. 923), for example, regards the abrogation and revoking of earlier divine promise to the people of the book as incompatible with the concept of divine justice.[43] Ibn Kathir (d. 1373), on the other hand, claims that based on 3:85, nothing other than Islam was acceptable to God after

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[43] Muhammad b. Jarir al-Tabari, *Jami' al-Bayan fi Tafsir al-Qur'an* (Beirut: Dar al- Ma'rifa, 1992), 2:155-56.

Muhammad's mission. Salvation to followers of the previous scriptures could only be guaranteed before Islam came. Verse 2:62 is construed as promising salvation to Jews, Christians, and Sabeans before the coming of Muhammad.[44]

In his commentary on verses 2:62 and 3:85, the twentieth-century exegete al-Tabataba'i does not invoke the principle of supersession, neither does he claim that the promise of salvation offered in 2:62 was limited to those communities before the coming of Muhammad. He provides an inclusivist interpretation on the issue of salvation to people of other faiths. Scholars like Ayatullah Sanei[45] and Muhaqqiq Damad[46] have agreed with Tabataba'i and extended salvific space to non-Muslims.

In the classical exegetical literature, the principle of God's message revealed through a series of prophets provided the theologians with the tool of abrogation with which they claimed that Islam was the culmination of divine revelation and that, because of it, the adherents of other monotheistic traditions could not be saved. Such an exclusivist theology could not foster a peaceful global human community based on the principles of peace, justice, and equity.

The foregoing suggests that the Qur'an seems to accord much room for the individual to negotiate his/her own spiritual space. Those interpreting the text have been less tolerant when it has come to validating rival claims to the truth. There is a clear tension between the tolerance exhibited by the Qur'an and the interpretation of later exegetes who, in all probability, were responding to the polemical disputations in which they had to assert the supremacy of Islam over previous revelations. They adopted

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[44] Ibn Kathir Isma'il, *Tafsir* (Beirut: Dar al-Mufid, n.d.), 1:104-5.

[45] See my interview with him cited above.

[46] This was relayed to me in a personal conversation.

exclusivist theological and juridical positions imposing, in the process, their own interpretations on the Qur'an.

For the exclusivists, soteriology lies in the recognition and acceptance of the saved authority. Without the recognition of the "saved authority" and detachment from all rival contenders for the truth, a community cannot possibly be saved.[47] Legitimation for this claim is sought often by extrapolating or interpolating scriptures in order to vindicate the position adopted. The process leads to a greater tendency to marginalize the other and to choosing a theology of exclusivity

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 suggested above are possible only if Muslims are able to speak their minds and discuss things openly. The challenge for Muslims in contemporary times is to recover the ecumenical message of 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

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[47] For a discussion on this see, John Wansborough, *The Sectarian Milieu: Content and Composition of Islamic Salvation History* (Oxford: Oxford University Press, 1978), 85, 124.

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.

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.