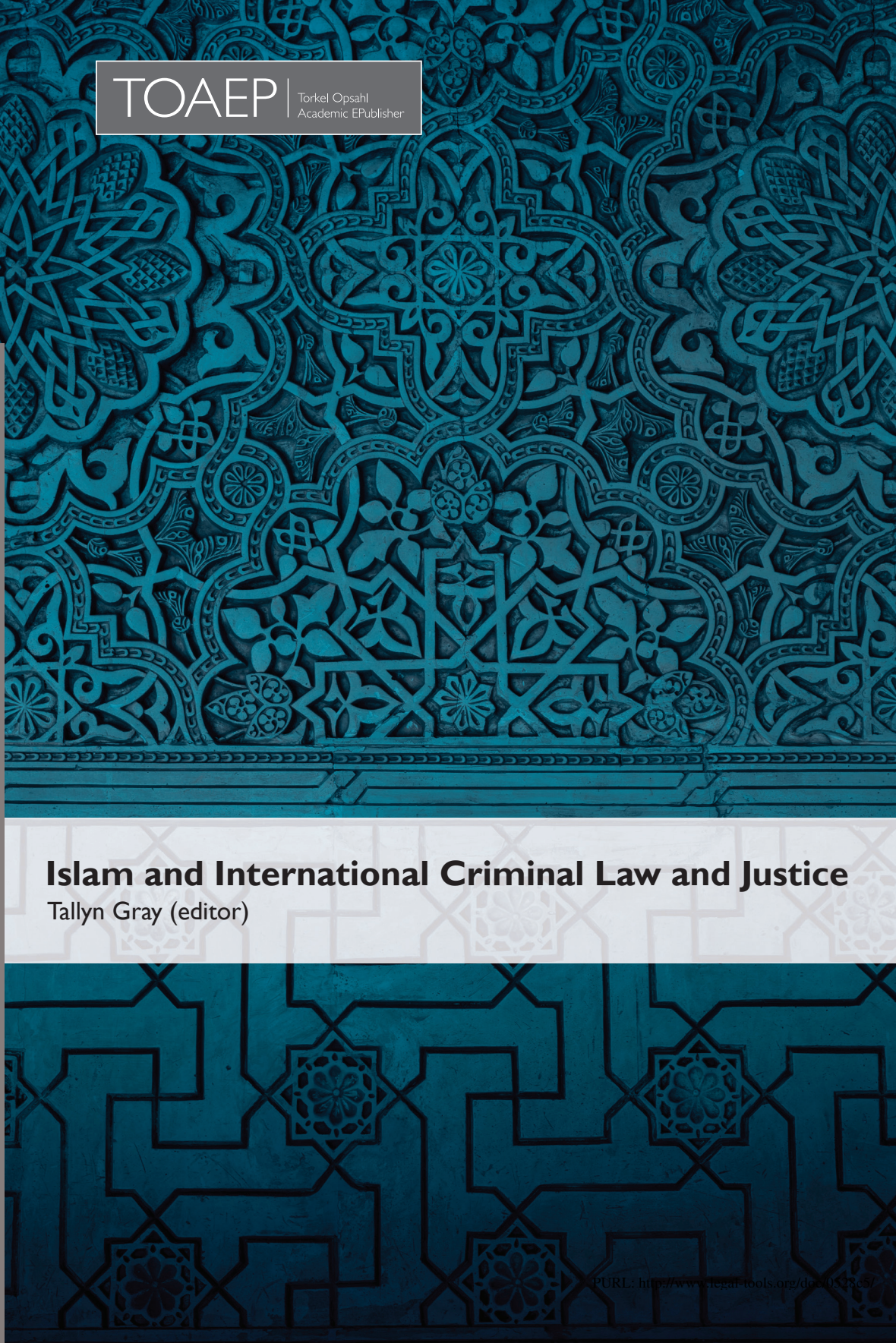

Islam and International Criminal Law and Justice

Tallyn Gray (editor)

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2

The Principal Sources of Islamic Law

Onder Bakircioglu*

2.1. Introduction

Islam carries significant characteristics of an elaborate legal system seeking to regulate broad areas of human conduct in accordance with its ideal paradigm of what constitutes right and wrong. Islamic precepts, which Muslims believe to have been inspired by God, should be followed by believers by means of thought and deed. Classical Islamic jurisprudence rests on a monotheistic outlook that regards God as the ultimate source of law, for He alone is taken to be the ultimate sovereign whose omnipotence over human affairs stems from His status as the creator of the universe. Humankind accordingly needs no further justification to be subordinate to His will. Unsurprisingly, in relation to Lord (*rabb*), Islam characterises humans as servants (*'abd*).[1] The word 'Islam', likewise, derives from the Arabic term *salám*, which has a two-fold meaning: peace and submission (to God).[2] A Muslim, then, is a person who submits to God's will to the exclusion of any other revered entity.

The challenging questions of how Islamic law regulates international affairs in general, as well as just recourse to and just conduct in warfare, along with issues germane to peaceful settlement of disputes and criminal justice,[3] demand a general examination of the origins, development and hierarchy of *Sharí'ah*. This chapter will explore the primary sources of

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1 Montgomery W. Watt, *Islam and Christianity Today*, Routledge, London, 1983, p. 125.

2 Bernard Lewis, *The Political Language of Islam*, University of Chicago Press, Chicago, 1988, p. 78.

3 Such issues pertinent to Islamic international law (*siyar*) will be examined in later chapters of the present volume.

Sharí'ah, namely the *Qur'án* and the *Sunnah* (the Prophetic tradition), and the main secondary sources, namely *ijtihád* (independent critical reasoning) and *ijmá'* (consensus of commentators on a controversial point of law). Rejecting literal and narrow hermeneutics, this chapter will highlight the need for a contextual reading of Islamic sources, whose varied interpretation informs most contemporary debates. By providing an overview of the key sources of Islam, this chapter aims at setting the ground for the volume.

2.2. Primary Sources

2.2.1. The *Qur'án*

The *Qur'án* (which literally means recitation or reading) constitutes the most important source of Islam, which is composed of the divine revelations received by the Prophet, who sought to form a moral socio-political order operating in accordance with the sacred messages delivered by God. The *Qur'án* is the primary and most authoritative source of Islamic law. Since the *Qur'án* is believed to contain the literal words of God, it is deemed the most authentic record of Islamic law,[4] incarnating the final, inimitable and infallible injunctions of everlasting validity. God in the *Qur'án* affirms Islam's complete nature, saying: "Today I have perfected your religion for you, and I have completed My blessing upon you, and have approved Islam for your religion".[5] Although the *Qur'án* expresses that "[e]very nation has its Messenger"[6] and that there is no difference between these Prophets,[7] Muḥammad is believed to have closed the line of Messengers[8] by re-introducing the original and unadulterated teaching of God. According to Islam, God's revelations have not been preserved in their pristine forms in earlier scriptures.[9] Muslims thus believe that the

4 Farooq A. Hassan, "The Sources of Islamic Law", in *Proceedings of the Annual Meeting (American Society of International Law)*, 1982, vol. 76, p. 66.

5 The *Qur'án* (translation by Arthur J. Arberry), 5:5.

6 *Ibid.*, 10:48.

7 *Ibid.*, 2:130.

8 *Ibid.*, 33:40.

9 Yúsuf Ali, *The Meaning of the Holy Quran*, 11th ed., Amana Publications, Maryland, 2008, p. 56.

Qur'án is God's final effort to reconstruct the undistorted message preached by other Prophets since Abraham.[10]

The *Qur'án*, in other words, presents Islam as the very religion that had been preached by earlier Prophets including Abraham, Noah, Moses, and Jesus[11] who themselves were originally Muslims. Among other Prophets, Muslims ascribe to Abraham a prominent standing, as he is considered a perfect model for the faithful and the harbinger of monotheism.[12] The fact that the Muslim tradition rooted itself within the soil of monotheism rendered the appeal of the *Qur'án* more acceptable to those who were already familiar with the monotheistic conception of the universe. Indeed, the Prophet Muḥammad had never rejected the legacy of his predecessors; he rather saw himself part of a long series of Prophets appointed by God to preach the divine truth. Like Abraham, Muḥammad proclaimed monotheism and advised his followers to comport themselves in a manner of righteousness and piety.[13] As with Christ, he reminded humankind of resurrection, the Day of Judgement, and of the punishments and rewards in the hereafter.

2.2.1.1. The Collection of the *Qur'án*

Islamic tradition holds that the *Qur'án* is revealed to Muḥammad by God through the medium of the angel Gabriel.[14] According to Muslim theology and jurisprudence, the entire corpus of the *Qur'án* sprang from Muḥammad's reception of divine revelations (*wahy*). Muḥammad received revelations in instalments during the Mecca and Medina period, over the course of twenty-two years (AD 610–632) until his demise.[15] The *Qur'án* is revealed in Arabic, containing 114 chapters (*súrahs*), 6,236 verses (*áyát*), and a total number of 77,934 words. The whole body of the

[10] *Ibid.*, 2:127–130.

[11] Jonathan Berkey, *The Formation of Islam: Religion and Society in the Near East, 600–1800*, Cambridge University Press, Cambridge, 2003, p. 48.

[12] John L. Esposito, *The Oxford Dictionary of Islam*, Oxford University Press, Oxford, 2003, p. 7.

[13] The *Qur'án*, 2:131–133, see *supra* note 5.

[14] *Ibid.*, 53:1–18.

[15] Michael Cook, *The Koran: A Very Short Introduction*, Oxford University Press, New York, 2000, p. 5.

Qur'án was completed during the lifetime of the Prophet who called on his scribes to record what had been revealed to him.

The Prophet's recitations were initially written down on whatever material came to hand, including palm leaves, wood pieces, and parchment. Under Muḥammad's supervision, these fragmented pieces were subsequently collected into *súrahs* or chapters. Although the *Qur'án* existed in its full, albeit fragmented, form since the first revelation, the written material was not brought together into a single codex during the Prophet's lifetime. The assembly of the entire Qur'ánic text was a lengthy and arduous task. Most commentators concur that an official codex had been collected under the rule of Uthmán, the third *Caliph*, within the period of 20 years following Muḥammad's death.[16]

Uthmán concerned himself with ascertaining whether the texts he assembled had been directly recited by the Prophet. During this process, the chief Qur'ánic material was the one collated by Muḥammad's chief secretary, Zaid Ibn Thábit. Uthmán is known to have ordered an authorised version of the *Qur'án* to be assembled and copied, and to have commanded his governors to destroy all variant texts.[17] For one of the main challenges lay in the fact that Arabic was the language of desert nomads, and its spoken form was far more sophisticated than its written form at a time when written Arabic lacked vowels or diacritical marks. This led to the acknowledgement of seven variant, but equally authoritative, readings (*qira'át*) of the *Qur'án*, which could have caused significant controversy over the meaning. However, when the *Qur'án* was redacted and an authoritative version was adopted, this put an end to alternative readings. This redacted version, effected by a number of learned *ṣaḥábah* (companions of Prophet Muḥammad), "has since remained unchanged and unchallenged".[18]

[16] John Burton, *The Collection of the Quran*, Cambridge University Press, Cambridge, 1977, p. 139.

[17] Al-Sayyid Abú Al-Qásim Al-Musawi Al-Khu'i, (translated by Abdulaziz A. Sachedina), *Prolegomena to the Quran*, Oxford University Press, New York, 1998, p. 135.

[18] M. Cherif Bassiouni, "Evolving Approaches to Jihad: From Self-Defense to Revolutionary and Regime-Change Political Violence", in *Chicago Journal of International Law*, 2008, vol 8, p. 119.

2.2.1.2. The Substance and Structure of the *Qur'án*

The *Qur'án*, as touched upon earlier, is deemed to embody an authentic record of God's eternal and unalterable word.[19] Incorporating an amalgamation of legal and ethical principles, as well as ritualistic and moral exhortations, the *Qur'án* provides the fundamental substance of the Islamic law (*Sharí'ah*) and imposes a clear set of legal and moral obligations on Muslims. The *Qur'án* covers the basic aspects of mundane and spiritual existence, envisaging guidelines for legitimate and ideal human conduct.[20] Lessons of right behaviour in daily matters, and wisdom in spiritual matters, may thus be sought from the *Qur'án*. In view of the fact that God's ordinance is contained in the *Qur'án*, the ideal life for Muslims is one that is lived in line with the relevant Islamic precepts and injunctions, whether ritualistic, moral or legal in character.[21] The *Qur'án* is thus a system of duties and responsibilities, which if duly performed may not only give a believer an inner satisfaction in the temporal domain, but also assure him a place in Heaven.

Muslim scholars usually distinguish between three main categories of ethico-legal injunctions in the *Qur'án*. The first pertains to the doctrine of belief in God, His messengers and the Day of Judgment; the next is essentially concerned with ethical human conduct; and the third part is associated with practical or daily actions of believers under Islamic law.[22] These categories are then sub-divided into relevant sections, which, among other things, deal with rituals, private and public matters, as well as wide issues of domestic and foreign policy. Whilst the *Qur'án* incorporates a detailed set of practical, legal and moral rules, when its meaning remains obscure or when it is silent on a particular matter, other sources of *Sharí'ah* (which will be explored below) may be drawn on to generate answers for the problem at hand. The *Qur'án*, in this context, may be compared to a constitution that provides the key material on issues of social, political, legal and practical nature. It is then the role of the scholar,

19 The *Qur'án*, 10:37, see *supra* note 5.

20 Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, Islamic Texts Society, Cambridge, 1989, p. 18.

21 Joseph Schacht, *An Introduction to Islamic Law*, Oxford University Press, Oxford, 1982, p. 11.

22 M. Izzi Dien, *Islamic Law: From Historical Foundations to Contemporary Practice*, Edinburgh University Press, Edinburgh, 2004, p. 37.

jurist, or legislator to explain or flesh out, while remaining loyal to the letter and spirit of the main text, norms to address what is required by concrete circumstances. Naturally, the ever-changing needs of societies require appropriate refinement and elaboration of Qur'ánic norms through human reasoning.

It is worth noting that a notable portion of the *Qur'án*'s contents had essentially been informed by the prevailing socio-political, economic, and religious circumstances of its day; thus, many moral, religious, and social pronouncements of the *Qur'án*, even though divinely inspired and transcendental, answer some of the problems faced at the time of Muḥammad's ministry. As some of the early verses make it clear, the *Qur'án* was primarily concerned with the acute problems of its time, which include such issues as polytheism, idolatry, the exploitation and maltreatment of the poor, malpractices in trade, and the overall injustice affecting society.[23] The practical facet of the *Qur'án* becomes quite evident when considering that a remarkable part of Qur'ánic revelations was handed down to Muḥammad over the course of twenty-two years in response to practical questions. Not surprisingly, therefore, the *Qur'án* contains a rich repository of guidance on real-life situations, with injunctions regulating a vast field, from issues of international relations and matters of war and peace, down to the habits of everyday life such as relations between spouses, child custody, eating, drinking, and personal hygiene.

In addition to containing timeless moral and spiritual injunctions, the *Qur'án*, then, responded to some of the important socio-political issues of its period. However, there is a controversy on whether the *Qur'án* subsumed all previous legislation. Some commentators maintain that Islam invalidated all previous legal systems, because the *Qur'án* provided a comprehensive account of everything.[24] Other scholars, particularly *Ḥanafí* jurists, assert that only those pre-Islamic rules, which had not been expressly abrogated by the divine will could be recognised as valid.[25] Evidence suggests that Islam had not repudiated the validity of all pre-Islamic doctrines; especially during the nascent stages of Islam, there was

[23] Fazlur Rahmán, *Islam & Modernity: Transformation of an Intellectual Tradition*, University of Chicago Press, Chicago, 1982, p. 2.

[24] The *Qur'án*, 16:89; 6:28, see *supra* note 5.

[25] Majid Khadduri, *War and Peace in the Law of Islam*, Johns Hopkins Press, Baltimore, 1955, p. 3.

widespread adoption of many legal and administrative institutions and practices of the newly conquered territories. There were "multiple influences on Muslims in places where they have adopted many social and cultural practices of pre-Islamic origin".[26] This was natural as the expansion of the Islamic State necessitated the management of foreign people with their particular traditions, which resulted in the fusion of some raw Islamic legal material with pertinent local customs and traditions. Prominent examples were seen in the law of taxation, religious foundations (*waqf*), and the way in which tolerated (monotheistic) religions were managed. The retention of some pre-Islamic traditions and local institutions was accompanied by the adoption of novel legal concepts, maxims, or methods of reasoning. In this way, as Schacht argues, many rules that had their origin in Roman and Byzantine law, Canon law of Eastern Churches, Rabbinic law, or Sassanian law, became part of the Islamic law.[27] Certainly when integrated within the Islamic law, some of such laws must have assumed a character in tune with the overall tenor of Islam. More importantly, Islam's rejection of idolatry in favour of God's supremacy resulted in the rejection of many pre-Islamic customs and practices that were idolatrous in nature.[28]

It is important to highlight the nexus between certain Islamic injunctions and pre-Islamic customary law because some Islamic norms may be better understood in light of knowledge concerning the pre-Islamic social setting. Hence, when an analyst is confronted with some obscure verse, a detailed evaluation of the relevant socio-historical backdrop must be conducted with a view to contextualising the issue involved. Given that the Qur'ánic material was communicated to the Prophet piecemeal, it is often possible to comprehend any ambiguity through studying the historical setting or specific challenges faced by Muslims.

2.2.1.3. The Elucidation of the *Qur'án*

As with other religio-legal systems, Islamic law has been subjected to interpretation in varying degrees, a process that has taken such modes of hermeneutics as traditional, customary, critical, and innovative. Consider-

[26] Mushirul Ḥasan, *Moderate or Militant Images of India's Muslims*, Oxford University Press, Oxford, 2009, p. 102.

[27] Schacht, 1982, pp. 18–21, see *supra* note 21.

[28] Khadduri, 1955, p. 3, see *supra* note 25.

ing the socio-historical dynamics that shaped the contours of Islamic law, any hermeneutical effort should arguably consider the overall historical context, connected verses and prophetic traditions, as well as the underlying logic, object and the purpose of Islam. As subjectivity constitutes an inevitable element of interpretation, regular revisiting and review of all relevant facts and rereading of relevant sources is also essential. But, notwithstanding the need to keep religious norms responsive to changing conditions, not every aspect of the religion may be subject to reinterpretation; for instance, there is very little scope in reinterpreting most ritualistic rules, or such timeless themes as the unity of God (*tawḥíd*), the profession of faith or affirming Muḥammad's status as the seal of all Prophets.[29]

For the purposes of interpreting the *Qur'án*, the aforementioned contextual method calls for the identification of the general atmosphere within which a verse was revealed, the particular problem (if any) to which the revelation responded, as well as the overall corpus, objective, and spirit of the Islamic legal system. The stress on context-specificity does not, of course, preclude the analyst from deducing general principles from a specific command or injunction, provided that such inferences accord with the fundamental tenets of Islam.

Islamic law is expounded through *úṣúl al-fiqh*, a method of extracting rules (*fiqh*) from primary sources. Hence, it is through the branch of *úṣúl al-fiqh* that secondary norms may be obtained.[30] The elaboration of Islamic norms has often been necessitated by the changing socio-political conditions. While the *Qur'án* states that it explains "everything",[31] and that nothing is "neglected [...] in the Book",[32] this, as Ramadan argues, should refer "to general principles, to essential and immutable rules".[33] The *Qur'án*, in this sense, contains the indispensable elements of legislation and the imperative will of God out of which secondary rules may be deduced.[34]

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29 The *Qur'án*, 7:158, see *supra* note 5.

30 Kamali, 1989, p. 2, see *supra* note 20.

31 The *Qur'án*, 16:91, see *supra* note 5.

32 *Ibid.*, 6:38.

33 Tariq Ramadan, *Radical Reform: Islamic Ethics and Liberation*, Oxford University Press, Oxford, 2009, p. 24.

34 Dien, 2004, p. 35, see *supra* note 22.

The modalities of interpreting the *Qur'án* present certain challenges on account of its directly revealed character and superiority over other sources. Like other scriptures, the *Qur'án* may not always be straightforward in its message,[35] which raises the challenge of comprehending the real sense of a verse while extracting rulings. This phenomenon resulted in distinct methods of interpretation that emerged within and between various Islamic cultures of different epochs. Evidently, the passage of time significantly affected the manner in which some verses are read, since what had been straightforward during the lifetime of the Prophet may have appeared relatively obscure to the commentator of subsequent ages. During his lifetime, Muḥammad expounded the meaning and implications of opaque passages. In fact, the *Qur'án* notes that it was incumbent upon the Prophet to "make clear to mankind what was sent down to them".[36] But since the prophetic mission could not be bequeathed to succeeding *Caliphs*, both divine legislation and its authoritative interpretation drew to an end. This led to serious complications, particularly when Islam embarked upon expansion outside Arabia. The development of Islamic law would have been much more linear and clear-cut had Muslim rule been confined to Arabia. The newly conquered territories, including Egypt, Syria, Iraq, and Persia, presented unprecedented legal challenges that could not be readily met merely through unelaborated principles. This challenge compelled Muslim jurists to make recourse to the prophetic tradition, personal opinion (*ra'y*) and certain pre-Islamic concepts to supplement the divine legislation and thereby to address the demands of culturally different societies.[37]

The theme of Qur'ánic order of rank and priority features prominently in textual interpretation; for not all verses, albeit all being of divine origin, enjoin the same normative status. Some verses are indeed more imperative than others in the way they impose duties on the believer. Likewise, some verses may be more direct about what they demand of humankind; some may be more explicit, while others may appear implicit in meaning, or they may require to be read in conjunction with other verses.[38] Naturally, the broader context of each era marks out the theoretical

35 The *Qur'án*, 3:7, see *supra* note 5.

36 *Ibid.*, 16:45.

37 Khadduri, 1955, p. 27, see *supra* note 25.

38 Ismail R. Al-Faruqi, *The Cultural Atlas of Islam*, Macmillan, London, 1986, p. 246.

contours of the analysis, informing the way in which the textual material of the *Qur'án* is understood and applied to real-life situations.

It follows that a commentator may often have a penchant for approaching the Qur'ánic text with a mindset conditioned by the presuppositions, concerns and expectations of his time. Hence, even when the commentator seeks to identify the rationale behind a verse, which may link the cause and consequences of the revelation, he is likely to approach the verse with a frame of mind that searches for its immediate practical implications. This dialectic relation between the text and its analyst is not only inescapable, but necessary to retain the scriptural guidance germane to changing human needs. Such an active engagement with the Qur'ánic material dovetails with the notion that the *Qur'án* incorporates sempiternal guidance for humankind of all ages. Indeed, were the *Qur'án*'s message restricted to the questions faced during the time of its revelation, the 'timeless' tenor of the text could be compromised; or it might have lost its central pertinence to Muslims of various epochs who need tailored solutions to complex problems they confront.

One of the barriers to interpretation is the extent to which elaboration may be carried out. The debate among conservative, liberal, reformist, or revivalist commentators has never actually been about whether there should be interpretation of the primary sources, but rather, about the degree to which this could occur. In their efforts to extract secondary rulings, some scholars, including such canonical figures as Abú Ḥanífah, faced accusations of neglecting the primary sources and disproportionately relying on their own views.[39] The key concern has always been whether commentators remained loyal to the divine legislation while distilling individualised responses. Although, as discussed below, systemic expansion of primary norms was generally interrupted after the age of "classical" theologians, Muslims have developed various schools of thought which sought to contribute to the development of Islamic law.[40]

In their quest to extricate further rules or extrapolate abstract constructions to concrete cases, Muslim jurists developed sophisticated methods of interpretation to reduce the margin of error. These techniques of law-making make use of deductive, inductive, and analogical reasoning,

[39] Ramadan, 2009, pp. 53–56, see *supra* note 33.

[40] John L. Esposito, *The Future of Islam*, Oxford University Press, Oxford, 2010, p. 88.

distinguishing the general principle (*'ámm*) from the specific (*kháṣ*), the manifest (*ẓahir*) from the explicit (*naṣṣ*), or the literal (*ḥaqíqí*) from the metaphorical (*majází*). Jurists mayalso invoke, among others, the doctrine of preference (*istiḥsán*) to respond to a problem in light of such considerations as equity, justice and fairness.[41] To sum up, the main purpose of generating secondary norms is to safeguard the applicability of primary sources to evolving socio-cultural context. Nevertheless, as human subjectivity is unavoidable in hermeneutical efforts, there emerged numerous schools of jurisprudence (with their varying interpretative frameworks) over the course of Islamic history. The following pages will turn to the second most important source of Islamic law.

2.2.2. The *Sunnah*

Loyal observance of the example of the Prophet, along with the commands of God in the *Qur'án*, plays a key role for Muslims in their quest to secure peace in this world and achieve salvation in the hereafter. The prophetic practice, also known as the *Sunnah*, forms the second principal source of *Sharí'ah*. The *Sunnah* includes the anecdotal accounts of Muḥammad's sayings, deeds, views, habits, or tacit (dis)approvals of certain practice. The concept of *Sunnah* is occasionally used to refer to the practice of Muḥammad's companions, too. The written account of these practices is termed the *ḥadíth*,[42] which contains the documented record of what Muḥammad is considered to have uttered or done during his lifetime. While the *Qur'án* embodies the binding law in God's own words, *Sunnah* is taken to be the reflection of God's wisdom with which the Prophet had been inspired.[43] Confirming this point, the *Qur'án* demands believers to follow the model pattern of behaviour exhibited by the Prophet.[44]

For Muslims, the significance of the *Sunnah* lies in the fact that Muḥammad was the final messenger of God, and as such his practice

41 James P. Piscatori, *Islam in a World of Nation-States*, Cambridge University Press, Cambridge, 1986, p. 4; Kamali, 1989, p. 3, see *supra* note 20.

42 Mir Mustansir, "The Sura as a Unity: A Twentieth Century Development in Quran Exegesis", in G.R. Hawting and A.A. Shareef (eds.), *Approaches to the Quran*, Routledge, New York, 1993, p. 218.

43 The *Qur'án*, 3:164, see *supra* note 5; Majid Khadduri, "The Maslaha (Public Interest) and Illa (Cause) in Islamic Law", in *New York University Journal of International Law and Politics*, 1980, vol. 12, p. 213.

44 The *Qur'án*, 33:21, see *supra* note 5.

bears a decisive role for a better appreciation of the *Qur'án*. As Esposito points out, Muḥammad has over the centuries "served as the ideal model for Muslim life, providing the pattern that all believers are to emulate. He is, as some Muslims say, the 'living *Qur'án*'".[45] A connected *Sunní* proposition is that only the Prophet was divinely protected from committing major errors in interpreting the revelations. This moot doctrine is known as the 'Prophetic infallibility' (*iṣmat al-anbiyá*). Having rejected the view that Muḥammad was a fallible being who had been "subject to the same experiences as the rest of men",[46] apologists of the 'infallibility' doctrine posit that while the Prophet could commit minor errors (*ḍalálah*) as a human being, his interpretive infallibility is unquestionable, for he is the "seal of the Prophets" who passed away without an heir of his stature.[47] After him, the argument runs, there remained no intermediary between God and humankind; and the successors (*Caliphs*) lacked the mandate to promulgate, or authoritatively explain, God's law.[48]

Although this is not the place to discuss whether the 'infallibility doctrine' stands on solid grounds, it is certainly true that the death of the Prophet had marked the termination of divine legislation. Remarkably, shortly before his demise in 632, Muḥammad recited what many scholars believe to be the final verse of the *Qur'án*: "Today I have perfected your religion for you".[49] This verse indeed signalled the termination of Muḥammad's prophetic mission, after which no divine law was to be sent down. The law of God was henceforth to be developed through (fallible) human effort, an enterprise whose results had to comply with the basic tenets of Islam. This fact alone made the traditions ascribed to Muḥammad all the more important, for they provided a perfect paradigm for the manner in which divine injunctions must be observed and applied.

45 John L. Esposito, *Islam: The Straight Path*, Oxford University Press, Oxford, 1994, p. 13.

46 Daniel W. Brown, *Rethinking Tradition in Modern Islamic Thought*, Cambridge University Press, Cambridge, 1996, p. 66.

47 Jackson Sherman, *Islam and the Black American: Looking Toward the Third Resurrection*, Oxford University Press, New York, 2011, p. 4.

48 Albert Hourani, *A History of the Arab Peoples*, Faber and Faber, London, 2005, p. 22.

49 The *Qur'án*, 5:5, see *supra* note 5.

2.2.2.1. The Structure and Role of the *Ḥadíths*

A *ḥadíth* is a narration containing a report of what the Prophet said or did in a certain form as transmitted one of his companions, who in his turn would relate it to someone belonging to the following generation.[50] Every *ḥadíth* has two parts. The first part (*isnád*) comprises a list of narrators that handed down accounts of the actions, sayings, teachings, decisions, overt or tacit views of Muḥammad or his immediate companions. This chain traces the sources through which the Prophetic practice had been reported with a view to attesting the historical authenticity of a particular *ḥadíth*. *Isnád* employs a classical formula along these lines: "It has been related to me by A on the authority of B on the authority of C on the authority of D that Muḥammad said […]". The second part, on the other hand, contains the actual content or text (*matn*) of the *ḥadíth* that communicates what the Prophet had reportedly said or done.[51] The report's main function is to shed light on a wide array of important matters in Islam.[52]

Roughly since the second century of Islam, Muḥammad's well-attested manner of behaviour has been considered to constitute a normative rule of conduct for Muslims. The phenomenon of precedent or normative custom, however, is not entirely foreign to the pre-Islamic period; Arabs have felt bound by tradition or precedent since time immemorial. The conventional wisdom dictated that the precedent of ancestors was to be revered and imitated. Adherence to ancient traditions often left no noteworthy room for new experiments and innovations that could alter the status quo. Entrenched customs thus presented a significant obstacle to innovation, so much so that in order to discredit an idea, it was generally sufficient to label it an 'innovation'.[53] The emergence of Islam, in this sense, proved to be the most radical innovation in Arabia at the time. Yet once Islam successfully prevailed over the Arabian Peninsula, the conven-

[50] Annemarie Schimmel, *And Muhammad is His Messenger: The Veneration of the Prophet in Islamic Piety*, University of North Carolina Press, London, 1985, p. 26.

[51] Israr A. Khan, *Authentication of Hadith: Redefining the Criteria*, International Institute of Islamic Thought, London, 2010, p. 28.

[52] John Burton, *An Introduction to the Hadith Tradition*, Edinburgh University Press, Edinburgh, 1994, p. 19.

[53] Majid Khadduri and Herbert J. Lienbesny, *Law in the Middle East*, The Lawbook Exchange, New Jersey, 2008, p. 34.

tional adherence to customs reasserted itself in the form of following the dictates of the new religious system.[54]

Concerning the role of the traditions, jurists reached a consensus that secondary norms had to be derived from the primary sources (as opposed to mere speculative reasoning). To be sure, this necessitated a much greater emphasis on the documentation of genuine (*sahih*) traditions.[55] Muslim scholars, among whom Al-Sháfi'í played a prominent role, sought to ensure the authenticity of transmitted *ḥadíths* so that legal certainty and predictability could be achieved. Rejecting the thesis that the authority of the Prophet had been that of an individual who had been better placed than any other human person to interpret the *Qur'án*, Al-Sháfi'í defended the position that the Prophet's overall practice was divinely inspired. This thinking, he reasoned, was the inexorable consequence of the Qur'ánic injunctions to obey God and His Messenger.[56] The eventual prevalence of Al-Sháfi'í's proposition that the acts or sayings of the Prophet reflected the divine will meant that accepted traditions could no longer be rebutted through content analysis of the narrations.[57] It followed that the veracity of a *ḥadíth* became generally dependent on the reliability of the chain of narrators transmitting the tradition. The wide acceptance of this position eventually raised controversy on the extent to which the reported traditions could be trusted.

2.2.2.2. Credibility of the *Ḥadíth* Literature

As alluded to earlier, the *Sunnah* has hitherto been employed to contextualise and understand the Qur'ánic material, as well as to enrich extant rules, customs and principles. Yet, the veracity of certain *ḥadíths* came to be questioned on the grounds that some of them might well have been fabricated to consolidate a given religio-political stance – as a certain position or attitude could be deemed correct, if a reliable chain of transmission testified to a corresponding practice of the Prophet.

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54 Schacht, 1982, p. 17, see *supra* note 21.

55 Dien, 2004, p. 35, see *supra* note 22.

56 The *Qur'án*, 8:20; 4:59, see *supra* note 5; Andrew Rippin, *Muslims: Their Religious Beliefs and Practices*, Routledge, New York, 2005, p. 223.

57 Noel J. Coulson, *A History of Islamic Law*, Edinburgh University Press, Edinburgh, 1964, p. 56.

The possibility of producing seemingly authentic *ḥadíth* was indeed not an unlikely risk, which loomed larger when spatial and temporal distance grew from the source of a reported tradition. Certainly, one of the most significant factors leading certain jurists to doubt the authenticity of some *ḥadíths* was that traditions had only been collected and recorded in the second and third centuries of Islam. This mindfulness explains why only such authoritative records of *Sunnah* as those of Al-Bukhari (d. 870) and Muslim Ibn Al-Hajjaj (d. 874) have been considered credible by the majority of scholars.[58] Such reliable transmitters related traditions through a chain of trustworthy authorities, who handed down the relevant piece of information from generation to generation. The companions of Muḥammad, who witnessed the practice or heard the sayings of the Prophet, were undoubtedly best positioned to convey a tradition. After the passing of the Prophet's contemporaries, the following generations had to be content with the information handed down from the earlier generations.[59]

One notable source of distrust rose out of occasional inconsistency and variability found among the relevant traditions attributed to Muḥammad. This led such scholars as Mu'tazila (d. 748), Sayyid Ahmad Khan (d. 1898), and Ghulam Ahmad Parwez (d. 1986) to doubt the authenticity of some traditions. But the number of Muslim critics has hitherto been small, since the majority of scholars recognise the authority of varied *ḥadíths* on the basis that there was nothing wrong with the Prophet having changed tactics in responding to the circumstances.[60] While it may be accepted that flexibility and prudent statesmanship has served the cause of God and made Islam responsive to the particular challenges it has faced, the danger of cherry-picking certain traditions (and Qur'ánic verses, often by divesting them of their context) in a bid to further a cause has always plagued the Muslim world.

Although the criticism of the *ḥadíth* literature originated within Muslim circles, some Western scholars, including Goldziher, Alfred Guillame, and Joseph Schacht, took issue with the very foundation and validi-

58 Abdullahi Ahmed An-Na'im, "The Rights of Women and International Law in the Muslim Context", in *Whittier Law Review*, 1988. vol. 9, p. 49.

59 Ignác Goldziher, *Introduction to Islamic Theology and Law*, Princeton University Press, Princeton, 1981, p. 37.

60 Piscatori, 1986, p. 4, see *supra* note 41.

ty of prophetic traditions as a source of Islamic jurisprudence.[61] The main arguments for their critical position are essentially built upon these premises: (1) the *ḥadíth* literature relies on oral transmissions, which significantly grew larger than those contained in earlier anthologies; (2) *ḥadíths* transmitted by the younger companions of the Prophet surprisingly exceed those reported by the older ones; (3) the transmission system was applied in such an arbitrary fashion that the genuineness of the traditions could not be proved; (4) there are many contradicting *ḥadíths* that are equally deemed valid, since Muslim scholars concerned themselves solely with the validity of the chain of transmission, and not with the content of the *ḥadíth*.[62] Ignác Goldziher, one of the most prominent critics of the *ḥadíth* literature, went as far as to argue that:[63]

> each point of view, each party, each proponent of a doctrine gave the form of *ḥadíth* to his theses, and that consequently the most contradictory tenets had come to wear the garb of such documentation. There is no school in the areas of ritual, theology, or jurisprudence, there is not even any party to political contention, that would lack a *ḥadíth* or a whole family of *ḥadíths* in its favour, exhibiting all the external signs of correct transmission.

Schacht similarly challenged the credibility of the transmission system, positing that it lacked historical value, being largely invented by those who sought to authenticate their doctrines. Hardly any legal tradition of the Prophet could therefore be considered accurate, according to such sceptics.[64] Nonetheless, well before such Orientalists, concerns about the authenticity of traditions had been raised by Muslim scholars who eventually developed a rigorous method of sifting credible traditions from apocryphal ones whenever contradictions, vagueness or doubtfulness surfaced. This method divided the *ḥadíths* into three categories: those trans-

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61 Shaheen S. Ali, "The Twain Doth Meet! A Preliminary Exploration of the Theory and Practice of As-Siyar and International Law in the Contemporary World", in Javaid Rehman and Susan Breau (eds.), *Religion, Human Rights and International Law*, Martinus Nijhoff Publishers, Leiden, 2007, p. 86.

62 Muhammad Siddiqi, *Hadith Literature: Its Origin, Development & Special Features*, Islamic Texts Society, Cambridge, 2008, p. 125.

63 Goldziher, 1981, p. 37, see *supra* note 59.

64 Muhamad Al-Azami, *On Schacht's Origins of Muhammadan Jurisprudence*, Oxford Centre for Islamic Studies, Oxford, 1996, p. 2.

mitted by virtuous people of high religious knowledge; those reported by people of lesser knowledge, but virtuous in character; and, finally, those suspected reports that did not fit within the overall matrix of Islam.[65] Authoritative traditionalists, such as Al-Bukhari and Muslim, invoked the said method and applied stringent criteria to collect merely the most authentic traditions. Bukhari is reported to have interviewed more than one thousand scholars of *ḥadíth* during his lifetime (810–869), and looked for transmitters of exemplary character possessing literary qualities. Bukhari sought evidence to confirm that the transmitters in question had actually met in real life and learned from one another – a method which differed from that of Muslims who opined that if two transmitters lived in the same locale, one could safely assume that they learned from each other. Bukhari's relentless search for solid evidence for a real encounter elicited wider recognition.[66]

Viewed from this perspective, it seems to be an over-generalisation to claim that the majority of the traditions emerged from suspect transmitters who, whether directly or indirectly, served the purpose of supporting a political agenda through forged *ḥadíths*. True, there exist traditions that are misleadingly, or with an ulterior motive, attributed to the Prophet, among which some contravene key Islamic principles, while some others, albeit fabricated, are yet congruent with Islam's ethical values including justice, equality and fairness.[67] Moreover, as Coulson notes, there were also such reporters who were "in the *bona fide* belief" that the Prophet would have so acted had he dealt with the same issue.[68] While there is no room in this chapter to discuss this matter extensively, suffice it to note that some Western scholars are also critical of Goldziher's and Schacht's sweeping dismissal of the *ḥadíth* literature. These scholars claim that oral and written transmissions go hand in hand, and that the majority of the traditions had been scrupulously scrutinised, particularly by such chroniclers as Muslim and Al-Bukhari.[69] A reasonable solution to the difficulty

65 Goldziher, 1981, p. 39, see *supra* note 59; Esposito, 2003, p. 217, see *supra* note 12.

66 Abdullah Saeed, *Islamic Thought: An Introduction*, Routledge, New York, 2006, p. 42.

67 The *Qur'án*, 16.90; 4:135; 2:178; 7:56, see *supra* note 5.

68 Coulson, 1964, p. 42, see *supra* note 57.

69 Siddiqi, 2008, p. 131, see *supra* note 62.

of distinguishing authentic *ḥadíths* from counterfeit ones arguably lies in the following saying attributed to the Prophet:[70]

> [C]ompare what I am reported to have said or done with the Book of God. If it agrees, I did actually say it; if it disagrees, I did not say it.

It follows that if a *ḥadíth* plainly negates the spirit of the *Qur'án*, it should not be taken seriously.

2.3. Secondary Sources

As stated earlier, Muḥammad has metaphorically been described as the corporeal scripture. Having contributed to establishing a blueprint for a moral life, his demise imposed a disquieting task on Muslims to keep the Islamic law responsive to unprecedented challenges. Despite the absence of continuous prophetic guidance, the companions of Muḥammad eventually managed to develop the raw legal material by devising new juristic tools to meet the demands of a rapidly changing social milieu.

These tools, known as the 'non-revealed' sources on account of their non-divine origin, mainly include: (1) *ijmá'*: the general consensus of commentators on a moot point of law; (2) *qiyás:* the method of analogical reasoning;[71] and (3) *ijtihád:* the application of critical personal reasoning in the interpretation of Islamic law.[72] These sources, particularly the *ijmá'* and *ijtihád*, proved to be crucial in providing answers to questions of law when primary sources were silent. As alluded to earlier, norms springing from the primary sources cannot be altered, whilst they may be subject to interpretation – whether through *ijmá'* or *ijtihád* all of which involve derivative legal reasoning.[73] Of course, novel principles

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70 Burton, 1977, p. 54, see *supra* note 16.

71 This chapter, for lack of space, will not focus on such supplementary law-making processes as *qiyás*, which designate the analogical assimilation and application of a principle established in one case to subsequent cases involving similar issues. *Qiyás* is, therefore, not about bringing about a new ruling, but about the implementation of an extant injunction (or precedent) to a new case. It is, to put it simply, a tool used by jurists to compare cases and achieve a ruling by resorting to analogical methodology (see further, Dien, 2004, pp. 50–56, *supra* note 22).

72 Kamali Hashim, "Methodological Issues in Islamic Jurisprudence", in *Arab Law Quarterly*, 1996, vol. 11, p. 3; Noor Mohammed, "Principles of Islamic Contract Law", in *Journal of Law and Religion*, 1988, vol. 6, p. 115.

73 Hassan, 1982, p. 67, see *supra* note 4.

whose roots are not strictly embedded within primary sources may also be crafted, provided that the results fit the overall Islamic framework.

Secondary sources have thus provided a degree of flexibility to the development of law. In fact, although Islamic law owes its origins to the primary sources, it has overwhelmingly flourished due to juridical activity,[74] which was particularly intense during the classical period of Islamic civilisation. Classical jurists were keen to harmonise non-peremptory and derivative principles with socio-political dynamics. Al-Qarafi (d. 1285), in this context, wrote that "holding to rulings that have been deduced on the basis of custom, even after this custom has changed, is a violation of unanimous consensus and an open display of ignorance of the religion".[75]

When deriving secondary rulings, however, Muslim jurists have been restricted relative to their secular counterparts. Non-religious jurists are certainly restrained with such concerns as the hierarchy of the norms and principles of equity, but they may rely on their own resources while making law. The Muslim jurist, on the other hand, must lay bare the will of God reflected in the *Qur'án* and credible traditions, rather than proclaim the dictates of his own judgement. But this hardly prevented Muslim scholars from expanding on positive law without being cramped in blind literalism, though they were much more cautious about immutable principles.[76] Putting it otherwise, early scholars employed personal or collective reasoning to devise solutions for the immediate challenges, while trying to remain loyal to the objective, rationale and spirit of primary sources. As discussed below, it was only in the aftermath of this classical period that Islamic scholarship assumed a more constrained, text-oriented approach in disregard of evolving social and human context.

Whilst the supremacy of the holy sources is beyond dispute in Islamic law, equally important is the fact that this body of law is by no means bestowed upon humans as a panacea for all the troubles afflicting them. Contribution to the development of the law in keeping with the shifts of life is hence encouraged, if not ordained, by Islam. One of the

74 Schacht, 1982, p. 5, see *supra* note 21.

75 Al-Qarafi, cited in Sherman A. Jackson, "Jihad and the Modern World", in *Journal of Islamic Law and Culture*, 2002, vol. 7, p. 9.

76 Bernard G. Weiss, "Interpretation in Islamic Law: The Theory of Ijtihad", in *American Journal of Comparative Law*, 1978, vol. 26, p. 201; Ramadan, 2009, p. 39, see *supra* note 33.

principal requirements of Islamic belief is that the individual must attain a level of consciousness whereby he perceives the world not in an unquestioning way, but through the eyes of his heart and intellect. Reason in this sense must be put in the service of comprehending the world and understanding the signs of divine presence.[77] Indeed, the *Qur'án* invites and demands believers to reflect upon the real meaning of messages delivered to them, and when necessary to elaborate on divine rules.[78] As Weiss notes, very few rules of the divine legal corpus are "precisely spelled out for man's convenience", thus "man has the duty to *derive*" more detailed principles "from their sources" – a task which calls for "human involvement".[79]

It is in such an effort to keep pace with changing times that Muslim jurists crafted very many fresh principles and doctrines. But Islamic hermeneutics was bound to be derivative in nature, contingent on the absolute authority of God. This meant that there was no automatic validity accorded to the declarations of the jurist, who could only assert that what he formulated flowed from the divine law.[80] This explains why Muslim scholarship insists that the outcome of the derivative process constitutes mere opinions (*ẓann*), as opposed to definitive knowledge (*'ilm*).[81] Regardless of how rigorous the reasoning behind the construction of *ẓann* could be, the juridical outcome is indeed indefinite knowledge. The following pages turn in more detail to two most significant secondary sources: *ijtihád* and *ijmá'*.

2.3.1. Critical Thinking (*Ijtihád*)

The term *ijtihád* literally means 'striving' or 'self-exertion'. In legal usage, it is commonly defined as the endeavour of a jurist (*mujtahid*) to infer, by exerting himself to the best of his ability and on the basis of evidence found in the primary sources, a rule of Islamic law. *Ijtihád* thus incorporates an intellectual effort undertaken by qualified jurists to derive sec-

77 Colin Turner, *Islam: The Basics*, Routledge, New York, 2006, p. 72.

78 The *Qur'án*, 10:24; 30:8; 30:21; 34:46; 39:42; 59:21; 3:191, see *supra* note 5.

79 Weiss, 1978, p. 199, see *supra* note 76.

80 *Ibid.*, p. 203.

81 Jean J. Waardenburg, "The Early Period: 610–650", in Jean J. Waardenburg (ed.), *Muslim Perceptions of Other Religions: A Historical Survey*, Oxford University Press, New York, 1999, p. 4.

ondary norms.[82] Such independent reasoning is, then, exercised to provide answers to questions when the *Qur'án* and *Sunnah* are silent.

Reportedly, the permissibility of deducing secondary rulings through critical thinking had been encouraged by the Prophet himself. Tradition has it that when Muḥammad appointed Muadh Ibn Jabal as a judge in Yemen, he questioned the latter concerning the legitimate dynamics of decision-making: "Through which will you judge?", asked the Prophet. "Through the book of God", answered Muadh. "And if you find nothing in the Book of God?", returned Muḥammad. "I shall judge according to the tradition of God's Messenger", said Muadh. "And if you find nothing in the Messenger's tradition?", asked again the Prophet. "I shall not fail to make an effort [*ajtahidu*] to reach an opinion". It is reported that this response pleased the Prophet.[83] Nonetheless, *ijtihád* by qualified jurists is not only about deriving norms when the primary sources are silent; it is also about elucidating the divinely inspired material, particularly when the latter contained general or imprecise injunctions. The main role of independent reasoning has thus been to complement, expound and flesh out the primary norms in a bid to bridge the theory and practice of Islamic law.[84]

Ijtihád is often dubbed as independent or critical reasoning, because its use requires analytical thinking, and not the blind emulation (*taqlíd*) of past judgements of authoritative jurists. *Ijtihád* may hence be said to be the most significant source of Islamic law after the *Qur'án* and *Sunnah*; for while divine legislation had discontinued after the demise of Muḥammad, *ijtihád* retains its role for relating divine rulings to the human context. The theory of *ijtihád* clearly acknowledges the import of critical reasoning in contextualising the law, a process, which requires a dialectical engagement with relevant texts and ever-changing life. Weiss is thus right in emphasising that "the Law of God is empirically available [mainly] […] in the formulations of jurists".[85]

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82 Vincent J. Cornell, *Voices of Islam: Voices of Tradition*, Praeger Publishers, Westport, 2007, p. 155; Schacht, 1982, p. 69, see *supra* note 21.

83 Tariq Ramadan, *The Messenger: The Meanings of the Life of Muhammad*, Penguin Books, London, 2007, p. 199.

84 Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law*, Syracuse University Press, Syracuse, 1996, p. 27.

85 Weiss, 1978, p. 200, see *supra* note 76.

It must, however, be stressed that adherence to the letter of texts has enjoyed pride of place within orthodox Muslim scholarship. The supremacy of the textualist approach, particularly with regard to peremptory rulings, is evident in most Sunní scholars' attempts to steer clear of all appearances of formulating new rules independent of the divinely ordained norms.[86] In actual fact, the success of any critical thinking has essentially been judged by the extent to which consonance is achieved between the primary legislation and secondary law-making process. In Kamali's language, "since *ijtihád* derives its validity from divine revelation, its propriety is measured by its harmony with the *Qur'án* and the *Sunnah*".[87] The doctrine of *ijtihád*, then, does not presuppose a full measure of novelty, as the interpreter is charged with the duty to elucidate God's transcendent will for humans living in various ages and contexts.

This thinking, in other words, presupposes that a Muslim jurist does not *invent* rules, but midwifes norms and principles that are already present, albeit in a concealed or gnomic form, in sacred texts. However, it should be reiterated that opinions forged through *ijtihád* are deemed conjectural (*ẓann*). This means that a Muslim jurist is not bound by the rulings of other jurists exercising *ijtihád*, unless such an opinion is formed by a judge in a case constituting precedent. But, as illustrated below, when an individual opinion is so widely recognised as to generate a consensus opinion (*ijmá'*), it may become binding.

2.3.2. Juristic Consensus (*Ijmá'*)

The concept of juristic consensus (*ijmá'*) as an authoritative, binding source of Islamic law was originally conceived through the exercise of *ijtihád* undertaken by the Prophet's companions and learned scholars of the classical period,[88] a phenomenon that highlights the dialectical relationship between these two secondary sources. While a theological basis of *ijmá'* may not be found in the Qur'ánic text, it is said to have been based on a tradition attributed to the Prophet: "My community will not

[86] Bernard G. Weiss, *The Spirit of Islamic Law*, University of Georgia Press, London, 2006, p. 86.

[87] Kamali, 1989, p. 468, see *supra* note 20.

[88] An-Na'im, 1996, p. 27, see *supra* note 84.

agree on error".[89] This is generally read to mean that after the Prophet, the Muslim community could concur with man-formulated doctrines and practices that were not expressed in the *Qur'án* and *Sunnah*. Absent prophetic guidance, Muḥammad's companions (*ṣaḥábah*) hence invoked the method of general consensus (*ijmá')* to enrich the Islamic law. New norms extracted through this method formed a substantial portion of Islamic law, supplementing the primary sources.

The deduction of laws through *ijmá'* enabled jurists to formulate widely shared principles. But as the creation of new norms had been a collective effort drawing upon the sacred sources, the prevailing assumption was that novel principles forged through consensus could not be deemed ordinary in nature; rather, they formed part and parcel of the sacred law. This conclusion was borne out by the aforesaid tradition that the Muslim community was safeguarded against error. Accordingly, the process of *ijmá'* came to assume an "aura of holiness", the repudiation of whose outputs "became sinful in the eyes of some",[90] even though the law obtained via consensus remained derivative in character.

Ijmá' generally involved lengthy debates conducted by jurists over legal, moral, and practical matters. When such learned scholars reached an agreement on a controversial point, *ijmá'* was declared to have transpired, settling the matter conclusively – or at least until revoked by further *ijmá'*. The norm created through this process was considered binding.[91] Therein lay the principal difference between *ijtihád* and *ijmá'*, although they are interlaced: while the former could engender conflicting views over a moot point, the latter produced an authoritative response thereto. Consensus of opinion thus had the advantage of achieving definitive knowledge until a new, invalidating consensus crystallised to replace the former. As Esposito puts it, "the relationship between *ijtihád* and

[89] Iysa A. Bello, *The Medieval Islamic Controversy Between Philosophy and Orthodoxy: Ijma and Tawil in the Conflict between Al-Ghazali and Ibn Rushd*, Brill, Leiden, 1989, p. 35.

[90] Ali Khan, "The Reopening of the Islamic Code: The Second Era of Ijtihad", in *University of St. Thomas Law Journal*, 2003, vol. 1, p. 365.

[91] Hassan, 1982, p. 65, see *supra* note 4.

ijmá' was an on-going process, moving from individual opinion to community approval to accepted practice to difference".[92]

Certainly, in the absence of consensus opinion, alternative views were considered equally valid. When there had been competing viewpoints advanced by recognised schools of thought, these were correspondingly deemed authoritative. In the absence of unanimity, there was no basis to require Muslims of various schools to adhere to a single view – each school could justify their reading of the authoritative sources.

The doctrine of consensus in this sense tacitly recognised difference over moral and legal issues as inevitable. By the mid-tenth century, jurisprudential schools had generally demarcated their intellectual territories through their distinguishing doctrines, expanding upon a sizeable corpus of politico-legal literature. Among these schools, only the principal ones managed to survive into contemporary times. These are the *Ḥanafí* school, founded by Abú Ḥanífah (d. 767); the *Málikí* school, established by Málik Ibn Anas (d. 795); the *Sháfi'í* school, based on the teachings of Idris Al-Sháfi'í (d. 820); the *Ḥanbalí* school, set up by Ahmed Ibn Ḥanbal (d. 855); and the *Ja'farí* school, a *Shí'ah* school of jurisprudence, following the teachings of Abú Jafar Muḥammad Al-Baqir (d. 731) and Jafar Sadiq (d. 765).[93] Through scholarly consensus, a notable body of judicial speculations were rendered into categorical rulings,[94] giving substance to many tentative positions.

Over time, *ijmá'* had not only reinforced the authority of learned jurists (*'ulama'*), but also largely standardised the legal position on thorny issues. Arguably, the most damaging consequence of consensus-based doctrines was that disagreeing jurists had effectively been deterred from re-examining established judgements. What is more, particularly from the tenth century onwards, *Sunní* scholars came to think that since classical jurists of the calibre of Ḥanífah, Málik, Ḥanbal and Sháfi'í had ceased to thrive, jurists of established schools would henceforth dominate the intel-

92 John L. Esposito, *Women in Muslim Family Law*, Syracuse University Press, New York, 2001, p. 148.

93 Slim Laghmani, "Les Écoles Juridiques du Sunnisme", in *Pouvoirs*, 2003, vol. 104, p. 25.

94 Wael B. Hallaq, "On the Authoritativeness of Sunní Consensus", in *International Journal of Middle East Studies*, 1986, vol. 18, p. 428.

lectual scene of the Muslim jurisprudence.[95] Over time, Muslim jurists had been urged against challenging entrenched doctrines, a stance which paved the way to orthodoxy where more liberal thinking was replaced by analogical reasoning and crude modelling on precedents.

2.3.3. The Temporary Ending of Critical Thinking

It was stressed above that, by the turn of the ninth century, independent reasoning and consensus-based doctrines led to the growth of a sizeable corpus of rulings and precedents. From this point onwards, however, most scholars, generally representing the *Sunní* tradition, came to claim that all key questions of law had been resolved by major schools, and hence personal interpretation of Islamic law was no longer necessary.[96] The early signs of legal rigidity had already become visible due to the purported infallibility of the consensus method. Scholars of this age posited that since all crucial questions had been exhaustively settled, the future activity of the jurist needed to be confined to the clarification of the law or doctrine as had already been laid down. The task of the jurist was simply to emulate (*taqlíd*), follow or expound the existent precedent or principle.[97]

This policy finally assumed an official character by the declaration of the Iraqi jurists to "close the door" for the exercise of *ijtihád*,[98] which confined independent reasoning chiefly to applying precedents, and to drawing straight conclusions from the recognised handbooks. This signified that legal norms could no longer be extracted directly from the primary sources, but from the textbooks of recognised schools, and hence any juristic attempt to breach the confines of endorsed doctrines could give rise to claims of heresy.

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95 Wael B. Hallaq, "On the Origins of the Controversy about the Existence of Mujtahids and the Gate of Ijtihad", in *Studia Islamica*, 1986, vol. 63, p. 136; Bernard Lewis, *The Middle East: 2000 Years of History from the Rise of Christianity to the Present Day*, Phoenix Press, London, 2000, p. 225.

96 Esposito, 1994, p. 195, see *supra* note 45.

97 Bernard Lewis and Buntzie Ellis Churchill, *Islam: The Religion and the People*, Wharton School Publishing, New Jersey, 2008, p. 29; Karima Bennoune, "*As-Salámu Alaykum*? Humanitarian Law in Islamic Jurisprudence", in *Michigan Journal of International Law*, 1994, vol. 15, p. 613.

98 Irshad Abdal-Haqq, "Islamic Law: An Overview of its Origins and Elements", in Hisham M. Ramadan (ed.), *Understanding Islamic Law: From Classical to Contemporary*, AltaMira Press, Oxford, 2006, p. 21; Wael B. Hallaq, "Was the Gate of *Ijtihád* Closed?", in *International Journal of Middle East Studies*, 1984, vol. 16, p. 5.

Arguably, in addition to the propensity of dominant circles to maintain the politico-legal status quo, a key contributor to the discontinuation of *ijtihád* had been the concern to standardise the legal tradition in an empire whose borders stretched far and wide. Muslim rulers and orthodox scholars alike dreaded the possibility of divisive impact of critical thinking and independent reasoning over the unity of Islamic jurisprudence-which was already splintered into numerous schools. Standardisation of the tradition through imitation and strict analogy could initially have prevented the intrusion of anomalous concepts, ideas, or traditions. However, casting the law into rigid formulas and black-letter analyses, and divesting the tradition of its dynamism eventually took its toll on the progress and adaptability of Islamic law.

Certainly, Muslim jurists had not altogether abandoned the practice of independent reasoning.[99] For instance, the eminent philosopher and jurist Al-Ghazálí (d. 1111) argued that critical thinking based on wider analogy, as opposed to narrow syllogism, and on the general purposes of law was permissible.[100] Ibn Taymiyya (d. 1328) likewise advocated the indispensability of *ijtihád* so that Islamic thought could be saved from stagnation.[101] Nonetheless, the tide of relying on orthodox interpretation of extant sources progressively rose, and over the centuries far fewer jurists claimed to possess the required qualifications to formulate novel ideas. Hence, whilst the doors of *ijtihád* remained ajar, Muslim jurists ceased to widely exercise it to resolve new problems. As Hashmi observes, the fact that some of the most canonical source books on Islamic law, like Al-Shaybání's work on Islamic law of nations (*Kitáb Al-Siyar Al-Kabír*), remain centuries old demonstrates the extent to which Islamic thought stagnated.[102] A mental straightjacket of this sort indeed stunted the Muslim law for nearly a millennium. Be that as it may, there is no hard-and-

99 Abdulaziz A. Sachedina, *The Just Ruler in Shi'ite Islam: The Comprehensive Authority of the Jurist in Imámite Jurisprudence*, Oxford University Press, Oxford, 1988, p. 159.

100 Imran A. K. Nyazee, *Theories of Islamic Law: The Methodology of Ijtihád*, The Other Press, Islamabad, 1994, p. 195.

101 Bernard Haykel, "On the Nature of Salafi Thought and Action", in Roel Meijer (ed.), *Global Salafism: Islam's New Religious Movement*, Columbia University Press, New York, 2009, p. 43.

102 Sohail H. Hashmi, "Islamic Ethics in International Society", in Sohail H. Hashmi (ed.), *Islamic Political Ethics: Civil Society, Pluralism, and Conflict*, Princeton University Press, Princeton, 2002, p. 151.

fast rule in Islam to prevent contemporary scholars from resorting to *ijtihád* to invigorate the law and make it more responsive to current realities.

2.4. Conclusion: Re-opening the Door for Critical Thinking

There is little doubt that blind adherence to orthodox doctrines up until modern times has, in large measure, been responsible for the decline of Muslim thought in almost all intellectual realms. The artificial shackles placed on Islam's inherent dynamism further paved the way for Western domination and colonialism in all its forms and manifestations over large parts of the Muslim-majority world. This eventually sparked considerable debate over the ways in which such hegemony could be countered and the once-glorious Islamic culture could be resurrected. By the end of the eighteenth century, it became unmistakably clear that the key institutions of the Muslim world were in steep decline, as judged against Western standards and progress in most areas that were defining the socio-political and economic contours of the modern period.[103]

Western domination eventually compelled Muslim thinkers to reflect on the precarious balance between entrenched religious standards and the changing demands of modern exigencies. The pressures exerted by such material and conceptual novelties, paired with the colonial enterprise over Muslim countries, eventually divided Muslim intellectuals as to whether essential modern concepts, ideas and institutions needed to be integrated or rejected-whether wholly or in part.[104] As Esposito puts it, Muslim reactions to Western power and domination ranged from rejection to adaptation, from a policy of cultural isolation and non-cooperation to acculturation and reform.[105]

By the late nineteenth century, reformist movements incrementally gained momentum within Muslim intelligentsia, advocating an overhaul of politico-legal, economic, military and cultural institutions.[106] Irrespective of their intellectual backgrounds, almost all reformist thinkers chal-

[103] Harry F. Hinsley, *Power and the Pursuit of Peace: Theory and Practice in the History of Relations between States*, Cambridge University Press, Cambridge, 1963, p. 153.

[104] Fazlur Rahmán, *Islam & Modernity: Transformation of an Intellectual Tradition*, University of Chicago Press, Chicago, 1982, p. 4.

[105] John L. Esposito, *Islam and Politics*, Syracuse University Press, Syracuse, 1987, p. 43.

[106] Khaled Fahmy, *All the Pasha's Men: Mehmed Ali, His Army and the Making of Modern Egypt*, The American University in Cairo, Cairo, 1997, p. 253.

lenged the *status quo ante* in a quest for ways to transform their societies by, among other things, criticising dogmatic religious premises and advocating progress to reverse the tide of decline. Islam, they essentially maintained, had to undergo a process of reformation and reinvigoration in respect of "mutable principles"[107] so that Muslims could awaken from their debilitating slumber that rendered Islamic thought bankrupt of any viable intellectual remedy responsive to modernity.

Reformers saw the restrictions on innovative thinking as hampering the progress of Muslims, positing that each generation of Muslims must be permitted to resolve the particular problems of their age through critical deliberation. For only in this way would the deleterious effects of unquestioned emulation be averted and the richness of Islamic thinking be saved from rigid dogmas. Reformist thinking hence highlighted the imperative for substantial reinterpretation and reconstruction of many basic concepts and principles via free discussion, open-mindedness, and rigorous scholarship.[108]

The impact of such reformist calls has hitherto been notable across the Muslim world, which, particularly since the nineteenth century onwards, has gone through dramatic transformations, including the phenomena of modernity in all spheres of life, socio-political liberalisation, and independence from colonial subjugation. In an effort to allow Islamic law to meet the growing challenges of faith and contemporary exigencies, many reformist-minded thinkers have rightly championed the revival of independent, critical thinking. Among the most pressing problems constituting battlegrounds for reformists have been such controversial themes as science *vis-à-vis* religion, secularism, rule of law, religious freedoms, human rights, and Islamic use of force.[109] Having drawn on the overall Islamic ethical framework, which places significant emphasis on such notions as justice, equity, non-discrimination and reciprocity, Muslim schol-

[107] John L. Esposito, "Trailblazers of the Islamic Resurgence", in Yvonne Yazbeck Haddad, John Obert Voll and John L. Esposito (eds.), *The Contemporary Islamic Revival: A Critical Survey and Bibliography*, Greenwood Publishing, Westport, 1991, p. 53; Beverly M. Edwards, *Islamic Fundamentalism since 1945*, Routledge, London, 2005, p. 20.

[108] Olivier Roy, *Secularism Confronts Islam*, Columbia University Press, New York, 2009, p. 45.

[109] Abdullahi Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a*, Harvard University Press, Massachusetts, 2008, p. 111; Ramadan, 2009, p. 207, see *supra* note 33; Esposito, 2010, p. 86, see *supra* note 40.

ars still seek to address these thorny problems that require radical rethinking.

One critical consequence of this change in perspective is that *non-eternal* rulings may now be understood against the backdrop of their politico-cultural setting and context that provided the rationale thereof. Consequently, such a contextualised method of hermeneutics requires the abandonment of outdated doctrines, except for timeless principles, in favour of developing new modes of thinking. This will in all likelihood also enable Muslims to undercut the generally ideological and biased portrayal of Islam as an inherently war-like and obscurantist faith. Finally, reopening the door widely for critical thinking has the potential to demonstrate the complexity of religious attitude towards issues of warfare, peace and criminal justice – themes to which the remainder of this edited collection will devote attention.

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Islam and International Criminal Law and Justice

Tallyn Gray (editor)

Mindful of alleged and proven core international crimes committed within the mainly-Muslim world, this book explores international criminal law and justice in Islamic legal, social, philosophical and political contexts. Discussing how law and justice can operate across cultural and legal plurality, leading Muslim jurists and scholars emphasize parallels between civilizations and legal traditions, demonstrating how the Islamic 'legal family' finds common ground with international criminal law. The book analyses questions such as: How do Islamic legal traditions impact on state practice? What constitutes authority and legitimacy? Is international criminal law truly universal, or too Western to render this claim sustainable? Which challenges does mass violence in the Islamic world present to the theory and practice of Islamic law and international criminal law? What can be done to encourage mainly-Muslim states to join the International Criminal Court? Offering a way to contemplate law and justice in context, this volume shows that scholarship across 'legal families' is a two-way street that can enrich both traditions. The book is a rare resource for practitioners dealing with accountability for atrocity crimes, and academics interested in opening debates in legal scholarship across the Muslim and non-Muslim worlds.

The book contains chapters by the editor, Onder Bakircioglu, Mashood A. Baderin, Asma Afsaruddin, Abdelrahman Afifi, Ahmed Al-Dawoody, Siraj Khan, Shaheen Sardar Ali and Satwant Kaur Heer, and Mohamed Elewa Badar, in that order.

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