Islamic civilization, since the time of Prophet Muhammad (s) until now, is firmly founded on the concept of ‘rule of law.’ For that reason, the law is published and known, and citizens and courts are expected to uphold it. In addition, Muslim citizens must adhere to Islamic law - Shariah. If a Muslim citizen commits a religious violation, he is judged according to Islamic law. A non-Muslim citizen is judged in religious issues by the laws of his own faith.

Invoking Divine Principles and Human Reason

Islam is a complete package – a complete message and way of life. To fraction it into its component, then examine them individually, will yield little or no understanding of Islam’s holistic whole. Inevitably aspects of Islam examined separately, without a wide-ranging grasp of its totality, will be taken in a fragmented context, in which case aspects may take on the appearance of extremism. This is a necessity as for men with impotence use of generic cialis, which increases the level of libido.

However, when viewed from a comprehensive perspective by any fair person, Islam will be found sensible in all its aspects and practices. Could it be otherwise for a faith that powers one of the greatest living civilizations – one whose dynamism and creativity supplied a foundation for countless aspects of modern society?

Shariah is the Islamic Law – the disciplines and principles that govern the behavior of a Muslim individual towards his or herself, family, neighbors, community, city, nation and the Muslim polity as a whole, the Ummah. Similarly Shariah governs the interactions between communities, groups and social and economic organizations. Shariah establishes the criteria by which all social actions are classified, categorized and administered within the overall governance of the state.

Shariah first establishes the patterns believers should follow in worshipping Allah: prayers, charity, fasting and pilgrimage.
Islam's law comprises a comprehensive outlook on life. As one looks from a satellite at this planet, the Shariah conceives of the earth as a single 'city' with diverse inhabitants—in modern parlance, a 'global village.' Islam looks to the benefit of the society as a whole from a general perspective and presents a theoretical model that if followed provides safety and protection for society.

Shariah literally means 'a well-trodden path to water,' the source of all life, representing the Path to Allah, as given by Allah, the Originator of all life.

**Islamist Understanding of Shari’ah**

Now a great problem today is that a new movement within Islam, the Islamist movement, has innovated a non-traditional approach to Shariah which vitiates all of the past approaches and establishes a rigid, hardline and non-pragmatic approach which vitiates all semblance of humaneness, sanity, moderation and decorum which constituted Islamic Law's traditional implementation over the past 14 centuries of history.

Islamist states take the letter of the law – this is 'Black letter law' without regard to precedence. As Christopher Houston asserts:

Indeed, the logic of the Shariah, with its minimal number of clear interdictions, and maximal scope for the interpretative extension of key precepts to particular situations, means that any freezing of the ulama’s ‘arbitrary’ decisions arises not so much from the essential characteristics of the Shariah, but from the historic institutionalizing of a particular legal tradition or method of exegesis or from the hegemony of a particular interpretation. Whether this lack of institutional and conceptual closure ironically encourages modern Islamist states (Saudi Arabia?) or groups to force such closure is another question. Paradoxically, the provisionality of law-making allows some Islamist groups to interpret the Qur’ān as affirming a radical negation of human autonomy. [1]

Traditional governments in Islam on the other hand, follow precedents established over many centuries – just as is done in the US - they do not follow absolute 'letter of the law.'

Olivier Roy sums up the position of traditional Islam when he writes:
The Shariah is never closed, for it is based not on a core of concepts, but rather on an ensemble of precepts which is at times general, at times precise, and which expands to include the totality of human acts through induction, analogy, extension, commentary, and interpretation. [2]

**Islam as a Complete Package – Three Aspects**

Islam is a complete way of life, sent by Allah in the form of revelation by means of Prophet Muhammad (s). As such it covers the three essential needs of human life: physical, intellectual and spiritual. These three aspects of the faith are known individually as:

1 **Islam – Divine law**

2 **Imān - Belief**

3 **Iḥsān - Ethics and moral character.**

The first aspect, Islam, deals primarily with the physical aspects of the faith, such as its obligations, prohibitions and recommended actions. This is the part of the faith governed by Shariah – Islamic law. This aspect cannot however be implemented by itself, but must complement the other two. When the Prophet (s) taught Islam to his followers, he taught them all these three aspects at once, in a natural and holistic approach.

**Shari‘ah’s Primary Objective is Mercy**

Allah says:

وَﻡَﺍ ﺃَﺭْﺱَﻝْﻥﺍ ﻝِّﻝْﻉَاﻞَﻡِﻳﻦَ

And We did not send you (O Muhammad) except as a mercy for all creation. [3]
And the Prophet (s) said, “The Most Merciful shows mercy to those who have mercy on others. Show mercy to those on earth, and the One above the heaven will show mercy to you.”

From this, and many other source texts, one can summarize the primary objective of the Shariah, (maqsad al-Shariah al-asasi) as Kamali has done:

The ulema [scholars of Islam] have, thus, generally considered Rahmah [Mercy] to be the all-pervasive objective of the Shariah and have, to all intents and purposes, used it synonymously with Maṣlaḥah [benefit in everyday communal life].

Similarly, Schact observes:

…the underlying tendency of the Qur’ānic legislation was to favour the underprivileged; it started with enunciating ethical principles... This feature of Qur’ānic legislation was preserved by Islamic law, and the purely legal attitude, which attaches legal consequences to relevant acts, is often superseded by the tendency to impose ethical standards on the believer.

Since Mercy is the Shariah’s primary goal, it is clear that this cannot be achieved if the believers who implement it are not imbued with this essential quality.

When society is informed by spiritual values, the purpose of Shariah, to bring out mercy to mankind, will be natural manifestation of those values. When an individual’s faith is informed by spiritual values his psyche and ethical compass will be balanced and his desire for immoral or criminal acts eliminated or reduced. Without such values, essential in removing the psychological illnesses and the societal ailments which afflict people in difficult physical situations, man becomes nothing more than a political animal and law becomes a means and an end, in-and-of itself.
Followers of Wahhabi movement, created by Muhammad ibn Abd al-Wahhāb (d. 1787), who make up the majority of implementers seeking ‘Islamic’ states today, reject the principles of spirituality, rather, they base their view of Islam purely on material aspects. Thus they see that the only approach to handling crime is to punish the perpetrator with a physical punishment.

Despite studying the religious books of his day Muhammad ibn Abd al-Wahhāb became extremely dogmatic in his understanding of the faith. Imām Abū Zahrā of Al-Azhar University asserts that Muhammad ibn Abd al-Wahhāb was excessively more extreme in his conceptions than any former scholar. Following his demise “his followers went to even further extremes surpassing all bounds of jurisprudence, declaring countless acceptable matters ‘forbidden.’ The Wahhabi movement, never content to promulgate its beliefs by tongue or pen, wielded a sword to fight whoever differed from its ideology.”[6]

**Bases of Shari‘ah – Revelation and Reason**

The bases of Shariah are four: two are revelatory, coming from Allah, and include the two core sources, the Qur’ān, Islam’s holy book, and the Sunnah (the practice and teachings of the Prophet Muhammad (s)); and two are based in rational endeavor, consensus (ijma) and analogical juristic reasoning (qiyās).

**Fiqh – Application of Shari‘ah in Real Life**

The Shariah, based primarily on texts from Qur’ān and Sunnah, embodies broad, general rules that are immutable, not unlike today’s modern societal rules: the sanctity of life, security and freedom of expression, and the inviolability of these rights. The adaptation of law according to time and circumstance is necessitated by changes in society, and the influx of various cultures and material conditions. Islam first came to one people with one lifestyle. As the religion spread and the borders of Muslim lands expanded, all of the different civilizations, each with their own codes of law, traditions and cultures, had to be incorporated into the Islamic polity. This was not achieved overnight and took great foresight on the part of Muslim jurists, being most elegantly brought out in the development of fiqh, the jurists’ law.

Kamali states:
The primary sources of Islamic law are twofold: divine revelation (waḥīy) and human reason (aqīl). This dual identity of Islamic law is reflected in its two Arabic designations, Shariah and fiqh. Shariah bears a stronger affinity with revelation, whereas fiqh is mainly the product of human reason. Shariah literally means “the right path” or “guide,” whereas fiqh refers to human understanding and knowledge. The divine Shariah thus indicates the path to righteousness; reason discovers the Shariah and relates its general directives to the quest for finding solutions to particular or unprecedented issues.

Kamali defines fiqh as a rational endeavor primarily based on speculative reasoning. Amplifying on this he says:

Fiqh is defined as the knowledge of the practical rules of the Shariah, which are derived from the Qur’ān and the Sunnah. The rules of fiqh are thus concerned with the manifest aspects of individual conduct. The practicalities of conduct are evaluated on a scale of five values: obligatory, recommended, permissible, reprehensible, and forbidden. The definition of fiqh also implies that the deduction of the rules of fiqh from the Qur’ān and the Sunnah is through direct contact with the source evidence and necessarily involves independent reasoning and intellectual exertion (ijtihād).

Khalid Muhammad delineates the distinction between Divine Law (Shariah) and Jurisprudence (fiqh) thus:
Shariah …stands for the normative order that Muslims have developed as an Islamic way of life. Its translation as “Islamic law” is not adequate because Shariah covers a wider range of meanings than “law” usually does. Modern Muslim jurists often define Shariah as revealed or divine law in order to distinguish it from fiqh, the jurists’ law, which is jurists interpretation of Shariah, and qānūn, which is state law. This distinction aims to stress the divine nature and origin of Shariah in order to establish that its norms are binding because they are divine in origin.

...the Muslim jurists [have made] continuous efforts to keep Islamic law acceptable to the people by bringing the legal norms close to social norms [through fiqh localized in time and place].

Shari’ah’s Foundations
Communal Interdependence

Islamic law is founded on the principle that individuals rely on other individuals. A single person cannot carry out every aspect of Shariah by himself, but needs other individuals that act as well, and from whose combined actions the society benefits as a whole. It is impossible for a person to reach perfection, but Islamic Shariah shows that one can reach perfection. How? By bringing all the people together. The society as a whole produces perfection which the individual by himself or herself cannot do. Through individuals striving for perfection and their interactions with each other under the Shariah, the entire society is refined.

This principle may be most clearly exemplified in the pilgrimage. A form of worship mandated for each individual, for whoever can afford it at least once in life, it nevertheless engages the entirety of society to accomplish it and it cannot be performed except as a community holding a global perspective. People gather in one place from around the world to fulfill this Divine command at the individual level, and altogether are successful at a single moment in affecting global changes. For that reason, Hajj has often been compared to an international assemblage, in which ideas, images and faith are gathered and shared in a vast revival of the community’s dedication to Divine Service, and through service to Allah, service to humankind.

Objectives of the Law (Maqasid al-Shari‘ah)

The overarching objectives of Shariah, where as mentioned above the overarching goal is Mercy, or the benefit of society (maslahah), are sometimes summarized under the following broad categories:
Establishment of justice;

Educating the individual;

Upholding morality, in public and private;

Preventing hardship, on individuals and society;

Preventing oppression.

Shaykh Abd al-Halim Mahmūd, a Shaykh of al-Azhar and one of the highest scholars in Islam in recent times, wrote:

Among these philosophical principles were justice, the existence of good and evil, and the relationship between human beings and the environment and his interactions with it, the most important of these being the freedom of choice. The leadership of Muslim scholars has shown the differences in their views: each was able to deduce different methodologies from which emerged the various schools of thought. [10]

Regarding the Objectives of Shariah, Kamali states:

The precedents of the leading Sahaba (Companions of the Prophet) indicate, on the other hand, that they saw the Shariah not only as a set of rules but also as a system of values, where the specific rules were the tangible manifestations of those overriding values… it was not until the time of al-Ghazālī (d. 505H), and then al-Shatibi (d. 790H), that significant developments were made in the formulation of the theory of Al-Maqasid.
Levels of Observance

Al-Fārābī (d. 950 CE), a leader in Islamic political thought, expounded these ideas pertaining to the governance of different sizes of community:

As humanity expanded through the earth and inhabited all its areas, it resulted in the formation of different nations and cultures. We can categorize the approach of nations into two: the ideal ones who are able to observe the highest level of principles and rules and those who observe them only partially. Those who observe the highest level are divided into three categories:

· Highest are those in which the whole global society agrees and works together in unity.

· Second is the localized observance – a region, city or state of the society works together in unity while the rest does not.

· At the lowest level we find a district or community in which harmony and cooperation are observed. [12]

Al-Shātibī defined Shariah’s levels from a different perspective:

Shariah law aimed to protect five basic human interests: religion, life, reproduction, property, and reason. He also found that these basic interests were universally recognized among all other nations. He developed a model of Islamic law consisting of three concentric circles. The innermost circle deals with the essential laws concerning the five basic interests. The second circle covers those laws and practices that are not directly related to the above-mentioned laws but are assimilated into Shariah on account of public convenience

... al-Sḥātibī finds the normative basis of Shariah, deeply rooted in human reason and social practices and standards.
Commenting on the role of reason in defining juristic law (fiqh), Christopher Houston observes:

…the majority of strictures governing the believer’s conduct is in both theory and practice debatable and hence revisable. [14]

On this topic, author Messick states, “In the gap between divine plan and human understanding lies the perennially fertile space of critique, the locus of an entire politics articulated in the idiom of the Shariah.” [15]

Mallat Chibli writes:

The lessons of the classical age, to sum up, are…: the rule of law is established as a principle, so is the concept of the right of man... At the same time, there is a dimension of civil society with its own autonomous regulation which can be found, in first approximation, in the importance of custom [urf] and its legal recognition, and in an identifiable sphere of separation of powers with the ruler on the one hand and ulama, muftis and qāļīs, on the other. [16]

A partially-deficient society is one in which extremes are applied. Such societies take only parts from the whole. Because of this, the society both progresses and suffers at the same time due to the imbalance in its observation of Shariah.

Such was often the case in Islamic history, where Islamic Law was implemented at some levels of society and not others. Often the ruler was exempt from provisions of law by royal fiat or explicit decree. Arjomand observes:
The legal history of medieval Islam is replete with examples of conflict between royal public law and the Shariah. The same is true of modern constitutionalism in the Middle East. Clashes between the jurisdiction of the state laws and the Shariah surfaced in a basic form in the constitutional debates in Iran in 1907–8, and since then in Pakistan and elsewhere. …But the civil rights to security of life and property – the first to be introduced in the Muslim world, though at variance with the political culture of the patrimonial and imperial systems of the Middle East – were not contradictory to Islamic law.

[17]

**Shari‘ah’s Sources**

1 **Revelation**

**Qur’ān**

The primary source of Shariah are two: Qur’ān and Sunnah. The Qur’ān is held by all Muslims as the ultimate source of law, being revealed from Allah to the Prophet Muhammad (s), and therefore perfect and infallible.

The Qur’ān contains broad, general rules that are immutable, not unlike societal rules of today: the sanctity of life, security and freedom of expression, and the inviolability of these rights. The adaptation of law according to time and circumstance was necessitated by changes in society, and the influx of various cultures and material conditions. Islam first came to one people with one lifestyle. As the religion spread and the borders of Muslim lands expanded, all of the different civilizations, each with their own codes of law, traditions and cultures, had to be incorporated into the Islamic polity. This was not achieved overnight and took great foresight on the part of Muslim jurists. This is most elegantly displayed in the development of the law.

**Sunnah**

Much of the Qur’ān was revealed through actual events encountered by the Prophet (s), and questions asked and answered by him. The Prophet (s) also used the Qur’ān as a basis of his own teaching and adjudication. Nevertheless, the Qur’ān is neither a legal nor a constitutional document, although legal materials occupy a small portion of its text; less than 3 percent of the text deals with legal matters. The legal contents of the Qur’ān were mainly revealed following
Understanding Islamic Law

Written by Shaykh Muhammad Hisham Kabbani

the Prophet’s migration from Mecca to Medina, where he established a government and the need therefore arose for legislation on social and governmental issues.

The second revealed source of Shariah is the Sunnah, or practices, injunctions and recommendations of the Prophet (s) as well as actions of others he approved or did not rebuff. It is consensus of scholars that the Sunnah is accorded the status of revelation, according to the explicit Qur’ānic text:

what the Prophet gives you, take and what he forbids, cease therefrom. [18]

2 Reasoning

Hashim Kamali states:

The nonrevealed sources of Shariah are generally founded in juristic reasoning (ijtihād). This reasoning may take a variety of forms, including analogical reasoning (qiyyās), juristic preference (istīhsān), considerations of public interest (istišlāḥ), and even general consensus (ijma) of the learned, which basically originates in ijtihād and provides a procedure by which a ruling of juristic reasoning can acquire the binding force of law. Analogy and consensus have been generally recognized by the vast majority of ulama, but there is disagreement over the validity and scope of many of the rational proofs that originate in ijtihād. [19]
**Understanding Islamic Law**

Written by Shaykh Muhammad Hisham Kabbani

*Ijtihad*, or juristic reasoning through analogy (*qiyas*) is a principle explicitly founded in the authentic Sunnah of the Prophet (s) in the famous hadith of Muadh.

[20]

The other principles were originated by the companions after the Prophet (s) and “Ali used to formulate his own opinion by means of *ijihad* based on *qiyas*, *istishāb*, *istiḥsān* and *istišlāh*, always basing his opinion on the broader aims of the Shariah.”

[21]

Before the canonization of the four independent schools of thought, Mālikī, Ḥanafī, Shāfiī and Ḥanbalī in the fourth century of Islam, [22] there existed more than 424 different schools of thought. These had been developed by experts who examined the revelation and precedents as established by the Prophet and the early Muslim generations, and formed them into law.

**Who is Eligible to Explain the Shari‘ah?**

After the time of the Prophet Muhammad (s), from over 100,000 of his Companions (students who personally met him), fewer than thirty are recorded actually issuing *fatwās* on new issues in which *ijihad*, or juristic reasoning, was required.

Today the authority for *ijihad* is with the mufti, or Dar al-Ifta, Center of Rulings, which gives general rulings (*fatwā*, pl. *fatāwā*) about an incident or legal question. As scholars, they are able to look at the entire package of Islam and issue a ruling on the question at hand.

The judge (*qālin*) on the other hand issues a judgment (*ray al-qalā*) on particular cases or incidents pertaining to an individual or groups, typically in cases involving two adversaries.

These two groups must work together – like two parties in which both seek the best understanding by applying their utmost efforts. The Center of Rulings and the mufti build the information model while the judge applies it to a particular case. Each case studied by the judge
(qāʻlī) is an attempt to comprise a particular verdict based on the legal precedent given by the mufti which can be applied in the specific judgment.

A ruling by a mufti is not given force of law – it is only a response to an issue and it is up to individuals to follow the ruling or not. Law on the other hand, is enforced by individual judgments of the court – typically informed by a fatwā but in practical application taking into consideration circumstances and conditions of plaintiff and defendant. Alternatively, a ruling (fatwā) can be made into law by order of the executive office.

It is essential to understand that no one can issue a ruling without qualification, and no one can issue a judgment without qualification. Since rulings have a tremendous impact on the life of society and ruling on the individual, it is essential that those issuing them have excellent moral character, and most importantly that they are qualified.

Allah says,

Say: Tell me what Allah has sent down for you of sustenance, then you make (a part) of it unlawful and (a part) lawful. Say: Has Allah commanded you, or do you forge a lie against Allah?” [23]

This verse emphasizes that no one has the right to judge something right or wrong unless he has complete evidence from the pertinent information as found in the source texts, from deep discussion among the people who have a grasp of the issue at hand, and to seek all meaningful evidence. Otherwise one should remain silent for then one would be lying against Allah and against the religion.

Imām Shāfiī, founder of one of the four great schools of jurisprudence, said:
It is not allowed for anyone to give a Shariah explanation (fatwā), except one who knows the Holy Qur’ān completely including what verses are abrogated and by which verses they were abrogated, and which verses resemble each other in the Qur’ān and whether a chapter was revealed in Makkah or Madina. He must know the entire corpus of the Hadith of the Prophet (s), both those which are authentic and those which are false. He must know the Arabic language of the time of the Prophet (s) with its grammar and eloquence as well as know the poetry of the Arabs. Additionally he must know the culture of the various peoples who live in each different nation of the community. If a person has all such attributes combined in himself, he may speak on what is permitted (halal) and what is forbidden (haram). Otherwise he has no right to issue a fatwā.

It is related that one of the greatest scholars of Shariah, Abd al-Raḥmān ibn Abi Laila said:

I was able to meet with one hundred and twenty of the Companions of the Prophet (s). Every one of these companions was asked about specific Shariah issues, seeking a verdict, but they avoided rendering a decision instead pointing to another companion to issue the answer. They were afraid to give an answer that would be incorrect for which they would be responsible before Allah.

That shows that one can be deeply imbued with Islamic knowledge, as were all the Prophet’s Companions, and yet still feel unqualified to give a verdict. All one-hundred and twenty of the Prophet’s Companions with whom ibn Abi Laila met were hesitant to issue a fatwā.

Imām Nawawī, one of the greatest of Islam’s later scholars, related that Imām ash-Shubī and Hasan al-Bašrī and many others of the Successors [generation immediately succeeding the Companions of the Prophet (s)] said, “people of today are quick to issue a ruling based on their analysis concerning someone. If an answer had been sought for that same issue at the time of Umar ibn al-Khaṭṭāb | (second caliph of the Prophet (s)), he would have gathered all the participants of Badr [i.e. 313 of the foremost Companions of the Prophet] in pursuit of the answer.”
Historically, *ijtihād* has been perceived as a concern primarily of the individual scholar and *mujtahid*. But in modern times, *ijtihād* has become a collective endeavor that combines the skills and contributions not only of the scholars of Shariah, but of experts in various other disciplines, because acquiring a mastery of all the skills that are important to society is difficult for any one person. Ideally, independent reasoning should be combined with the Qur’ānic principle of consultation (*shūrā*), making it a consultative process, preferably as an integral part of the workings of the modern legislative assembly.

*Ijtihād* has also been seen in the past as a juristic concept, a preserve of the jurist to the exclusion of specialists in other disciplines. But as a method by which to find solutions to new issues, *ijtihād* should be exercised by the scholars of Shariah as well as by experts in other disciplines, provided that those who attempt this independent reasoning acquire mastery of the relevant data, the Quaran, and the Sunnah. There is thus no reason why experts in Islamic economics and medicine, for example, could not carry out *ijtihād* in their own fields.

**Detailed Objectives of the Law (Maqasid ash-Shari‘ah)**

Schact, in describing the purpose of the Law writes:

In the field of penal law, it is easy to understand that the Qur’ān laid down sanctions for transgressions, but again they are essentially moral and only incidentally penal, so much so that the Qur’ān prohibited wine-drinking but did not enact any penalty, and the penalty was determined only at a later stage of Islamic law. The reasons for Qur’ānic legislation on all these matters were, in the first place, the desire to improve the position of women, of orphans and of the weak in general, to restrict the laxity of sexual morals and to strengthen the marriage tie, to restrict private vengeance and retaliation and to eliminate blood feuds altogether; the prohibition of gambling, of drinking wine and of taking interest are directly aimed at ancient Arabian standards of behaviour. [25]

Shaykh Faraz Rabbani describes the intent behind Divine Law, something which has been strongly highlighted in the current era as people with various agendas, from apologist to extreme Islamist, seek to define Islamic Law within a Western framework of understanding:
The ultimate worth of actions is based on intention and sincerity, as mentioned by the Prophet (s), who said, “Actions are by intentions, and one shall only get that which one intended.” The Shariah covers all aspects of human life. Classical Shariah manuals are often divided into four parts: personal acts of worship; commercial dealings; marriage and divorce, and penal laws.

The legal philosophers of Islam, such as Ghazālī, Shāṭibī, and Shāh Walīullāh explain that the aim of Shariah is to promote human welfare. This is evident in the Qur’ān, and teachings of the Prophet (s).

The scholars explain that the welfare of humans is based on the fulfillment of necessities, needs, and comforts.

Necessities

Necessities are matters that worldly and religious life depend upon. Their omission leads to unbearable hardship in this life, or punishment in the next. There are five necessities: preservation of religion, life, intellect, lineage, and wealth. These ensure individual and social welfare in this life and the hereafter.

The Shariah protects these necessities in two ways: firstly by ensuring their establishment and then by preserving them.

**Religion:** To ensure the establishment of religion, Allah Most High has made belief and worship obligatory. To ensure its preservation, the rulings relating to the obligation of learning and conveying the religion were legislated.

**Life:** To ensure the preservation of human life, Allah Most high legislated for marriage, healthy eating and living, and forbid the taking of life and laid down punishments for doing so.
Intellect: Allah has permitted that sound intellect and knowledge be promoted, and forbidden that which corrupts or weakens it, such as alcohol and drugs. He has also imposed preventative punishments in order that people stay away from them, because a sound intellect is the basis of the moral responsibility that humans were given.

Lineage: marriage was legislated for the preservation of lineage, and sex outside marriage was forbidden. Punitive laws were put in placed in order to ensure the preservation of lineage and the continuation of human life.

Wealth: Allah has made it obligatory to support oneself and those one is responsible for, and placed laws to regulate the commerce and transactions between people, in order to ensure fair dealing, economic justice, and to prevent oppression and dispute.

Needs and Comforts: Needs and comforts are things people seek in order to ensure a good life, and avoid hardship, even though they are not essential. The spirit of the Shariah with regards to needs and comforts is summed up in the Qur’ān,

\[
	ext{He has not placed any hardship for you in religion,}
\]

And,

\[
	ext{Allah does not seek to place a burden on you, but that He purify you and perfect His grace upon you, that you may give thanks.}
\]
Therefore, everything that ensures the human happiness, within the spirit of Divine Guidance, is permitted in the Shariah. [28]

Deferral of Ruling and Judgments

An essential principle for muftis and qāfīs is they must not to be quick in ruling and must examine all the evidences from the Holy Qur'ān, hadith and precedent prior law. The mufti must not think that being quick to respond is due to his own ingenuity, rather he must take painstaking care and be tranquil as he approaches the problem, in order not to make the slightest error, for the lives of people are in the balance in such decisions. Similarly, he must await changes in circumstances, for conditions and situations might change and evidences might emerge that were not known at the outset of the issue before him. It is thus not uncommon for a mufti to wait many weeks before issuing a *fatwā*. However, where extreme forms of Shariah are practiced, *fatwās* or judgements are often made quickly with insufficient attention to the issues or the Shariatic arguments relating to the judgment.

The Middle Path

Islamic Shariah calls people to the middle path in all things in belief, worship, ethics, morality, behavior, individual interactions, social interactions and in intellectual understanding. This is the basis of Shariah’s *širāţ al-mustaqīm* – the Straight Path.

This essential principle of Shariah is known as “*al-wasaṭiyya*”, moderation, as mentioned in the Holy Qur’ān,

> “we made you a nation of justice and clemency.”

[29]

This principle encourages clemency and reasonableness in making judgments.

Allah said:
Nor should the believers all go forth together. If a contingent from each expedition remained behind they could devote themselves to study of religion and admonish the people when they return that thus they may guard themselves from evil. [30]

This Qur'ānic exhortation recommends that a handful of individuals should come forth and study the faith deeply - they become the ones to advise the community in religious issues.

Allah said, "Ask about Allah from one who knowledgable." [31] and He said:

so ask the followers of the Reminder if you do not know,”

[32]
indicating the need to ask those possessing knowledge of an issue; not from one’s opinion or from someone who is ignorant.

Imām Mālik was once asked about twenty-two different juristic issues. He only responded to two. In answering these he prayed seeking support from Allah and he was not hasty in his responses.

It is said that “the one among you who quickly runs to make fatwā, is like one who is running to throw himself into the fire.” Such sayings emphasize the importance of deep consideration when making a ruling.

Ease above Ardor

Another principle in issuing a fatwā the mufti must seek the easiest way that people can apply, which is acceptable in Islam.
Allah said:


differences as mercy

Prophet Muhammad (s) said, “Islam consists in three hundred and thirteen roads (Shariah). There is not one upon which one meets Allah, Almighty and Exalted except he enters Paradise through it.” [34]

Prophet Muhammad (s) said, “It is meritorious for a judge to make an interpretation (ijtihād), even if wrong. But for the judge who adjudicates rightly there is twice the merit,” [35]

meaning he received the merit of striving to seek a correct judgment and the reward of having done so.

One of the Successors of the Prophet (s), the caliph Umar | ibn Abd al-Azīz said, “I don’t like to see the Companions of Prophet (s) agreeing on the same issue, rather I prefer to see them disagree.”

What he meant was that if the Companions, who are the main reference for the Shariah, disagree, different valid viewpoints would emerge, and in this way more solutions to the same problem would become available. This kind of dispute never divides the community.
In fact there is a saying, “The differences among my Community are a mercy” which the scholars of Islam agree is correct in meaning. Ibn Taymiyya said, “The consensus of the Imams [of law] on a question is a definitive proof, and their divergence of opinion is a vast mercy.” [36]

Dr. Muhammad Imara of Al-Azhar in Cairo says:

It is easy to avoid discussing the differences in the Ummah but it is impossible to remove them and say that all will accept the same ideology and school. Whoever thinks that about the Muslim Ummah can one day be free of schools of thought, is in fact an enemy of freedom and diversity, or believes in an idealistic dream which is, in reality, impossible to expect. For stifling intellectuality and preventing different ways of thinking about religion from being expressed, in essence imposes dictatorship on religion… [37]

Muslims are thus presented with competing fatwās. In such cases he or she would follow the ruling of the scholar observing the same religious madhhab. If two muftis of the same madhhab issue conflicting fatwās, the common Muslim has his or her choice. In practice however, today holding to a particular tradition is not strictly applied, giving Muslims more flexibility in choosing among alternatives. Extreme Muslims however reject the principle that differences are a mercy and seek to impose one ‘brand’ of Islam and one set of rulings on everyone. This in practice makes them rigid, unbending and intolerant.

Clemency

In the verses of punishment, one finds that Allah always follows by mentioning forgiveness, as in:

[verse text]
And for him who is forgiven somewhat by his (injured) brother, prosecution according to usage and payment unto him in kindness. This is a concession and a mercy from your Lord. After this whoever exceeds the limits shall be for him a great penalty. [38]

This is made very clear in the Qur’an wherein each mention of punishment, is followed by the mention of repentance and forgiveness.

…We decreed for the Children of Israel that whosoever killeth a human being for other than murder or corruption in the earth, it shall be as if he had killed all mankind And if anyone saved a life, it would be as if he had saved all of mankind. [39]

In mentioning the laws of punishment for waging war, the Qur’an recommends the death penalty. However, even for this most grievous crime it allows a way out

…except for those who repent before they fall into your power. In that case, know that Allah is Forgiving, Merciful. [40]

Again emphasizing forgiveness, Allah says:
...let them forgive and overlook. Do you not wish that Allah should forgive you? [41]

And in respect of cutting the hands of the thief, Allah says:

But if the thief repents after his crime, and amends his conduct, Allah turneth to him in forgiveness; for Allah is Oft-forgiving, Most Merciful. [42]

We see that all these verses which commence as verses of punishment are immediately followed by verses of mercy. That is Islam’s way of dealing with criminality to reduce the severity of punishment. That is why a judge must examine each case with great consideration.

It is reported by ‘Āishā that the Messenger of Allah (s) said: “Ignore the offenses of those seen to possess [good] qualities (dhawi ‘l-ḥayāt), except in [corporal and capital] penalties.” [43]

‘Āishā also related that the Prophet (s) said: “Stave off the penalties from the Muslims as much as you can, and if any leeway is found then release the detainee. Truly it is preferable for the ruler to pardon mistakenly than to punish mistakenly.” [44]
The Companion Abd Allāh ibn Masūd said: “Stave off the penalties by way of inconclusive evidence. Avert death from the Muslims as much as you can.” [45]

The caliph Umar ¦ said: “To erroneously not apply the penalties because of inconclusive evidence is dearer to me than mistakenly applying them on the basis of inconclusive evidence.” [46]

Shaykh Yūsuf al-Rifai, commenting on the excessive application of punishments by Salafi extremists, writes:

…you forgot that the Prophet (s) said: “The first judgment that shall be passed among the people on the Day of Resurrection shall be over blood [unjustly shed].” [47] Therefore, fear Allah and do not kill a life which Allah made sacred, except in justice! [48]

**Moderation**

The Prophet (s) said, “Beware of extremism in religion. Those who were before you nothing destroyed them except their extremism in religion.” [49]

The moderate Islamic Shariah is described by the verse:

“Invite (all) to the Way of thy Lord with wisdom and beautiful preaching; and argue with them in ways that are best and most gracious…” [50]
This verse shows that even in debates with others, one must use a good form of discussion and dialogue.

Allah prevented Muslims from discussion with non-Muslims except in a moderate way:

“and dispute not with the people of the Book except with means better than mere disputation,… and say ‘we believe in the revelation that has come down to us and in that which has come down to you. Our God and your God is one and it is to Him that we surrender.’” [51]

And in another place He says:

If they do wrangle with thee, say, “Allah knows best what it is ye are doing. Allah will judge between you on the Day of Judgment concerning the matters in which ye differ.” [52]

Gentleness

Islam encourages people to be good hearted:
it is part of the mercy of Allah that thou does deal gently with them. Were thou severe or harsh-hearted they would have dispersed from around thee, so pardon them and ask forgiveness for them…. [53]

There are many other verses and hadith which will demonstrate the moderation of Shariah. The Prophet (s) said to his wife ‘Āishā, “Allah loves gentleness in everything in this life and religion, either in tongue or in deed.”

This is evidenced in the following aḥādīth: “Allah loves kindness in all matters and, “Kindness makes things beautiful, violence makes them defective,” as well as in the following wisdom of our forebears: “Whoever desires to command the common good, let him do it gently.”

Public Interest

The subject of public interest (maslaḥa) has been subject of great interest to those studying Shariah from the viewpoint of its compability with Western law. On this topic Kamali says:

Although the leading schools have also recognized considerations of public interest (istislah) as a source of law, they have generally tended to impose a variety of conditions on it because of its strong utilitarian leanings. Only the theologian Mālik advocated it as a source of law in its own right, which is why the considerations of public interest are seen as a Maliki contribution to the legal theory of the sources, the usul al-fiqh.

Whereas analogy operated within the given terms of the existing law, and juristic preference basically corrected the rigidities of analogy, public interest was not bound by such limitations. Furthermore, it vested the ruler and mujtahid with the initiative to take all necessary measures, including new legislation, to secure what he considered to benefit the people.

An example of istislah, or public interest is when Imām ibn Ḥanbal issued a verdict permitting compelling the owner of a large house to shelter the homeless.
Imām Ahmad also endorsed requiring striking workers and craftspeople to continue to provide their services at a fair wage to avoid hardship on society. [54]

Muhammad Khalid, remarking on this topic states:

Islamic jurists] frequently invoked the principles of necessity, expediency, preventive measures, state of emergency, and other similar doctrines to reconcile the contradictions between laws and social norms. The contradictions continued because these doctrines were not regularized as “norms” in the legal theory. Nevertheless, some Muslim jurists tried to develop legal theories to regularize the quest for a normative basis of Shariah in the social practice and usage of the people. [55]

Haim Gerber discusses the similar concept of urf, most commonly observed in Hanafi fiqh:

Ibn Abidin’s notion that the law was not wholly built on revelation, but that some of the material was collected by the founder mujtahid from the customary law of his time. He goes on to posit a new legal category within the law—the books of the school, which stand below the texts of revelation (nass, Qur’ān and Sunnah), and are even eclipsed by the urf, laws that derive from local customs. [56]

**Extremism**

Extremism is described in Islam by two words: ghuluw – extremism, extravagance, immoderation, and tatarraf – radicalism.

One of the main forms of extremism in religion is complete ignorance of the comprehensive nature of Islam. This is what makes an individual who has knowledge of parts but not the whole think he has entered the circle of scholars when the fact is he knows nothing but bits and pieces that he uses to deduce a verdict. Such a verdict will invariably be fraught with error.

In their ignorance of religion and in their pride, people are lead to hold tight to the literal
meanings of the source texts without trying to understand the multiple meanings and the intent and purpose behind the revelation or a relevant action or saying of the Prophet (s). Today extremists are bringing back the school that was known as the school of literality (*al-dhahiri*). That school originally refused to take into consideration *qiyaṣ*, analogy, or reasoning between different rules, or precedence in law.

A simple example: the Prophet (s) prohibited individuals from traveling to areas of non-Muslims or areas of unbelievers carrying the Holy Qur’ān. [57] If we look today however, we find that the Holy Qur’ān is on the shelf of the library of any country in the world, Muslim or not.

In the time of the Prophet (s), the concern was that the Holy Qur’ān time was written by hand in fragments of skins and parchment, etc. and there was fear that the words might be twisted and meanings altered. Today that problem no longer exists, as the Qur’ān has been gathered and formalized, so to travel with the Qur’ān is no longer an issue.

The extremist on the other hand, will declare that the letter of the saying must be obeyed, without taking into consideration the circumstances and reasons for this ruling.

Another example: the Prophet (s) said, “a woman must not travel except accompanied by a relative.” A mufti, examining this issue in detail, finds that in the past, someone traveling alone, through deserts, mountains and forests might face great ordeals. In emphasizing the respect and honor in which women are held, the Prophet (s) asked that she travel with a relative.

Today however, traveling from one place to another is no longer fraught with difficulty. One has complete security and is accompanied by hundreds of fellow passengers in the short time it takes to cover thousands of miles. Therefore there is no longer fear for a woman traveling alone, for she is accompanied by all the people on the plane, whom may be considered as adequate protectors. But the extreme interpretation of the hadith is that a woman cannot travel except with a relative, again emphasizing the literal meaning of the hadith.

If in such minor issues, we see examples of extreme literalism among the non-moderate Muslims, what then when it comes to cutting hands and stoning? These are far more serious issues to consider.
Allah says,

but say not for any false thing that your tongues may put forth – this is lawful and this is forbidden, so as to ascribe false things to Allah. For those who ascribe false things to Allah will never prosper. [58]

This verse addresses the extremists. Moderate Muslim scholars are extremely surprised to see those who migrated overseas to different countries around the world, seeking study and sustenance, have carried with them this extreme literalist ideology. The result has been the creation of a large number of groups and divisions within the Muslim community, seemingly showing the entire Muslim community as radical in their views and violent in their actions. If the leadership of the immigrant Muslims had shown moderation in the countries to which they moved, and integrated with the culture of the country, they would have greatly changed the stark image of Islam in the eyes of common people.

Khalid Muhammad states:

Shah Waliullah opens his work [Hujjatullāh al-bālīgha] by refuting those who compared Shariah with the commands of a master intending only to test his slaves loyalty and sense of obedience. He rejected this view and argued that Shariah laws were not merely for the sake of obedience; they have human welfare as their goal. [59]

Shah distinguished between religion and laws and elaborated his idea that religion is based on the principle of unity, while laws are based on the principles of change and diversity. [60]

Yūsuf Al-Qaradāwī in Priorities of the Islamic Movement in the Coming Phase says:

Third, an individual may impose on himself the hardest conditions if he so wishes, testing his will to the limit, though moderation is the best and most appropriate way as the Prophet (s) says, “Allah likes people to take the [facilitation] licences He gave them as He hates their committing of sins [that anger Him],” reported by Ahmad, Ibn Hibban and Al-Bayhaqi, on the
authority of Ibn Umar. It is also in the *Saḥīḥ al-Jāmi al-Saghīr*.

However, a *faqih* should not impose hard conditions on Muslims in the matters that concern the wide majority: he has to take into account that among them are the weak, the old and those who have lawful reasons for exception. A hadith says about leading congregational prayers, “He who acts as imām [leader] in prayer should make his prayer short, for among the people [behind the imām] are the old, the ill and those with errands to run.” Prayer is a symbol of the various aspects of life Therefore, the *faqihs* of the Islamic Movement just cannot adopt strict opinions that restrict and do not facilitate, and prohibit but do not allow, especially with respect to the issues related to women, family, arts, entertainment and their likes. It also applies to penal codes, where the least punishment should be imposed, including the opinion that the repentance rescinds the *ḥadd*, the opinion that the punishment for drinking wine is a discretionary one, and so on.

I would like our motto in this phase to be the statement of Imām Sufyān Al-Thawrī, “Only the trustworthy *faqih* can give licences, but everybody knows how to pass a restraining pinion.”

Khalid Muhammad points out that “at the level of religion, the Sufis, the pietist Muslim mystics, were the first to point out the contradiction between legal norms and Islamic ethical values.” He writes:

The Sufis were critical of the jurists’ literal and legalist approach to religious obligation. They suggested an emphasis on Shariah, the inner meanings of Shariah, and personal commitment as the motive for obedience to laws, instead of punishment and coercion. They criticized jurists’ reliance on worldly power. Contrary to the jurists, who lived in the world of text, the Sufis were closer to the masses and their norms. In most Muslim societies, Sufis represented a popular and liberal view of Islam.

**Adaptation to Societal Norms**

Khalid Muhammad writes:

Muslim jurists in the past were quite aware of the constant need to reconcile contradictions between social and legal norms. They continuously adjusted laws to bring them in line with the
customs and norms of the people. The normative basis of the institutions and concepts such as family, property, rights, responsibility, criminality, civil obedience, social order, religiosity, international relations, war, peace, and citizenship have changed significantly over the last two centuries. [63]

Iman Shāfī, the founder of one of the four schools of thought, he was living in Bagdhad when he put forth his school of thought as Imām Abū Ḥanīfa and Imām Mālik before him. Imām Shāfī came in the 2nd century of hijri and established his school of thought in Baghdad 1250 years ago Hijri. When he moved from Baghdad to Egypt in the last years of his life, he changed his school of thought. He said, “I saw people more corrupted in Egypt then from Baghdad. So what I wrote previously and explained is insufficient to treat these corrupted people because I was more lenient. Now I have to be more strict. So I have to change [my rulings].”

Shah Waliullah expounded the theory of evolution of society in four stages and found that social norms played a central role in the evolution of laws. [64]

Ibn Abidin is a well-known Syrian Ḥanafī jurist from the late Ottoman period. He wrote a short treatise on urf [custom] and its position in Islamic law” (Ibn Abidin 1884), explaining the validity of urf as a source of Shariah laws. He distinguished between two types of texts: Shariah and jurist law (fiqh). In case of conflict between a custom or usage and the Shariah text, Ibn Abidin rejected only those customs which were absolutely contradictory. In case of conflict with a jurist law text, the custom prevailed as a principle. [65]

One can see this principle employed extensively today. Kamali mentions that “…jurists have gone on record in recent years to issue a verdict (fatwā) to declare photography permissible in this light. This is because photography has now become a ubiquitous practice among Muslims everywhere.” [66]

In another paper, Kamali writes:

Mālik is the chief source of the two important doctrines of public interest (maslaḥa) and blocking
the means (ad al-ṣarā’i), both of which are eminently rational and rely mainly on personal reasoning. Maliki jurisprudence also attempted to forge a closer link with the practicalities of life in Medina and attached greater weight to social customs than other jurists did.

Shari’ah Permits Other Faith Communities Their Own Law

Shaykh Yūsuf al-Qaradāwī writes:

*Dhimma* means a pact and guarantee. That is to say, the non-Muslims who live in Islamic society and within the Islamic nation, are the responsibility of Allah, His Messenger, and all Muslims, under their guarantee and their protection.

Islam established rules regulating the relations between the Islamic state and non-Muslims …so that these would be natural relations. They are living in Islamic society under the general principle established by the religious legal authorities: ‘What is [permitted] to them is [permitted] to us and what is [incumbent] upon them is [incumbent] upon us.’ This is the basis for relations with non-Muslims, including the Jews except for that which requires a religious distinction. If their religion commands them to have a day of rest on Saturday, I will not impose upon them to work on Saturday and rest on Friday. No, I must be considerate. I respect what their religion dictates.

Our master Umar ibn Abd al-Azīz, whom the religious legal authorities call the fifth Righteous Caliph, sent [a letter] to Imām Hasan al-Bašrī, who was one of the greatest-known religious figures of his time, telling him he was shocked to discover that the Zoroastrians in the land of the Persians, marry their mothers and sisters. How can we allow this? [Ḥasan al-Bašrī] sent him a letter [of reply] and said this is permitted by their faith. Don’t try to change this. Even if they marry their mothers, their religion allows this.

Respect for the dictations of [other] religions and faiths is one of the most fundamental things for us. We don’t get involved in their affairs. Islam is at the top of the tolerance scale; it allows one to do what is forbidden to Muslims, if it is permitted [in one’s owns religion], such as eating pork and drinking wine. Wine for the Muslims is the worst evil, it is one of the worst and most severe sins, yet so long as your religion permits it, we won’t prevent it [from you]. What is required in this matter is that this [behavior] not be spread among the Muslims.
Schact writes:

The jurisdiction of the qāļī extended to Muslims only; the non-Muslim subject populations retained their own traditional legal institutions, including the ecclesiastical and rabbinical tribunals, which in the last few centuries before the Arab conquest had to a great extent duplicated the judicial organization of the Byzantine state. This is the basis of the factual legal autonomy of the non-Muslims which was extensive in the Middle Ages, and has survived in part down to the present generation.

‘Political’ Fatawa

Another cause for extremism in youth their rejection of ‘official’ muftis whose fatāwā mirror their government’s policy. Such rubber-stamp scholars issue a fatwā on order of the ruler, not based on Islamic reasoning. A nation whose leader is socialist will produce official scholars who endorse socialism. This has become so common in recent times, that such ‘official’ muftis cause rejection by the youth, and provide a recruitment rationale by which extremists attract them to their fold.

Letter Versus Spirit of the Law

The intent of Islamic law is not punitive, as much as corrective and reformative.

Khurram Murad writes:

It is a significant contribution of Islam that these penalties are called hudūd (boundaries) and not punishments: they are liabilities incurred as a result of crossing the boundary set by Allah

. Another important function which these punishments serve is educative, and thus preventive and deterrent. The Quran alludes to this aspect when it describes them

as exemplary punishment from Allah

...
Therefore before applying the death penalty for a capital offense, the entire case must be investigated by the judge (qāły). In such case the family pardons the killer, per the Qur’ān’s recommendation, the court may reduce the penalty from capital punishment, to prison or exile. The only other grounds for capital punishment are terrorism (al-hi rāba, fašād fi ’l-ar), highway robbery and rape - acts which are critical threats to public security.

Laws were revealed to Prophet Muhammad (s) due to real-life situations requiring a judgment. Today the same method is followed in issuing fatāwā. Therefore the ‘reasons for revelation’ (as bāb an-nuzūl) are essential to understanding Qur’ānic revealed laws and the objectives (maqāsiļ) behind them. For example, the rules of hijab, the covering of women, were revealed in a time when the hypocrites were ridiculing Muslim women in the streets of Madina.

Reduction of Stringency with Time

One finds that in the early days of Islam some Divine orders were very strict, and were later reduced. For example, Muslims were not allowed sexual relations during the month of fasting due to the initially restrictive rules of the fast. Later revelations to the Prophet permitted intimacy during night hours (fasting occurs between sunrise and sunset).

Initially, the early Muslims were ordered to pray for one third of the night; to build up their spiritual relationship with God. Later this was reduced. Similarly, God initially declared that in a defensive war against an aggressor, unless the ratio of aggressors to Muslims exceeded 10-to-1 the Muslims were obliged to fight. This was later reduced to a ratio of 2-to-1 as the general level of faith decreased with the influx of new converts to the faith.

Thus we see the importance of gauging the capacity of the people to implement any given code of conduct. Today, it cannot be expected that the law be enforced as it was a century ago, as the conditions of life have changed immensely. For that reason, the Prophet (s) indicated that in the last days applying the letter of the law would become very difficult, saying that those who would attempt to implement religion in its entirety at that time would be like someone carrying a burning coal.
Another example is the requirement of prayer. The Prophet (s) was first told to order his nation to pray fifty times a day. During the Night Journey, this requirement was reduced to five prayers per day.

**Flexibility in Application of Shari'ah**

All the above is found in the theoretical definition of an Islamic state. However, in today's world, such an implementation is nowhere to be found, while those few nations who lay claim to an Islamic system of government are in fact quite far from its true implementation. These 'Islamist' nations tend to interpret Islamic law with the narrowest view, rejecting traditional teachings and scholarship. We find such governments constantly issuing decrees of stoning to death, amputating hands, lashing, and other severe punishments for various crimes.

The current overriding problem is 'Islamic' states follow the letter of the law – 'black letter law' – without regard to precedents. On the other hand, in Islam, traditional governments follow precedents established over many centuries, much as is the case here in the U.S.

In Islam rules are tempered by application. As a simple example, who is allowed to make the judgment to cut the hand of a thief? Let me explain how this is implemented. First of all, you cannot cut the hands of someone who steals in order to eat, as we see today in Argentina. In Islam, the government's first duty is to help the impoverished; you simply cannot cut the hands of people who steal because they are hungry. If a person is in need of medicine and steals it, you cannot cut off his hand. The only time the judgment of cutting the hand applies is when someone steals out of greed, without need, and even then numerous criteria must be met to hand down such a punitive sentence.

Even rules based on the principle of consensus of scholars, *ijma*, which in itself is difficult to accomplish, can be changed. Dr. Wahba al-Zuhayli, wrote:

Consensus of scholars on a certain issue made earlier can be abrogated by the consensus made by a later generation if there were changes in the conditions which are for the common good of the people as time progresses. The followers of the Hanbali school and some of the followers of the Hanafi school say that one can reformulate or abrogate a law developed by consensus at one time by a new law that fits the later circumstances.
Islamic law necessitates reformation or rejuvenation due to changes in society over time.

The Islamists differ from the traditionalists in that the latter call for a reinstitution of *fiqh*, but not necessarily an elimination of existing systems of law.

Islam requires in the case of the thief that the system attempt to rehabilitate him and seek ways to encourage him to repent:

But if the thief repents after his crime, and amends his conduct, Allah turneth to him in forgiveness; for Allah is Oft-forgiving, Most Merciful. [73]

This means he should be given every chance to reform, such as assisting him to earn a lawful living. It is the state’s responsibility to ensure people’s life needs are met, such that there is no need to steal. Job opportunities should be provided as a form of social security. Such examples can be found in Brunei, and in a number of other wealthy Muslim countries.

Unfortunately, today we see the reverse being implemented by “Islamic” nations. Someone steals medicine, food, etc. and is punished, while those who amass millions of dollars through dummy corporations, racketeering, money laundering, illicit drug and weapons sales, are never brought to justice. This is the sad condition of some Islamic religious leaders of our time, who follow the letter of the law in contravention of its spirit.

Followers of Wahhabism, whose teachings many of today’s Islamic governments follow, have created a yardstick for Shariah that takes it to the harshest extremes when applied to common citizens. Those in power however, typically remain exempt from its application. This is a purely political implementation of the Shariah, done for show and thus appears wantonly cruel; utterly lacking wisdom. This is utterly contrary to the Objectives of the Law, Maqasid ash-Shariah. The Law was established to better the individual’s relationship with his or her Creator and with fellow
humans.

Of this rigidity, Schact writes:

...the Wahhabis in Arabia in the nineteenth and again in the present century... made it their aim, to enforce Islamic law exclusively, to abolish the double system of administration of justice, and to outlaw administrative and customary law. [74]

The Prophet (s) is reported saying, “By Allah! Even if my daughter Fatimah steals, I would cut off her hand.” [75]

His intent was not to show Islam as stern Islam nor to demonstrate a specific parenting style, but rather to demonstrate how abhorrent theft, of any kind, is in the Eyes of God, including: corruption, forgery, bribery, deceit, and larceny. Today however, far from being blind, we see “Shariah Law” abused to advance one group against another, while those who manipulate it appear exempt from its impact.

**The Case of Adultery**

The late Shaykh Abudllah al-Alaili, president of the Council of Muslim Scholars of Lebanon, and a latter-day genius in *fiqh*, writes in *Where is the Mistake?:*

Let us take another example – that of the punishment of stoning to death for the commission of adultery. In accordance with Islamic Law, the witness must pass his hand or a string between the man and woman, and find it is blocked. According to broad interpretation of the law, there must also be four witnesses, each of whom personally observed the act in detail “*al-mā’il fi ‘l-mukhala*” (seeing the act with the eye), otherwise the accusation is dropped, and the witnesses are
considered transgressors and defamers. This is what happened to Abī Bakrah, the honorable companion, when he accused Al-Mughīrah bin Shuba of adultery; Al-Mughīrah was release with no punishment, while the witness was arrested, when he said: “I only saw this man rising and falling, while on top of the woman, consecutively and taking turns”. Although Umar ¦ (the second caliph in Islam), was certain that this pious person was telling the truth, he was forced as the leader to consider his testimony insufficient, and thus an act of defamation, so he punished him. On the other hand, Al-Mugīrah, having satisfied his urge retained his innocence.

Therefore, who can testify, fulfilling all the technical conditions and proofs that the crime was committed? Short of a confession, in practice there is no possibility of fulfilling the stringent evidentiary requirements to guarantee a conviction.

Another caveat attached to the required evidence to prove the crime of adultery is that without sufficient witnesses, the accuser actually becomes the accused and will be punished for the very ugly crime of *libel* – for which the accuser will be liable.

This demonstrates the essence of Islamic law, with the intent to raise the highest standard of morality for human beings, while in reality the law is almost impossible to legitimately enforce. Therefore, we see legal and social intent is to prevent an act from occurring by highlighting its enormity and emphasizing the threatened punishment, while not expecting it to be applied.

If it was true, that the penalty for the adultery, of a free wedded woman, is stoning to death, it would have been specifically mentioned, because of its terrible terror; and claiming the abrogation, of the above verses, by the “*hadith*”, is reversing the criterion for deduction.

Let us say that we accept their claim, then what will be done with the wedded slave girls, since their penalty, is half of the penalty of the free wedded woman? Should we divide it, into two halves, this claimed stoning? And how should we do so? That is why the interpreters, were forced to say, regarding the slave girls, the penalty is half the number of lashes of the original punishment. Just this concession on their part, refutes the claim of stoning, without their being aware of it. [76]

The concept at issue here “waiving the severest penalties by all available means,” is best
demonstrated by the following incident. A woman came to the Prophet (s) and confessed her adultery. However, the Prophet refused to accept the testimony and turned away from the woman. Time after time he tried to avoid having to implement the letter of the law, but the woman herself came back and insisted. He urged her to rethink the matter – perhaps she had not committed the act, or she was not in her full senses.

She returned and again confessed her crime. He wanted her to hide the act, but again she insisted. Further, she demanded to be punished. Then she came and said, “I committed that act and I am now pregnant.” He instructed her, “Go and deliver the child, then return to me.” She insisted on the punishment. So after delivering the child she came back. The Prophet (s) then bade her nurse the child for two and a half years. Finally, when all possible excuses had been exhausted, the Prophet had no choice but to implement the law.

However, his compassionate heart overwhelmed him and he told his Companions, “If the forgiveness that lady had received for her atonement was to be spread among all of you, it would suffice.”

Thus we see that the message came to correct behavior, not to punish human beings. There is no greater symbol for Allah’s dislike of an act than its expression as a form of punishment. Yet, despite this, one fails to find a single verse of Qur’ān ordering the penalty of death by stoning – as if by its absence, Allah were saying this is a punishment only for the most extreme cases of flagrant and wanton sexual activity in public, actions which will eventually destroy the moral fiber of the community.

How does the warping of this application of law take place? This is in fact due to the political reality behind the visage of extremism in every form. In reality ten percent or less of Muslims are fanatic in their ideology, not unlike the communists in recent history. Once they come into power, as in the Nigerian state of Katsina, they must implement their beliefs to prove themselves “righteous.”

The first judicial change apparent in an “Islamic” state is stoning adulteresses and cutting the hands of thieves, while the spirit of law is abandoned. In the true Islamic teaching, the absence of the five daily prayers and fasting are greater issues for the community than stealing and adultery, as the abandonment of the daily applications of faith are more apt to quickly erode the social fabric.
Cutting of hands and stoning adulterers was legislated to emphasize the wrong of these particular actions: adultery and stealing. The purpose is not primarily application of the literal punishment, but is rather a means to emphasizing the enormity of these actions and to demonstrate the inhumanity of stealing as a form of injustice, or adultery, as a betrayal of one’s spouse.

There are many manifestations in the Shariah that must not simply apply the letter of the law when societal issues might induce the crime. Oftentimes the purpose behind a ħadd ruling is more metaphorical than literal, preventive more than punitive.

As we have elucidated, cutting hands for theft is not the intent of the Shariah. Rather the intent is to prevent the commission of crime. This does not differ with the use of the various penalties in the Western modern law, legislated with the intent of eliminating criminal activity.

Al-Shāţibī writes:

Throughout Muslim history, those who neglected acquiring mastery over the science of Al-Maqāṣid, so at their own peril, as it made them liable to error in ījtihād. Included amongst these were the āhl al-bida (the proponents of pernicious innovations), who only looked at the apparent text of the Qur’ān without pondering over its ultimate aims and objectives. These innovators [an allusion to the Kharijites] held steadfastly to the literal text of even the mutashabihah [the intricate, allegorical segments of the Qur’ān] and premised many conclusions on them. [77]

Keep in mind that when these laws were revealed to the Prophet (s), he was an exceptionally just and merciful leader, as were his successors. For that reason when the lady came demanding to be punished for adultery, he made every effort to avoid implementing the prescribed punishment.
For this reason we say that the Islamic Shariah as a whole tried to balance all aspects of the community. Moderate scholars found that most problems in a community or society which cause people to violate the law, are found to originate in societal ailments, stemming from the environment and circumstances in which people are found. These make their way of dealing with others wrong, resulting in criminal pathology making them to act in a manner harmful to themselves and to society.

**Gradual Application of Shari‘ah**

Islamic Shariah was not revealed piecemeal to the Prophet (s). It was implemented over 23 years, primarily in the last ten, after the establishment of the first Islamic state in Madina. Most of those who seek to re-introduce Shariah in their nations, have forgotten the wisdom for the gradual nature of this implementation. This was a necessary interval in the development of Islam, so that the people were not overwhelmed with new regulations and rules of conduct, but rather were able to learn it bit-by-bit, as it was revealed.

A familiar example is the process of revelation which culminated in the prohibition of liquor. The first verse revealed concerning liquor said:

O ye who believe! Draw not near unto prayer when ye are drunken, till ye know that which ye utter. [78]

Someone who is drunk neither knows what he is saying and might say something irreverent or even do something immoral, while praying. For that reason the people were not allowed to come prayer while drunk.

Western governments say, “don’t drink and drive.” Someone caught doing so is liable under the law, even if no crime has been committed. Effectively, drunk-driving becomes a crime. The intent however, is to prevent someone’s drunkenness causing an accident. In such a case, the court will even increase the penalty. Thus we see the graduated approach also found in the
West, with the ‘intent of the law’ being the key factor behind legislation.

Revelation of the verse of drunkenness impacted the drinking habits of the Arabs for which they were renowned. Since prayer while drunk was sanctioned, observant Muslims were forced to restrict their drinking to avoid prayer times. Since the five prayers are spread throughout the day, in practice this made drinking something that could only be done at night.

Later it was revealed to the Prophet:

They ask thee concerning wine and gambling. Say: “In them is great sin, and some profit, for men; but the sin is greater than the profit.” [79]

This verse, while hinting at the evil of drink, by no means forbade it. It was only some time later when the verse of prohibition was revealed and when news of the revelation spread, the streets of Madina ran red with the flowing of spilled wine.

Thus we see that in the hard-drinking society of pagan Arabia, a graduated approach was essential. It not only provided the ruling from Allah, but the reasons behind the ruling, which people of intellect always seek.

Now while drinking is prohibited, to drink in private was not culpable before the law. For that reason one can find liquor in private Muslim homes, even in the holy cities. However when the use of drink is obvious and outward, then it is culpable. This is similar to laws for public drunkenness in Western nations.

On this issue, Yūsuf al-Qaradāwī relates:
There is an example in that respect which is related concerning Umar ‼ ibn Abd al–Aziz, whom the Muslim scholars regard as the fifth rightly-guided caliph and a true follower of his great-grandfather, Umar ibn Al-Khaṭṭāb. ‼

Umar ibn Abd al-Azīz’s son, Abd al-Mālik, who was a firm pious young man, said to his father one day, “O father! Why you do not implement the rulings firmly and immediately? By Allah, I would not care if all the world would furiously oppose us so long as we seek to establish the right [that Allah Almighty has enjoined].” These words show how zealous that young man was to destroy all signs of corruption and deterioration immediately and without delay whatever the consequences.

But the wise father said to his son, “Do not deal with matters hastily, son. Allah Almighty [Himself] despised drinking alcohol twice in the Qur’ān and did not declare it forbidden but in the third time. I am afraid that if I enjoined the right on people at one stroke, they would give it up all at once, which might lead to sedition.” [80] [81]

Extremist Hegemony

The utterly practical aspect of Islamic law is seen to be built into its framework. This aspect is often ignored by non-moderate Muslims, who seek to replace a corrupt society with an ideal one overnight, ignoring the essential inertia of human nature and societal conditioning. Thus, they end up trying to overpower man’s resistance by force. This leads to brutal misapplication of the Shariah, particularly in the arena of crime and punishment.

Arjomand writes:

Agitating outside the Constituent Assembly, the fundamentalists, led by Abul-ala Mawdudi, called for the creation of an ‘ideological state,’ and turned not to the constitutional history of the Mughal empire, or any other Muslim state, but rather to the juxtaposition of Western constitutional blueprints to the scriptural sources of Islam. The result was the declaration of God’s sovereignty in the 1956 constitution of the Islamic Republic of Pakistan, which the late Fazlur Rahman characterized as a ‘comic’ transfer of political sovereignty to God, the famous Objectives Resolution of 1949. [8 2]
The problem today is that extremists are in control of the Muslim mic. Those who went abroad and studied extreme doctrine are being used to perpetuate their ideas and prevent Muslims from living under a reasonable democratic system. They say, “don't talk to us, you don't know our way.” They seek to impose a heavy-handed, strict and rigid application of Shariah on all the people as soon as they take power, resulting in an “allergic reaction” by the people to Islam and Islamic law, as conveyed by their hardline, fascistic approach.

Commenting on this Yūsuf al-Qaradāwī says, “If we want to establish a real Muslim society, we should not imagine that such an end can be achieved by a mere decision issued to that effect by a king or a president or a council of leaders or a parliament.”[83]

One wonders how it is acceptable for these same Islamists to allow non-Muslims to train their military, while at the same time outwardly condemning them and considering work with them to be loyalty of the non-Muslims? They accommodated themselves to that by adjusting the law based on precedents in the sources of Shariah.

There is a conspiracy here to prevent the spread of democracy because it will remove the hegemony of Islamist oppressors. The mistake is in asking the wrong people for an opinion. Today the most oppressive people claim to speak on behalf of Muslims.

Sohail Hashemi, addressing this problem says:

…many Islamic reformers and reform movements shifted their strategy to a “top-down” approach …[conceiving] Islamization as the obligation of the state. The result has been the proliferation of a holistic and authoritarian vision of Islamic life and politics among the most politically active and assertive Islamic intellectuals and groups. In the battle for control of the state being conducted by secular authoritarians on the one hand and religious authoritarians on the other, the gradual and educative path of Islamic reform has been marginalized or repressed altogether. [84]

The result for ideological Islamist regimes has often resulted in a devolution from their stated goals of Islamization through unification of the judicial and executive roles, sometimes resulting
Understanding Islamic Law

Written by Shaykh Muhammad Hisham Kabbani

It is interesting to note, however, that with the take-over of the modernized state and its legal framework by the Islamic militants and the declaration of the supremacy of the Shariah, the old dualism of public and sacred law reappeared immediately. This dualism enabled the clerical jurists of the Council of Guardians to defend property rights, which were fully consistent with the Shariah, against the later encroachments of parliamentary legislation since the early 1980s. But it also introduced fundamental contradictions in the Iranian constitutional law. Furthermore, proclamations notwithstanding, the Islamic law of unilateral divorce was not restored. A court order was required for divorce, and women began to play an increasing role in the family courts as assistant judges. In 1998 the first women judges were appointed, in clear contradiction to the Shariah.

The more general result of this new legal dualism was a prolonged constitutional crisis that was partly resolved by Khomeini’s assertion of the superiority of state law over the Shariah in 1988. This principle was immediately institutionalized by the creation of a Council for the Assessment of the Interest (maslaḥa) of the Islamic Regime, which was duly recognized as an organ of the state in the constitutional amendments of 1989.

Various items of legislation previously vetoed by the Council of Guardians for being contrary to the Shariah became law, and the Assessment Council showed little hesitation to legislate beyond disputes bills. The result has in general been the strengthening of the authority of the state, but at least in one remarkable case it was a victory for women’s rights. By a law enacted in November 1992, the Assessment Council instituted alimony as compensation for domestic labor during marriage. This radical departure from Shiite law was justified by the argument that domestic labor was distinct from reproductive duties required by the Shariah. [85]

The final result of such divergence from “pure” Islam is to create an autocratic state system which in fact is nothing less than a dictatorship with Islamist “flavor.” In such a situation, the enforcers and the same as the adjudicators, making for the typical conflict of interest all fascistic systems embody.

Conclusion

Islam aspires to the highest level of behavior at the individual, family and community levels. The Prophet brought different rules in order to accommodate the culture of each nation and tribe. Allah said:
If Allah so willed, He could make you all one people... [86]

Why did He not do so? To allow flexibility in the rules governing mankind and to generate competition. That is why the ‘door of *ijtihād*’ remains open, allowing new laws to be created as time moves on.

In the time of Prophet Muhammad (s), Islamic Shariah was implemented over a span of twenty-three years. However the extremists have reversed this approach. They come to newly revived Muslims, expecting them to adopt every particular of Islam instantly, while exempting themselves. In reality they must begin with ‘a’ and proceed to ‘z’, but instead they go from ‘z’ and work backwards.

It is for the same reasons that judges (*quļāt*) are given the autonomy and authority to administer the application of Shariah rules and *fiqh* in a manner which accords with the place and conventions of the time. Christopher Houston notes “much Orientalist commentary on the practice of Islamic law condemns not the slavish legality of the *qāļī* (judge) but his apparent inordinate discretion. Thus Goldziher criticizes the ‘mental gymnastics of [ulema] casuistry’ for proving ‘detrimental to the inwardness of religion.’” [87]

In a similar vein Schact writes:

By their decisions, the earliest Islamic *qāļīs*, did indeed lay the basic foundations of what was to become Islamic law. They gave judgment according to their own discretion or ‘sound opinion’ (*råyy*), basing themselves on customary practice which in the nature of things incorporated administrative regulations, and taking the letter and the spirit of the Qur’ānic regulations and other recognized Islamic religious norms into account as much as they thought fit. [88]
In the early time of Islam, these methods were put together as the discussions ensued between the propagators of philosophy (kalām) and *ijtihād*. To reduce that contention four schools were formalized as those in authority. That was done by consensus (*ijma*) of scholars. Whoever references one of these four schools, is considered to have referenced the Qur’ān and Sunnah. Each school while agreeing with the others in the fundaments, differs from the rest in the branches. This provides enormous flexibility to the individual seeking a ruling which fits his needs.

Allah says in the Holy Qur’ān:

```arabic
ﺇِﻥَﻥ ﺱَﻉْﻱَﻙُﻡْ ﻝَﺵَﺕَّ
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Verily the ends ye strive for are diverse [89]

and He informed us:

```arabic
ﻭَﻝَﻭْ ﺵَاء ﺭَﺏُﻙَ ﻝَﺝَﻉَﻝَ اﻠْﻥَّﺍﺱَ ﺃُﻡَّﺓً ﻭَﺎَﺢِﺩَﺓَ ﻭَﻟﺎَ ﻱَﺯَﺎَﻝَ ﻭُﻥَ ﻭَﻠَﺁَ ﮏَﺕَ ﺍِﻝِﻙُ ﻭَﺋِﻝِﻙَ ﻭَبِﻝَ ﻤَﻙَ ﺍِﻝِﻙُ ﻭَبِﻝَ ﻤَﻙَ ﻤَﺡَﺕَﻝِﻑِﻱَﻥَ
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And had thy Sustainer so willed, He could surely have made all mankind one single community: but [He willed it otherwise, and so] they continue to hold divergent views. [90]

In acknowledging such diversity as Allah’s own handiwork in creation, Allah sets the precedent for divergence of opinion in thinking. Dr. Imara comments on this saying:

The appearance of different schools of thought is the fruit of mental and spiritual labor. The result of this struggle is to create opinions and interpretations that move with the time and locale
In conclusion we will quote Dr. Ausaf Alī where he says:

Progress never comes without the pain that is caused by new ideas, new interpretations, new constructions, new paradigms, new theories, and new stocktaking of the situation. Of the tens of hundreds and thousands who participate in intellectual discourse, debate, and creative work only a very few turn out to have been right, and they too not entirely. But everyone, including even those who get it all wrong, contributes. What is crucial is that even those who turn out to be wrong in retrospect need freedom of speech and publication. …To demand that everyone say only the things said before or look at things in accordance with the established opinions and the decisions of the organized groups or the government of the day is to foreclose all possibilities of any conceptual breakthroughs and thereby the enrichment of the conceptual resources of the community.


[20] Muadh ibn Jabal relates that when the Prophet (s) sent him to Yemen, he asked, “What will you do if a matter is referred to you for judgment?” Muadh said, “I will judge according to the God’s Book.” The Prophet (s) asked, “what if you find no solution in God’s Book?” Muadh said, “Then I will judge by the Sunnah of the Prophet.” The Prophet (s) asked, “And what if you do not find it in the Sunnah of the Prophet?” Muadh said, “Then I will make *Ijtihad* to formulate my own judgment.” The Prophet (s) patted Muadh’s chest and said, “Praise be to Allah who has guided the messenger of His Prophet to that which pleases Him and His Prophet.” Narrated by Abū Dāwūd in his *Sunan*


[22] Known as “*hijrī*” date, on which the Islāmīc calendar is based; from the time the Prophet (s) migrated from Mecca to Madinah.


[26] Sūratu 'l-Hajj [The Pilgrimage], 22:78

[27] Sūratu 'l-Mā'idah [The Spread Table], 5:6.


[29] Sūratu 'l-Baqarah [The Heifer], 2:143.


[33] Sūratu 'l-Baqarah [The Heifer], 2:185.

Bukhārī, Muslim, and several other authentic collections relate this Ḥadīth.


Dr. Muhammad Imāra, “Muslim Unity: an elusive goal”, Al-Watan al-Arabī.

Sūratu ‘l-Baqarah [The Heifer], 2:178.

Sūratu ‘l-Mā’īdah [The Spread Table], 5:32.

Sūratu ‘l-Mā’īdah [The Spread Table], 5:34.

Sūratu ‘n-Nūr [The Light], 24:22.

Sūratu ‘l-Mā’īdah [The Spread Table], 5:39.

Narrated by Abū Dāwūd, Aḥmad, and others.

Tirmidhī narrated it from ‘Āishā without raising it up to the Prophet. It was also narrated from Alī by al-Dāraqutnī; Abū Hurayrah by Ibn Mājah and Abū Yala; Abdullah ibn Amr by Abū Dāwūd and al-Nasāʾī.

Al-Bukhārī. The same was narrated from Uqba ibn Amir and Muadh with mawqūf chains and Umar with a munqati mawqūf chain.
Mawqūf
means “Stopped”—a chain arrested at the Companion-narrator without explicit attribution to the Prophet.

Munqati
means “Cut up”—a chain missing two successive links or missing only the Successor-link.


[47] Narrated by Ahmad and the Six except Abū Dāwūd.


[49] Imām Ahmad.


[51] Sūratu ‘l-Ankabūt [The Spider], 29:46.


[53] Sūrat Āli-Imrān [The Family of Imrān], 3:159.


In Hadiths related by Imām Mālik, Bukhārī and Muslim.

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Bukhārī.


[78] Sūratu ‘n-Nisā [Women], 4:43.


[80] Cf. Ash-Shāṭibī’s *Al-Muwafaqāt*, vol. 2, p. 94


[86] Sūratu ‘n-Nahl [The Bee], 16:93.


[89] Suratu 'l-Layl [Night], 92:4

[90] Sūrah Hūd, 11:118.
