

have not been identified because of their polemical importance. Rather, the real problems and challenges facing the Muslim world – poverty, deprivation, illiteracy, instability, authoritarianism, exploitation, injustice, economic inequality, violence, human rights deviations, women’s rights deficiencies, technological and economic backwardness, dependence on the West, and so on – do not make a happy picture. There must be a reason and there has to be a solution.

As a product of independent inquiry in Islamic law and jurisprudence, it offers a past-enriched perspective that is respectful of what has been accumulated as knowledge and wisdom over the centuries, every bit as much as it aims to be forward-looking in regard to provoking a discourse that hopefully will usher in a better future.

Chapter Two

Shari‘ah, Law and the Qur’an: Legalism vs. Value-Orientation

For, there can be no doubt that the true Shariah (as propounded by the Qur’an and the Prophet and understood by his Companions) is now almost hidden in a maze of scholastic views and deductions – a superstructure of subjective opinions accumulated in the course of centuries and now clothed in the garb of fictitious “authority”.¹

Is there a true Shari‘ah, as argued by Muhammad Asad in the quote above? How the Shari‘ah is understood and the inclination towards legalism are facets debated and explored followed by a discussion on the importance of value-orientation and key principles concerning this. Today, the center of human civilization has shifted completely away from the Muslim world to the West. At the same time, many Muslim-majority countries² are leaning toward traditional Islam by way of implementation of the Shari‘ah. The more a country leans this way, the more not just the West, but conscientious Muslims around the world, become anxious. Additionally, many Muslims, throughout the Muslim world as well as in the West, also seem disillusioned, impatient or even agitated. In view of these changing circumstances, there is a dire need to ask what this means and how the way the Shari‘ah is understood and perceived affect us in our contemporary time.

A concept can be distorted by way of misperception, misunderstanding, misapplication, or misuse. The way the Shari'ah has been distorted is through the association with its partial and discriminatory implementation through dictatorial, authoritarian or hereditary rule, often applied to the general, largely poor, populace, while those in power or the wealthy are immune to the harsh punishments. The Shari'ah projects have basically meant the institution of *ḥudūd* punishments intended to implement Shari'ah law by enforcing punishments mentioned in the Qur'an and Sunnah. In practice, these are a sham as well as a gross violation of the spirit of justice that Islam demands. Illustrative is the Hudood Ordinance implemented for adultery which has in places resulted in the outrageous imprisonment of rape victims with the ever-present possibility of conviction for even capital punishment.³

However, the solution is not simply to discard the notion or term altogether but rather to purge it of misunderstanding, clarify the abuses, and ensure that the praxis of faith conforms reasonably and conscientiously to the claimed ideals. It is the contention of this chapter that there exists a fundamental misunderstanding concerning Islam and the Shari'ah. Some illuminations with respect to the Shari'ah as relates to contemporary issues are offered.

Highly reputed scholars who are committed to transforming Muslim thought, among the laymen, journalists, and demagogues often equate the Shari'ah to Islamic law. This is due to the fact that quite often people's applied efforts are a reflection of their contemporary understanding, regardless of what may have been the formulations of the past. Another reason is that the later period of classical Islamic discourse employed the term Shari'ah without explication, in the probable assumption that the term was known and understood. Even though the notion of its definition was absent in the earliest of classical discourse, the use of the term Shari'ah has only become widespread in the modern era.

The Shari'ah is often thought to be divine. According to the Merriam-Webster Dictionary, the word "divine" means: "of, relating to, or proceeding directly from God."⁴ So, the question is, is the Shari'ah something that has come directly from God? The answer depends on how the scope of the "Shari'ah" is defined. If the Shari'ah is equivalent to Islamic law (fiqh) then it cannot be considered divine. Fiqh or Islamic law is, after all, mostly a human construct. Even though one of the *uṣūl* (source methodologies), the Qur'an, is divine, the other sources –

Hadith, *ijmaʿ* (consensus) and *qiyās* (analogical deductions) – are not sacred. Thus, in the sense that the Shariʿah is commonly used, where the details of the laws are not derived from a divine origin, but instead from less divine (Hadith)⁵ and human derived (*ijmaʿ* and *qiyās*) sources – it is not divine.

The Shariʿah is often thought to be immutable. Such assertions are, however, simply vacuous, emotional, and indefensible claims. Such understanding is reflected in the historical development of the Shariʿah as a rigid body of theological dogmas and legal codes. The Shariʿah is not immutable because there have been variations to it under the guidance of different messengers, such as prophets Moses, Jesus and Muhammad. While many traditionalists have elevated the Shariʿah to a sacrosanct level and effectively consider it immutable, many Islamic jurists have conversely recognized that a vast portion of it is changeable, subject to circumstances and situations as per the principle: “Rulings change according to time and place.”⁶

The Shariʿah is often thought to be the same as Islam and a complete code of life. Several scholars have represented Islam as a “complete code of life”, suggesting that Islam has guidance for the full spectrum of life and that there is an implication of a solution for every issue, situation, or problem. Also implied is the notion that since Islam is a self-contained, self-sufficient way of life, Muslims should not seek answers elsewhere. However, Islam is not a manual dealing with every contemporary problem or issue that Muslims may encounter. It stands to reason that if, indeed, all the problems and solutions were known, or easily deducible, the condition of the Muslim world would not be so miserable and deplorable. A fundamental pitfall of Muslim thought has been its over-reliance on its sacred texts. Such rigidity in Islamic thought has led to sterility and stagnation in Muslim thought. Islam is not like a dictionary; rather, it is more like an alphabet (building blocks of language). Many words are available for consultation in the dictionary and those words not already formed will be based on the alphabet.

The Shariʿah is often confused with “law”. Furthermore, the equation drawn between the Shariʿah and Islamic law represents a profound confusion regarding Islam. If, as is the case, the Shariʿah relates to the entire spectrum of life, then it stands to reason that it cannot all be concerned with law. For example, ablution, prayer, fasting, etc. are not legal matters at all. Turning every aspect of Islamic guidance into law is therefore inconsistent with Islam. Despite the fact that the verses of

the Qur'an dealing with legal matters constitute a rather small portion of the whole, legalistic tendencies still manage to reduce the Qur'an to a series of laws. Converting everything into a matter of law, however, adds an undue burden of rigidity to life inconsistent with humankind's *fiṭrah* (innate human nature). The Qur'an urges believers to focus on avoiding the big sins (*kabā'ir*). This does not mean that God's adherents should treat other sins lightly, but neither should everything be considered a simple matter of law.

The Shari'ah is often enforced over its entire spectrums without distinctions, such as between prayer or crimes. Implementation of the Shari'ah is usually discussed within the context of enforceable laws. Indeed, the most immediate manifestation of such implementation tends to be "enforcement" of the penal codes known as the *ḥudūd* – specific punishments prescribed for certain offenses in the Qur'an (murder, adultery, theft, etc.). As above, equating the Shari'ah to Islamic Law is simply erroneous because Islam, in the comprehensiveness of its guidance, not only covers law but also values, principles, rituals, etc. Therefore, not all aspects of Islam are enforceable by human authority. God is not interested in enforcing, for example, prayer and fasting or in turning society into a police state to ensure the conducting of these practices after all. The Prophet's mission was no more than conveying the message. If, indeed, he is not the manager (*musaytir*) of people's affairs, then his followers cannot assume a duty larger in scope.

The Shari'ah is often thought to provide clear and unambiguous guidance over the entire spectrum of life. This is a simplistic view. In matters concerning injunctions, the Qur'an is explicit and categorical. However, implementation of its ordinances is not straightforward, unless one adopts a straight-jacket approach that often yields outcomes contrary to the intent (*maqāsid*) of Islam. Consider the following examples. The Hudud Laws in Pakistan, promulgated under a military dictator, have served to imprison – and incarcerate – many female victims of rape. Though miserable victims of a vile crime, scores of women have been imprisoned or prosecuted for their part in it under this version of the Shari'ah.⁷

Another example in Muslim societies is the man's unilateral, arbitrary, unregulated divorce of a wife through the instant pronouncement of the triple-*ṭalāq* (divorce), often leading, in turn, to the female spouse being forced out of her home. Conversely, the process of divorce

prescribed by the Qur'an is wise, balanced and sensitive to factors involving both spouses. However, gross versions of the Shari'ah (confused with Islamic law) have validated such un-Islamic practices. Nevertheless, most schools of Islamic thought have validated them under the influence of legalism.

Legalism can be understood as a fixation on laws, codes of conduct, or legal ideas, without balancing with the mercy and grace of God. In the centuries since the time of the Prophet, Muslim societies tended towards legalism reducing everything down to black and white, right and wrong, or permissible and impermissible. Legalism makes people self-righteous while it induces in them a judgmental trait towards their fellow human beings. Legalism creates an environment where people are constantly worried about being improper, culminating in hair-splitting efforts over highly minute details of life. However, God does not intend that this world should be a place of perfection. More important is facilitating the human connection to and bonding with the Creator.

The Qur'an specifies few legal injunctions and offers much more in the way of guidance. Because the Prophet facilitated the appropriate value-orientation, there was law but no legalism, and Islam is not intended to be an exclusively text-oriented belief. The discourse that constitutes Islamic jurisprudence is already experiencing the call toward value-orientation. An orientation in the literature includes *maqāṣid al-sharī'ah* (higher objectives of the Shari'ah), identified as the preservation and protection of the *dīn* (faith; religion), life (*nafs*), family system (*nasl*), intellect (*ʿaql*), and wealth or property (*māl*).⁸

The value-oriented perspective advocated here is somewhat more nuanced. Some introduce the *maqāṣid* as simply representative of values. The traditional *maqāṣid* hierarchy makes other components, such as life, family, intellect and property, to be subservient to belief. In addition, the main modes of *ijtihād*, including jurisprudence that is value-oriented, are based on a text-oriented approach. Thus, it is rather through self-critical discourse, creative and constructive intellectual rejuvenation, moral and religious clarity that is simple as well as unambiguous, a dynamic problem-solving and value-oriented approach rooted in the Qur'an, and inspired and guided by the Prophetic legacy, that Muslims will be enabled to better fulfill their duty to themselves, to humanity and above all to their benevolent Creator.

Value-Orientation

A society's real character is a reflection of its values and principles. A legal system and environment also reflects the values and principles that a given society upholds. To place laws above, or delink them from, values leads to legalism, this is akin to putting the cart before the horse. Khan aptly invites Muslims to: "Treat Islam as a *fountain of values* that guide conduct rather than a system of ready-made solutions to problems."⁹ So, what are the essential values that Muslims must uphold and integrate into their thought process, culture and legal framework? The following are illustrative and by no means exhaustive:

1. *Fundamental Human Dignity (Each Human As A Person, Not An Object Or Commodity)*

God has sanctified each one of us at the human level, and Muslims should be at the forefront in upholding the fundamental right of human dignity (*Sūrah al-Nisā'*, 4:1).

2. *Justice*

Islam's emphasis on justice (fairness) is unequivocal. It sets a standard that is much higher compared to any other ideology or religion, exhorting its adherents to stand forth for justice even if this entails acting contrary to one's own interest (*Sūrah al-Nisā'*, 4:135).

3. *Equality (and Non-Discrimination)*

Whether in terms of Muslim or non-Muslim, male or female, black or white the value-oriented norm of Islam is equality. In this world, human beings all are equal, especially in terms of those rights relating to life, honor and property. Whatever good or virtue Muslims possess is rewarded by Allah in the life hereafter. At the human level though, each must regard the other as equal.

4. *Freedom*

That the edifice of Islam is based on free choice not coercion is one of the pivotal aspects of the value-orientation approach. If Islam is to become relevant once again there must be recognition of the foundation of free choice for those who embrace the belief. When the Prophet and his nascent community faced severe and persistent persecution Allah emphatically reminded the Prophet to cherish freedom. Subject to the usual parameters that apply in any healthy and functional society, no-one has the right to remove the fundamental right to choice and freedom. Probably the biggest and broadest area relating to choice and

coercion involves the role of the state in Islam. In light of the experience with Islamic law and its incorrect application, many Muslims, as well as most non-Muslims, now have tremendous reservations about Islamic law, or the mixing of political power with religious authority. Muslims need to present a better, functioning model of state and governance in accordance with the values and principles of Islam.

5. *Universal Moral Values (Ma'rūf)*

You are indeed the best community that has ever been brought forth for [the good of] mankind (*al-nās*): you enjoin the doing of what is right (*ma'rūf*) and forbid the doing of what is wrong (*munkar*), and you believe in God. Now if the followers of earlier revelation had attained to [this kind of] faith, it would have been for their own good; [but only few] among them are believers, while most of them are iniquitous. (*Sūrah Āl 'Imrān*, 3:110)

The Qur'anic call toward *ma'rūf* and away from *munkar* relates to moral values in the universal sense. Both *ma'rūf* and *munkar* have a broad range of meanings and a clear understanding of these two concepts is critical to a Muslim's life.

6. *Humanity-Orientation and Global Belonging*

At one level all humans belong to a family. At another they belong to a nation or country. On a quite different level the Muslims belong to the Muslim Ummah. At yet another level all belong to humanity. None of these senses of belonging necessarily need conflict with each other. One's family and nation are often not choices of one's own; individuals are born into them, belonging to a family and circle of relatives through biological and other bonds. National belonging is becoming more fluid at this juncture with the greater global mobility of people. Nevertheless, it is quite possible to maintain ties to the part of the world one originates from without conflict while remaining loyal to the place of permanent residence. Muslims need to make this clear to the people of the countries to which they emigrate. Muslims must seek common ground concerning worthy causes. Muslims should be at the forefront of fostering the spirit of global belonging.¹⁰

7. *Representation and Participation (Shūrā)*

Consultation or *shūrā* is a vital process and important institution in Islam and critical in a value-oriented context. Different levels of relationship in Islam are based on consultation rather than on coercion

or imposition. Thus, the concept of governance, administration and leadership is participatory – meaning that those who are affected by the decision have the right to be duly consulted.

8. *Rule of law*

The essence of the rule of law in Islam is summarized according to four points:

- (a) Equality of all before the law, with no-one being above it, where the laws are based on objective, accessible rules;
- (b) An independent judiciary;
- (c) Enforcement of the law is civil and non-partisan;
- (d) Conflict resolution occurs either through the legal system, the political system or both without involving violence on the part of the citizens or State.

9. *Seeking Common Ground for Mutual Good*

It is a common human tendency to emphasize and exaggerate differences more than commonness. Muslims are no exception to this. Islam invites people to the pristine truth, and whenever appropriate and possible, it also seeks to identify and build on common ground.

10. *Rejection of Violence As Normal*

In Islam peace and non-aggression are the norms. Islam rejects violence in the form of unjustified aggression, but does not proscribe violence in the form of justified use of force. However, the only form of violence permissible is in self-defense, without its initiation, without committing excesses, and subject to strict guidelines as part of the rule of law. Otherwise, it is never permissible for Muslims to engage in violence, especially in a vigilante manner.

11. *Non-judgmental*

As Allah's judgment will be in place in the life hereafter it is important that all verdicts concerning matters of worship should be deferred to Allah alone and Muslims must not judge their fellow human beings in this regard.

12. *Emphasis On Substance Over Form*

'Faith' has become a mere figure of speech, a mere empty word devoid of that spark of *enthusiasm* which in the early days of our [Islamic] history inspired the Muslims to imperishable deeds of cultural and social achievement. No doubt, Islam is still alive as an *emotion*. It is

alive in the instinctive love of countless millions of people who vaguely feel its principles are ‘right’: but only very few of them grasp those principles intellectually and are able, or genuinely prepared, to translate them into terms of practical life.¹¹

This is a fundamental problem facing Muslims today; substance, in terms of the underlying spirit or value, has become delinked from forms and rituals. Thus, memorization of the Qur’an is hugely emphasized in preference to studying and understanding its message.

13. Embracing Life-Experience As Part of the Collective Learning Curve

Contrary to the traditionalist understanding and approach, Islam is not intended to be an exclusively text-oriented belief. In attempting to understand this world God appears to want humans to benefit from the experience of life. He commands man to travel, see and learn about history. Rather than burying one’s head in sacred books the faculties have been called upon to observe, think and reflect on reality.

This list of values is by no means exhaustive. The values and principles above are based directly on the Qur’an which are elaborated upon and duly corroborated in the book. These should be among the essential parameters guiding the derivation and establishment of Islamic laws originating from non-Qur’anic sources. When sources other than the Qur’an, including the Hadith, conflict with these clear principles (as the deliverer of God’s final message the life of the Prophet cannot contradict the Qur’an) these principles or values must be given precedence. Furthermore, laws and codes, as required, must not be approached in an atomistic manner as per the experience of legalism. Therefore, without compelling evidence to the contrary, any laws and codes derived via human agency must not violate or compromise Qur’anic principles.

Chapter Three

Islamic Law and the Use and the Abuse of Hadith

The Qur’an is the fountain source of Islam. The second source of Islam is the Sunnah, which delineates the Prophet’s way of life, the example he set before us in his attitudes, actions and sayings, and which forms the framework of the faith. Discussion here will examine some vital issues pertaining to the subject of *aḥādīth* and discuss some of the