Chapter Five

Qiyās (Analogical Reasoning) and some Problematic Issues in Islamic Law

Scholars of Hadith have performed a most invaluable service in establishing the Hadith collections and developing methods for their authentication. Individual hadiths in themselves are neither divine nor infallible. Even more removed from a divine origin are the other two sources of Islamic law – ijmaᶜ and *qiyās*. *Qiyās* is the fourth source of Islamic fiqh and otherwise valid and useful tool of Islamic jurisprudence. Discussion here on *qiyās*, deals with the many conceptual problems and disturbing examples of the misapplication of this tool in Islamic legal promulgation.

In many cases, when our jurists confronted new situations, they successfully and effectively applied *qiyās* to seek new solutions. As Muslims, we all benefit from their precious and noble contributions in this regard. Neither the Qur'an nor the Sunnah/Hadith covers every situation that its adherents might encounter. This is where *qiyās* or analogical reasoning, where "the root meaning of the word … is 'measuring,' 'accord,' and 'equality,'"[21] appears. "*Qiyās* mean[s] to seek similarity between new situations and early practices, especially those of the Prophet."[22] However, *qiyās* has been a mixed blessing.

Similar to the faulty methodologies and categorizations we saw with ijmaᶜ, the claim that is also made of the Companions' consensus concerning *qiyās* is also untenable. Many of the Companions applied what they knew to situations that were unknown yet similar to prior established positions and, thus, in this way what was practiced amounted to *qiyās*. However, to claim that the Companions of the Prophet knew this constituted *qiyās*, deliberated accordingly and reached a consensus thereafter is difficult to support. There is no verse in the Qur'an that the scholars have been able to agree upon which can be clearly discerned as acting as the basis of *qiyās*. Likewise, scholars use the Sunnah, through the Hadith collections, to establish additional textual justification for *qiyās*, but there is no real justification that is agreed upon either.

The relationship between ijmaᶜ and *qiyās* is a close one. However, for the result of an analogical deduction (*qiyās*) to be broadly accepted, it also has to be validated by ijmaᶜ. Herein lies an anomaly in reasoning.

Even though those who follow the four main Sunni schools of thought generally accept *qiyās* as one of the four sources of Islamic jurisprudence, there is considerable disagreement about what *qiyās* constitutes, its scope, the method of its validation. Little consensus exists concerning *qiyās*. Each school prefers its own definition, possessing its own special emphasis or nuance. For instance, for al-Shāfiʿī, *qiyās* and ijtihad are synonymous, while for other scholars this is not the case. The common denominator in all cases between the four schools involves identifying the ʿ*illah* (effective cause of the law). Just as the consensus that *qiyās* constitutes a valid methodology of Islamic jurisprudence does not exist, so are there similar problems concerning the consensus over what constitutes an ʿ*illah*, how it is derived and even how it is validated.[23]

Another problem with *qiyās* as a source methodology and authority in Islamic jurisprudence is that it is seriously compounded by a lack of agreement concerning the relationship between the *aṣl* (the original case) and the validity of *qiyās*-based rules so derived. *Qiyās* constitutes a speculative proof as it is based on fallible human reasoning. Thus, when infallible divine sources and fallible temporal sources become part of a single toolkit, unless an appropriate level of conscious humility regarding human fallibility is taken into due consideration and explicitly acknowledged, excesses can occur.

There are further ways in which the application of *qiyās* is problematic, as in, for instance, with *Kafā'* or *Kufū'* (equality in marriage). The fact that prospective partners in marriage should share as much in common with each other or originate from as comparable a background as possible is a simple matter of common sense. However, transforming the entire matter into a legal requirement and treating specific violations of it as an issue of legal intervention by family members and the *Qāḍī* (judge), is illustrative of a legalistic tendency. Referencing Ḥanafī texts, *al-Hidāyah*, by Marghīnānī (d. 1197 CE),[24] "…in confirming a marriage and establishing its validity; for if a woman should match herself to a man who is her inferior, her guardians have a right to separate them, so as to remove the dishonor they might otherwise sustain by it."[25]

The problem with this passage is the direction that something is a "requirement" of marriage when neither the Qur'an nor the Sunnah specifies any such thing. Moreover, the imputation that the guardians of the two prospective marriage partners can legally intervene through the court system to have the marriage dissolved if the marriage does

not meet these requirements is unwarranted. Textual proof is provided: "ʿĀ'ishah reported that the Prophet (s) said: 'Choose for your sperms the best women, marry with comparable [in Arabic, *akfa'*] and make proposal of marriage to them.'"[26]

The narration constitutes neither *mutawātir bi al-lafẓ* (the exact words) nor *bi al-maʿnā* (the exact meaning). Had the narration been accorded the category *ṣaḥīḥ* – otherwise known as authentic hadith – even then in this case certainty of knowledge is not yielded. However, a bigger problem is the fact that the hadith is not even *ṣaḥīḥ*. Furthermore, aside from this hadith, trawling through Hadith literature reveals the absence of any other narrations concerning this subject. Only speculation can explain the invention of a law, deduced from this narration, the violation of which can be subject to legal intervention. What the relevant scholars then did was to stretch the issue of equality to a level such that it fell within the realm of *qiyās*, even though this type of argumentation is supported neither by the Qur'an nor the Sunnah.

The idea of "equality" is turned on its head, contradicting the pristine Islamic principles and value of justice and egalitarianism. In responding to further sections of the *al-Hidāyah* text, if a woman is an adult and desires the marriage despite the obvious disparity, surely this should be her prerogative. The need for professional equality is not a strict requirement. What is particularly objectionable in the tract is an identification of barbers, weavers, tanners etc. as being involved in degrading professions. In fact, there is no evidence anywhere that the Prophet made any pronouncements denigrating any particular profession; rather, he recognized and honored honest labor. In fact, in his last sermon the Prophet demolished all discriminatory and unjust notions when he said:

> All mankind is from Adam and Eve. There is no superiority of an Arab over a non-Arab, or of a non-Arab over an Arab, or of a white man over a black man, or of a black man over a white man, except in terms of *taqwā* (piety) and good action.

Incredibly, the segment dealing with this topic from *al-Hidāyah* begins with the prefatory remark: "*Kafat*, in its literal sense, means equality."[27] However, legal analysis and reasoning flipped the issue of equality into an endorsement of inequality. What was supposedly formulated to protect the rights and status of women and their families instead ensured their inferiority. How the scholars can transform an issue of

equality into one involving the alleged inferior status is through the unwarranted embellishment of *qiyās*.

The chapter provides detailed illumination of several other important issues where application of *qiyās* has gone haywire.

Chapter Six

Islamic Fiqh (Law) and the Neglected Empirical Foundation

We need to be asking a host of different pertinent questions around the reasons why there is so much injustice and decadence in thought in Muslim societies and communities. Decadence has gradually crept in and now Muslim societies are virtually dysfunctional and, due to internal as well as external factors, unable to solve most of their problems on their own, never mind being able to compete with the developed world. For example, why the gap between existing Islamic laws and the reality on the ground in terms of solving problems and upholding the Islamic principles of justice and balance? Why are many Muslim women revolting against some of the key provisions in the classical laws, turning instead towards secular laws? Why are Muslim societies encumbered with the problem of widespread poverty and destitution, out-dated education, as well as technological backwardness?

It is important to grasp that in attempting to gain an understanding of these issues, the fact needs to be recognized that Islamic law or fiqh lacks a systematic empirical foundation (the term empirical here must not be confused with the narrow sense of empiricism – the practice of relying on observation and experiment alone). Discussion here deals with a pivotal aspect of Islamic law and jurisprudence, namely the fact that Islamic law and jurisprudence lack an adequate empirical foundation, "empirical" in today's sense.

Text-centeredness or text-orientation has not only been hugely responsible for the loss of dynamism of Islam and its laws, but it has also led to those non-Muslims who have studied Islam to be vulnerable to misunderstanding the belief and prone to misinterpreting it. Traditional Islam is reductively legalistic, encapsulated in layers of primary, secondary and tertiary texts, very often disconnected from the stark realities of life. Just as research or empirical work conducted to fully