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

appreciate a problem before formulating or enacting a law is virtually absent in this context, there is also an absence of research or empirical work geared towards determining the effects and consequences of particular legal formulations and enactments.

A case in point is the social implications of traditional inheritance. The Shariᶜah stipulates that surviving family members and relatives have designated shares, determined exclusively in reference to the textual sources. However, there are no modern studies to investigate the impact of these laws on particularly women, who generally constitute one of the most vulnerable segments of society. Men can easily walk away from family relationships and obligations; also known is the fact that women cannot. It is deemed, and argued, that a woman will always have the support of someone – her father, husband, brother, son, or the government and society. But there is no way to begin to appreciate the misery and vulnerability of many women, especially those among the poor, without pertinent empirical social studies to explore the nature and extent of the problem arising from the rigidity of the inheritance laws.

An ivory tower approach, which merely focuses on formulating and enacting laws whilst ignoring the principles of the Qur'an and Sunnah, is one that can lead to misery for many. Those qualified to do so need to study what happens in real life, to real life people, to determine why a serious gap exists between the reality and the higher objectives of laws. It is only then they will be able to address the gap.

Another example includes the polemics of Islamic economics and finance. Due to the dichotomy between religious and secular education, few Muslim jurists and scholars are adequately familiar with the field of modern economics and finance. This shortcoming apparently does not deter them from issuing *fatāwā* (juristic opinions from a religious perspective) on the subject, nonetheless. Although empirical studies by the proponents of Islamic banking and finance exist, there are two major problems regarding the attitude of the scholars concerned. Firstly, they commonly fail to disclose that for most of the time the four sources – Qur'an, Hadith, ijmaᶜ and *qiyās* – are referred to only speculatively, leading to probabilistic knowledge, and thus any subsequent fatwa is nothing like a Divine commandment; rather, these are no more than Qur'an and Sunnah-informed, human constructs. Secondly, the same experts fail to acknowledge the existence of empirical studies that counter their claims. Because they are not

familiar with the importance and role of empirical work, the religious jurists and scholars are prone to making uncorroborated claims, most often without specific empirical proof.

Empirically it is noteworthy that if both profit and interest incomes accrue more to the rich, then focusing attention exclusively on interest is misplaced. Some of the commonly propagated ideas about public finance in an Islamic state is utterly simplistic. For example, expecting the believers to open up their coffers anytime the government wants is unrealistic. And advocating zakah as a means to meet government needs, especially at this time when every Muslim polity has been anything but Islamic and where there is considerable disagreement about whether zakah can be paid individually or must be institution- alized – especially through the government – is not reasonable or practical either. Requiring banks to offer interest-free loans to the government would be objected to and scoffed at even by the existing Islamic financial institutions and may lead to a run on their reserves as people attempt to remove their cash if, indeed, the policy is ever successfully implemented. As a last resort, printing currencies and notes as and when needed, and other things remaining the same, is a simple invitation to economic disaster. Indeed, not only are many jurists prone to writing in an uncorroborated manner about their own field, Islamic Fiqh, but also about other areas (for example, economics) about which they have yet to demonstrate expertise.

Balancing a text-oriented approach with a life-oriented approach requires that we explore, understand and determine the social realities, processes and changes in a meaningful way. Muslims need to embrace empirical methods and, at the same time, avoid falling into the trap of empiricism – the theory that holds that the origin of all knowledge is sense experience. Indeed, a stumbling block for many Muslims in appreciating the relevance of the empirical approach is the narrow western notion of empiricism (relying on experience or observation alone). The first step in solving any problem is to thoroughly grasp and understand its nature and extent. This requires inductive research and study. In this context, Muslims need to gain a sound understanding of not only the Sunnah of the Prophet, but also the *sunnat Allāh*: God has put in place certain laws (*sunnat Allāh*) guiding all natural as well as social processes that, according to the Qur'an, do not change.[28]

So far, we have identified three defining conditions for Islamic law: (a) that the formulation of the law must be rooted in the foundational

sources of Islam, (b) it is derived with explicit attention to the *maqāṣid* and values of Islam, and (c) that the adoption and enactment of the law by society be through *shūrā*. In light of this chapter, those conditions need to be more nuanced, as follows: A law is to be considered Islamic when all three of the following conditions are met: (a) the formulation of the law is rooted in the foundational sources of Islam, with life-oriented, empirical due diligence, (b) it is derived with explicit attention to the *maqāṣid* and values of Islam, and (c) the adoption and enactment of the law by the society is through a process of *shūrā*.

Chapter Seven

Conclusion: Toward Our Reformation

Today we face a number of challenges in the Muslim world. The people of some countries are facing a horrible conflict as part of an international power play involving oil. In other parts of the Muslim world, occupation or effective control by unfriendly forces persists. Illiteracy and poverty are particularly rampant in Muslim-majority countries. In other parts, sectarian violence continues; in general, the physical abuse of women is common; though not exclusive to Muslims, 'honor killing' of women still occurs; in the heartland of Islam, women still cannot drive in the name of Islam. Even in 'progressive' Muslim-majority countries, a Muslim spouse can be served a triple (irreversible divorce) message through SMS on a cell phone. In the West, there are many mosques where Muslim women are not welcome.

Many of these issues are matters, which concern the prevailing socio-cultural-political environment. However, the Muslim mind and the present culture are entrapped in the current dysfunctional and stagnant situation, because of the deeply conditioned traditional religious understanding and devotion that exists, made possible by inappro-priately projecting back to textual sources in general and extravagant use of hadiths, sometimes questionable hadiths, in particular for support and evidence.

Firstly, Shariᶜah, as it is commonly used, is a misleading term as so many extraneous attributes like divinity, sacredness and immutability are assigned to it. When, in a reductionist manner, the Shariᶜah is equated with Islamic law society suffers from legalism. Detachment from the spirit, goals (*maqāṣid*), or normative principles of Islam not only involves loss of social dynamism, but also overwhelmingly