

**Sharia Law and the Arab Oil Bust:  
PetroCurse or Cost of Being Muslim?**

by

**Glenn L. Roberts**

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# SHARIA LAW AND THE ARAB OIL BUST: PETROCURSE or 'COST OF BEING MUSLIM'?

by Glenn L. Roberts, Esq.<sup>1</sup>

## INTRODUCTION.

Since the days of Gianbattista Vico, social scientists have attempted to explain cultural behavior in terms of laws of cultural development.<sup>2</sup> Only a bit less ambitious, economic development theory, like economics in general, and law and economics in particular, has emphasized formulaic theories of economic behavior, which, it is hoped, will explain patterns of economic development in different regions of the globe sufficiently to provide observers with predictive ability.<sup>3</sup>

Ricardian diminishing rents and Malthusian population cycles identify absolute limits to economic growth.<sup>4</sup> Neoclassical views emphasize the positive impact of capital formation and “trickle-down” effects, while Keynesianism emphasizes the level and distribution of consumption. But none adequately

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<sup>1</sup> B.A. University of Texas; M.A., Rice University; J.D. University of Houston Law Center. This paper is the first of a two-part thesis written in 2002-2003 in partial satisfaction of the J.D. requirements at the University of Houston Law Center, the second entitled “Islamic Human Rights and International Law” submitted to Jacqueline Lang Weaver, A.A. White Professor of Law at University of Houston Law Center, and Jordan Paust, Professor of International Human Rights Law at University of Houston Law Center. Stated opinions and any errors herein are entirely those of Glenn L Roberts, attorney and translator, Pro-Lex Services.

<sup>2</sup> In his 1725 work *LA SCIENZA NUOVO*, Gianbattista Vico, an Italian lawyer, claimed to have discovered a “physics of man,” which was accessible via *sapienza poetica*, or the “science of mythology.” See LEON PAMPA, ED. AND TRANS., *VICO: THE FIRST NEW SCIENCE* (Cambridge University Press, 2002).

<sup>3</sup> Alan Gelb summarizes current economic development modeling in the context of oil economies in ALAN GELB AND ASSOCIATES, *OIL WINDFALLS: BLESSING OR CURSE?* 14-31 (Oxford University Press, 1988).

<sup>4</sup> For a theoretical discussion of David Ricardo’s rents and David Malthus’ ideas on population growth, see M.M. POSTAN AND JOHN HATCHER, *Population and Class Relations in Feudal Society*, in T.H. ASTON AND C.H.E. PHILPIN, EDS, *THE BRENNER DEBATE: AGRARIAN CLASS STRUCTURE AND ECONOMIC DEVELOPMENT IN PRE-INDUSTRIAL EUROPE* 64-78 (Cambridge University Press, 1985).

explain the persistent economic backwardness of those countries that are predominantly Muslim. Despite the oil boom of the 1970s and 1980s, Arabic-speaking countries, all of which are majority, or exclusively, Muslim, remain the most economically backward, major cultural region of the world.<sup>5</sup>

Even Saudi Arabia, with the largest proven oil reserves of any nation, and the foremost beneficiary of the oil boom with an influx of over a trillion petrodollars within twenty years, has signally failed to diversify its economy beyond the oil industry, or to significantly increase the living standard of the mass of its small population, which remains on a level with Greece or Portugal.<sup>6</sup> Today Saudi Arabia has a national debt of over \$100 billion, approaching its entire GDP,<sup>7</sup> runs large and increasing annual government deficits, has seen its financial reserves drop from \$200 billion in 1980 to under \$60 billion today,<sup>8</sup> and has markedly cut back public benefits or assessed new fees to access essential government services.<sup>9</sup> Suffering indirectly from the oil bust through less aid and more

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<sup>5</sup> See UNITED NATIONS ARAB HUMAN DEVELOPMENT REPORT, 2002. Also, Noreng states “the region appears to be a resounding economic and social failure,” in OYSTEIN NORENG, OIL AND ISLAM: SOCIAL AND ECONOMIC ISSUES 1 (John Wiley & Sons, 1997). See also *Special Report Arab Development*, THE ECONOMIST July 6<sup>th</sup>, 2002, at 24, which asks bluntly “What went wrong with the Arab world?”

<sup>6</sup> NORENG, *supra* note 5, at 22. Per capita income as of 2002 is one-half of what it was in 1980, down to \$6,600. See GIL FEILER, THE MIDDLE EAST IN THE NEW MILLENIUM: ECONOMIC DEVELOPMENT AND BUSINESS LAW 328 (Kluwer, 2000). Saudi Arabia has a population of over 20 million, including an estimated several million guest and domestic workers. See U.N. REPORT GRAPH THREE, *supra* note 5, at 144.

<sup>7</sup> Noreng puts Saudi Arabia’s current debt at \$100 billion. Gil Feiler puts Saudi Arabia’s GDP at \$130-140 billion; Noreng somewhat less. See FEILER, *supra* note 6, at 327.

<sup>8</sup> The Gulf War alone cost the Saudis \$64 billion. See DONALD E. SHEIL, ED., REPORT OF THE DELEGATION TO THE MIDDLE EAST: LEGAL CHALLENGES FACING SAUDI ARABIA, BAHRAIN, AND KUWAIT 8 (American Bar Association, Section of International Law & Practice, 1991).

<sup>9</sup> NORENG, *supra* note 5, at 230. These cutbacks were implemented in an emergency atmosphere in 1998, with new government hiring halted, contracts cut by 10%, defense scaled back 22%, social services cut by 6%, and “gas prices,” presumably gasoline at the pump, raised by 50% over 1997. Fees for work permits and entry and exit visas have similarly been substantially raised. FEILER, *supra* note 6, at 328.



unemployment, many non-oil producing Arab countries are now experiencing declining per capita income.<sup>10</sup>

Over the years, many explanations have been offered for the failure of Islamic economies to develop: commercial rivalry with a developed West; the prevalence of dictatorship; the effects of European imperialism and colonialism; economic neocolonialism; lack of natural resources.<sup>11</sup> Since the oil bust, theorists have added the PetroCurse, i.e., the notion that a sudden influx of oil wealth on a traditional society has a detrimental effect on development that would otherwise have developed along more “normal” lines.<sup>12</sup>

The modern preference for “objective” social science techniques has rendered it unfashionable to suggest that cultural factors may play an economic role.<sup>13</sup> However, for decades before the oil boom, it seemed a truism to many Western observers, and was repeatedly and openly acknowledged by many Arab writers, that Arab cultural factors, especially the religion of Islam, were chiefly responsible for the long economic, political, and intellectual “Dark Age” of the

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<sup>10</sup> NORENG, *supra* note 5, at 2-3.

<sup>11</sup> Beginning with Europe’s circumventing of the Middle East by sea-trade through the Indian Ocean. See MAXIME RODINSON, TRANS. BRIAN PEARCE, ISLAM AND CAPITALISM 56 (Univ of Texas Press, 1981). See also BERNARD LEWIS, THE MUSLIM DISCOVERY OF EUROPE 33 (W.W.Norton & Co., 1982).

<sup>12</sup> Described in detail by GELB, *supra* note 3, at 3-13. Gelb favors the Keynesian view that a failure to redistribute windfall oil profits in an egalitarian fashion leads to a negative overall impact on oil-exporting economies.

<sup>13</sup> Robert E. Looney, a specialist on the development economics of Saudi Arabia seeks to correct this, stating “National economic performance is influenced not only by natural and raw material resources, but also by its religious and other social institutions, and the overall philosophy supporting the sociopolitical superstructure. Even a resource-rich country such as Saudi Arabia may be hampered in its development efforts by its own religion-derived institutional-philosophical underpinnings. A rigid, doctrinaire philosophy may not only make it difficult to attain development objectives; it may also perpetuate sub-optimal allocation of resources.” See ROBERT E. LOONEY, SAUDI ARABIA’S DEVELOPMENT POTENTIAL: APPLICATION OF AN ISLAMIC GROWTH MODEL 19 (Lexington Books, 1982), hereafter LOONEY, POTENTIAL. Echoing this view, in the preface to a later work of Looney’s, Professor Raymond Mikesell states “Most economists have come to the conclusion that our understanding of the development process cannot be significantly advanced by theoretical models; it requires more case studies of development under varying economic and political conditions.” See ROBERT E. LOONEY, ECONOMIC DEVELOPMENT IN SAUDI ARABIA: CONSEQUENCES OF THE OIL PRICE DECLINE xix (Jai Press, 1990), hereafter LOONEY, ECONOMIC.

Arab world from the 14<sup>th</sup> to the 19<sup>th</sup> centuries CE.<sup>14</sup> These factors prompted what was termed the Arab Dilemma—how to modernize without sacrificing those values that defined what it meant to be a Muslim Arab, especially Islam.<sup>15</sup> The Dilemma was posed precisely because modernization seemed impossible without abandoning these traditional values, and it was widely predicted that Islam itself was destined for extinction as the price of progress.

Cultural factors, however, underscore the fact that an economy is merely a summation of human behavior. Until one can define humanness with the precision of an element of nature, the many efforts of economists, whether domestic or global-oriented, to identify laws or principles of economic development will probably be doomed to failure. It is difficult to imagine how a religion-inspired attack on American icons of business and global development such as the World Trade Center in September, 2001, with its widespread negative economic consequences for both America and the Arab world, could have been predicted by any of the popular econometric schemes, all of which presume rational maximizing of economic behavior. Islam owes nothing to Adam Smith, or to John Locke, or to the social science tradition of Gianbattista Vico.

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<sup>14</sup> For example, Fayez A. Sayegh, Nejla Izzeddin, Faris and Husayn, Malik Bennabi, Mahjub bin Milad, Ishaq Husseini, Abdullah Ali al-Qasimi, and many other Arab writers of the 20<sup>th</sup> century as cited by RAPHAEL PATAI, *THE ARAB MIND* 249-255 (Charles Scribner, 1973). While many observers have emphasized fatalism and passivity engendered by Islam as a prime cause of Arab backwardness, others on the other hand note that such observations derive from rural areas, and that similar attitudes can be found among non-Muslim peasantries. Al-Ghazali wrote in the 12<sup>th</sup> century, “[the ignorant believe] that what *tawakkul* means is...abandoning in one’s heart the capacity to organize, and letting oneself drop to the ground like a rag that is thrown away...but it is forbidden by the religious law.” RODINSON, *supra* note 11, at 111-113.

<sup>15</sup> For a comprehensive treatment, see ALBERT HOURANI, *ARABIC THOUGHT IN THE LIBERAL AGE, 1790-1939* (Cambridge University Press, 1983). See also ABDALLAH LAROUÏ, *THE CRISIS OF THE ARAB INTELLECTUAL* (University of California Press, 1976).

Muslim behavior and ideas, economic or otherwise, stem from a different universe of values.

To what extent is that cultural complex of values commonly termed “Islamic” responsible for the failure of Muslim oil economies to develop? Several observers have explored this question, but none have approached it from a legal point of view. This paper asks: What has been the impact of Islamic Law on the economic development of Saudi Arabia as the chief exemplar of the Sharia in the modern world and as the foremost reservoir and exporter of oil among Muslim states, since the end of the oil boom in the mid-1980s? As a corollary, I ask: What is the relevance of Islamic Law to existing petroleum and investment contracts in today’s oil-producing Arab states, especially Saudi Arabia?

This paper focuses on legal issues that have economic impact, and does not treat institutions, court systems, politics, foreign policy, or gender relations except where necessary to the thesis, or purport to make any claim as to the validity of Islam as a world religion or its moral values.

As described below, I conclude that the legal rules of the Sharia have had an overall deleterious effect on economic growth in Saudi Arabia and other Muslim economies, and on the economies of other Islamic countries, partly by setting up direct impediments to economic progress, both procedurally and substantively, and partly by emphasizing certain social values that indirectly harm economic progress. In fact, the Sharia accentuated the oil bust, calling into question the stability of every large country member of OPEC with a significant Muslim

presence.<sup>16</sup> Thus this article seems to confirm that there is an economic Cost to Being Muslim.

However, at the same time, this paper concludes that the Sharia has been over-emphasized and misunderstood. As a product of theory-oriented legal clerics, direct comparisons of the Sharia with the practice-oriented legal regimes of the modern West are improper, attracting unjustified accusations of double standards. Layers of quasi-secular law have historically operated in all Islamic societies, at times free of many of the formal restrictions of the Sharia, and this duality persists in Saudi Arabia today, embodied in King and Cleric, stemming more from political and social tensions than from deliberate deception. Both the Sharia and secular rules have contributed—together and separately—to the misallocation of the vast wealth that has flowed through the coffers of the Saudi state in the past generation.

Moreover, a new generation of Muslim theorists, well-trained in Western economics and political philosophy, has emerged with an agenda of modernizing the Sharia. Not only have these constructed an international network of Islamic banks,<sup>17</sup> but have inserted Islam in the larger context of global economic and political struggle between an under-developed “South” and an industrialized “North.” This paper explains how the decision of Sobhi Mahmassani in the LIAMCO arbitration of 1977 placed the Sharia in a superior position vis-à-vis the

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<sup>16</sup> Specifically: Saudi Arabia has become politically unstable; Indonesia and Nigeria have experienced near economic collapse; Iran, Iraq and Kuwait foreign wars; while Algeria has undergone a vicious civil war. The exceptions are Libya, Bahrain, Qatar, and the UAE, each of which has a very small population compared to the larger countries, and huge oil resources. It can also be argued that only American intervention prevented the latter three from becoming occupied by Iraq in the Gulf War of 1990, which devastated Kuwait and Iraq.

<sup>17</sup> See Genevieve Wilkinson, *Eight Islamic Nations State Intention To Apply Sharia Law to Islamic Banks*, BUREAU OF NATIONAL AFFAIRS, 11-14-2002, A-10, No. 220.

allegedly dominant “*lex petrolea*” of current international law, demonstrating that a modernized and re-interpreted Sharia has the capacity to serve as an alternative regional international law under the aegis of the Organization of Islamic Conference and of OAPEC, the “Organization of Arab Petroleum Exporting Countries.” The resourcefulness of the renowned Mahmassani in placing the Sharia in the midst of the North-South dialogue—and in demonstrating its relevance and capacity—has been heretofore largely overlooked.

## Chapter One. THE NATURE OF ISLAM.

Islam is the faith of over one billion people,<sup>18</sup> the majority of the population in at least forty-three nations, and is the state religion of at least twenty-eight nations, including those controlling the bulk of the world's oil and gas reserves.<sup>19</sup> A principal component of both Arab and Iranian nationalism, Islam is also a global political and economic force in its own right. The traditional Islamic legal system, developed over a millennium by Islamic jurists, and termed *al-Sharia*, or "the Path to the Well," remains law, to a greater or lesser extent, in virtually all of these countries.<sup>20</sup> The lack of awareness of the modern West of the size and impact of Islam and its traditional Sharia, both domestically and internationally, is difficult to account for, seemingly requiring a supreme effort of will to ignore.<sup>21</sup> Despite its predicted demise in the 1950s, Islam has since experienced a dramatic revival as generations of more-or-less secular nationalists in the Arab world failed to accomplish economic and political independence, or to implement their oft-stated goal of defeating the state of Israel.

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<sup>18</sup> Lewis and Algaoud put the total of Muslims at 1.2 billion, others at somewhat less than one billion. See MERVYN K. LEWIS & LATIF M. ALGAOUD, *ISLAMIC BANKING* 16 (Edward Elgar: 2001).

<sup>19</sup> C.G. WEERAMANTRY, *ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE* 167 (St. Martin's Press, 1988). Ahmed al-Suwaidi reports that 43 countries are members of the Organization of Islamic Conference. See AHMED A.M.S. AL-SUWAIDI, *FINANCE OF INTERNATIONAL TRADE IN THE GULF* 20-21 (Graham & Trotman, 1994).

<sup>20</sup> The most notable exception is Turkey, which removed Islam from both state and law in the 1920s. See GEORGE G. ARNAKIS & WAYNE S. VUCINICH, *THE NEAR EAST IN MODERN TIMES*, VOL II 72-80 (Jenkins Publishing, 1972).

<sup>21</sup> Even today, most law schools in the United States do not offer a single course in Islamic Law, and most business schools and many colleges do not offer any programs on Islam or courses in the Arabic language. The author recalls driving across the United States to locate an advanced Arabic course, which included only five other students.

The word “Islam” means “submission,” specifically submission to the one eternally existent God, or Allah.<sup>22</sup> In this sense, Islam is the most extreme example of monotheistic religions that emphasize the power, dominance, and immanence of God. Many have alleged that this resulted in a corresponding devaluation of the individual, and an attitude of fatalism—illustrated by the Arab proverb “*ma min yedin illa yed allahi fawqa’ha*,” or “Nought happens but has the hand of God behind it,” sometimes recited when acquiescing to misfortune. In reply, the French economist Maxime Rodinson observed that fatalism is itself a product of underdevelopment and that similar fatalistic attitudes can be found in any rural peasantry, pointing out that early medieval Muslims, as well as many Muslims today, have found Islam to be no impediment to commercial enterprise.<sup>23</sup> Still, the vehemence of Muslim resistance to non-Muslim rule does seem to suggest, to the author at least, that Islam means submission to *no one but Allah*.<sup>24</sup>

Unlike modern Christianity, which has long relegated religion to a matter of individual conscience, Islam continues to aspire to be a comprehensive guide regulating life from birth to death, and encompassing all human activity, past, present, and future. Therefore, the Sharia includes law, but is not limited to law in

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<sup>22</sup> See PHILIP K. HITTI, *ISLAM, A WAY OF LIFE* 23 (Regnery/Gateway, 1970).

<sup>23</sup> Rodinson points out that the Muslim *Ibadites* of southern Algeria have displayed a marked talent for entrepreneurship without any apparent hindrance from their Islamic heritage. RODINSON, *supra* note 11, at 115. Yemen is also majority *Ibadite*.

<sup>24</sup> The 19<sup>th</sup> century Russian war to occupy the Caucasus, which lasted an entire generation, today apparently being repeated in Chechnya, certainly belies any notion of passivity or chronic resignation on the part of the local Muslims. The long resistance of Muslims to French rule in Morocco, and to Italian rule in Libya, can be matched with numerous similar examples of resistance to European occupation in the past two centuries.

the Western sense of the term.<sup>25</sup> Unlike in the modern secular West, there is no notion of progress in traditional Islamic Law, economic or otherwise. The Sharia, the “Holy Law” as it is commonly termed, is an expression of natural divine law—eternal and fixed. Unlike Christianity, which places theology above canon law, Islam places law above theology.<sup>26</sup> That is, law under Islam is not derivative or supplemental, but rather Islam exists, and was communicated to Man, for the explicit purpose of implementing the divine law of the Sharia. Therefore, Islam can be said to be a religion *of* law, and the Sharia was developed (not *created*, since only Allah created the Sharia), and interpreted, and administered by legal clerics from a number of core principles and statements. These Muslim “lawyers” are termed *ulama*, “those who know the Holy Law.” Historically, the very word for knowledge, *ilm*, meant primarily knowledge of the Sacred Law.<sup>27</sup> In fact, Islamic society in history is a prime example of a society whose intellectuals were mostly lawyers in this broad sense, creating a legalistic society with high regard for the form of religious observance.

Ideally, Islam is monolithic, creating out of the mass of humanity a single community of the pious, the *Ummah*, which is supposed to endure till the Day of Reckoning, or *yaum ad-din*, when all shall be judged by Allah and consigned to Heaven or Hell.<sup>28</sup> Under the traditional Sharia, one cannot be a Muslim without belonging to this community, which is at once social, political, economic, and religious. And once belonging, one cannot renounce Islam without committing

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<sup>25</sup> BERNARD WEISS, *THE SEARCH FOR GOD’S LAW* 1-2 (University of Utah Press, 1992).

<sup>26</sup> HITTI, *supra* note 22, at 44.

<sup>27</sup> *Id.* at 44.

<sup>28</sup> PATAI, *supra* note 14, at 205.



apostasy. Hence, individual conscience alone is insufficient for one to be a Muslim. While, to be a Christian, it is enough to say “I am a Christian,” and to do nothing more—to be a Muslim, it is never enough to say, “I am a Muslim.” One must join the larger community of Muslims and participate in the prescribed religious observances. Similarly, to renounce Christianity, it is sufficient to say “I am no longer a Christian.” If one renounces Islam, however, one commits the crime of apostasy or treason to the religious state, the penalty for which—according to the traditional Sharia—is death.<sup>29</sup>

Originally, the Ummah was a unified theocratic state. Therefore, in the minds of traditional Muslims, the Ummah should be a single theocratic state today, and all modern “Islamic” and Arab governments are therefore illegitimate.<sup>30</sup> In fact, however, the Ummah was riven with political dissent and religious schism almost from the death of Muhammad. Apostasy is today punished only within the borders of a few countries like Saudi Arabia and Sudan, and only regarding their own citizens. Many Muslims today often find full participation burdensome, a personal “cost of being Muslim,” such that some are content to be Muslim in

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<sup>29</sup> In 1992, Egypt’s highest court affirmed that Nasr Abu Zaid, an Egyptian professor of Arabic then sitting on the board of the *Encyclopedia of the Quran*, was an apostate, due to his unorthodox views. Since under the Sharia an apostate cannot marry a Muslim, the Court directed Zaid to divorce his wife. To avoid this, he and his wife eventually immigrated to England. See Toby Lester, *What is the Koran?* ATLANTIC MONTHLY, January 1999, at 50. In a more serious case, the former chief theologian of Sudan, Mahmud Muhammad Taha, was found guilty of apostasy by the High Sharia Court of Khartoum for proposing that parts of the Quran were intended only as a model for Muhammad’s life, and not intended for later Muslims. In 1985, for this, at the age of 85, Taha was publicly hanged in Khartoum. See DANIEL PIPES, *THE RUSHDIE AFFAIR* 76 (Birch Lane Press, 1990).

<sup>30</sup> Over the years, this writer has often heard it stated by Arab students studying in the United States that all governments in the Islamic world today are illegitimate due to their being insufficiently Islamic.

conscience only, with minimal or no participation in the larger community, a modern phenomenon long common to other major religions.<sup>31</sup>

One benefit of having clear rules is that everyone can achieve salvation. Obey the precepts of Islam and paradise shall be yours under the promise of Allah. There are no esoteric doctrines in Islam, as with Luther, to leave believers questioning whether they will indeed be saved. Another aspect of Islam is its embracing of life and according an essential dignity to the natural world, including its physical pleasures. For example, there is no doctrine of original sin in Islam. Similarly, there is no doctrine in Islam of the wickedness of material existence, with resulting mortification of the flesh such as occurred in Hinduism, or imputation of a special corrupt nature to women as occurred in medieval Christianity. There is no known instance, for example, of Muslims burning a witch. Both in this world and the next, Islam sanctions pleasure and wealth, scandalizing medieval Christians, who tended to condemn everything material or pleasurable, and especially money, as obstacles to salvation.<sup>32</sup> Under the Sharia commerce and wealth are approved and poverty has no halo of piety.<sup>33</sup>

Eminently social, behavior within Islam is controlled through collective shame, not individual guilt, and the path to Allah therefore lies through

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<sup>31</sup> “Cost of Being Muslim,” or COBM, is a complaint that the author has heard from a few younger Muslims disillusioned with the handicaps which they feel Islam imposes upon them.

<sup>32</sup> There is a Muslim doctrine of “shame zones” on the physical body, violation of which, for example by viewing an inadequately clad person, brings sin on the viewer, but these zones change according to one’s marital status. In the author’s view, this demonstrates the legal nature of the category, as opposed to theological. See PATAI, *supra* note 14.

<sup>33</sup> The Quran has no equivalent of the New Testament phrase “It is easier for a camel to pass through the eye of a needle, than for a rich man to enter Heaven.” Similarly, there is no parallel for Jesus attacking the money-changers before the Temple.

participation in the larger community and in faithfully observing the Sharia, not through a hermit's isolated contemplation of the hereafter.

## Chapter Two. THE SACRED LAW.

**The Quranic Revelation.** Islam was the religion of Muhammad.<sup>34</sup> It would be incorrect to say that Islam began with Muhammad, because Muslims believe that the revelation of the Quran only restored the original religion of Abraham, Moses, and Jesus, which their contemporaries had corrupted.<sup>35</sup> In 610, while Muhammad was meditating in a cave near the town of Mecca, the angel *Jibril* (Gabriel) transmitted to him by mystical means the first revelation.<sup>36</sup> Over the next twenty-two years the revelations continued intermittently. As an aid to memory, various persons wrote them down, and, after Muhammad died, these writings were collected, compiled, and re-arranged in order of longest to shortest, i.e., not chronologically. This compilation of Muhammad's revelations came to be called *al-Qur'an*, or "the Recital."<sup>37</sup>

It is an article of faith that the Quran was first inscribed on a "well-guarded tablet" in Heaven in Arabic, and was Allah's precise words, and therefore is

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<sup>34</sup> It has been said that Islam is the only religion to be born in the full light of history. Nevertheless, contemporary documentation is notably lacking, and revisionist works on the historicity of the Quran and Muhammad are numerous. For a recent summary, see Toby Lester, *What is the Koran?* in ATLANTIC MONTHLY, January 1999.

<sup>35</sup> There is also reason to suppose that monotheism was already gaining acceptance among Meccans before Muhammad's time. Muhammad's own father was named Abdullah, or Servant of Allah, and Muhammad's full name therefore was Muhammad bin Abdullah.

<sup>36</sup> Itself a very un-Muslim activity, meditating alone in a cave was perhaps adopted after observing Christian monks.

<sup>37</sup> In medieval Arabic, the verb *qara'a* meant both read and recite, since reading was typically done aloud. Writing at the time was intended for the most part as an aid to memorization, writing materials being scarce. Much like ancient Hebrew, Arabic script was incomplete in comparison to modern European scripts, in that it lacked the diacritical marks and vowelization necessary to distinguish many letters or delineate pronunciation. The Quran as originally written had no diacritical marks or vowels, and a hadith (see below) relates that Muhammad stated that there were seven different ways to recite its verses, each of which was equally authentic. See Yasir Kazi, *The Documentation of the Quran*, in THE MESSAGE INTERNATIONAL March 1992, at 15. Modern Arabic still retains some of this incompleteness, requiring more substantial knowledge of the language than does English to comprehend written text.

incapable of translation. The Quran is a poem, or more precisely, a ritual song, much of the effectiveness of its message lying in the subtlety of its meters and the musical sound of its Arabic words. Due to these unique features, a written translation can no more be the Quran than notes on a page Stravinsky's "Rite of Spring." The hold that the Quran has on the mind of the average pious Muslim, at times virtually intoxicated by round-the-clock radio broadcasts of its musical *surahs*, or chapters, even to those who have relegated ritual observance to mere conscience, or to those many Muslims who cannot understand Arabic, is grossly underestimated and unappreciated by non-Muslims.

Muhammad denied any claim of divinity for himself, but asserted that he was the last, or the "seal," of the biblical prophets.<sup>38</sup> When he died, the door was permanently closed on revelation, preventing any further additions to the Quran, which remains unchangeable and the one infallible source of Islamic law. Yet the Quran itself presents few explicit legal rules, and is rather concerned mostly with moral behavior and acceptance of the central message of metaphysical salvation.

**Sunna and Hadith.** After Muhammad's death, the Islamic state expanded, and the ulama encountered many problems that could not readily be solved by consulting the Quran. As an additional guide, Muslims began to examine Muhammad's deeds and words as recalled by his former companions, which came to be called the *Sunna* or "Way" of Muhammad. These examples were found in remembered accounts or anecdotes of Muhammad's life called *hadith*, or "tradition(s)." Subjected to an exhaustive process of rational verification

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<sup>38</sup> QUR'AN (33:40).

through *isnad*, or “chains” of witnesses, six collections of hadith came to form the core of the Sunna, and were regarded as divinely inspired or guided.<sup>39</sup>

Despite the care of medieval Muslims to exclude unauthenticated hadith from these collections, Western historians today regard most hadith as suspect.<sup>40</sup> Nevertheless, these collections, with that of al-Bukhari holding top rank, are today an integral part of Islamic law and individual Muslims are not free to reject them.<sup>41</sup> The prohibitions on making representations of animals or humans, which are linked to idolatry, or of playing music, derive not from the Quran, but from hadith of the Sunna of Muhammad.<sup>42</sup>

Out of the Quran and the Hadith eventually emerged four schools of Sunni or “orthodox” Islam: Maliki, Hanafi, Shafii, and Hanbali. The majority of Muslims today still follow one of these schools.<sup>43</sup>

Around 760 CE, the jurist Malik Ibn Anas founded the first major school, or rite (*madhab*), of Sunni Islam in the city of Medina by emphasizing the validity of the six orthodox collections of hadith as a second major source of Islamic law.<sup>44</sup> As the Ummah expanded into an empire with control over many non-Arab and non-Muslim peoples, new generations of *qadis* (judges) and *ulama* (legal clerics)

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<sup>39</sup> Charles J. Adams, *Islam* in THE ENCYCLOPEDIA OF ISLAM, at 496.

<sup>40</sup> Most hadith are considered by Western historians to be evidence of political and social trends for the period in which they were produced, not, however, as primary documentation of events that occurred during Muhammad’s lifetime. See Adams, *supra* note 39, at 497.

<sup>41</sup> After al-Bukhari, the hadith collection of Imam Muslim is accorded the highest value, followed by Nasai, Abu Daud, Ibn Majah, and Tirmidhi in no particular order. See MAZHAR U. KAZI, A TREASURY OF HADITH AND SUNNAH (551 HADITH) 29 (Alminar Publications: Claymont, Delaware, 1997).

<sup>42</sup> A popular English compilation of Hadith is Dr. MAZHAR U. KAZI, A TREASURY OF HADITH AND SUNNAH (551 HADITH) (Alminar Publications: Claymont, Delaware, 1997).

<sup>43</sup> Minor “orthodox” schools include *Ibadite* (Yemen), and *Zaidi* (Oman).

<sup>44</sup> WEERAMANTRY, *supra* note 19, at 37.

began employing new techniques of interpretation in their efforts to resolve the growing complexity of real-world disputes and social issues.

Under Abu Hanifah, ca 780 CE, the second major school of Islamic law began to take root. Embracing the principle of *ra'y*, or “opinion,” these Hanafi jurists applied rational speculation to the primary sources of Quran and Hadith, including techniques of logic learned from Greek-speaking philosophers. The chief principles of *ra'y* were *ijma*, or “consensus of the religious community,” and *qiyas*, “extension of law by analogy.”<sup>45</sup> These two principles, providing a way for Muslim society to “keep up with changing times,” are generally regarded as weakly grounded in Quran and Hadith.

**Usuul ul-Fiqh.** The third major school of Islamic law followed around 800 CE with al-Shafii. This school framed *usuul ul-fiqh*, or “roots of understanding.” These roots were as described *supra*: Quran, Hadith, Ijma, and Qiyas, as understood through the systematic use of reason. This “reason” was not, however—as a Westerner might suppose—for the purpose of implementing human will or meeting human needs, but only for use as an aid in the discovery of those divine principles discernible in the original sources of Islam, which were then to be applied to new situations by consensus and analogy. God disposed; it was Man’s task merely to discover and implement His will. Human reason, being fallible, was unworthy of more.<sup>46</sup>

This search for divine principles was not mere abstraction. Under Shafii, the search for *fiqh*, or “understanding,” was a comprehensive process of discovering

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<sup>45</sup> HITT, *supra* note 22, at 44.

<sup>46</sup> WEERAMANTRY, *supra* note 19, at 53.

divine categories for expression as legal rules, or *ahkam*.<sup>47</sup> This process of “categorization,” in the language of Professor Bernard Weiss, thenceforth became the essential activity of Islamic theologians. Shafii distinguished *ibadat*, or relations between Man and God on the one hand, from *mu’amallat*, relations between man and man on the other, supplying each with legal detail. In time, fiqh came to refer primarily to this supplying of ritual or regulatory detail by a process of “discovering divine law,” and today the term fiqh is usually translated in this broader sense of “jurisprudence.”

The fiqh of *ibadat* inform one precisely how to perform the Five Pillars, the obligations that every Muslim owes to Allah as a condition of obtaining salvation under the Covenant: (i) the profession of faith, termed Shahadah (witnessing),<sup>48</sup> (ii) the Salat (Prayer), (iii) the Zakat (alms-giving), (iv) the observance of Ramadan, and (v) the Hajj to Mecca, which alone of the five is optional, although one should perform the Hajj at least once in one’s lifetime if possible.

The *mu’amallat*, on the other hand, describe and regulate civil, commercial, and criminal matters. These latter include a working out of what deeds are *haram*, or forbidden to Muslims, e.g., overcharging a customer, and which are *halal*, or permitted, for example eating ritually slaughtered beef or lamb. These are part of a larger scheme that classify all deeds as (i) *wajib* or obligatory, which includes performing the Five Pillars of the *ibadat*, (ii) *mandub* or recommended,

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<sup>47</sup> “Categorization” is the term of Bernard Weiss, in translation of the Arabic *ahkam*, which is more usually translated as “regulations” or “rules.” WEISS, *supra* note 25, at 1.

<sup>48</sup> Public pronouncement of the Arabic phrase “*La ilaaha illah Allahu, wa Muhammadun rasuul Allah*,” or “There is no God but God, and Muhammad is his Prophet.”



(iii) *mubah*, or neutral, (iv) *makruh*, or disapproved, and (v) *mahzur*, or forbidden.<sup>49</sup> The first four are halal; the last is haram.

Another important category is *sahih*, or valid, versus *batil*, or invalid. A prayer that is performed in accordance with the requirements of fiqh is *sahih*, i.e., valid, and succeeds in discharging one's duty to God, and thereby has earned God's favor in return. A prayer improperly performed, e.g., with improper ritual washing beforehand, is *batil*, or invalid. Similarly, a contract that did not incorporate the fiqh required of contracts is therefore invalid, or *batil*, in Western terms void from the outset. Extenuating circumstances can make a *batil* contract into a *sahih* contract, and vice-versa. Contracts are thus categorized into (i) *azima*, or firm, i.e., unaffected by extenuating circumstances, and (ii) *rukhsa* or infirm, i.e., one affected by extenuating circumstances.<sup>50</sup>

This legal process of fiqh is central to the Sharia, which, therefore, is not a system of positive or "man-made" law, but a comprehensive scheme of divine categorization with legal implications—some fiqh detailing duties to God or to Man, some behavior prohibited absolutely, and other acts permitted or allowed in various degrees, even if some remain sinful. A particular halal act may therefore be recommended, neutral or disapproved without thereby incurring any legal penalty for its act or omission.

Skeptical of some contemporary hadith, al-Shafii decided to reject all that were derived from the companions of Muhammad, and to accept only those that were traceable via reliable isnad to Muhammad himself. However, Shafii had no

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<sup>49</sup> HITTI, *supra* note 22, at 45. For a comprehensive treatment in English of *fiqh of Ibadat*, see MOHAMMAD YUSUF ISLAHI, TRANS. ABDUL AZIZ KAMAL, *EVERYDAY FIQH*, 4<sup>TH</sup> ED. (Maktaba Zikra: Delhi, 1995).

<sup>50</sup> WEISS, *supra* note 25, at 2.