

# The Reopening of the Islamic Code

## The Second Era of Ijtihad

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It is God who has appointed for you the stars,  
that by them you may guide yourself in the darkness of land and sea.<sup>2</sup>

### Introduction

For more than a hundred years now, an accord has gradually emerged among Muslim scholars that Islamic classical jurisprudence (fiqh) must be reformulated to meet the needs of Muslim communities. Non-Muslim commentators are even more vocal in criticizing classical fiqh. Some identify classical fiqh with fundamentalism that, they argue, spawns poverty, gender oppression, violence, ignorance, cultural segregation, intolerance, and unaccountable political structures.<sup>3</sup> Some provide empirical analysis to argue that the notions of democracy, rights and tolerance derived from Islamic principles are deceptive.<sup>4</sup> Included in this analysis is the intimation that Islam be reduced to private faith, as has been Christianity, so that Islam no longer shapes social, economic, political and legal discourses.<sup>5</sup> Even some Muslims argue that classical fiqh permits

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<sup>2</sup>Quran 6:97. And landmarks and by the stars they might be guided. Quran 16:16

<sup>3</sup>See generally Bernard Lewis, *What Went Wrong?* (2002). Dirk Vandewalle, *Islam in Algeria: Religion, Culture, and Opposition in a Rentier State in Political Islam* 34 (ed. John Esposito, 1997). Donna E. Arzt, *Heroes or Heretics: Religious dissidents under Islamic Law*, 14 *Wis. Int'l L. J.* 349(1996)(examining intolerance towards dissidents and Christians).

<sup>4</sup>Emmanuel Sivan, *Why Radical Muslims Aren't Taking Over Governments in Revolutionaries and Reformers* 1, at 8 (ed. Barry Rubin, 2003).

<sup>5</sup>A total privatization of Islamic faith is unlikely because Islam, by its inherent design, builds legal communities. Christian commentators themselves have concluded that unlike Christianity, in which Christ is believed to be the self-disclosure of God, Islam reveals God's Law rather than God per se. See Norman Geisler & Abdul Saleeb, *Answering Islam* 101 (1993).

slavery, gender and religious discrimination and will continue to do so until specifically repealed.<sup>6</sup>

Resisting radical proposals for change, most Muslim communities are refusing to discard the entire past.<sup>7</sup> Although some Islamic regimes have experimented with secularism--and Turkey has officially adopted non-amendable constitutional secularism--most Islamic nations reject the secular model of law under which legislative authority is reposed in institutions divorced from religion and law is separated from the principles of the Quran and the Sunna--the Basic Code.<sup>8</sup> Mainstream Muslim scholars and jurists from across the world seem to have reached a near-consensus that, although the Basic Code cannot be abandoned, it must be re-interpreted to establish legal systems that respect classical fiqh but also incorporate change. This evolutionary call-- "that history, as a continuous movement in time, is a genuinely creative movement and not a movement whose path is already determined"<sup>9</sup>--is made to extract Muslims from historical stalemate and expose them to ceaseless dynamism.<sup>10</sup> Every day, in the words of the Quran, shines with new splendor, majesty and freshness (shan).<sup>11</sup>

This article supports the call for the evolution of fiqh without compromising God's

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<sup>6</sup>Abdullahi Ahmed An-Naim, *Toward an Islamic Reformation 172-77*(1990). Professor An-Naim is advocating the views of his teacher, Mahmoud Mohammad Taha, who was executed in the Sudan for his radical reformist interpretations of the Quran and the Sunna.

<sup>7</sup>Allama Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam*132 (1986)(original 1934). It is factually incorrect to argue that classical fiqh has been the source of Islamic economic backwardness for great Islamic empires flourished under classical fiqh. *See text infra note 103.*

<sup>8</sup>Azzam Tamimi, *The origins of Arab Secularism in Islam and Secularism in the Middle East* (eds. John L. Esposito & Azzam Tamimi 2000)(arguing that Arab secularists have failed to protect pluralism, democracy, civil liberties and human rights).Sohail Hashmi, *The Power of Religion*, 20-SPG Fletcher F. Word Aff.13 (1996)(Western-oriented secular regimes perpetrate violence against Islamists and violate universal values).

<sup>9</sup>Allam Iqbal, *supra note 7*, at 113.

<sup>10</sup>Wael Hallaq, *A History of Islamic Legal Theories* 259 (1997). The call for ijthihad began to become universal at the end of the 19<sup>th</sup> century. Among eminent proponents demanding ijthihad are Jamaluddin Afghani (1838-1897), Muhammad Abduh (1845-1905), and Muhammad Iqbal (1876-1938). *See N.J. Coulson, A History of Islamic Law* 202-217 (1994).

<sup>11</sup>Quran 55:29.

supremacy and the prophet's wisdom as expressed in the Basic Code<sup>12</sup>. Interpretation rather than abandonment of the Basic Code guides the evolution of fiqh in the second era of ijtiḥād, as it has along the centuries, with the same, if not more, intellectual energy and creative boldness commonly associated with the first era of ijtiḥād. The first era is tied to Islamic empires. The second era of ijtiḥād, however, is likely to flourish under Islamic Free State--an entity the rudiments of which I have articulated elsewhere.<sup>13</sup> Here, it is shown how Islamic Free State embraces the concepts of minhaj and ijtiḥād, discussed below, as it employs contemporary institutions and new legal methods to interpret the Basic Code and reformulate classical fiqh. Islamic Free State does not abandon classical fiqh. It seeks guidance from classical fiqh and it codifies the laws of classical madhabs to the extent they offer acceptable solutions to contemporary problems. At the same time, however, Islamic Free State reserves the option to depart from specific rules of classical fiqh, if and when necessary.

In recognizing the evolution of fiqh, Islamic Free State does not build a single empire of Islamic law. It rather respects the diversity of Muslim communities expressed through local customs and traditions compatible with the Basic Code. It repudiates any call for unity through a monolithic interpretation of the Basic Code good for all Muslims across the world. Diverse Muslim

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<sup>12</sup>Muslims have at least three options with respect to the Basic Code. First, they privatize faith, embrace secularism, and divorce lawmaking from the Basic Code. Second, they alter the text of the Basic Code to meet modern needs. Third, they accept the Basic Code as a permanent guide for individual and social life but see the Code as a flexible and evolutionary source. The first option has been tried but the confrontation with religious forces opposing secularism has often maligned the secular state. The second option is unacceptable to all Islamic communities. The third option seems to be the most suitable alternative for the material and spiritual development of the Muslim world.

<sup>13</sup>L. Ali Khan, *The Extinction of Nation-States* (1996); *A Theory of Universal Democracy* (2003). In *The Extinction of Nation-States*, I first presented the idea of Free State, an evolutionary entity that emerges out of the nation-state. Free State is founded on moral intelligence, in addition to positive law, with a strong orientation towards domestic and global justice. Free State offers intimate self-rule to the people at home and constructs a world, through international law, committed to peace, equitable development and pluralism. Open administrative borders, rather than closed sovereign borders, are the most distinguished feature of Free State. In *A Theory of Universal Democracy*, the concept of Free State is further developed, confirming that secularism is not a required feature of Free State. A Free State may or may not fuse state with religion. Islamic Free State is a fusion state in which law and religion are blended as per aspirations of the people. The concept of democracy as the foundation of Free State, Islamic or non-Islamic, is further explained. Furthermore, the concept of universal values, including diversity, that emerges out of the combined wisdom of the peoples of the world, is explored. In addition to preserving its local traditions, Free State safeguards universal values that inform the evolution of human civilization. The concept of Islamic Free State has not yet been fully and separately articulated, even though one can be derived from studying the two books mentioned above. This article, however, builds upon the concept of Free State that has opted for fusion of law and religion, specifically Islam, and shows how sacred sources might shape the discourse, and even content, of laws.

communities are free to interpret the Basic Code in light of their unique needs, customs, social and economic development.<sup>14</sup> What unites the Islamic world, as it has in the past fourteen centuries, is a shared commitment to the Basic Code, and not to any one period of fiqh and far less to any one school of law (madhab).<sup>15</sup>

In reading this article, the readers would notice that shariah is not part of the analysis. The concept of shariah has been thoroughly confused in legal and common literature.<sup>16</sup> For some Muslims, shariah consists of the Quran and the prophet's Sunna but nothing else. For others, it also includes classical fiqh. Most encyclopedias define shariah as law derived from the Quran, the Sunna, and classical fiqh derived from consensus (ijma) and analogy (qiyas).<sup>17</sup> This definition of shariah inappropriately lumps together the revealed with the unrevealed. This blending of sources has created a muddled assumption that scholarly interpretations are as sacred and beyond revision as are the Quran and the Sunna. This article is founded on a fundamental premise that the Quran and the Sunna constitute the immutable Basic Code, which should be kept separate from ever-evolving interpretive law (fiqh). This analytical separation between the Basic Code and fiqh is necessary to understanding institutional ijtihad, a concept offered later in this article.

The evolution of fiqh is consistent with the Quran's promise that for each people, including Muslims, God has "prescribed a law and an open way (minhaj)."<sup>18</sup> Notice that God's prescription is not just for law or open way; it is for both law *and* open way. Law without minhaj loses its vitality

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<sup>14</sup>Michael Mumisa, Islamic law 138(2002).

<sup>15</sup>Abdullahi An-Naim advocates a similar position. *See supra* note 6, at 185-87. However, his repudiation of classical fiqh as a mere construct confined to its time is too dismissive of Islamic traditions to be acceptable to most Muslims. Even the methodology he offers to renovate the interpretation of the Basic Code is likely to create more problems than solve them. His conclusion that Islamic Sharia is not an appropriate vehicle for Islamic self-determination is a prescription that does not comport with aspirations of Muslims fighting in Chechnya, Kashmir and Palestine.

<sup>16</sup>For a background analysis of the word and the concept of shariah, *see* Fazlur Rahman, Islam 100-116 (1979). Confusion regarding shariah may be noticed in the following article that argues that terrorists invoking Islam are acting illegally under the shariah. And that West should invoke the shariah to convince terrorists that what they are doing is unlawful. *See* David Schwartz, International Terrorism and Islamic Law, 29 Colum. J. Transnat'l L. 629, 651. (1991). Professor An-Naim believes that the proponents of shariah pose the clearest and greatest dangers in creating problems of intolerance and persecution. *See* An-Naim, *supra* note 6, at 48.

<sup>17</sup>10 New Encyclopedia Britannica 701.

<sup>18</sup>Quran 5:48

and relevance. And minhaj without law can lead to anarchy, normative confusion, arbitrariness, and even deadly harm.<sup>19</sup> Striking a dynamic balance between law and minhaj, the Quran assures that Muslim communities are neither stagnant nor rudderless, that they progress within the boundaries of God's Law, and that they respond to constantly shuffling layers of reality.<sup>20</sup> From an evolutionary viewpoint, minhaj is dynamic intelligence that assures the harmony of law with time and space. It is a spirit of inquiry that brings the Islamic faith closer to science and knowledge.<sup>21</sup> Minhaj is the opposite of dogma.

Closely related to minhaj is the concept of ijtiḥād.<sup>22</sup> The Quran affirms the general concept of ijtiḥād in saying: "And to those who exert We show Our path."<sup>23</sup> Intellectual and spiritual exertion to find the path is ijtiḥād. The prophet more specifically introduced ijtiḥād in judicial and juristic contexts.<sup>24</sup> The relationship between minhaj and ijtiḥād is parallel to the one between vision and effort. Minhaj emboldens believers to imagine the path beyond where the paved road ends; ijtiḥād furnishes the means to further pave the path. Minhaj warns against losing the way in a rigid pursuit of law; ijtiḥād cautions against losing the law in an arbitrary pursuit of freedom. Minhaj is a reminder to jurists that law is warped if openings are closed; ijtiḥād safeguards the openings. Hand in hand, minhaj and ijtiḥād constitute a dialectical pair that protects the integrity of the Basic Code

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<sup>19</sup>Ibn Khaldun, *The Mudaddimah* 155 (Trans. Franz Rosenthal, 1967)(state policies without the supervision of religious law are reprehensible).

<sup>20</sup>Quran 3: 190. This verse, for example, invites experts to contemplate the constant movement of time through the alternation of day and night, an idea often repeated in the Quran. And according to Quran 55:29, every day carries a new splendor and freshness.

<sup>21</sup>Jamal al-Din al-Afghani argues that the Islamic religion is closest to science and knowledge, and the truth is where there is proof, whether it comes from Galileo or Newton. See Nikki R. Keddie, *An Islamic Response to Imperialism* 107(1968). This book contains the political and religious writings of al-Afghani.

<sup>22</sup>Etymologically, ijtiḥād and jīḥād are derived from the same root word, *juhd*, which means to strive or make an effort. Jīḥād is striving to propagate the message of Islam and to fight oppression, occupation and subjugation. Ijtiḥād is striving in the realm of law to solve new legal problems. The exercise of ijtiḥād however presupposes that the jurist (*mjūṭāḥid*) possesses the required knowledge and competence in deriving new rules of law through reasoning from the original sources, that is, the Quran and the Sunna (the pronouncements and practices of the Prophet ). Ijtiḥād however is lawful only if the Quran and the Sunna are not decisive on a particular question under juristic consideration.

<sup>23</sup>Quran 29:69

<sup>24</sup>When the prophet appointed his companion, Maadh bin Jabal, as the governor of Yemen, he advised the appointee to engage in ijtiḥād to solve a problem for which no solution is available in the Quran or the Sunna. Even more generally, the prophet encouraged the faculty of reflection and reasoning among his followers.

and expands and contracts its meaning to assimilate change.

In Islamic literature, *ijtihad* carries two distinct meanings. In its more general meaning, *ijtihad* is associated with the expansion and renewal of Islamic law. In its more specific meaning, *ijtihad* is a juristic tool, a process of reasoning, used to interpret the Basic Code, that is, the Quran and the Sunna. In both meanings, *ijtihad* assures that *fiqh* would continue to meet the needs of Muslim communities across the world and across time, solving their social, economic and political problems. Though never fully abandoned, the concept of *ijtihad* lost its vitality and cutting edge when the concept of strict precedents (*taqlid*) surfaced as the dominant jurisprudential motif in the middle ages of Islam. For the past two hundred years, however, *taqlid* has been losing ground and the call for vigorous *ijtihad* is winning universal approval. Muslim lawmakers, judges and scholars seem determined to interpret the immutable sources of the Basic Code--the Quran and the Sunna--to effectively respond to ever changing national and global imperatives. In this effort, they are seeking guidance from classical *fiqh*.

In harnessing *minhaj* and *ijtihad* as agents of change, the Quran provides insightful guidance. The Quran distinguishes between basic principles and specific laws. Setting forth the parable of a wholesome tree, the Quran distinguishes between its root (*usul*) and branches (*furu*).<sup>25</sup> The Quran indicates that the root of a wholesome tree is firmly fixed, but its branches flourish and reach to the heavens and its fruit is eternal, for all seasons and all times. The parable is designed to explain that a wholesome tree can barely survive unless firmly rooted, but even a firmly rooted tree is alive only if it retains the inner strength to produce branches and fruit. The vitality of a wholesome tree cannot be questioned if its branches are lush and luxuriant and bear fruit. Hidden in the meaning of the Quran's parable is the observation that a wholesome tree periodically renews itself with fresh leaves and branches.<sup>26</sup>

Classical *fiqh* used the parable of the wholesome tree to distinguish between legal principles and rules. Legal principles (*usul*) are seen as the root and legal rules (*furu*) as the branches of *fiqh*.

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<sup>25</sup>Quran 14:24

<sup>26</sup> In setting forth this parable, the Quran draws a parallel between a wholesome tree and the wholesome *Kalma*. The two are alike, the Quran states. Just like wholesome tree, *kalma tayyiba* is wholesome word. In its most essential sense, *kalma tayyiba* refers to the words of the Quran (Al-Kitab), and includes statements recorded in authentic ahadith (Al-Hikma).

Legal principles are firmly rooted in the Basic Code, that is, the Quran and the Sunna. Specific rules, however, are juristic opinions derived either through interpretation of the Basic Code or by some other legal method.

Just as several branches grow out of the same tree, so can sprout diverse schools of law from the same Basic Code. And just as branches are integral part of the same tree, so are the diverse schools of interpretation, for each school draws from the inner vitality of the same Basic Code. In this process of interpretation, great effort is made not to sever any rules from the Basic Code, for any branches severed from the tree turn into dead wood. This great effort (ijtihād) to tap into the inner vitality of the Basic Code to propose solutions to new legal problems prompts Islamic communities to live under the rule of law, rooted in the Basic Code but not confined to any one school of law (madhab) or to any one age of jurisprudence (minhaj).

In striving for minhaj, it must be borne in mind that the Basic Code is protected knowledge, as is intellectual property under secular law.<sup>27</sup> The Basic Code is placed in a sacred trust for the benefit of all human beings, Muslims and non-Muslims. No one, including scholars, judges and lawmakers, is authorized to tinker with this sacred trust. Accordingly, no one is authorized to repeal, amend, add to, or subtract from the Basic Code.<sup>28</sup>

The thesis of this article—that Islamic law is inherently evolutionary within the bounds of the Basic Code<sup>29</sup>--is developed through following sections. Part I examines the creative elements of the first era ijtihād to demonstrate that classical fiqh was a remarkable juristic effort to solve legal problems in light of the Basic Code. This section also shows that the rules of fiqh as well as legal methods by which these rules were extracted—which later generations of Muslims have taken as articles of faith--were highly debatable issues at the time. The study of this period is also conducive

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<sup>27</sup>Ali Khan, *Islam as Intellectual Property*, 31 *Cumberland L. Rev.* 631(2001).

<sup>28</sup>Professor John Voll presents three categories of reform movements in Islamic history. One reform movement aspires to restore a strict rule of the Quran and the Sunna. Another movement argues for ijtihād, with some changes in classical fiqh. The third reform movement is more experiential and Sufism-oriented. What is common among all reform movements, however, is a unified commitment to the Basic Code. *See* John Voll, *Renewal and Reform in Islamic History: Tajdid and Islah in Voices of Resurgent Islam* 32, 35-37 (ed. John Esposito, 1983). *See also*, John Voll, *Islam: Continuity and Change in the Modern World* (1982).

<sup>29</sup>Evolution of life is not constant change that discards the past completely. Evolution contains the elements of conservation. In the evolution of fiqh, the Basic Code provides the essential elements of conservation. *See* Allama Iqbal, *supra* note 7, at 132.

to learning creative techniques and legal methods that might be used in future ijihad, thus providing continuity to Islamic law and jurisprudence. Part II discusses the reasons for which the creative period came to an end, and the jurisprudence of strict precedents (taqlid) was established. During the period of strict precedents, ijihad did not cease to exist because new questions constantly arose for which solutions had to be found. However, in this period, old interpretations could not be modified or repealed. What was also missing in this period was the creativity that defined the first era of ijihad. Studying taqlid, bear in mind that even the jurisprudence of strict precedents was a decision of jurists, and not an Act of God. Though following precedents rather than innovating law was the defining paradigm of taqlid, Muslims nonetheless did not embrace any dogmatic notion of interpretation and pluralism continued to be highly regarded. Finally, relying on the dialectical pair of minhaj and ijihad, Part III presents institutional ijihad, a concept already emerging in the Muslim world. Institutional ijihad challenges the era of strict precedents and urges Muslim communities to find creative solutions for new problems, interacting with other legal systems, including international law. This call for creativity is made within the context of Islamic Free State, an evolutionary entity that offers democracy, respect for classical fiqh, enforcement of universal values that arise from the combined wisdom of the peoples of the world,<sup>30</sup> and an unwavering commitment to the Basic Code.

## I. The First Era of Ijihad (632-874)

The first era of ijihad, which lasted for about two hundred and fifty years, was a period of astounding jurisprudential research and creativity, that is, minhaj. In this period, the great jurists of Islam laid the foundation of the five schools of fiqh, also known as madhabs--Hanafi, Maliki, Shafi, Hanbali and Jafari--that would define Islamic law for centuries to come.<sup>31</sup> Each madhab developed

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<sup>30</sup>For a more detailed understanding of universal values, *see* L. Ali Khan, *A Theory of Universal Democracy* (2003).

<sup>31</sup>The first era of ijihad does not include the period of prophecy (610-632) during which the Quran was received and the prophet's Sunna was established. The first era is counted from 632, the year the prophet passed away, to 875 by when the five founders of Islamic jurisprudence had finished their teachings and died. Jafar al Sadiq (d.765); Abu Hanifa (d.767); Malik b. Anas (d.795); Al-Shafi (d.820) Ibn Hanbal (d. 855). Included in this period are the life spans of two great compilers of ahadith, Al-Bukhari (809-869) & Al-Muslim (817-875). Thus, by 875, two hundred and forty three

detailed rules and regulations of family law, decedents estates, trusts, contract law, commercial law, taxes, property, secured transactions, payment systems, and criminal law. These rules put together constitute classical fiqh. However, even classical fiqh is not a monolithic corpus but contains the rules, some at odd with each other, developed by the five schools.<sup>32</sup>

Even though each madhab was further developed in subsequent centuries, the later generations of jurists worked within the established boundaries of the madhab, refining rather than reforming the existing laws. Attempts to establish any new jurisprudential schools remained fruitless.<sup>33</sup> Madhabs became so influential in Islamic civilization that Muslim communities were identified with their association with particular madhabs.<sup>34</sup> Over the subsequent centuries, faith in Islam was securely tied with faith in madhabs, as if one cannot be separated from the other. Though all madhabs were mutually respected, a person without a madhab was a person without an authentic faith. In this unquestioning adherence to madhabs, human interpretation triumphed over the sacred source. The Basic Code, the ultimate origin of all interpretive laws, however, exercised a magical influence over the founders of madhabs.

### The Basic Code (610-632)

One remarkable achievement of the first era of ijthihad was the preservation of the Basic

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years after the prophet's death, all founders of five schools of jurisprudence and the two great researchers of authentic ahadith had passed away, closing a remarkable period of creativity and research.

The Jafari school of jurisprudence is Shia whereas the other four schools are Sunni. The Jafari school is named after Muhammad Al-Baqir (d. 731) and his son, Jafar Sadiq (d.765), the fifth and sixth Shia imams. In 1874, Hasan al-Askari, the 11<sup>th</sup> Shia imam died and the 12<sup>th</sup> Shia imam disappeared. Thus, in 1874, the Shia source of original jurisprudence also came to an end.

<sup>32</sup> Regarding marriage, for example, the Hanafi school requires the consent of both adult spouses for a valid contract of marriage. The Shafi and Malik schools agree with the rule but make an exception under which a female, in her first marriage, must obtain the consent of the guardian. *See* Abdur Rahim, *The Principles of Islamic Jurisprudence* 314 ( 1911, 1994).

<sup>33</sup>Even the Wahhabi school successfully established in the nineteenth century Saudi Arabia has derived its roots and legitimacy primarily from the Hanbali school.

<sup>34</sup>Turkey, Palestine, India, Pakistan and Afghanistan follow the Hanafi school. North Africa, Nigeria & the Sudan follow the Maliki school. Egypt, Indonesia & East Africa follow the Shafi school. Saudi Arabia follows the Hanbali and its derivative Wahhabi school. Iran and Shias in Iraq and other parts of the world follow the Jafari school. *See* Seymour Vesey-Fitzgerald, *Muhammadan Law*10-16 (1999).

Code, which consists of the Quran and the prophet's Sunna-- the two immutable sources of Islamic law. While the text of the Quran was definitively preserved soon after the prophet's death, the prophet's Sunna remained uncertain for decades. It was unclear to early Muslims what extent the Sunna should be integral part of the Basic Code, partly because early Muslims focused on the Quran to the exclusion of everything else and partly because the definition of the Sunna, as explained below, was far from certain. In addition to this normative confusion, logistical difficulties of retrieving the prophet's Sunna posed an additional barrier. Mostly oral and some written ahadith<sup>35</sup> circulated in different parts of the emerging Islamic empire. But the task of separating the true from the false ahadith and verifying both the substance and the source of each reported hadith was a huge undertaking, particularly because opposing political groups used and even manufactured ahadith as weapons to legitimize their respective political, theological, social and familial viewpoints. While the prophet's Sunna was being determined, the Quran remained the undisputed part of the Basic Code.

### 1. Quran (610-632)

The Quran is the most supreme source of the Basic Code. The first verse of the Quran--Read in the name of thy Lord who created<sup>36</sup>-- revealed in the year 610, sets knowledge, that is, reading and learning, as the foundation of faith. Over the next 23 years, the Quran was revealed piecemeal, mostly in response to concrete situations and questions (asbab al-nuzul) that the prophet faced dealing with Muslims and non-Muslims. This method of revelation made the Quran a practical guide to solve problems arising in the real world. The Quran was completed in 632, shortly before the prophet's death, with the following injunction from God: "Today I perfected your religion for you and completed my favor to you and have chosen for you Islam as your religion."<sup>37</sup>Even this ending

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<sup>35</sup>Ahadith is the plural of hadith. Hadith is a report containing the prophet's sayings, deeds, approvals and disapprovals. Ahadith carry both legal and non-legal matters.

<sup>36</sup>Quran 96:1

<sup>37</sup> Quran 5:3. The last verse revealed, however, was either 2:281 or 4:176 (And fear the Day when you shall be brought back to God. Then every soul shall be paid what it earned and none shall be dealt with unjustly." The Quran is divided into thirty chapters. There are 114 Surahs of varying length. The longest Surah is Al-Baqarah consisting of

of revelation was a profound completion of God's instruction, emphasizing for Muslims a code of behavior infused with gratitude (favor), peace and submission (Islam).

The Quran as the source of God's Law is not the first book revealed to human beings. The Quran has descended from the same Original Book (umm al-kitab) written on a well-preserved Tablet<sup>38</sup> retained in God's presence,<sup>39</sup> from which other scriptures, including the Old Testament and the New Testament, have descended.<sup>40</sup> Though revealed in diverse languages to various prophets in different eras, all scriptures, according to the Quran, are derived from the same Original Book. Confusion has arisen, according to the Quran, because some holy books have been altered.<sup>41</sup> Nonetheless, the Quran testifies to the unity and integrity of God's Law, good for all times and all places and all communities. The concept of God's Original Book establishes the need for the interfaith dialogue and mutual respect for each other's faith, and challenges believers of all scriptures to launch a shared effort to discover God's Eternal and Universal Law.

In recognizing the Quran's purity and its proximity with the Original Book, there remains an inter-generational consensus among Muslims that each word of the Quran, as it is placed in the text, is sacred; and, therefore, no word, let alone a verse, section, or chapter of the Quran can be altered or its sequence re-arranged.<sup>42</sup> As such, the Quran is an immutable text.<sup>43</sup> Professor Arkoun, a French Muslim scholar, points out an important though obvious fact that the Quran did not come to the prophet as a written text but was communicated orally.<sup>44</sup> It was about twenty years after its

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286 verses and the shortest Surah is Al Kawthar consisting of only three verses. The whole Quran has 6236 verses containing 77,250 words. The arrangement of the verses is not in the same order in which they were revealed. The prophet himself organized the verses in surahs and chapters.

<sup>38</sup>Quran 85:22.

<sup>39</sup>Quran 43:4.

<sup>40</sup>The Quran uses the following words to describe these scriptures: tawrat(torah), injil(the Gospel) & zabur (Psalms). Torah is described as light and guidance. Quran 5:47. The Gospel is described as confirming the Torah. Quran 5:49-50.

<sup>41</sup>Quran 5:44.

<sup>42</sup>Many Muslims memorized the verses, syllable by syllable, as the Quran was being revealed.

<sup>43</sup>Bernard G. Weiss, *The Spirit of Islamic Law* 47 (1998).

<sup>44</sup>Muhammad Arkoun, *Rethinking Islam* 32-33 (Trans. Robert D. Lee, 1994)(original French, 1989).

oral completion that the Quran was officially embodied in one written text.<sup>45</sup> But what distinguishes the Quran from other oral revelations is an internal belief among Muslims that the Quran's written text is a true copy of the "oral text." The timeless textual integrity of the Quran is a founding pillar of Islamic faith and fiqh.

Therefore, no concept of justice, equality, modernity, progress, evolution, minhaj or ijtihad can alter the text of the Quran. The immutability of the Quran is the supreme law, which has been strictly observed over the centuries. The concept of minhaj, however, makes the Quran accessible to each generation of Muslims and non-Muslims, sometimes in ways not known to previous generations. Consider, for example, the following verse of the Quran. "And it is We who have built the universe with our power; and, verily, it is We who are steadily expanding it."<sup>46</sup> The meaning of this verse is now clear in light of the scientific research that the universe is not static but constantly expanding.<sup>47</sup> This meaning of the Quran has been hidden from previous generations, even though the invitation to reflect upon the expansion of the universe was always there.<sup>48</sup>

Since the meanings of the Quran are revealed only upon reflection and research, the prophet's mission included offering explanations and applications of the Quran. So the prophet's life, his deeds, his sayings, his methods of dispute resolution, almost everything he said or did was taken as illuminations of the Quran. As such, the prophet's Sunna is regarded as an indispensable source of guidance in all matters, including law. The Quran furnishes legitimacy to the Sunna in the following verse: "And whatever the Messenger gives you, take it, and whatever he forbids you, leave it."<sup>49</sup>

## 2. The Sunna (610-632)

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<sup>45</sup>The Quran was reduced to text in 651 during the caliphate of Uthman.

<sup>46</sup>Quran 51:47

<sup>47</sup> Amir Aczel, *God's Equation: Einstein, Relativity & the Expanding Universe* (1999).

<sup>48</sup>This verse, like many others, also reveals the truth that there is no one context in which the Quran can be read. The argument that the Quran must be read in its Arab historical context is unpersuasive because God's Law is not bound to any one social, cultural or linguistic context.

<sup>49</sup> Quran 59.7.

For all purposes, the Sunna is subordinated to the Quran. Yet the two together constitute the Basic Code. Completed within the same period of twenty-three years in which the Quran was revealed, the Sunna consists of ahadith--cases, observations, comments, opinions, and deeds of the prophet--accurately recorded and transmitted by Muslim scholars. The Sunna explains, clarifies, applies, and interprets the Quran's text in the contexts of concrete cases that arose during the period of prophecy.<sup>50</sup> For the jurists, therefore, the Quran's text and the Sunna are in philosophical, intellectual, spiritual, and conceptual harmony. Just like the Quran, the prophet's Sunna covers a wide range of issues. As such, not all ahadith deal with law. But ahadith remain a secondary source of law.

No serious jurist in the first era of *ijtihad* argued that the Basic Code be reduced to mere injunctions of the Quran, completely ignoring the Sunna, for such a jurisprudential model would have severed an essential source of law and wisdom. The controversy about the Sunna involved around the accuracy of ahadith--the reported historical materials purported to contain the contents of the Sunna. There was a remarkable consensus among jurists that not all reported ahadith are accurate. Whereas the Quran is one and the same for all Muslims for all times, the reported ahadith fall short of enjoying universal approval across the Muslim world.<sup>51</sup> This variance arises in part because some reported ahadith have been found to be forged, others altered, and still others are considered weak in their authenticity. A reported hadith, for example, is not considered authentic if its chain of transmission is defective or if its substance is doubtful in light of the Quran. Defective

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<sup>50</sup>The Quran, for example, prescribes to cut off the hand of a thief, male or female. 5:38 The Sunna clarifies the rule by decreeing that the punishment cannot be imposed unless the value of stolen goods exceeds a certain prescribed amount. *Sahih Al-Bukhari*, Hadith 781, Vol. 8 (trans. M. M. Khan). Imam Malik, one of the founders of the five schools of *fiqh*, reports several cases where the thief's hand was not cut. The prophet prohibited cutting the hand in cases of the theft of plants and fruits. Caliph Umar prohibited the cutting of a hand of a servant who stole a mirror of his master's wife. Caliph Abu Bakr reversed the punishment of cutting hand when reminded that the thing stolen was of minor value. Imam Malik, *Muwatta* (Trans. Muhammad Rahimuddin, 1985). Since the Quran carries literal as well as symbolic meaning, it might be argued that hands represent labor. In some cases, therefore, the thief might be ordered to set aside his earnings to compensate for the stolen property that the thief has consumed. In cases of famine or extreme shortage, the punishment might not be imposed on the ground that the theft was committed under existential duress.

<sup>51</sup>Soon after the prophet's death, Muslim scholars began to memorize and transmit the ahadith. In the process of transmission and collection of the prophet's acts, words, deeds, and decisions, errors and forgeries occurred. Scholars of Islam have employed labor-intensive skills to sort out the authentic ahadith from suspect ones. A near consensus has emerged among Muslims that certain collections of ahadith are authentic. *Sahih Muslim* and *Sahih Bukhari*, for example, are two such authentic compilations of ahadith, which are held in respect across the Muslim world. See Irshad Abdal-Haq, *Islamic Law: An Overview of its Origin and Elements*, 7 *J. Islamic L. & Culture* 27, 48 (2002).

and doubtful ahadith do not constitute the Sunna law. Despite controversies about the substance and source of some ahadith, there exists a core collection of ahadith--an authentic body of the Sunna--that constitutes the essential part of the Basic Code.<sup>52</sup>

*Parameters of the Sunna:* The first and the foremost task facing early scholars was to ascertain the undisputed corpus of authentic ahadith. Therefore, a methodology of retrieval was established. Scholars meticulously researched the content and transmission of each hadith. This process of verification was launched to separate authentic ahadith from frivolous and false ones. Though the process of ahadith collection started soon after the prophet's death, the final reporting of authentic ahadith, which could be attributed to the prophet without doubt took place in the middle of the ninth century, that is, about a little more than two hundred years after the prophet's death. Of many collectors of the ahadith, Bukhari and Muslim have earned a unique place in the history of the Sunna, as their collections not only present the most authentic ahadith but also the reporting is organized in an orderly and code-like manner.

Despite a universal consensus among Muslims that the core body of authentic ahadith has been identified and codified, Western scholarship continues to challenge the validity of the consensus. The most credible challenge came from an Hungarian scholar, Igan Goldziher, who argued that great many ahadith considered authentic are not so in reality.<sup>53</sup> Despite Western challenge, the internal viewpoint about the authenticity of the established Sunna remains unshaken.<sup>54</sup> Some Western scholars have also embraced the Muslims' internal viewpoint on the authenticity of ahadith.<sup>55</sup>

Much confusion arises from using the words Sunna and hadith interchangeably. An hadith

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<sup>52</sup> For the Sunni, six collections of ahadith are considered authentic. They are Bukhari, Muslim, Dawud, Tirmidhi, Nasai'i and Majah. *See* Abdal-Haqq, *supra* note 51, at 48. For the Shia, authentic ahadith are compiled by Kulyani (d. 939) and supplemented by Ibn Babuyi (d. 991) and Tusi (d. 1067).

<sup>53</sup>Igan Goldziher, *Muslim Studies* (Trans. S.M. Stern & C.R. Barber , 1967-71); *Introduction to Islamic Law and Theology* (Trans. Andras & Ruth Hamori, 1981). Joseph Schacht further developed Goldziher's thesis to cast doubt on historical accuracy of ahadith. *See* Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (1959).

<sup>54</sup> M. H. Kamali, *Principles of Islamic Jurisprudence* (1991).

<sup>55</sup> *See, e.g.,* H.A.R. Gibb, *Muhammadanism: An Historical Survey* (1949).

is an historical report, whereas the Sunna is the obligation to observe the law contained in an authentic hadith. A universal consensus exists among Muslims that an authentic hadith is integral part of the Sunna and the Basic Code. Hence, the controversy among diverse sects of Islam is not about the binding character of the Sunna but about the authenticity of certain reported ahadith. For all Muslims, the Sunna carries one and the same meaning--it consists of obligations arising from authentic ahadith. If a certain hadith is forged, it is not part of the Sunna for any Muslim. Even doubtful ahadith fall short of becoming integral part of the Sunna.

A clear understanding of the Sunna is critical for determining the parameters of the Basic Code. The Sunna as part of the Basic Code does not include pre-Islamic Arab customs, except to the extent these customs are specifically incorporated in the Quran or authentic ahadith.<sup>56</sup> This point is important because the word sunna, as a quasi-legal concept, had existed long before the dawn of Islam. Thus, the prophet's Sunna is both normative and customary. It is normative in the sense that it creates rights and obligations; it is customary in the sense that many of its rules arose from actual customary practices of pre-Islamic Arabia.<sup>57</sup> Even post-Islamic Arab customs do not automatically become part of the Basic Code.

Al-Shafi, one of the five founders of classical fiqh, devotes several pages to clarify this point. He warns that the prophet's Sunna should not be confused with the sunna of the first four caliphs, that of the prophet's companions, or that of his family members.<sup>58</sup> What the first four caliphs, the prophet's companions, and his family members--including his wives, daughters, grandchildren or cousins--said or did or the cases they decided deserve utmost consideration and respect for they knew the Basic Code closely. Yet the Sunna as part of the Basic Code is confined to the prophet and to none else. For the Shia, the sunna of Ali, the fourth caliph and the prophet's son-in-law, and that

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<sup>56</sup>The pre-Islamic customary law of Arabia had been known as the sunna. See Majid Khadduri, *Nature and Sources of Islamic Law in Islamic Law and Legal Theory* 88 (ed. Ian Edge, 1996). A.J. Wensinck, *The Importance of Tradition for the Study of Islam in Islamic Law and Legal Theory* 88 (ed. Ian Edge, 1996)

<sup>57</sup>. Relying upon I. Goldziher, *supra* note 53, Professor Rahman explains the distinction between hadith and Sunna. Hadith is a reported event whereas Sunna is the same reported event that has acquired a normative character. Fazlur Rahman, *Islam* (1979) (original, 1966).

<sup>58</sup> *Islamic Jurisprudence Shafii's Risala* (Trans. Majid Khadduri, 1961)(hereinafter *Shafi's Risala*); Ahmad Hassan, *Al-Shafi's Role in the Development of Islamic Jurisprudence* 389 *in Islamic Law and Legal Theory* 88 (ed. Ian Edge, 1996).

of his descendants constitutes an additional source of binding law.<sup>59</sup> Yet, the Basic Code for all Muslims remains confined to the Quran and the prophet's Sunna.

### 3. Normative Hierarchy

In order to clarify the relative weight of the rules found in the Quran and the Sunna, the founders of madhabs developed the rules of normative hierarchy. As a general principle, the Sunna must always be understood and applied in light of the Quran's text. No hadith can modify the Quran, though the Quran can modify the hadith. In this hierarchical normative order, the Quran is the supreme source of law. Compatible with the Quran, an authentic hadith serves as a binding precedent. However, a rule of the Sunna cannot be stretched out of its meaning and context. For example, if the facts of a new problem are such that the application of a Sunna rule would lead to inequity or injustice, the Sunna, though still valid in its rightful sphere, cannot be used to solve the problem. In such situations, *ijtihad* would allow that a new rule be decreed. The new rule decreed through *ijtihad*, however, must fit in with the broader landscape of the Basic Code. This methodology is no different from the one employed in other legal systems, including common law. However, unlike common law under which a binding precedent can be altered or discarded,<sup>60</sup> a Sunna rule cannot be changed, though it can be confined to its facts and contexts.<sup>61</sup> The immutability of the Sunna is similar to that of the Quran, as both offer rules beyond revision or repeal. However, the Quran is universal and eternal, whereas the Sunna is the application of the Quran in a definite temporal and spatial context.

*Text and Meaning:* Text and meaning carry different weights in the Basic Code. In the case of the

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<sup>59</sup>Iran Constitution, Art. 2 (reference to the sunna of the Imams, called the innocents).

<sup>60</sup>Even in common law, there was a period when precedents were not subject to change. Thus common law had its own period of *taqlid*. It is unclear to what extent the common law doctrine of strict precedent was influenced by Islamic *fiqh*.

<sup>61</sup>Stoning to death for adultery is a rule of the Sunna, and not that of the Quran. When punishment for an act is not provided in the Quran but is extracted from the Sunna, the punishment must be carefully confined to the facts under which it was granted under the Sunna. Any attempt to universalize the Sunna punishment, regardless of facts, might fall outside the parameters of the Sunna.

Quran, the text is the supreme source of law. The Words of Quran are fixed, though their meaning is flexible. In the case of the Sunna, the focus of law is more on the meaning rather than words of the ahadith. Still, the reported words of ahadith cannot be altered. Even though no meaning can exist without words, the significance of the text of ahadith is not the same as that of the text of the Quran. This distinction is derived from a simple historical fact that the words of ahadith were retrieved and reported long after the prophet had passed away, whereas the Words of Quran were preserved as soon as they were revealed.

Furthermore, the Words of Quran are revealed whereas the words of ahadith are at best inspired, but not revealed. Scholarly controversy surrounds this distinction as well. At one time, for example, Abu Hanifa, one of the five founding jurists of classical fiqh, argued that even the Words of Quran were inspired, not revealed. He later changed his mind.<sup>62</sup> On the other end, some scholars argue that ahadith are no more than the prophet's opinions, which are neither revealed nor inspired. One implication of such a characterization of ahadith would have allowed subsequent generations of scholars to confine the prophet's opinions to its time and place. These controversies, rampant in the first era of ijtiḥad, have now been settled. There exists a broad consensus among Muslims that the Quran is God's Words whereas ahadith carry messages that God inspired in the prophet. According to this consensus, the laws contained in the Quran as well as in authentic ahadith constitute the Basic Code. These laws are binding on all Muslims. Although the Basic Code cannot be repealed, amended or put in abeyance, it may be interpreted to meet the needs of time. This allowance to expand Islamic law through interpretation of the Basic Code gave birth to classical fiqh.

## B. Classical Fiqh (632-874)

In addition to preserving the Basic Code, the first era of ijtiḥad invented fiqh, the concept of Islamic jurisprudence. While the Quran and the Sunna contain the fundamental principles of law, fiqh consists of substantive law and legal methods that the first era jurists formulated to solve legal problems for which no answers were directly available in the Basic Code. The substantive law

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<sup>62</sup>Abdur Rahim, *supra* note 32, at 66.

developed by fiqh covered wide areas of legal relations, including, among others, contracts, family law, decedents estate, trusts, and property. The greatest invention of fiqh, however, were the legal methods by which new rules can be extracted from the Basic Code. These legal methods established an interactive relationship between the Code and the jurist, implying that the Basic Code contains dynamic texts that yield new meanings in changed contexts provided the jurist strikes an intelligent and active relationship with these texts. “In the earth are signs for those of assured faith; and also in your own selves, will you not then see?”<sup>63</sup>

*Laws derived from the Basic Code:* Fiqh is founded on a simple principle that new laws can be formulated through reflective interpretation of the Basic Code. “We will show them Our signs in all the regions of the earth and in their own souls until they clearly see that this is the truth.”<sup>64</sup> In light of such verses of the Quran, the legitimacy of the interpretive principle was beyond doubt. The evolution of fiqh simply reaffirmed the actual practice of Muslim communities in the emerging Islamic empire, which supplemented the laws of the Basic Code with local customs, juristic opinions, and laws derived from other sources. Contrary to the popular belief, the Basic Code does not provide direct answers to all issues and problems facing Islamic communities. The Basic Code furnishes fundamental norms from which more specific rules can be derived, and the rules derived from other sources can be tested for their compatibility.<sup>65</sup> It is in this fundamental sense that the religion of Islam was perfected before the prophet’s death--for no one else but the prophet alone had been the exclusive medium to receive the Quran and furnish the Sunna. But the ever-evolving details of individual, social and economic life of Muslim communities with diverse cultures, languages, and legal customs require constant interpretation of the Basic Code. In fact, the interpretation of the Basic Code was done even during the prophet’s life. It became inevitable after his death.

Fortunately, a good number of the prophet’s companions were available to offer advice. The prophet’s companions -- men and women who associated with the prophet, who saw and heard the

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<sup>63</sup>Quran 51:20-21.

<sup>64</sup>Quran 41:53.

<sup>65</sup> We have revealed to you a Book explaining everything.” Quran 16:92 “We have neglected nothing in the Book.” Quran 6:39.

prophet decide cases, and who had an intuitive feel for the Basic Code and an understanding of social and spiritual contexts in which verses of the Quran were revealed and rules of the Sunna were delivered—attained a very special place in fiqh. The conduct and rulings of the first four caliphs (632-661), each one of whom was the prophet's close associate, set the tone and scope of classical fiqh

During the reign of the first four rightly-guided caliphs, the authority of ijtihad was exercised primarily by the caliph, even though juristic consultation was common. This era had no concept of separation of power. The power to govern, the power to decide disputes, and the authority to interpret the Basic Code, all three powers belonged to the caliph. Judges (qadis) do appear however when the empire expands. Still the caliph serves as the ultimate court. Furthermore, the secular was not separated from the sacred, as the caliph exercised the authority both as a worldly leader and as an imam, the religious leader. Caliphate and imamate resided in one and the same person. This merger made sense because the first four caliphs simply followed the model of power that the prophet himself had exercised. Those who adhere to the classical period of the first four caliphs still argue that Islamic state does not allow any separation of powers.

*Supremacy of the Basic Code:* During the reign of the first four caliphs, a norm seems to have been established that the ruler has no inherent authority to make laws. The norm might have arisen from the actual practice of the first caliphs, who claimed no independent legislative authority. This self-imposed restraint was most intriguing in light of the Quran, which states: Obey God and obey the prophet and those among you who have authority.<sup>66</sup> Of course, the ruler cannot invoke the Quran's command to demand uncritical obedience from the community, for the ruler's claim to obedience ranks third in the hierarchy; it is preceded by obedience to the prophet and God. The command nonetheless opens the theoretical possibility that in addition to God and the prophet, those in authority can furnish the rules of behavior. The first caliphs, however, did not interpret the provision to arrogate independent legislative authority to themselves. They seem more inclined towards the enforcement of the Basic Code and its interpretive applications. Even in subsequent decades of the first era, the ruler's secular power did not emerge as an independent source of lawmaking.

Consistent with the Quran's command to obey God, the prophet and the ruler, an even more

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<sup>66</sup>Quran 4:59

powerful norm came into existence that the ruler cannot legislate contrary to the Basic Code. Again, the norm was reinforced through the actual practice of the first four caliphs. The norm is in line with the normative ethos of Islamic consciousness infused with anti-egoism, humility, submission to One God, and obedience to the prophet. The Quran's injunction that God has neglected nothing and explained everything in the revelation places a huge burden on rulers, scholars and judges to search for answers in the Basic Code. When direct answers are unavailable, the Quran itself suggests that an effort be made to decipher the layers of meaning that the text carries. This mandatory effort (juhd) to seek guidance from the Basic Code, rather than rely on secular power or demands of the state, taught the first caliphs not to exercise authority in an arbitrary or rash manner. Thus, the first four caliphs established a firm principle that no Islamic government has unlimited or arbitrary authority to make and unmake laws, but must always uphold the Basic Code and operate within the limits of God's Laws. This precept provided the bedrock on which classical fiqh would be built in subsequent decades of the first era. The restraint on the government, however, does not prohibit or retard the interpretation of the Basic Code. It simply guides the Islamic state to anchor new laws in the principles of the Basic Code---for, God is the Lawgiver to the lawgivers.<sup>67</sup>

*Plural Interpretations of the Basic Code:* When the authority to interpret God's Laws is vested in individuals or institutions, difference of interpretation is inevitable. Recognizing that even the most pious and competent believers will disagree in their understanding of God's Laws, classical fiqh eschewed any absolutist notion that there is only one righteous interpretation of the Basic Code. The first four caliphs, who were the prophet's companions and relatives, did not advocate any notion of self-righteous interpretation. They had known the context in which the Quran's verses were revealed and they had the first-hand knowledge of the prophet's life and law. Each one of them was determined to rule in accordance with the Basic Code. If the answer to a problem was unavailable in the Basic Code, the caliph often conferred with the prophet's companions, thus establishing the practice of scholarly consultation in conducting affairs of the state. Though each caliph strived hard to derive new rules from the Basic Code, their interpretations on the same issues were not always the same. This interpretative diversity among the rightly-guided caliphs established a norm that it

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<sup>67</sup>Quran 95:8.

is neither a sin nor a sign of spiritual waywardness or intellectual weakness that even the best and the most pious, after diligent effort to seek guidance from the Basic Code, might reach different conclusions on the same issue.<sup>68</sup>

The Quran, for example, prohibits drinking liquor but prescribes no punishment. It simply warns that there is more harm than good in drinking. It is reported in ahadith that the prophet prescribed forty stripes with palm branches for drinking alcohol. Another hadith reports that the prophet smiled and did not order hot pursuit of an intoxicated man who ran away to avoid lashing.<sup>69</sup> Perhaps unsure about the exact punishment for drinking alcohol, the first four caliphs differed in prescribing punishment for drinking. The first caliph prescribed forty lashes; the second caliph however, upon consultation with the prophet's companions, raised the punishment to eighty stripes, though mildly administered.<sup>70</sup> The fourth caliph interpreted the Basic Code and concluded that the punishment for drinking liquor should be eighty lashes. He derived this rule through analogy by comparing the behavior of a person who consumes liquor with that of a person who falsely accuses a woman of committing fornication or adultery. The Quran prescribes eighty lashes for slandering a chaste woman.<sup>71</sup> The prescribed eighty lashes for drinking is thus based on a presumption that drinking liquor causes a person to make false accusations.<sup>72</sup> Eighty lashes for drinking liquor is not a rule of the Basic Code; it is a rule derived from the interpretation of the Basic Code. It is a rule of classical fiqh.

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<sup>68</sup> This simply means that many rules are simple preferences of jurists and interpreters. It also means that rules can be temporal and spatial. As human condition changes, past juristic preferences might no longer be valid. This relativity applies only to fiqh and not to the Basic Code, which is believed to be fixed in content, though flexible in application.

<sup>69</sup> Abu Dawud Bk. 38, hadith No. 4461 (trans. Ahmed Hasan).

<sup>70</sup> Sahih Muslim, Bk 17, hadith No. 4226 (trans. Abdul Hamid Siddiqui)

<sup>71</sup> Quran 24:4

<sup>72</sup> Wael Hallaq, *supra* note 10, at 8. This punitive deduction might be challenged on the basis of empirical evidence that a small quantity of alcohol might not lead to any distortion in the drinking person's behavior. Even if the punishment of eight stripes might be set aside in light of new empirical evidence, the prohibition against consuming alcohol is still mandated by the Basic Code. On the other hand, if a drunk person causes an accident and kills someone, the punishment would be much higher. This example demonstrates the need to revise the rule of classical fiqh dealing with the prohibition of consuming alcohol.

Despite legitimacy conflicts surrounding the office of the caliphate,<sup>73</sup> the first four caliphs actively engaged in the interpretation of the Basic Code. On some points, they all agreed; on others, they had different views. In divergent interpretations, however, they showed mutual respect thus establishing the ethic of interpretive tolerance. The norm of interpretive tolerance further flourished when the authority to interpret the Basic Code shifted from the caliph to the jurist.<sup>74</sup>

*The Rise of Jurists:* A remarkable and a more lasting era of interpretive jurisprudence dawned as the authority to engage in ijihad drifted away from the office of the caliph, primarily for political reasons attributable to succession rules. The emerging Islamic polity failed to forge a consensus on how power should devolve from one ruler to the next. Three of the first four caliphs were murdered, further deepening political divisions among competing political constituencies vying for power. The situation worsened soon after the fourth caliph was killed. The fourth caliph's older son, the prophet's grandson, assumed the office of the caliph. He however soon abdicated the office in favor of a more worldly wise ruler. This abdication was a remarkable event in the history of classical fiqh, for the prophet's grandson renounced the caliphate but retained the imamate, thus separating the power to govern from the authority to interpret the Basic Code. The caliph's authority to interpret the Basic Code was further undermined when the prophet's other grandson and his family members were slaughtered in the battle of Karbala at the caliph's order. Amidst this political chaos, the office

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<sup>73</sup>In the first thirty years after the prophet's death, the Islamic state was ruled by the prophet's close companions, the four rightly-guided caliphs, Abu Bakr, Omar, Osman and Ali. During this period, the caliph was both the executive and the lawgiver. In addition to discharging administrative duties of an emerging empire, the caliph was also the interpreter of the Basic Code. Few questioned the caliph's authority to interpret the Quran and the Sunna to design new rules of religious, social and economic behavior. Ijihad was at its best as the legitimacy of the caliph's rule-making authority was fully intact.

As soon as this first era of the caliphate comes to an end, the lawmaking authority begins to shift away from the caliph towards the Islamic scholar. This shift occurs in part because the office of the caliphate loses its spiritual legitimacy and in part because diverse families compete for political power. Even during the reign of the first four caliphs, the constitutionality of caliphate was far from certain. Some argued that the caliph should always be a prophet's blood relative, others opted for a more democratic rotation of political power. Among the first four caliphs, only Ali was the prophet's blood relative. The other three, though related to the prophet through marriages, did not have the same close blood ties as did Ali. The battle of Karbala--in which the prophet's grandson, and Ali's son, was brutally killed, along with his family members, at the caliph's order--is the saddest chapter in the early Islamic history. It created a permanent schism in the Islamic community, a schism which would later reappear in the Sunni-Shia divide. The battle of Karbala also weakened the spiritual authority of the caliphate as he was no longer the trustworthy source of new law derived from the Basic Code.

<sup>74</sup>1 Law in the Middle East 70(eds. Majid Khadduri etc. 1955).

of the caliph began to lose its spiritual dimension and communities looked towards holy men and women for guidance in their daily affairs and transactions.

The concept of the imam as the repository of spiritual and legal wisdom failed to bridge schisms that had arisen in the Islamic empire. In fact, the spiritual office of the imam would later become a source of as much divisiveness as had been the political office of the caliph. The Shia sect began to develop a conception of the imam that most Muslims would not accept.<sup>75</sup> For the Shia, the imamate was becoming a highly specialized order of spiritual leadership descending directly from the prophet's lineage.<sup>76</sup> For the Sunni, the imamate was becoming an honorable term to be applied to leading scholars regardless of their blood ties with the prophet.

The concept of the imam as a leading scholar facilitated a natural shift from the caliph to the jurist as the supreme interpreter of the Basic Code. The Quran and the Sunna had already supplied sufficient provisions to honor the Islamic scholar. For example, God Himself invokes the authority of scholars to demonstrate that He is One.<sup>77</sup> Furthermore, the Quran testifies that God has elevated scholars over others.<sup>78</sup> According to the prophet, the scholar among believers is like the moon among

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<sup>75</sup>Shia and Sunni are two major sects of Islam. An overwhelming majority of Muslims are Sunni. The Shias are mostly concentrated in Iran and Iraq, even though they live all over the world. This sectarian division started as a political dispute over political power. The Shia wanted the chief political office of the caliph to be reserved for the descendants of the prophet's daughter, Fatima. The Sunni did not accept such a political theory. As the schism deepened, theological dimensions were added to the Shia conception of Islam. Over the centuries, the two sects have lived with each other rather peacefully. More recently, however, the persecution of the Shia in predominantly Sunni countries has been mounting.

<sup>76</sup>Even within the Shia sect, the concept of imamate has been a source of discord rather than union, for all could not agree to the same succession rules to the office of the imam. Dwight M. Donaldson, *The Shiah Doctrine of the Imamate in Islamic Law and Legal Theory* 462-70, at 463. (ed. Ian Edge, 1996).

<sup>77</sup>Quran 3:18

<sup>78</sup>Quran 39:9; 58:11; 4:59; 35:28.

stars.<sup>79</sup> Thus the Basic Code reserves special respect and honor for the learned.<sup>80</sup> It was therefore not difficult for Islamic communities to turn to scholars as the heirs of the prophet-- particularly in matters of explaining, refining and furnishing rules of behavior consistent with the Basic Code.

The rise of the jurist as the custodian of classical fiqh overshadowed the prestige of the judge (qadi). Judges were seen as dispute-resolvers, not law-givers. In resolving disputes, judges relied on the Basic Code and fiqh, applying laws of the relevant madhad. Although judicial decisions, even if erroneous, were binding on the parties, they did not serve as binding precedent, for a judicial decision was not part of fiqh unless the judge rendering the decision was a jurist. The prestige of the jurist was so high in the eyes of the learned that many jurists refused to become judges and some were severely punished for such refusal. Abu Hanifa, the founder of the most popular school of law among Muslims, was thrown into prison and beaten with lashes when he declined the caliph's offer to assume the office of the chief judge.<sup>81</sup> Eminent jurists declined to become judges for they wanted to maintain their juristic freedom to interpret the Basic Code in utter honesty and without pressure from the caliph to issue opinions supporting the government. These Muslim jurists, determined to avoid even the appearance of being part of the government, were affirming the principle of intellectual integrity that, they believed, was hard to maintain by joining governmental institutions, including the judiciary.

*Development and Diversity of Legal Methods:* In addition to mistrusting the government as source of law, Islamic jurists also debated the question whether human rationality can be trusted to shape fiqh. Is reason a good legal method to test the validity of laws? Is reason a valid source of law when

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<sup>79</sup>Sunan Abu Dawud, Bk 25, Hadith no. 3634 (Trans. Ahmed Hasan). The hadith is also available in Abu Zakariya Yahya bin Sharaf An-Nawawi, Chap. 13, Hadith 1388, Riyadh -As- Saliheen (trans.Salahuddin Yusuf)(available online [http://www.dartmouth.edu/~alnur/ISLAM/HADITH/RIYADH\\_AS\\_SALIHEEN/book13.htm](http://www.dartmouth.edu/~alnur/ISLAM/HADITH/RIYADH_AS_SALIHEEN/book13.htm)). In another hadith, 'Abdullah b. 'Amr b. al-'As reported Allah's Messenger (may peace be upon him)as saying: Verily, Allah does not take away knowledge by snatching it from the people but He takes away knowledge by taking away the scholars, so that when He leaves no learned person, people turn to ignorant as their leaders; then they are asked to deliver religious verdicts and they deliver them without knowledge, they go astray, and lead others astray. Sahih Muslim, Vol.4, Hadith No. 6462 (Trans. Abdul Hamd Siddiqi).

<sup>80</sup> Muftis, Fatwas, and Islamic Legal Interpretation *in* Islamic Legal Interpretation (ed. Masud, Messick and Powers, 1996)

<sup>81</sup>Charles Adams, Abu Hanifa: Champion of Liberation and Tolerance *in* Islamic Law and Legal Theory at 378-387, at 386.(ed. Ian Edge, 1996).

the Basic Code does not furnish direct solutions to legal questions? Should the Quran itself be read in the realm of human rationality? These and many other related questions informed debates, conversations and opinions of the first era of ijihad.

However, these great questions arose while the status of the prophet's Sunna had not yet been fully determined. Discussions of reason therefore fell into the all-consuming controversy about the prophet's Sunna. The followers of ahadith (traditionalists) began to challenge the followers of reason (rationalists), on the questionable assumption that the two methods are inherently opposed to each other. The rationalists were worried about false and frivolous ahadith that had muddled the domain of law. They were also reluctant to subordinate human rationality to any uncritical embracing of revealed laws. Believing that human rationality itself is God's light, the rationalists intended to formulate classical fiqh by applying human intellect to the Basic Code. They accepted very few ahadith as part of the Basic Code, only those ahadith which either repeated the injunctions of the Quran or otherwise met the test of reason. The rationalist approach thus limited the number of ahadith to be incorporated into the Basic Code.

Opposed to the rationalists were the traditionalists who wanted to enforce the prophet's Sunna, even if the reported ahadith fell short of reason or were contrary to human intellect. Presuming that human intellect is defective, fickle, and malleable, the traditionalists wished to build classical fiqh on a more stable foundation. For them, the prophet's Sunna was such perfect foundation.

Traditionalists won the day, if not argument. The role of reason as an independent source of juristic rule-making was thus blunted in classical fiqh. Reason must not only submit to the Quran but also to the rules laid down in the Sunna. However, the victory of the Sunna over human intellect was neither unconditional nor absolute. The traditionalists came under increasing pressure to verify the authenticity of each hadith to be incorporated in the Basic Code. Furthermore, traditionalists were forced to develop a methodology to iron out inner consistencies among authentic ahadith or any inconsistency between the Quran and ahadith. Thus intellect could not be ousted from the realm of classical fiqh. It simply reappeared in legal methods adopted to ascertain the meaning of the Basic

Code.<sup>82</sup>

The founders of classical fiqh developed several legal methods to interpret and supplement the Basic Code.<sup>83</sup> It is important for clarity to distinguish rules of conflict resolution from legal methods, as used in the analysis here. Founding jurists developed the rules of conflict resolution<sup>84</sup> to iron out the seeming incongruities between verses of the Quran, and the seeming incompatibilities between the Quran and the Sunna. Legal methods include the rules of conflict resolution but serve other multiple tasks as well. Some legal methods, such as analogy and logic, serve as juristic tools to interpret the Basic Code in order to extend or limit its application. Some legitimize the reception of laws found in sources other than the Basic Code, such as local customs. Some legal methods, such as equity or public good, provide guiding criteria to test the validity of rules derived through interpretation or received from outside the Basic Code.

Among legal methods of the first era of ijtihad, analogy (qiyas), logic (istidlal), custom (adat), consensus (ijma), public good (istislah), and equity (istihsan) are the most prominent. Almost all schools subscribe to analogy as a permissible legal method to interpret the Basic Code, for God Himself uses analogy and comparison to clarify points in the Quran. Almost all schools of fiqh recognize custom and consensus as supplementary sources of law, though some with more reservation than others. With respect to equity and public good, however, the classical schools are

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<sup>82</sup>Some reformers advocate the use of reason as a source of interpretation of the Basic Code. Wael Hallaq, *supra* note 10, at 212.

<sup>83</sup>Some legal scholars fail to distinguish between the Basic Code and legal methods used to interpret the Basic Code. Noel Coulson, for example, assumes that “Sharia law is formally and systematically represented and derived from four principle sources.” He then lists the Quran, sunna, ijma and qiyas. After listing these sources, Coulson further comments that qiyas is a legal method “by which the principles established by the Quran, sunna and ijma are extended to cover new cases.” If qiyas is a legal method, which it is, it cannot be a principal source of law, for its reach and legitimacy are derived from the Basic Code. *See* Noel James Coulson, *Muslim Custom and Case-Law in Islamic Law and Legal Theory* at 259 (ed. Ian Edge, 1996).

<sup>84</sup>The concept of abrogation (tanseekh), for example, is such a rule of conflict resolution. It is derived from the verse of the Quran: “God repeals what he wills, or confirms.” Quran 8:39. According to Shafi, the Quran allows abrogation under which an order is repealed by a subsequent order. For example, God first ordered Muslims to pray facing Jerusalem. A subsequent command ordered Muslims to pray facing Kaba in Mecca. Thus, the first order contained in the Quran was repealed by the subsequent order. *See* Shafi’i’s *Risala*, *supra* note 58, 123, at 133 (1961). I take the view that abrogation is a questionable concept, and that all verses of the Quran are equally valid. The seemingly irreconcilable God’s Orders emerge from changed situations and contexts and even the so-called abrogated verses continue to contain instructive materials. However, this point will be developed in another article and cannot be further pursued here.

less than unanimous.

For example, the Hanafi school--the most pragmatic and realist school--employs equity (istihsan) when a highly formalized analogical reasoning leads to unjust outcomes. In such cases, the jurist abandons the fruit of analogy in favor of a more equitable solution to the problem. The Shafi school--a highly formalistic school in its interpretive motif-- is opposed to equity (istihsan) as a valid legal method and considers it to be a method that makes laws--something, according to Shafi, a jurist is not supposed to do.<sup>85</sup> The Maliki school--inclined to interpret the Basic Code in light of local customs combines pragmatic and formalistic techniques--proposes its own alternative legal method to equity (istihsan) considered to be a loose standard that dilutes the force of law. This alternative method is known as istislah or public good--ironically, an equally loose standard <sup>86</sup> to expand the Basic Code. Public good as a legal method is nonetheless acceptable to the Maliki school, since for them public good is not an abstract idea but is defined and constrained by local customs.

Likewise, the schools differ over the use of logic in fiqh. The Maliki and the Shafi schools use logic (istidlal) as a distinct legal method to derive rules. For example, they use logic to argue that Jewish and Christian scriptures are valid sources of law for Muslims to the extent the Basic Code has not overruled their provisions. The Hanafi school rejects this logic on the pragmatic presumption that the Quran does not address all the alterations made (or which might be made in the future) in other scriptures.<sup>87</sup> However, the laws of previous scriptures are acceptable to the Hanfai school only if they are specifically approved in the Quran. Thus for the Hanafi school, the fact of alteration is more decisive than pure logic.

*Ijma or Consensus:* One legal method, which should figure prominently in the evolution of fiqh, is know as ijma or consensus. The prophet has said: "My followers will never agree upon what is

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<sup>85</sup>Shafi'i's Risala, supra note 58, 304 (1961). Abdur Rahim, supra note 32, at 158.

<sup>86</sup>The Maliki school for example would allow the use of force to seek confession of theft. For such a use of force, according to this school, will serve the public good. Of course, forcible confessions raise complex legal and moral questions of the legitimacy of such a method. Other Muslim scholars have therefore argued that any use of torture to obtain confessions is unacceptable.

<sup>87</sup>Abdur Rahim, supra not 32, at 66.

wrong.” Historically, a rule was considered unimpeachable if the prophet’s companions approved it unanimously. In fact, this legal method became so sacrosanct that some jurists began to treat it, though erroneously, as the third part of the Basic Code.<sup>88</sup>

It is incorrect to assume that ijma is a primary source of Islamic law.<sup>89</sup> Just like qiyas, ijma is also a legal method by which the meaning of the Basic Code is determined. Qiyas is analogical reasoning, ijma is reasoning by means of consensus. Qiyas is the solo intellectual effort of a jurist to interpret the Basic Code, whereas ijma is the shared effort of a community of scholars to furnish new rules through discussion and agreement. Scholarly ijma is also inspired by the Basic Code, although the consensus might be built on a shared intuition rather than a shared reason.

The concept of ijma can be interpreted in two important ways, juristic and democratic. The juristic concept of ijma focuses on the consensus of the learned whereas the democratic concept involves the consensus of the people. The juristic concept assures that persons formulating the rules are knowledgeable. The democratic concept safeguards the voice of ordinary Muslims. Each version of ijma has its relative merits and shortcomings.

Using these legal methods, classical fiqh produced a corpus of law designed to solve problems that arose or might arise in legal transactions. The process was highly creative in its methodology as well as content. As the time passed, the founders of fiqh became mythical figures and acquired an aura of holiness. What they produced came to be regarded not simply law derived from the Basic Code but a way of living an authentic Islamic life. Adherence to their jurisprudence became a madhab, carrying the connotations of faith. The concept of the shariah was invented to include their laws along with the laws found in the Basic Code. Any repudiation of their fiqh became sinful in the eyes of some. And for some, classical fiqh in the guise of the shariah is as sacred as is the Basic Code. This uncritical deference to classical fiqh launched an era of strict precedents, which stifled creativity, revision and change.

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<sup>88</sup>Several ahadith support the concept of Ijma.

<sup>89</sup>Ahmad Hasan, Al-Shafi and Islamic Jurisprudence 413-20 *in* Islamic Law and Legal Theory 413-20 (ed. Ian Edge, 1996). (examining Imam Shafi’s skepticism about ijma as a principal source of law).

## II. The Closure of Creative Ijtihad (875-1875)

The creative period of the first era of ijtiḥād came to an end, partly by gradual exhaustion of energy and partly by intellectual resignation of subsequent jurists. What followed the creative era were the long ten centuries of taqlid, that is, an era of strict precedents. There was no one dramatic moment when ijtiḥād was abandoned in favor of taqlid.<sup>90</sup> The shift was gradual but progressively stronger. Under taqlid, Muslims were obligated to follow not only the Basic Code, which is indeed eternal and unalterable, but also the madhabs. Taqlid, taking the shariah as a unified corpus of law, collapsed the distinction between the revealed and the unrevealed, making both sources of laws equally binding. The door of ijtiḥād was closed on the assumption that the interpretation of the Basic Code had been completed and that classical fiqh needed no more fundamental alteration or adjustment.<sup>91</sup> The closure, however, was far less than complete, as many Muslim jurists, in both Sunni and Shia sects, continued to engage in limited ijtiḥād.<sup>92</sup> However, more and more jurists were interpreting the doctrine rather than the Basic Code. Taqlid did not prohibit interpretation of the interpretation, it only suppressed creative interaction with the Basic Code. Consequently, fiqh began to turn inward, losing touch with the evolutionary forces of life.

*Loss of Intimacy:* There are many reasons behind the closure of creative ijtiḥād. The foremost among them is the simple fact that learned scholars, who engaged in ijtiḥād, derived their intellectual and spiritual heritage from personal intimacies first with the Prophet and then with the Prophet's companions. The ijtiḥād of the first four caliphs, for example, was regarded as the most trustworthy

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<sup>90</sup> This period is measured from the death of Imam Muslim in 875 to the teachings of Jamal Abdal al-Afghani (1838-1897) who initiated the second era of ijtiḥād. The year 1875 has no special significance except that it counts well the ten centuries of the closure of creative ijtiḥād. Al-Afghani's book, *The Truth about the Materialists*, was published in 1880, which laid down the need to modernize Muslim communities. See Nikki R. Keddie, Sayyid Jamal ad-Din al-Afghani (1972). Around this period, after centuries of forced exclusion, the study of philosophy was restored at the famous university of Al-Azhar in Egypt. This was due to the efforts of Al-Afghani and his disciple, Muhammad Abduh. See Fazlur Rahman, *Islam* 123 (1979).

<sup>91</sup> Joseph Schacht, *An Introduction to Islamic Law* 70-71 (1964). This closure however did not advocate the supremacy of any single school of jurisprudence or any one legal method.

<sup>92</sup> As one author has put it: "Cases of first impression do not cease to occur, and must be decided somehow." Vesey-Fitzgerald, *supra* note 34, at 9.

since each of them personally knew the prophet, heard the prophet decide cases, and had a deep understanding of the Quran, and since these caliphs were there over a period of twenty two years when the Quranic verses were being revealed. Likewise, the ijtiḥad of the other companions of the prophet and their disciples was also very highly regarded.<sup>93</sup>

As the jurist moved away in time from the prophet's ministry, his credibility to engage in ijtiḥad became harder to establish. This gradual phasing out of the authentic jurist is discernable even among the four Sunni schools of jurisprudence (madhabs). Imam Abu Hanifa (d.767) and Imam Malik (d.795), for example, were much closer to the prophet's ministry. Their schools of interpretation have much more following than the schools of Imam Shafi (d.820) and Imam Hanbal (d.855),<sup>94</sup> who were comparatively removed from the prophet's time. Imam Abu Hanifa,<sup>95</sup> closest to the prophet has the most following, whereas Imam Hanbal, the most removed in time from the prophet, has the least following among Muslims. Thus, the closure of ijtiḥad made sense to generations of Muslims who could not see the later jurists having any first hand knowledge of the prophet's ministry. Furthermore, this phasing out of the jurist credibility is rooted in a strong Muslim belief that mere human intellect cannot be trusted as a source of law. No matter how skillful and learned, a Muslim jurist is trusted only if he can establish a strong relationship with the prophet, either through family ties or by means of an impeccable personal character demonstrated through exemplary piety. As the time passed, the tests became harder to satisfy. Muslims continued to respect highly learned and pious scholars during the period of strict precedents, and even accepted their opinions as law. Yet, no scholar could muster the credibility anchored in intimacy with the

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<sup>93</sup>A hadith states: "The most beneficial ones of my Umma are those who live in my time (companions). The next most beneficial ones are those who succeed them (successors). And the next most beneficial ones are those who will come after them (successors of successors)." This hadith was mentioned by Imam Shafi in his *Risala*, see Shafi's *Risala*, supra note 58, at 286.

<sup>94</sup>Imam Hanbal was Imam Shafi's student in Islamic law. Imam Hanbal collected thousands of ahadith and documented them in his work, known as *Musnad*. In the 18th century, the Hanbali system received a vigorous support from the Wahhabi movement founded by Muhammad bin Abdul Wahab (1703-1787 AD), the founder of the Wahhabi movement.

<sup>95</sup> See supra note 80. (This source describes the life of Imam Abu Hanifa).

prophet to found a new school of fiqh.<sup>96</sup>

In the spirit of interpretive tolerance, now fully established in fiqh, even taqlid upholds the principle that there is no one righteous interpretation of the Basic Code. And it preserves the validity of multiple interpretations. Accordingly, the four Sunni madhabs remained mutually respectful and equally legitimate. Even the Shia madhab has been tolerated well, though recent persecutions of Shias in some Islamic countries have breached the ethic of tolerance. For the most part, Muslims of succeeding generations have been free to opt for one or the other madhab, but they are often required to strictly follow the rules of the chosen madhab. Despite the option to move from one madhab to the other, the walls of each madhab remained tall and strong. Most scholars remained deferential to the basics of the madhabs. Attempts to extract a new school of jurisprudence from the Basic Code are often seen as acts of rebellion and sabotage. In this sense, fiqh has been detained within the fortification of the five madhabs.

*Loss of Minhaj:* Wael Hallaq's scholarship makes an impressive, though unsuccessful, case that the door of ijtiḥad has never been closed. His work most certainly highlights an already well-known point that the school-bound ijtiḥad did not cease to exist.<sup>97</sup> This highlighting refutes the view that Islamic law came to a standstill after the establishment of the fiqh schools. Hallaq's point is also well-taken that the concept of taqlid has been criticized throughout Islamic history, as jurist after jurist pointed out its suffocating effects. Nonetheless, Hallaq has failed to dis-establish the larger point that such was the force of taqlid that no new school of jurisprudence was successfully instituted. Most importantly, no new legal methods were crafted to access the Basic Code. Perforce, jurists continued to work with the methods established in the first era of ijtiḥad. Breaking no new ground in substantive law or legal methods, taqlid commentaries did refine the contents and methods

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<sup>96</sup>In the 14<sup>th</sup> century, Ibn Taymiyya (1263-1328) launched a powerful scholarly attack on taqlid and argued for the institution of ijtiḥad de novo. Though highly controversial in his time, some of Taymiyya's ideas have influenced later jurists, including Abd-al Wahab who established the Saudi school of Wahhabism. Yet, Ibn Taymiyya failed to establish a new school of jurisprudence. See Joseph Schacht, *Islamic Law in Contemporary States*, 1959 American J. Comp. Law 8. See also An-Naim, supra note 6, at 37.

<sup>97</sup>Wael Hallaq, *Was the Gate of Ijtiḥad Closed?* 16 *Inter. J. Middle East* (1984) reprinted in *Islamic Law and Legal Theory* (ed. Ian Edge, 1996). Wael B. Hallaq, *Ifta and ijtiḥad in Sunni Legal Theory: A Developmental Account in Islamic Legal Interpretation* (ed. Masud, Messick and Powers, 1996)

of established schools, thus keeping the doctrine alive. But the doctrine itself had lost creativity and boldness. The era of taqlid should be examined not as the end of interpretive law but as the end of creativity and imagination embodied in the concept of minhaj.<sup>98</sup>

The most damaging effect of taqlid has been the closure of fresh reasoning. In fact, taqlid launched strict formalism that for the most part required dogmatic suspension of the reasoning process. One eminent jurist captures the core of formalism, advising Muslims in the following way: When you have a question, ask only for the rule of the law (mas'alah). But do not ask for the basis on which the ruling is given(dalil).<sup>99</sup> The advice is sound to the extent that persons not trained in law might fail to appreciate the force of reasoning behind the rule, thus opening the rule to debate and doubt. But the advice also entrenches the motif of strict precedents, because most rules of the madhab have indeed been detached from historical, social and economic contexts in which they were first made. The original dalil supporting the rule might no longer be relevant or valid. Still, the rule continues to be binding. This is the classical symptom of legal formalism. A legal system loses touch with reality whenever the reasoning process is abandoned, whenever the justification of the rule is automatically presumed, and whenever old rules are binding even if they fail to address the problems arising from changed social and economic conditions.

Closely related to taqlid is the doctrine of bida that prohibits innovations. The doctrine of bida is derived from the prophet's pronouncement that innovations in the faith are prohibited.<sup>100</sup> The doctrine, in its most strict meaning, has been interpreted to prohibit even minor changes, such as the length of the man's beard and eating with a fork or spoon. In its most consequential impact, the ban on innovation has been extended to discourage any deviation from the social, economic, military and legal models of early Islam. Periodic attempts to erase innovations have been made to bring Islamic communities back in conformity with the classical Islamic era. The concept of bida, however, is controversial because probative evidence is available to support that good innovations that

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<sup>98</sup>Wael Hallaq, supra note 10.

<sup>99</sup>Sajid A. Kaym, *The Jammāt Tableegh and the Deobandis*, Chap. 12 (2001)(available online <http://www.ahya.org/tjonline/eng/contents.html>); The idea is attributed to a great Indian scholar Moulana Ashraf Ali Thanvi, whose book, *Taqlid and Ijtihad* (original Urdu)(also available online), examines the comparative arguments of strict precedent and innovation in Islam.

<sup>100</sup>Sahih Muslim, vol. 2, hadith no. 1885 (trans. Abdul Siddiqi).

strengthen the faith are acceptable.<sup>101</sup>

The most powerful movement against bida is the so-called Wahhabism, attributed to the teachings of Muhammad ibn Abd-al-Wahhab(1703-92), and practiced in the present-day Saudi Arabia. On a practical level, al-Wahhab's teachings criticized the cult of saints and worship at their tombs. Declaring these practices as unlawful innovations, al-Wahhab preaches a simpler and nostalgic version of Islam to be found in the early Islamic period. In demolishing medieval innovations, however, al-Wahhab also challenges the theoretical underpinning of taqlid by arguing that the only legitimate source of Islamic law is the Basic Code--the Quran and the Sunna.<sup>102</sup>

This idea of going back to the basics of Islam, rather than unwarranted attacks on misunderstood sufism, is the hallmark of Wahhabism, for it opens the door of re-reading the Basic Code without cumbersome historic baggage. Detached from some constraints of classical fiqh, however, the followers of Wahhab have interpreted the Basic Code in highly literal and conservative ways. Some of their interpretations, including a ban on women to drive vehicles, have been accepted nowhere else in the Islamic world. Despite literal applications, Wahhabism has played an efficacious role in shaking the foundation of taqlid. While the Wahhabi movement has, for the most part, remained confined to Saudi Arabia and failed when exported to Afghanistan via the Talibans, its more generic message has touched the hearts of all Muslims that something must be done to reformulate classical fiqh. Despite its lack of popularity in the Islamic world, Wahhabism is a reform movement that sets the stage for the second era of ijtihad.

### III. The Second Era of Ijtihad (1875-present)

The second era of ijtihad confronts a new world. The imperial era no longer exists. Great Islamic empires--the Umayyads(661-750), the Abassids(750-945), the Ottomans(1301-1918), and the Mughuls(1526-1858)--has dissolved, leaving behind ethnically distinct Islamic societies

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<sup>101</sup>Sahih Bukhari, vol. 3, hadith no. 227 (trans. Muhsin Khan).

<sup>102</sup>Later, his followers added ijma as of the first three centuries as a valid source of law. *See* Abdur Rahman, *supra* note, 32, at 197-198.

scattered across the world.<sup>103</sup> Introduced mostly through colonialism, the Western influence has permeated the entire Islamic world. And in the past one hundred years, many Islamic legal systems have borrowed heavily from European civil codes, English common law, and more recently from American constitutionalism.<sup>104</sup> Even the Soviet communism has left marks on Islamic consciousness as many Muslim states experimented with Islamic socialism, recognizing the economic welfare of individuals as state obligation.<sup>105</sup> In the past few decades, the emergence of universal values in the form of human rights has touched all legal systems, including those of Islamic nation-states.<sup>106</sup> This confluence of external impacts has awakened Muslims to find their own minhaj. They do not want to banish religion from the realm of law. But at the same time, they are aware that an absolute adherence to classical fiqh is losing scholarly support and the call for ijihad is gaining pitch and momentum across the Islamic world.<sup>107</sup>

In response to this call, Islamic Free State offers the basic political and legal structure to enhance the reformulation of classical fiqh. Repudiating the concept of occupation, colonialism, racism, apartheid, and foreign domination, Islamic Free State liberates Muslims from external oppression. It also liberates them from domestic oppression by reforming undemocratic political institutions and centers of power. Instituting democratic governments under which ruling elites are periodically accountable to the general population, Islamic Free State embraces the principles of self-determination and the will of the people.

While the will of the people is the basis of governmental authority, Islamic Free State does

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<sup>103</sup>Ira M. Lapidus, *A History of Islamic Societies* (1988).

<sup>104</sup>J.N.D. Anderson, *Law as a Social Force in Islamic Culture and History* in *Islamic Law and Legal Theory* 547, (ed. Ian Edge, 1996).

<sup>105</sup>Ali Khan, *Constitutional Kinship between the Soviet Union and Iran*, 9 *New York L. Sch. J. Inter & Comp. L.* 293(1988).

<sup>106</sup>Peter A. Samuelson, *Pluralism Betrayed: This Battle between Secularism and Islam in Algeria's Quest for Democracy*, 20 *Yale J. Int'l L.* 309, 358 (1995)(the ideals of human rights and pluralism are compatible with developments in the mainstream of resurgent Islam).

<sup>107</sup>The call for resurrecting the office of One Caliph for the entire Muslim world is no longer a desirable idea. Likewise, theories of Pan-Islamism are no longer popular. And the clash of civilizations concept is not taken seriously. Still, the movements for self-determination in Chechnya, Palestine and Kashmir are broadly supported in the Muslim world.

not embrace the linear notion that all laws flow from the power of a representative government or a constitution.<sup>108</sup> Islamic Free State adopts a constitution to clarify rules of succession and distribute powers among governmental branches. However, it does not envisage state constitutions as the repository of highest norms to which all laws must be subordinated. Such a notion of secular constitutionalism suppresses ijtiḥād; it separates human laws from God’s Law.

Instead, Islamic Free State recognizes the fluid supremacy of the Basic Code. It acknowledges the Quran and the Sunna as the supreme sources of law to which Islamic Free State constitutions, laws and regulations must conform. The Basic Code is not altered, set aside or repudiated, for Islamic Free State safeguards the sacred relationship between God and the people as expressed in the Quran and the Sunna. However, Islamic Free State also recognizes that the meaning of the Basic Code is not cast in stone but in a flexible language, for God has established a creative relationship with the creatures. Furthermore, Islamic Free State is no longer bound by the fiqh of the first era of ijtiḥād. All madhabs (schools of law) developed in the first era are respected, studied and their laws used when appropriate. The rules of classical fiqh are nonetheless persuasive, not binding.<sup>109</sup> Therefore, Islamic Free State is at liberty to alter or repeal specific provisions of any madhab. In altering or repealing the rules of old fiqh, however, Islamic Free State cannot undermine or set aside the Basic Code. Even the reformulation of classical fiqh must be done through rigorous legal methods and not through mere expedient political will or through inconsiderate juristic effort. In this regard, the Quran reminds every Muslim, including jurists: “And pursue not that of which you have no knowledge.”<sup>110</sup>

#### A. Reformulation of Legal Methods

In the second era of ijtiḥād, the legal methods of classical fiqh are being reformulated to

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<sup>108</sup>See generally H.L.A Hart, *The Concept of Law* (1962).

<sup>109</sup>Muhammad Iqbal, *supra* note 7. “The teaching of the Qur’an that life is a process of progressive creation necessitates that each generation, guided but unhampered by the work of its predecessor, should be permitted to solve its own problems.” *Id.*, at -----

<sup>110</sup>Quran 17:36.

reflect contemporary political, legal and economic realities.<sup>111</sup> Consensus, analogy, equity and public welfare remain useful tools to interpret the Basic Code in contemporary contexts. Given the complexity of contemporary transactions, however, new legal methods must also be crafted to make useful and efficient laws. These new legal methods vary from state to state, as each Muslim community find the most appropriate ways to interweave the Basic Code with its customs and legal traditions. The new methods are no longer geared to verbal niceties of sacred texts but are anchored in broad purposes that the Basic Code has established for human beings in general and for Muslims in particular. This article does not offer an exhaustive list of legal methods to be used in the second era of *ijtihad*. It does, however, identify two legal methods for the consideration of Islamic Free States.

First, Muslims may use the balancing method (*al-mizan*) to weigh the compatibility of proposed laws with the Basic Code.<sup>112</sup> This method is consistent with God's own method of reasoning. In the case of gambling, for example, the Quran measures profit and loss, reminding rational believers that gambling is essentially a losing activity in that it carries more harm than benefit.<sup>113</sup> The balancing method is also consistent with the established Sunni doctrine of purpose (*hikmat* or *maslahat*) for understanding God's Law.<sup>114</sup> The balancing method considers whether the proposed legislation advances an important goal of the Basic Code. For example, a tax statute designed to raise revenue for the promotion of primary education is allowed under the Basic Code,

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<sup>111</sup>Modern Islamic constitutions recognize the supremacy of the Islamic Basic Code. Consider, for example, the constitutions of Egypt, Iran and Pakistan. Egypt's constitution recognizes that classical *fiqh* shall be the principal source of legislation. The provision fails to distinguish between the Basic Code and rules derived from the *fiqh*. It appears that the legislation must not only conform to the Basic Code but must also be in harmony with the Maliki school of law enforced in Egypt. Egypt Constitution, Art. 2. Iran's constitution envisages a perpetual practice of religious jurisprudence derived from the Quran and the Sunna of the Imams. Iran Constitution, Art. 2. This statement refuses to distinguish between the Prophet's sunna and the sunna of others. It appears that the development of Shia jurisprudence is under more constraints as it must comply with a lot more sources than just the Basic Code. The Pakistani constitution specifically demands that all laws be in conformity with the Basic Code, that is, the Quran and the Sunna. However, it upholds classical *fiqh* interpretations of the Basic Code. Pakistan Constitution, Art. 227.

<sup>112</sup>The balancing or measurement method is derived from the concept of balance that the Quran often repeats in various contexts. For example, according to the Quran, the sun and the moon have been balanced to mathematical certainty. Furthermore, the Quran mandates that Muslims respect the principle of balance and measure accurately. Quran 55:6-8.

<sup>113</sup>Quran 2:219.

<sup>114</sup>Abdur Rahim, *supra* note 32, at 141.

since a fundamental theme of the Quran is to extract communities from ignorance and expose them to knowledge.<sup>115</sup> The balancing method may also be used to enact laws that do not retard a specific goal of the Basic Code. Modern intellectual property laws designed to protect human inventions for a limited statutory period, for example, are not contrary to any expressed principle of the Basic Code, even if it is difficult to identify a principle from the Basic Code that directly approves intellectual property laws. This difficulty, however, is not be a barrier to the acceptance of such laws for the balancing method allows an incentive for invention that can benefit the whole world. Likewise, environmental laws designed to protect the integrity of ecosystems are justifiable under the balancing method, as the Quran states: “Mischief has appeared on the land and sea, because of (the need) that the hands of man have earned, that (God) may give them a taste of some of their deeds: in order that they may turn back (from evil).”<sup>116</sup> The command of the Quran is most consistent with modern environmental movement that aspires to restore the earth by repairing the damage that the human hand has inflicted on ecosystems. These examples are not exhaustive but illustrative of the balancing method that Muslim communities can use to restore the lost balance in existing laws or to measure the costs and benefits of proposed legislation.

Second, Islamic Free State may use universal values as a legal method to test the validity of proposed laws. The Quran and the Sunna do not teach normative isolation of Islamic legal systems. Repeated deferential references to sources other than the Quran are meant to place Islamic laws in a universal context. For example, the Quran defines a believer as one who not only believes in the Quran but also in revelations contained in earlier scriptures.<sup>117</sup> God’s Law is not sent just for Muslims but “as a guide to human beings, and He sent down the Criterion of judgment between right and wrong.”<sup>118</sup> These references demonstrate that non-Muslims are also blessed with God’s Light, and their effort, along with Muslims, in shaping universal values good for all human beings is part

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<sup>115</sup>As mentioned before, the very first revealed to the prophet was iqra, which means read. In Pakistan, an iqra tax has been imposed on exports to raise revenue for the education of poor children. This iqra tax is in harmony with the Basic Code.

<sup>116</sup>Quran 30:41

<sup>117</sup>Quran 2:4.

<sup>118</sup>Quran 3:4.

of ijthihad.

As an integral part of human civilization, Islamic Free State shuns normative isolation. It interacts with other legal systems, freely borrowing legal solutions compatible with the Basic Code. It also participates in proposing, drafting and adopting universal values. Incorporated in global treaties, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, universal values express the combined wisdom of the peoples of the world.<sup>119</sup> These values exist above and beyond cultural and religious diversity and no concept of cultural relativity can repudiate their universality. Some Islamic states have been fully engaged in drafting treaties containing universal values; others have been reluctant to do so. Islamic Free State enforces universal values through the domestic legal system. Domestic application of universal values will create a new fiqh that interweaves these treaties into the texts and contexts of the Basic Code.<sup>120</sup> Muslim legislatures, jurists and judiciaries are likely to make a concerted effort in the form of institutional ijthihad to demonstrate the compatibility between universal values and the principles of the Quran and the Sunna.<sup>121</sup>

For example, the Basic Code establishes a clear guideline that there is no compulsion in matters of faith.<sup>122</sup> This freedom of religion and worship is also a universal value protected under a variety of human rights treaties.<sup>123</sup> Accordingly, institutional ijthihad conducted in Islamic Free State must not interfere with private faith, a direct relationship, which Islam recognizes, between God and individual, a Muslim or a non-Muslim. In respect for this individual-divine relationship, Islamic Free State refrains from investigating whether a person is saying daily prayers or fasting or

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<sup>119</sup>The new Afghanistan constitution refers to the Universal Declaration of Human Rights.

<sup>120</sup>Quran 9:4 (the injunction to fulfil treaties provided they are not violated by other parties).

<sup>121</sup>There can be no incompatibility with universal values and the Basic Code. This is so because no value can become universal if it is opposed by Muslim states representing one fifth of humanity. Hence, there exists little justification to establish any normative hierarchy between the Basic Code and universal values.

<sup>122</sup>Quran 2:256.

<sup>123</sup>Universal Declaration of Human Rights, Art. 18. International Covenant on Civil and Political Rights, Art. 18; *See generally* Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief.

whether a person who professes to be a Muslim is indeed so.<sup>124</sup> Likewise, respect for religious minorities and their privacy of belief are the values that Islamic Free State reaffirms through institutional ijtiḥad.

In addition to religious tolerance, institutional ijtiḥad protects diversity that is emerging as a universal value. The Basic Code affirms the principle of diversity by stating that God has created human beings in diverse tribes, colors and languages. “And among His Signs is the creation of the heavens and the earth, and the difference of your languages and colors. Verily, in that are indeed signs for those who know.”<sup>125</sup> This diversity is created, the Quran states, so that the people can develop shared customs and intimate bonds of mutual understanding.<sup>126</sup> The purpose of diversity is not to deepen mutual mistrust or despise. The reference to tribes underscores the significance of varying customs and attendant legal obligations. The reference to languages is recognition of the fact that, although the original language of the Basic Code is Arabic, Islam does not undermine the natural linguistic diversity that exists in the real world. This affirmation of diversity (for its legitimate reasons) serves as the foundation principle of constructing institutional ijtiḥad across the Muslim world. Accordingly, institutional ijtiḥad incorporates the principle of diversity to recognize varying customs and linguistic traditions.

This recognition of customary and linguistic diversity, however, should not be taken as a license to undermine the basic traditions of Islam. Institutional ijtiḥad recognizes the force of custom within the framework of the Basic Code and not outside it. Custom is a supplementary source of law and its legality is unassailable if the custom is compatible with the letter and spirit of the Basic Code. However, no custom must violate clear laws of the Basic Code. In emerging Muslim communities, local customs contrary to the provisions of the Basic Code may gradually be changed to assure their conformity with the Basic Code. Since customary law is deeply rooted in habits and minds of the community, it is often resistant to change. Institutional ijtiḥad does not use force to change deeply rooted customs, but educates the community so that the change is based on informed

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<sup>124</sup> The State however may enforce the law of zakat for giving a portion of surplus income for the benefit of the poor. The law of zakat, though related to private faith, is nonetheless a social obligation.

<sup>125</sup> Quran 30 22

<sup>126</sup> Quran 49 13

consent.

*Languages of ijthad:* Consistent with the principle of diversity, Arabic, which remains the language of the Quran and daily prayers, is no longer the only authorized language of ijthad.<sup>127</sup> Institutional ijthad allows that laws be enacted, interpreted, reviewed, and applied in national languages. This allowance is in strict compliance with the Basic Code, which recognizes linguistic plurality and, as a general principle, prefers facility over difficulty. As a pragmatic and universal faith, Islam cannot be confined to any one language. Likewise, a genuine development of Islamic law would require that Muslims across the world be able to think and reflect upon the Basic Code in their mother tongues. Accordingly, the languages of institutional ijthad are many. In a highly diverse Muslim world, state legislatures, judiciaries and jurists cannot be forced to adopt Arabic as the sole language of law.<sup>128</sup>

In the first era of ijthad, one indispensable qualification of jurists (mujtahids) was a superior knowledge of the Arabic language. This qualification made sense when ijthad was confined to linguistic interpretation of the Basic Code, for no one can meaningfully interpret a text without fully understanding the language of the text. Institutional ijthad is not linguistic but more comprehensive in its interpretation of the Basic Code. The emphasis of institutional ijthad is not on mere words. Institutional ijthad is derived from a comprehensive understanding of the Basic Code. Arabic is one but not the only way to obtain a comprehensive understanding of the Basic Code. As good and

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<sup>127</sup>In the first era of ijthad and in subsequent centuries, Arabic has been the predominant language of Islamic law. For the most part, Arabic remains a key language of Islam for all times to come for the simple reason that the Quran is revealed in Arabic. It is a miracle that even after fifteen centuries, the Quran's language is alive in that time has been unable to reduce its original familiarity and power. The Quran has now been translated in hundreds of languages to make its meaning accessible to Muslims across the world, thus breaking the taboo that the Quran must always be read in Arabic. Even the Sunna is being translated in other languages. Despite the availability of translations, most Muslims wish to read, recite and listen to the Quran in Arabic. This universal trend is unlikely to change, even though translations will facilitate understanding of the Basic Code. Institutional ijthad favors translations of the Basic Code. However, it opposes state-sponsored official translations, which might weaken authenticity of the Basic Code. Furthermore, institutional ijthad does not reverse the long established tradition of saying daily prayers in Arabic. All Muslims cannot realistically learn Arabic even as a second language. Yet, learning to say prayers in Arabic has been a timeless obligation; it is also a demonstration of every Muslim's minimum commitment to Islamic faith.

<sup>128</sup>Since the inception of Islam, the demographics of Islamic populations have changed dramatically. Now the majority of Muslims live outside the Arab lands. Even in the Middle East, Turks and Iranians do not speak Arabic as their first language. Indonesia, the largest Islamic state, has minimum contacts with the Middle Eastern culture and history. Millions of Muslims living in Western countries are practicing faith in local languages. English, French and Spanish are fast becoming the languages of Islam as major works of Islamic law and jurisprudence are being done in Western languages.

authentic translations obtain respectability, state legislatures and judiciaries in non-Arabic countries will be able to engage in meaningful ijihad.

Furthermore, the requirement that the language of ijihad be Arabic alone has interposed a formidable barrier for millions of Muslims across the world who wish to participate in the development of fiqh but cannot speak Arabic. Despite this barrier, the literature on Islamic law has never been confined to Arabic and influential works of jurisprudence have been done in other languages. For centuries, because of the language requirement, the development of Islamic law has been tied to the Arab culture. It seems more likely that the future development of fiqh would be highly responsive to diverse languages, customs and cultures.<sup>129</sup>

## B. Institutional Structure of Ijihad

At a fundamental level, institutional ijihad conducted under the auspices of Islamic Free State reflects diverse realities of the Muslim world. Comprised of over a billion Muslims, most Islamic communities are highly diverse in cultural and legal customs. They are also at different levels of economic and scientific development. Most importantly, there exists no single empire as one did during the first era of ijihad. Now Muslims are distributed over the globe in local and national communities. Millions of Muslims live in non-Islamic countries in which they must obey local laws. This diversity of social and political life is not conducive to any monolithic development of fiqh, for no one scholar will be able to respond to these complex realities. The era of imperial scholars who wished to construct universal jurisprudence is over. It is therefore important that the concept of ijihad be decentralized so that each Islamic Free State can consider local conditions and customs in proposing interpretations of the Basic Code.

Furthermore, any legal methods, old or new, to interpret the Basic Code can be abused and are prone to error, even arbitrariness. To prevent interpretive abuse, error and arbitrariness, Islamic Free State provides an institutional structure of ijihad under which no one person or body of persons

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<sup>129</sup> Institutional ijihad imposes no language requirements on state legislatures, courts and councils of jurists. Still, some participants in institutional ijihad, such as members of the council of jurists, must have an intimate knowledge of Arabic. All members of all institutions however are not required to know Arabic as a necessary qualification for lawmaking.

has exclusive monopoly to declare what is compatible with Islamic principles of law and what is not. In Islamic Free States, institutional ijihad is enforced through the normative interaction of three primary institutions, legislature, judiciary, and the council of jurists.<sup>130</sup> Most secular states empower legislatures to make laws and allow judges to fill in the gaps that lawmakers have left open. Islamic Free State also adopts these institutions. In fact, almost all Muslim nation-states have already established legislatures and national judiciaries. Some have even established councils of scholars that participate in the enterprise of lawmaking. As such, institutional ijihad proposed in this article is neither a sudden break from the past, nor is it a foreign concept. It simply affirms a current practice of Islamic legal systems. Each Islamic Free State promulgates its own constitution, empowering the legislature to make laws and authorizing the judiciary to refine the application of statutory laws. The council of scholars assures that the laws are compatible with the Basic Code.

*Free State Legislature:* In Islamic Free States, the legislature is the primary source of institutional ijihad.<sup>131</sup> New laws compatible with the Basic Code are formally made in Free State legislature. Lawmakers, including the Executive, are vested with the power to initiate legislation that meets political, social, economic and international needs of the Islamic community.<sup>132</sup> In considering legislation, lawmakers are primarily motivated by a sense of public welfare, a classical legal method of the Maliki school.<sup>133</sup> They are also sensitive to universal values within the constraints of the Quran and the Sunna. In considering legislation, lawmakers are deferential to the classical schools of fiqh. They do not repudiate classical fiqh on the unexamined assumption that old laws reflect bygone realities. As a broad principle, old laws are retained and traditions are maintained.

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<sup>130</sup>Rachid Al-Ghannouchi, *Secularism in the Arab Maghreb in Islam and Secularism in the Middle East*, 114 (Eds. John Esposito Azzam Tamimi, 2000)

<sup>131</sup>Fazlur Rahman reaches the same conclusion. *See The Islamic Concept of State in Islam in Transition* 261-271 (ed. John Donohue & John Esposito 1982)

<sup>132</sup>This article does not discuss the role of the Executive in Islamic Free State. However, the Executive lawmaking powers are no different than those of the Free State legislature. They are also subject to the restraints of the judiciary and the council of jurists.

<sup>133</sup>*See* text accompanying supra note 85.

Furthermore, the legislature may invite comments and testimonies of international muftis to assure whether the proposed ijtehad can be made compatible with classical fiqh. Despite these genuine efforts to uphold the methods and laws of the first era, however, Free State legislature is not bound to uphold a rule of classical fiqh at all cost. Under institutional ijtehad, the repeal of classical fiqh, if necessary, is piecemeal, that is, one rule at a time. Free State legislature does not repeal an entire school of jurisprudence in one stroke.<sup>134</sup>

Institutional ijtehad requires that Free State legislature be a democratic institution whose members are periodically elected by the people. A democratic legislature is founded on the twin principles of consensus (ijma)<sup>135</sup> and consultation (shura).<sup>136</sup> These twin principles of the Basic Code maintain and strengthen a dynamic relationship of mutual trust and mutual respect between the rulers and the ruled. A government that rules with coercion rather than consent and a government that is no longer accountable to the community loses its institutional legitimacy to engage in ijtehad. Institutional ijtehad therefore requires that at least one house of the legislature be accountable to the Islamic community. A unicameral legislature must always be popularly elected. In bicameral legislatures, at least one house must be elected directly by the people.

The upper house in bicameral legislatures may be designed according to varying Free State needs and traditions.<sup>137</sup> This allowance in designing the upper house anchors institutional ijtehad in local customs, and not in a priori concepts. In addition, the upper house may include members of epistemic groups, including scientists, sociologists, historians, lawyers, poets, and philosophers. Islamic Free State assures that the upper house represent all major systems of knowledge and not be biased toward any one form of knowledge, whether it be of science or theology. A richly diverse epistemic dimension of the upper house comports with the principle of the Basic Code that those who have knowledge must be respected in conducting affairs of the community. The Quran specifically states: “God will exalt in degree those of you who believe and who have been granted

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<sup>134</sup>Turkey Constitution., Articles 2 & 4.

<sup>135</sup>Shafi’s Risala, supra note 58, at 285-287.

<sup>136</sup>Quran 3: 159; 42:38 (the principle of consultation).

<sup>137</sup> L. Ali Khan, A Theory of Universal Democracy 32 (2003).

knowledge.”<sup>138</sup>

*Free State Judiciary:* In addition to a democratic legislature, an independent judiciary is indispensable for institutional ijtiḥād. In the first era ijtiḥād, as discussed above, judges did not actively participate in the formulation of fiqh rules and legal methods. Institutional ijtiḥād assigns a vigorous institutional role to Free State judiciary in the application and refinement of laws that Free State legislature makes. This assignment is derived from universal values and from actual judicial practices in many Muslim countries, both of which consider an independent judiciary to be vital for a vibrant and fair legal system. Increasingly, state judiciaries are becoming the overseers of legal systems, assuring that law as applied does not violate basic principles of equity and fairness. They also maintain the normative hierarchy of the legal system, assuring that specific laws do not violate basic principles of the state constitution as well as of the Basic Code.

Institutional ijtiḥād cannot succeed if the judiciary exercises broad authority to enforce its own interpretation of the Basic Code over the one that the democratic legislature has used to construct legislation. Any such broad authority of judicial review weakens the power of the legislature to engage in ijtiḥād. As a general rule, Free State judiciary is not a reactionary institution at odds with the legislature. Its main role is to refine rather than reform the law. In this process of refinement, however, Free State judiciary may strike down parts of legislation that violate the state constitution or the Basic Code. A responsible and competent judiciary is always self-conscious of its dual role in maintaining the institutional balance with the legislature and in refining the law without sabotaging the reforms that the legislature have made. This self-consciousness is most needed for the highest court in the system, the court that has the final authority to rule on the nuances of institutional ijtiḥād.

To maintain the institutional integrity of the high court, Islamic Free State assures that judges sitting on the court represent a variety of jurisprudential perspectives. The high court is not a congregation of self-righteous mullahs, nor is it a secular club of non-believers who see religion as a source of strife. Judges, men and women, equipped with highly sophisticated legal education, are God-fearing believers. They understand the obligation of institutional ijtiḥād in the context of

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<sup>138</sup>Quran 58:11.

Islamic legal traditions. They may not think alike but make a concerted effort to reach a knowledge-based consensus in the light of honest reason. But if they cannot agree in true conscience, they register their dissent without fear or favor. Free State judiciary is not an infallible institution. Nor does it have the final word in institutional ijihad. Its power is balanced against that of the legislature and that of the council of jurists.

Furthermore, Free State judiciary is under a set of legal constraints to interpret the laws of the land. Even today, the constitutions of many Muslim states explicitly empower the judiciary to review legislation for conformity with the Quran and the Sunna. In its judicial review, the high court of the land must engage in a complex analysis of the sources of law to decide whether a piece of legislation is in conformity with the Basic Code. It must exercise the power of judicial review within the constitutional limits, and interpret the laws by recognized legal methods, with due deference to precedent and the rules of statutory construction. Likewise, in its effort to satisfy the principle of conformity, the high court must not discard international obligations that the state has contracted through international treaties and international customary law.

In this effort to reconcile a piece of legislation with the constitution, international law, and the Basic Code, the judiciary cannot distort any of these supreme sources. Most certainly, the judiciary might have the most leeway with the national constitution, because the other two sources, the international law and the Basic Code, have transnational interpreters who would most certainly frown upon any unacceptable interpretation. In the case of the Basic Code, the judiciary must be most careful as their opinions will be judged by national and global Muslim scholars. Thus, the judicial process of ijihad will be the most complex in its effort and most authoritative in its impact if the legal methods of ijihad are acceptable to the community of scholars in the Islamic world.

*Free State Council of Jurists:* In addition to legislature and judiciary, Islamic Free State establishes the council of jurists to complete the essential infrastructure of institutional ijihad. In the first era of ijihad, master jurists were the primary source of creative ijihad, even though thousands of scholars and opinion-givers (muftis) nurtured fiqh.<sup>139</sup> Now the primary responsibility of scholarly contribution resides with a council of jurists. In Islamic Free States, the council of jurists is an

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<sup>139</sup>Bernard G. Weiss, *The Spirit of Islamic Law* 15 (1998).

independent constitutional institution<sup>140</sup> established to balance the weight of democratic legislature on one side and that of independent judiciary on the other. Its primary function is to analyze proposed legislation and international agreements from an Islamic viewpoint. This unique Islamic institution prevents the enactment of laws and treaties contrary to the timeless principles embodied in the Basic Code. The council may express its opinion before a legislation is promulgated, so that the necessary changes are made. Likewise, the council may propose reservations to a treaty before ratification. Such scholarly previews continue to promote the Islamic tradition of respecting the people of knowledge. However, any amendments to proposed laws or reservations to treaties are finally approved by the legislature or the executive in accordance with the constitutional procedures.

The juristic opinions of the council are advisory, not binding on the legislature. Accordingly, Free State legislature may adopt proposed legislation with or without changes the council has suggested. By disregarding the council's suggestions, however, Free State legislature takes a political risk that the people might show their disapproval in the next parliamentary election and not elect the lawmakers who voted against the council. It also takes an institutional risk in that Free State judiciary might strike down the legislation under its power of judicial review. In Islamic Free State, therefore, the legislature is under political and institutional pressures to extend utmost respect to the opinions of the council.

The council's opinions are not binding for a number of reasons. First, institutional *ijtihad* suffers an irreparable harm if the council overrules the considered choices of a democratic legislature. Any such power granted to an unelected council of jurists, even though highly learned, undermines the democratic foundation of Islamic Free State, and the power to make and unmake laws shifts from the legislature to the council. Second, any power of the council to overrule the policy choices of a democratic legislature is contrary to the principle of popular consensus (*ijma*), a classical method of *ijtihad*, which essentially empowers the people in general to participate in *ijtihad*. Third, any such veto power undermines the institutional balance of Islamic Free State in which both the upper house of the legislature and the high court are highly learned institutions, composed of individuals with high educational and scholarly credentials. Finally, the council can

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<sup>140</sup>The council of scholars should not be confused with state scholars who issue juristic opinions to please the ruler. *See, e.g.*, Yvonne Yazbeck Haddad, Operation Desert Storm and the War of Fatwas *in* Islamic Legal Interpretation 297, at 306-309 (eds. Muhammad Masud etc. 1996).

be politically corrupted if its preview of legislation and treaties is binding for in that case the members of the council may be selected for their political views rather than their knowledge and scholarly authority, thus undermining the *raison d'être* of the institution.<sup>141</sup>

Despite institutionalization of *ijtihad*, individual scholars will continue to play a leading role in thinking about contemporary problems and their solutions in harmony with the Basic Code. Islamic Free State values knowledge and reserves high respect for epistemic communities including Islamic scholars. Private scholars are free to formulate ideas, devise new legal methods, and propose legislative and judicial outcomes, thus guiding state institutions in managing as well as engineering social, political and economic reality. They are also free to reformulate provisions of classical *fiqh* to adapt them to new needs.<sup>142</sup> In fact, Islamic Free States encourage individual scholars to study and interpret the Basic Code. Individual scholarly works cannot be censored or outlawed on the ground that only state scholars (*ulama al-sultan*) are authorized to engage in *ijtihad*. Any such monopolization of scholarship is contrary to the weight of the Islamic legal tradition. Islamic Free State cannot detain, arrest, punish Islamic scholars for freely expressing their ideas or refusing to join the government. No theory of modernity, state security or secularism justifies any harsh treatment of the people of knowledge for they have special protection under God's Law.

Furthermore, Muslim scholars cannot be prevented from joining the legislature. In Islamic Free State, the formal authority to make laws vests with the state legislature elected through periodic genuine elections and accountable to the people. Jurists and other Islamic scholars can contest elections to join state legislatures to participate in formal lawmaking. They cannot be denied access to the legislature by banning religious political parties or by disqualifying them for less than legally sustainable reasons. In legislatures, jurists are free to criticize or vote against any proposed legislation for its lack of conformity with the Basic Code. They are equally free to propose legislation in conformity with the principles of institutional *ijtihad*. No jurist may be expelled from

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<sup>141</sup>This article does not propose any method for the selection of jurists to the Free State Council. Nor does it propose the size of the Council. Each Islamic Free State should devise its own procedures to determine how, and how many, jurists be appointed to the Council.

<sup>142</sup>Attempts have already been made to loosen the rules of classical *fiqh*. Under the concept of *takhayyur*, for example, a minority rule within a specific *madhab* may be preferred over its dominant rule. Likewise, one may arrive at a new legal solution by combining several rules from different *madhabs*. This technique is known as *talfiq*. See Wael Hallaq, *supra* note 10, at 210.

the legislature for expounding views considered “too radical” or “too conservative.” Such expulsions hinder rather than advance the cause of institutional ijtiḥād.

In protecting these freedoms, Islamic Free State encourages Islamic scholars and jurists to gain knowledge from a variety of sources, old and new, Islamic and non-Islamic. A great scholar cannot be confined to any one form of knowledge, and is open to other disciplines for cross-pollination of ideas. The renewal of Islamic law cannot be achieved if Islamic jurists and scholars limit their knowledge to classical sources of fiqh. Jurists can of course specialize in classical fiqh, but their contribution to Islamic Free State will be meaningful only if they also have an effective grasp of new knowledge. For example, jurists can learn both fiqh and non-Islamic legal systems so that they can compare and contrast proposed legislation through Islamic and foreign experiences.

*Institutional ijtiḥād is binding:* Private scholarly freedom is not a license to subvert the ijtiḥād institutions of Islamic Free State. Individual scholars themselves realize the importance of preserving integrity of the legal system. Accordingly, they refrain from issuing opinions (fatwas) contrary to the pronouncements of ijtiḥād institutions. If an ijtiḥād institution has concluded a point of law, individual scholars rely on the system to overturn the ruling. Any scholarly declaration that the rule is not binding is an invitation to anarchy, revolt and dissension. It is also a violation of a basic principle of the Basic Code that obligates Muslims to “obey those charged with authority.”

In fact, the laws developed through institutional ijtiḥād are binding on Muslims within the jurisdiction of Islamic Free State. A new rule cannot be disobeyed for it being contrary to classical fiqh. Under institutional ijtiḥād, any rule of classical fiqh derived from analogy, consensus, equity or any other legal method can be effectively limited in application, modified and repealed. Of course, institutional ijtiḥād has no such authority with respect to the Basic Code. Institutional ijtiḥād assures through its architectural constraints that no law contrary to the Basic Code is promulgated. However, if a Muslim believes that a new rule enacted through institutional ijtiḥād is contrary to the Basic Code, the rule is nonetheless binding. The Quran’s mandate that Muslims obey those charged with authority applies to institutional ijtiḥād. This mandate comports with historically validated evidence that no legal system can function if individuals are free to repudiate rules on account of personal beliefs.

Even though Muslims must obey the rules of institutional ijtiḥād, they are free to criticize

any rule that they believe is contrary to the Basic Code. Criticism of a rule is not the same as its disobedience. Islamic Free State is not a self-righteous entity nor do its institutions enjoy any authority to suppress dissent. In fact, the institutions of ijtiḥād take into account popular will as a factor, though not a decisive one, in its legislative deliberations. Although the formal decision-making authority belongs to ijtiḥād institutions, the right to criticize belongs to individual Muslims. If the criticism is valid, ijtiḥād institutions may reconsider the law and make any necessary changes consistent with popular demands.

No concept of infallibility is associated with institutional ijtiḥād. Human efforts to interpret the Basic Code, even when most sincere, deliberate and anchored in knowledge, may contain error. God prescribes no punishment for any erroneous interpretations, for every good faith effort to understand the Basic Code is rewarded. Since ijtiḥād institutions are fallible, their rules are subject to modification and repeal. However, a rule of institutional ijtiḥād must be changed through the same process in which it was enacted. No one person, including the Head of the State, is authorized to change the rule, because any such power is contrary to the principles of consultation and consensus. The institutions of ijtiḥād retain the primary and exclusive authority to review, modify and repeal its own laws.

*Pluralism and Transcultural Contacts:* Consistent with the long standing tradition of fiqh, multiple interpretations of the Basic Code will continue to flourish in Islamic Free States, as diverse Muslim communities understand and apply the Quran and the Sunna to their unique customs and cultures. As always, the meaning of the Basic Code is neither fixed in time nor in space but is determined through the creative interaction between the text and the community. What unites Muslims is the fact that they all derive their diverse meaning from the same Basic Code. What also unites them is the shared belief that the Basic Code is beyond alteration. No Islamic Free State is allowed to change even a word of the Quran or corrupt the meaning of authentic ahādith. However, no single monolithic interpretation of the Basic Code can be imposed on all Muslim communities in the name of unity. Any such unity is foreign to the concept of Islam.

While institutional ijtiḥād embraces pluralism and diversity, it does not encourage segregated centers of Islamic legal development confined to national, ethnic or linguistic boundaries. It establishes universal contacts among ijtiḥād institutions across the world, so that Islamic Free States

find the best solutions to common legal problems. For example, scholars from across the Islamic world can periodically meet to exchange ideas, examine new legal methods, and review specific substantive laws made in Islamic Free States. Muslim judges can similarly congregate in regional and global seminars to discuss judicial techniques, application principles, and the general role of judiciary in the development of fiqh. Such periodic regional and global contacts must be developed even among state legislatures so that common techniques of lawmaking are developed through consensus and consultation, the two cardinal principles of the Basic Code.

Universal contacts among ijthihad institutions of Islamic Free States do not aim at creating a single, monolithic legal system binding on all Muslims. Therefore, these contacts are not designed to establish a global Islamic legislature or a grand council of scholars that would rule the Islamic world with one voice. Formal ijthihad institutions at the regional level may be established to generate unified jurisprudence among like-minded Islamic Free States. Even regional ijthihad institutions, however, may fail because Muslim communities prefer diversity and pluralism over any notion of dictated regionalism or universality.

Fiqh thrives the most if universal contacts among ijthihad institutions are informal and educational. Lawmakers, judges and scholars from across the Islamic world, as well as from other legal systems, meet each other in a spirit of comparative law, deepening their learning of Islamic and non-Islamic legal systems. Borrowing from non-Islamic legal systems is permissible provided the borrowed laws are compatible with the Basic Code. Even divergent laws within the Islamic world can be compared on the fundamental assumption that Free State institutions have exercised good faith efforts (juhd) in developing new legal methods and substantive laws. Muslim jurists understand the need to develop uniform laws across Islamic Free States. But they also appreciate the force of local customs as well as the validity of plural interpretations of the Basic Code. Most importantly, they construct Islamic fiqh that participates in the enforcement of universal values, establishing connections between Islamic civilization and the rest of the world.

### Conclusion

In the second era of ijthihad, Islamic Free States across the world would continue to conform its laws to the Basic Code consisting of the Quran and the Sunna. However, the classical fiqh embodied in the five schools of jurisprudence would lose their mutually exclusive boundaries as

Islamic Free States begin to borrow freely from all schools taking the best solutions from each school. Furthermore, even though the rules of classical fiqh would continue to influence the development of specific areas of law, they would be considered persuasive rather than binding. This reevaluation of classical fiqh stems from a simple proposition that no human interpretation of the Basic Code is eternal. Interpretations emerge from concrete social, cultural, economic and international contexts. And when contexts change, older interpretations may or may not be valid or even useful. It is therefore no sin to reinterpret the Basic Code, with due regard to past traditions but without blind imitation.<sup>143</sup>

In the constant evolution of Islamic Free State, even the methodology of ijtiḥād would change. In the first era, private interpretations of the Basic Code competed for attention, popularity and legitimacy. The schools of fiqh (madhabs) were not the creatures of any empire or state. They developed through private effort of the jurists and were voluntarily followed by Muslims. Procedurally, the second era ijtiḥād combines the effort of three significant state institutions: democratic legislature, independent judiciary and highly knowledgeable council of jurists. Private interpretations are still offered and followed. But great issues and social concerns are addressed through Islamic Free State institutions. Substantively, institutional ijtiḥād promises a more dynamic development of Islamic law consistent with local customs as well as universal values. As always, ijtiḥād would allow pluralistic readings of the Basic Code, deepening the ethic of interpretative tolerance. Despite pluralism, however, Islamic Free States stand united in their common belief that the Basic Code cannot be altered or abandoned.

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<sup>143</sup>Allama Iqbal, *supra* note 7, at 132 (life moves with the weight of its own past on the back, and the value and forces of conservatism cannot be overlooked).