Critical Thinking and Its Implications for Contemporary *Ijtihad*

Sayed Sikandar Shah and *Mek Wok Mahmud*

Abstract

As an intellectual process, critical thinking plays a dynamic role in reconstructing human thought. In Islamic legal thought, this intellectual tool was pivotal in building a full-fledged jurisprudential system during the golden age of Islamic civilization. With the solidification of the science of Islamic legal theory and the entrenchment of classical Islamic jurisprudence, this process abated somewhat. Recent Islamic revival movements have engendered a great zeal for reinstituting this process. The current state of affairs in constructing and reconstructing Islamic jurisprudence by and large do not, however, reflect the dynamic feature of intellectual thought in this particular discipline. Thus this article attempts to briefly delineate this concept, unveil the reality on the ground, and identify some hands-on strategies for applying critical thinking in contemporary *ijtihad*.[1]

Introduction

Critical thinking, defined as a process of constructing thoughts, views, and legal stands via evaluation, comparison, analysis, and synthesis of the available source material, is essential for ensuring that Islamic law keeps pace with development. As a method of thinking and exerting the mind, it is a variant of advanced *ijtihad* that not only involves formulating rules for new legal questions that require creative thinking, but also involves reconstructing,

Sayed Sikander Shah, an associate professor in the Department of Fiqh and Usul al-Fiqh at the International Islamic University Malaysia, specializes in Islamic criminal law, comparative law, the Islamic law of evidence, and the modern Islamic codification of *fiqh*. Mek Wok Mahmud, an assistant professor in the Department of Fiqh and Usul al-Fiqh at the International Islamic University Malaysia, specializes in issues of women in Islam and Islamic family law.

reviewing, and updating old juridical pronouncements that were either time-space bound or have obtained new dimensions. But as a methodology for developing *fiqh* by means of evaluating the orthodox approaches to *ijtihad*, it has not yet been fully considered. Muslim jurists, generally speaking, still cling to the traditional culture of producing and reproducing the past (*turath*)[2] in order to discuss and construct laws to be used in the present day. Moreover, legal researchers debate issues and conduct research through the same process with or without minimal questioning.[3] Some Muslim states also codify classical *fiqh* with only a minimum effort to update them, or none at all, to make them relevant to modern realities.[4]

But as to how to revitalize critical thinking, despite some degree of consensus among reform-minded thinkers about the necessity of critical thinking, the perspectives proposed for its operational framework have not been uniform (among the champions of reform movements). Some have advocated a return to scriptural literalism[5]; others have called for a holistic rationalism beyond legalism,[6] an escape from the bigotry and factionalism of existing legal schools (*madhahib*), and liberation from the obscurantism of the ulema, the patrons of *taqlid*.[7] While opting to be unconstrained by such perspectives, this article seeks to point to some practical measures by which critical thinking can be effectively revived and resuscitated.

Conceptual Framework

As implied by its Arabic equivalent of *al-tafkir al-naqdi*, critical thinking literally implies the idea of a thinking process that involves the close scrutiny, inspection, and examination of something.[8] In Islamic legal parlance, it signifies the idea of dissenting or differing with other people on the basis of such factors as methods of legal deduction, types of evidence, changes in social circumstances, unsubstantiated legal assumptions, and methods of juridical articulation.[9]

This intellectual pattern, in the form of *naqd al-fiqhi*, was a living spirit that pervaded the legal field during early days of Islamic jurisprudence. For instance, Abu Yusuf (d. 767) critiqued al-Awza`i's (d. 773) book on *siyar* (*Al-Radd `ala Siyar al-Awza`i*), Imam al-Shafi`i (d. 767) criticized the Hanafis' undestanding of juristic preference (*istihsan*), Sa`id ibn Musayyab (d. 715) frowned upon Mu`awiyah's (d. 680) acceptance of Ziyad as his adopted brother (it contravened the Islamic understanding of lineage), Ibn Qayyim (d. 1350) questioned what he perceived as certain "heresies" being spread by some mystics through his *Talbis Iblis*, serious researchers scrutinized the

prevalent assumptions about "closing the door of *ijtihad*" after the fourth Islamic century and questioned its factuality, Ibn Qasim (d. 1506) criticized Ibn `Arafah's (d. 1316) book on the grounds that "it is neither understandable by the beginners nor needed by the accomplished," and Judge `Iyad ibn Musa (d. 1149) disputed Ibn Khuwayz Mund's (d. 390) credibility by saying that "he is not all-rounded in *fiqh*," just to mention a few.[10] Of course, one cannot determine here if any or all of these criticisms were accurate or not.

Accordingly, if the great jurists of the past used critical thinking as a methodology during the law's formative stage and pursued it to ensure the consistency of juridical views with the letter and spirit of the law, contemporary jurists cannot afford to simply copy, cut, and paste without verifying, scrutinizing, and relating this material to the needs of contemporary Muslims. Underlining this reality, AbdulHamid AbuSulayman said: "To deal with the crisis of thought … one dimension is to deal with the imitative historical solution as it is derived from the Islamic historical experience regardless of consideration of relevance in terms of times and place."[11]

In this context, critical thinking can be understood from the perspective of its opposite, namely, *taqlid*. *Taqlid* means the uncritical and unquestioning acceptance of those doctrines devised by the established schools and authorities.[12] To be more specific, within the context of this article critical thinking means evaluating the juristic legacy (*taqwim al-turath*) and critiquing Islamic jurisprudence (*al-naqd al-fiqhi*) or its critical adoption (*naqd al-turath*) so that it can be included within contemporary works of jurisprudence. As such, critical thinking is supposed to be the norm of an intellectual culture.

Thus one may argue that using Qur'anic anecdotes about Prophet Abraham, who asked if the Sun and the Moon were deities and then concluded that whatever sets and disappears cannot be all-powerful, showed that the Creator of all created things was the One God.[13] The Qur'an continually emphasizes and demands that Muslims observe, think, ponder, reflect, and question creation,[14] including the wonders of the universe and what is within us, to recognize God's existence: "Do they not ponder/reflect on the Qur'an?" (4:82); "…the signs in detail for those who reflect" (10:24); "Do they not reflect in their own minds?" (30:8); "…and contemplate the wonders of creation," (3:191) and "… in order that you may consider" (2:219, 226).

In Islamic jurisprudence, the vehicle for critical thinking is the intellectual tool of *ijtihad*.[15] Etymologically, *ijtihad* originates from *jahada* (he/she strove) and its intensive form *ijtahada* (he/she strove to the utmost).[16] As a process of intellectual exertion, it was given legislative recognition based on

the famous tradition of Mu`adh ibn Jabal: It is reported that when the Prophet decided to send Mu`adh (d. 630) to Yemen, he asked upon what he would base his judgment. Mu`adh replied: "In accordance with the Book of Allah." "But what if you don't find it there?" he inquired. "According to the Sunnah of the Prophet of Allah," replied Mu`adh. "But what if you don't find it there too?" he asked. "I will exert my own opinion," replied Mu`adh. The Prophet put his hand on Mu`adh's chest and said: "Thank God for assisting His Prophet with what he loves."[17]

In this hadith, *ijtihad* means "exercising one's opinion or judgment" (*al-`amal bi al-ra'y*). As such, it involved legislating on matters about which the Qur'an and the Sunnah are silent. The Companions and the Successors undertook *ijtihad* to deal with the numerous emerging problems that faced them before the scholars of Islamic legal theory transformed the term into a technical concept.[18] Theoretically, its modus operandi was confined to cases that were not covered by the Qur'an, the Sunnah, and *ijma`* (scholarly consensus) during the classical period. This was known as *ijtihad bi al-ra'y* (intellectual exertion based on personal legal reasoning)[19] or *ijtihad* in a broad sense, namely, collective *ijtihad* based on analogical deduction and consideration of the ummah's collective interest consistent with the Shari`ah's higher purposes (*maqasid al-Shari`ah*) during the time of the Rightly Guided Caliphs. Collective as well as individual juristic exertion, although with somewhat different methodologies, were also the norm during the time of the Successors.

With the passage of time, however, the techniques of employing *ijtihad*[20] multiplied as the various jurisprudential schools devised their own methods of legal deduction. This led to the standardization of Islamic legal theory, the locus of which lay not only in restricting rational tools to those of *qiyas*, *istihsan*, *maslahah mursalah* (public interest), *`urf* (custom), *sadd al-dhara`i* (blocking the means [to evil]), and *istishab* (case law), but also in establishing interpretive methods of legal deduction from text proofs. The Hanafi, Shafi`i, Maliki, Hanbali, and Shi`ah legal schools contributed to this intellectual legacy, as did other (now defunct) schools whose scholarly contributions continue to trigger debate and inspire legal scholars: those founded by al-Hasan al-Basri, al-Zahiri, al-Awza`i, al-Thawri, and al-Tabari.[21] As the law that governs Muslim societies today predominantly draws upon the views of the surviving schools only, the contemporary understanding of *ijtihad* has narrowed. This fact can be seen in the technical definition provided by many well-known authorities on *usul al-fiqh*. For instance, al-Shawkani (d. 1834), defined it as the exertion of effort to arrive at a practical legal rule

via deduction,[22] al-Ghazali (d. 1111) wrote that it denotes the "[u]tmost exertion on the part of *mujtahid* in the pursuit of knowledge about the legal rules till he exhausts his ability of exertion,"[23] while al-Zarkashi (d. 1374) defined it as the "[e]xertion of effort in the pursuit of arriving at practical legal rules by way of deduction."[24]

Hassan al-Banna (d. 1949) opined that these definitions narrowed the underlying concept of *ijtihad* from what it had been before the classical era. According to him, this reality was the result of three factors: al-Shafi`i's equating *ijtihad* with *qiyas*, the rise of the *usūli* maxim that there is "no *ijtihad* in the presence of a text (*nass*)," and the classical notion that *ijtihad* is a means to discover – not to create – the law. In practical terms, however, these dictum do not hold true because rational methods of legal deduction include other sources, as noted above. Numerous juristic controversies surround the interpretation of text proofs (*nusus*), and actual cases abound where jurists issued verdicts without any basis in the text proofs (precedents).[25]

The development of Islamic legal theory after the establishment of these legal schools, therefore, witnessed a departure from the classical understanding of *ijtihad* in terms of methods of dealing with text proofs. The noted Maliki scholar al-Shatibi (d. 1370) described previous methodologies as restrictive because they did not take into account the spirit of the law (*maqasid al-Shari`ah*) when interpreting the divine texts. Accordingly, he opined that "the competence to engage in *ijtihad* requires two basic requisites: knowledge of the higher purposes of the law and ability to deduce the law from legal texts consistent with such purposes."[26]

Accordingly, *ijtihad* as a process of intellectual/juristic exertion has played a vital role in constructing Islam's legal corpus. It started as liberal enterprise bound by textual proofs cum the spirit of the law and eventually crystallized into a highly technical theory of Islamic jurisprudence and its methodology. In this process, however, al-Shatibi saw the predominance of literalism as restrictive, an opinion that caused him to propound the theory of the law's purposes as an allied methodology of *ijtihad*. This later development somewhat reenergized the discourse on *ijtihad* and has a great potential to regulate the contemporary formulation of laws.

What follows, therefore, is that critical thinking represents a kind of mental exertion that seeks to determine, in a critical manner, legal rules from the body of existing legal opinions (*turath al-fiqhi*) and ensuring that their suitability and application are consistent with the purposes and definitive principles of the Qur'an and the Sunnah.

Obstacles to Critical Thinking

The spirit of intellectual stagnation that followed the previous jurists and became a general trend toward the end of the fourth Islamic century seems to have continued until the modern era mainly due to psychological reasons. This state of mind can be traced to, among other factors, the psychology of legal education to which the jurists were exposed. For instance, when novices come across statements such as the one by Ahmad ibn Muhammad al-Sawi of the Malikiyyah (d. 1825) – "No deviation from the *fiqh* of four Sunni Madhhab is allowed even if that be in harmony with the opinions of a companion or a sound hadith or a legal provision from the Qur'an. Going outside the legal parameter of the Four Sunni Schools is tantamount to being misguided and misguiding others…."[27] – they may hesitate to question juridical concepts laid down by long-dead scholars. Instead of examining the rulings' validity, therefore, they may begin to sanctify them. This kind of approach was pursued and defended vociferously by the supporters of *taqlid*, who claimed, among other things, that (1) the present scholars are not adequately qualified to exercise *ijtihad* and extract rulings from the texts both in terms of knowledge as well as personal piety; (b) the distinguished leading *mujtahidun* have virtually exhausted all arguments in establishing the authenticity of their rulings and it is thus unnecessary to reopen the issues again (by questioning); (c) the Prophet has emphasized the superiority of the first three generations over all others; and (d) the `ulama are the heirs of the Prophets, as established by a statement from the Sunnah.[28]

But these arguments can be questioned in many ways. First, the founders of the *madhahib* never made such claims. For instance, when Abu Hanifah (d. 767) was asked about the conclusiveness of his *ijtihad*, he replied: "I swear in the name of Allah that I am not positively sure. Maybe it is an untrue/false position without any shred of doubt."[29] Similarly Imam Malik (d. 795) stated: "Verily I am only human. I may err or I may be right. Thus you should probe into my opinion. If anything is proved to agree with the imperatives/spirit of the Qur'an and the Sunnah, take it. If anything be to the contrary, discard it."[30] Imam Ahmad used to say: "You should not imitate me or Malik or Shafi`i or Awza`i or Thawri (d. 741), but extract the ruling from where they have extracted [it]."[31] Finally, al-Qarafi (d. 1285) summed up this position: "Perennial stagnation/clinging to quoted opinions/legal heritage is tantamount to the misguided position in religion and ignorance about the stated goals of the Shari`ah that was anticipated by the early scholars and our predecessor."[32]

Second, the scholars who lived close to the time of revelation were the best in the sense of having easy access to pure Islamic teachings, not in the sense that they were infallible. Stressing this and echoing Imam Malik, Hassan al-Banna asserted:

> Everyone else's opinion could be taken or abandoned, except that of the Prophet. All the body of opinions originating from our predecessors, if consistent with the Qur'an and the Prophet's Sunnah, could be accepted. Otherwise the Qur'an and the Sunnah prevail over human speculations. But in this process, we should refrain from personal attack against those whose *ijtihad* deviates from the textual rulings of the evidence of the Qur'an and the Sunnah.[33]

Accordingly, in matters of Islamic law no human formulation of it is conclusive and final except for those based upon definitive evidence from the Qur'an and the Sunnah. This is why al-Qaradawi maintains that one should not question the textual rulings embedded in these two sources, given that they are immune to human error (*ma`sum*),[34] whereas this is not the case with any creative construction (*ijtihad*) undertaken by any person. Abu Bakr (d. 634) fully appreciated this fact, as can be seen in his remark: "If you see me uphold the truth then assist me; if you observe that I incline toward falsehood then straighten me,"[35] as did Umar (d. 644), who stated: "O people, if any of you see any deviation on my part, put me on the right path"[36] and "O people, the Prophet's opinion was conclusive, as he was guided by God; ours, however, is one of conjecture and speculation."[37] Third, the belief that the ulama are the Prophet's heirs must encompass all of these scholars, not just those of a particular epoch or brand type. Another implication is that all of them are responsible for guiding the people in matters of legislation, just as the Prophet was. This hadith lends more support to serious intellectualism than stagnancy.

In recognition of this reality, the rationale of questioning what part(s) of the Islamic legacy should be adopted is both legally sanctioned and demanded by common sense. Mahathir Mohamed, the former prime minister of Malaysia, once asked if it was "heretical to question the interpretation of the Islamic jurists. Are they prophets that we cannot even question them?"[38] In explaining why we need to adopt a revisionist approach toward interpretations made by previous generations of scholars, he maintained:

> Naturally these Muslim jurists were influenced by the stage and circumstances, in the evolution of Muslims society. They were living in the period of glory … Under such circumstances the Muslims were in a position

> to impose whatever they considered to be laws in accordance with Islam … But those days of glory and power are over. Today even in countries where Muslims form majority or make up the entire population, they cannot ignore opinions, pressures and powers outside their countries.[39]

Sayed Ahmad Khan (d. 1898), stressing the necessity of critical thinking also asserted that "we should be aware of the fact that time changes and that again and again we are confronted with new questions and new needs."[40] Rashid Rida (d. 1935) voiced the same opinion: "Whosoever impedes the function of *ijtihad* is, in effect, impeding the *hujjat Allah* (arguments expressed in the Qur'an and the Sunnah). Thus not only does he destroy the law's infrastructure, but also its potential for contributing to the betterment of the Muslim community in the modern era."[41]

The Situation Today

Uncritical articulation of *fiqh* makes the mind blunt, uncreative, and dull. Although contemporary jurists no longer believe in the ascendancy of *taqlid* and the heresy of innovation, renewal, fresh thought, questioning, and creative thinking, in practice they de-emphasize *ijtihad*, revisions, and critical thought in their articulations of *fiqh* and its exposition. A perusal of the state of academic activities, from teaching to writing textbooks and conducting research, carried out in Islamic law schools point to the continued stagnation of legal thought, which al-`Alwani[42] has dubbed the crisis of *fiqh* and Mahmud Shaltut (d. 1963) has described as the loss of the spirit of impartial academic inquiry and blind adherence to a particular author's words or interpretation; unquestioning acceptance of the existing body of laws; renunciation of a practical approach to *fiqh* by researching issues of theoretical importance only; focus on creating legal loopholes to dodge legal responsibilities (*hiyal* and *makharij*); and sectarian-based construction and reconstruction of ideas and opinions, which excludes a vast body of legal scholarship from our legal discourse due to the Sunni-Shi`ah divide and regards the ideas of al-Tabari (d. 923), al-Thawri, Ibn Hazm al-Zahiri (d. 1064), and other great thinkers as antagonistic to one's professed school.[43]

Another aspect is requiring that *ijtihad* be conducted in accordance with traditional methods, such as calling for the revival of *ijtihad mutlaq* (unconditional research) and undertaking inter-textual inference of laws without recourse to their historical contexts. This latter tendency has plagued even some commendable works in the field. Diagnosing this problem, Muhammad Jamil Ghazi, editor of Ibn Qayyim al-Jawziyyah's *Al-Turuq al-Hukmiyah fi al-Siyasah al-Shar`iyah*, lamented:

> Today Islamic jurisprudence (*fiqh*) suffers crisis, external and internal. The former takes the form of onslaughts from its enemies and people prejudiced against it. The internal crisis, on the other hand, plagues this field due to its own unthinking proponents. The most crippling of the two is the internal one, because these people (though *mala fide*) restricted their role to closely guarding the Islamic legal heritage without investing any effort toward its further development, revision, and contextualization (relating it to the ummah's contemporary needs). This glaring laxity receives neither God's nor the people's approval.[44]

These concerns are not mere assertions, as can be seen by any honest look at the reality on the ground. For instance, anyone with some basic working knowledge of Arabic can detect such facts at many levels: First, some textbooks on Islamic law still delve into subjects that have no bearing on today's realities; little or no effort has been made to update them. For example, some books still present the world's political map as it existed during Islam's days of glory, covering such now-irrelevant concepts as *jizyah*, *dar al-harb*, and *dar al-Islam*.[45] Second, such an obsolete outlook perverts the dissertations and theses written by students graduating from Islamic law schools.[46] Third, the codification of Islamic law in Muslim states, although a progressive step as regards implementing Islamic tenets in contemporary Muslim societies, shows the glaring symptom of *taqlid* in many ways.[47]

Strategic Mechanisms

Embracing the spirit of *takhayyur* (eclectic approach) and even *talfiq* (patching up) from our legal heritage has been hailed as a positive development.[48] This development should have served as a precursor to adopting credible opinions derived from the legal views and interpretations of all jurists – namely, embracing the whole array of school-bound, independent, defunct and current legal thought – because it is neither scholarly nor obligatory to imprison one's horizon of thinking within the parameter of the legal thought belonging to a particular school or scholar. Realizing this malaise among some of the jurists, Shaltut said: "The findings of a *mujtahid* are binding only on himself/herself, no matter how eminent he/she may be. Moreover, it is inadvisable for anyone to accept a *mujtahid*'s opinion without understanding its underlying reasoning."[49]

Accordingly, adopting a liberal approach to extrapolating legal rulings from the Qur'an and the Sunnah (the "search for a new model") must be allowed to continue particularly now, as the conditions prevailing during the

early Islamic period were never reproduced in such a way that they could sustain the classical model.[50] This fact, therefore, calls for a genuine, sincere, and disciplined process of critical thinking on the part of both the students and scholars of Islamic law. Based on this understanding, for critical thinking to take off and for serious scholarship to emerge and flourish, the items listed below are necessary:

1. Questioning the logical assumption underlying some rulings (by unveiling its fallacies) and the dismissing it in favor of a more logically sound and intellectually sensible position. For instance, the juridical opinion stating that *qisas* (analogical deduction) cannot be implemented in the case of a father who murders his son (or daughter) was based on some logical assumptions that contain obvious fallacies. The rationale reads that "since the father is the cause of the son's existence, it is inappropriate that the son should then become the cause of his father's annihilation."[51] This logic is open to many questions, such as "What if the father rapes his son or daughter?" and "What about the irrefutable raison d'être of *qisas* (bringing equivalence) which ipso facto seeks to repudiate the pre-Islamic practice of inequality once and for all?"[52]

2. Reviewing previous conclusions in light of experimental knowledge. On this note, al-Qaradawi maintains: "In our time, one of the most effective factors and sure criteria in the study of comparative *fiqh* that helps students of jurisprudence emerge from disputed points/conflicting positions among the jurists and confidently opt for the preferred position is the availability of scientific findings drawn from astronomy, physics, biology, chemistry, medicine, physiology, and other disciplines unknown to our predecessors. Therefore, some of their assumptions may be refuted by these findings and dismissed as weak and unacceptable *ijtihad* on a given question of *fiqh*."[53] He further states:

> When referring to the exegesis and commentaries on the divine textual proofs, one must search for their messages and meanings and not [hold onto] false assumptions and outdated culture-based speculations appended to them. The reason [for this] is that juristic commentaries, the rationalizations of the rationalists, and the exegeses of past scholars were made in light of the available state of knowledge about the universe, life, human, history as obtained then and were further constrained by factors of time, space, social environment and customs. For instance, when commenting on "And among His signs is the creation of the heavens and the earth and the living creatures that He scattered through them" (42:29), al-Qaradawi

claims that some classical commentators held that the purported existence of living creatures in heaven is figurative, as they are only found on Earth. Hence, this assumption can no longer be held as true because recent discoveries suggest the possibility of life on other planets as well.[54]

Jamal al-Din al-Afghani (d. 1897), the pioneer of reform (*tajdid*) through *ijtihad*, not only called for devising a new hermeneutic paradigm by which one could interpret scriptural texts, but also underlined the paramount significance of learning from other legacies: "Muslims must take guidance from the Qur'an and authentic traditions and strive earnestly to broaden their intellectual horizons thereby, and to derive, by way of analogy from contemporary sciences – keeping in view the needs of the time – that which does not contradict the explicit texts."[55]

For instance, the classical juristic criterion for ascertaining murderous intent is determining the method of killing or identifying the weapon used. Abu Hanifah stipulates that the weapon used must be capable of actually cutting or piercing. Today we have better means of ascertaining criminal intent (*mens rea*), for the modes and means of causing death are numerous and vary according to time and place, and perpetrators are constantly devising new methods.[56] If such realities are not recognized, cunning criminals can take advantage of weaknesses in the law and continue to wreak havoc without ever having to worry about being caught and punished. Thus upholding a more rational outlook, as supported by scientific findings, is in line with the Islamic ideals of social equality and protecting human rights.

In addition, on many issues forensic science yields more positive knowledge about the reality of things than the criteria devised by jurists, such as establishing paternity,[57] identifying justifications/grounds for abortion, and proving adultery.[58] Other matters, such as classifying vaginal bleeding during pregnancy, were subject to controversy: Hanafis and Hanbalis regarded it as an ailment discharge (*istihadah*), while Shafi`is and Maliks considered it as menses (*hayd*). Contemporary medical science has settled the issue once and for all in favor of the first group.[59]

3. Modifying or repudiating archaic juristic opinions due to changed social conditions. An opinion based on the general welfare or social custom can be discarded or reviewed in light of new situations if they no longer serve such objectives. For example, Umar stopped distributing zakat to *mu'allafat al-qulub* (new converts) because its original justification, acquiring its recipients' support for the Islamic cause, was no longer necessary after the Muslims established themselves as a sovereign community that

could defend itself. Therefore, establishing alliances through financial incentives was no longer necessary.[60] Subsequently, the *fuqaha'* ruled: "The adjustment of laws (based on custom and *maslahah*) is an irrefutable principle in view of the change in time."[61] As al-Qarafi observed:

> Whenever the tradition/custom of people changes you must take that into account, and whenever it passes you must repudiate it. You should not become stuck on what has been written in the books throughout your career. Whenever a person from another locality asks your opinion on a matter, do not advise him/her according to the prevailing custom in your locality or in line with what is written in the book. Rather, ask what is customary in his/her place and rule accordingly. This is the right course in advising (obvious truth).[62]

An example[63] of such a juristic ruling pertained to the status of a missing person's wife. Jurists differed over how many years should elapse before she could be considered a widow – four years, ninety years, or seventy years – a ruling that was supposedly based upon a person's natural life span at that time.[64] Now that people have access to modern communications, asking the wife of a missing person to wait indefinitely can prejudice her many other rights.

Another instance is the admissibility of a non-Muslim's testimony. The majority of jurists, except for the Malikis, consider such testimony to be unreliable except for the case when a dying person executes a will while traveling.[65] This was reflective of the former hostility and mistrust that prevailed between Muslims and non-Muslims.[66] This situation is now obsolete, for the modern world is no longer divided on the basis of continual hostility between two warring centers of power: *dar al-harb* and *dar al-Islam*. Rather, the world has become an abode of coexistence, one with an intertwined fate and characterized by interdependency via various international instruments.

4. Improving legal education. The field's course structure must contain a comparative perspective of *fiqhi* issues. The required reading list must incorporate perspectives from literature written in languages other than Arabic in order to build a sufficient juristic aptitude (*malakat al-fiqhiyah*) in each student. Before specific topics are taught, each student must be thoroughly familiar with the goals of the Lawgiver (e.g., a *maqasid*-oriented approach). To give them a good grounding about the law's practical side and sophistication, a multi-disciplinary approach should be attempted; in particular, a parallel position in civil law must be explored.

5. Avoiding superficial, naïve, and simplistic approaches to understanding contemporary issues and positing solutions. Unfortunately, the number of examples that can be cited of modern jurists, such as al-Sabuni, Fathullah, al-Mawjud, to name a few, who provide segmental, superficial, and even emotional solutions to pressing social problems (e.g., overcoming the Muslims' high divorce rate, child abuse, teenage pregnancy, and terrorism) are legion.[67]

6. Undertaking intelligent, serious, and critical comparative studies of Islamic jurisprudence, as opposed to half-baked and haphazard ones vis-à-vis western legal systems.[68] This is particularly true in the domains of constitutional, international, and procedural laws, for various sociopolitical aspects of Islamic law were left underdeveloped due to the rift between political royalty and the Muslims' intellectual leadership after the Rightly Guided Caliphs.[69]

7. Determining priority areas for research and intellectual discourses, such as *istihsan* (juristic preference), though with the good intention of serving the ummah. Conclusions "according to so and so" should be avoided.[70]

8. Relating juristic thought and interpretations to a contemporary setting bound only by the Qur'an's definitive injunctions and legislation derived from Sunnah. For instance, some *fuqaha'* still talk about *dhimmi*, *musta`man* (a non-Muslim living in a Muslim land who has been guaranteed safety), and *mu`ahid* (a person from a country that has a peace treaty with the Muslims) when dealing with of citizenship, as if they do not understand that the collapse of the Ottoman Empire in 1924 resulted in the formation of Muslim nation-states with their own unique and distinct sociopolitical contexts. Consequently, they spend their time deliberating on an issue associated with a political setup that no longer exists. For instance, `Abd al-Karim Zaydan says:

> When non Muslim citizens live under Islamic sovereignty, they enjoy a special status and are known along with other minorities as *ahl al-dhimma* or *dhimmis*. *Dhimma* is an Arabic word that means safety, security, and contract. Hence, they are called *dhimmis* because they have agreed to a contract by Allah, His Messenger, and the Islamic community that grants them security. This security granted to *dhimmis* is like the citizenship granted by a government to an alien who abides by the constitution, thereby earning all the rights of a natural citizen. Thus, upon the preceding basis, a *dhimmi* is a citizen of the Islamic state as described by Muslim jurists.[71]

Nevertheless, some open-minded contemporary jurists who have realized just how much the traditional pattern of human interactions has changed

and have proposed a reconstructed view of such private international law matters like *dhimmah*.[72] Having freed themselves from the yoke of *taqlid*, they have started to argue that the classical grouping (being mutable *fiqh*) cannot override the immutable Qur'anic principle of human equality on the basis of undisputed human unity and the Prophet's designation of Madinah's inhabitants as one ummah irrespective of their religious affiliation.[73] For instance Fahmi Huwaydi, who juxtaposes the traditional status of a "protected" community with the concept of modern citizenship, stated:

> The term *dhimmah*, in spite of being regarded as originating from the Prophet's usage, was part of the vocabulary of pre-Islamic Arab tribes in their tribal relations. Thus the Prophet's use of it could not add any juridical connotation to it, except that he employed it with a great sense of trust and accountability. But it lost its sense of responsible use in treating non-Muslims in the course of history. As such, I do not see any reason for adhering to this term in relation to non-Muslims.[74]

Joining him, al-`Awwa stated:

> The basic principle of citizenship was founded by the Prophet when he declared a collective concept of citizenship for both Muslims and non-Muslims in the Constitution of Madinah, namely, that the city's Muslims and Jews are a single community. This, together with the general Qur'anic commands on kind treatment of people irrespective of their religious affiliation, represents the *de jure* position of Islamic law on this point. Hence specific injunctions sanctioning unjust treatment were meant for specific circumstances. Given that modern nation-states represent a new kind of Islamic sovereignty to which much of traditional jurisprudence cannot apply, reasoning based on *ijtihad* must be used to deduce a new system. The modern Muslim state is the result of a common struggle for independence and nation-building in which both the Muslim majority and the non-Muslim minority participated. In this way, it differs sharply from the early Muslim state that was based on conquest. Now the discourse has changed from one of contract (*`aqd*) to one of constitution (*dustur*), and from dhimmah to citizenship/nationality (*muwatanah*).[75]

As regards the underlying logic, he opined:

> The *dhimmah* was a contract (*`aqd*), not a posited rule (*wad`a*). Every contract, contrary to popular belief, is amenable to nullification. *`Aqd al-dhimmah* as such was repudiated with the demise of the state that formulated it, namely, that of the Prophet and the subsequent caliphates. The nation-states of today are not the successors of the founding Islamic state

> (established by the Prophet). Its continuation was disrupted by colonization. Post-colonization Muslim nations were established on the basis of a joint struggle by all citizens, Muslims and non-Muslims alike, on the basis of a social contract (*al-`aqd al-ijtima`i*) unknown to ancient [Muslim] jurists."[76]

Ahmad Kamal Abu al-Majd expressed a similar view when he remarked that although *dhimmah* was an historical expression of the rights and duties guaranteed by the founding sources of Islamic law, today the "conditions originally necessary for this institution no longer exist. Thus a constitution which today guarantees full civil and religious rights to all would be fully in harmony with the Shari`ah."[77] By analyzing the Constitution of Madinah, in which the Prophet declared the Muslims and Jews to be one ummah, Muhammad Immarah sheds new insight on the issue: communities and states are founded on shared belongings, which include creed, family, tribe, ethnic group, locality, and other factors. Non-Muslims can be full citizens even though they do not share a common creed with their Muslim cocitizens.[78]

The need to adjust to changes in tandem with the dynamics of political developments was acknowledged centuries ago by Ibn Taymiyyah (d. 1328) who, after reviewing al-Mawardi's (d. 1058) work on constitutional organization, *Ahkam al-Sultaniyah* (see the chapter on the caliphate) observed:

> With the demise of the last of the righteous caliphs, Ali ibn Abi Talib (d. 661) came the end of ideal government, but not of valid government. Valid government as such does not require the title of "caliphate" to underpin its legitimacy for legitimacy has to do with function and performance, not form and nomenclature.[79]

The Controlling Rules (*Dawabit*)

Constructing and then implementing a productive and Islamic-compliant critical approach to Islamic law require that the following rules be borne in mind:

1. Distinguishing the "questionable" from the "unquestionable." Any questioning and criticizing must be done within the framework of the Islamic paradigm and never follow the path of sheer rationality, as propounded by western philosophy. Sensing this, Muhammad `Abduh (d. 1905) said that

> Muslim intellectuals had become deeply divided by two conflicting systems of education that were in vogue in Egypt at that time: the old religious school system represented by al-Azhar and the modern missionary

> one established by the British and French colonial powers. The former was reluctant to change its ancient philosophies and methodologies, while the latter, with its focus on European rationalism, had created an outlook that was spiritually and intellectually alien to Muslim society. I am afraid that society will eventually be destroyed by its restless spirit of individual reason – always questioning, always doubting.[80]

Accordingly, it would be *ultra vires* for human thought to be employed in the area of texts that are unanimously agreed to be unequivocal (*nusus qat`iyah mujma` `alayha*).[81]

Being aware of this unique nature of Islamic legal thought, Muhammad Iqbal (d. 1938) maintained: "No people can afford to reject their past entirely. It is their past that has made their personal identity."[82] When it comes to Islamic rules, he said: "Each one of these rules are endowed with a life value of its own, inasmuch as it tends to give such society a specific inwardness and further secures that external and internal uniformity which counteracts the forces of heterogeneity always latent in a society of a composite character."[83] Abul Kalam Azad (d. 1958) cautioned Muslims to be careful so that their zeal for fresh thinking and their crusade against *taqlid* do not trap them in the unfettered liberalism of western thought. The reason, according to him, is that the "purveyors of the philosophy of enlightened thought and modern research have dressed up atheism and free thought in the disguise of wisdom and *ijtihad*."[84]

2. Awareness of the pitfalls in scientific findings. It is important to realize that some scientific conclusions are either informed by western philosophical worldviews that are antagonistic to Islam or are merely hypotheses. Accordingly, they cannot be accepted as the only criteria for judging the validity or otherwise of all *fiqhi* rulings. For instance, although Darwin's view of the origin of species enjoys wide popularity among scientists, it has been refuted by others as a mere hypothesis.[85] Moreover, it is certainly opposed to the Islamic worldview.

3. Knowing the risk of the liberal use of social sciences. Any reevaluation of Islamic law based upon distinguishing between its religious and social elements not only excludes a vast body of laws as historical, but also confuses what remains as purely religious elements. While advocating the use of social sciences as a methodology to know the reality of things while undertaking *ijtihad*, Iqbal nevertheless warns against its overuse: "A purely sociological approach to *ijtihad* is bound to destroy the broad human outlook which Muslim people have imbibed from their religion. This kind of exertion is exceeding the limits for reform."[86]

When dealing with the juristic heritage, one must bear in mind the following juridical protocols:

1. Every *faqih* and *mujtahid* is entitled to his/her own *ijtihad*, and even an incorrect ruling is rewarded on account of the juristic exertion employed;
2. Acknowledge the fact that past scholars made their rulings in good faith and sincerity and that if they erred during the process, their account is with Allah;
3. Any ruling that might be criticized and rejected today might have been just what was needed, based upon the time-space context in which they were enunciated;
4. No one is perfect, and hence neither the criticized nor the critic should claim that the truth entirely vests with his/her legal verdict on issues[87]; and
5. Be just and constructive when criticizing the views that are reviewed and repudiated. For example, Umar refused to review a verdict handed down by `Ali and Zayd ibn Thabit (d. 666) for: "Had I wanted to reject their views on account of their contradiction with the Qur'an and the Sunnah, I would have done so. But in matters of juridical deduction, we are all the same."[88]

Conclusion

The main trend of thought emerging from the above analysis is that the essence of critical thinking, defined as a process of critiquing and scrutinizing juridical thought within the framework of Islam's immutable principles and being consistent with the spirit of the Shari`ah is, by and large, nowhere near to being a major concern or undertaking of contemporary jurists. The dynamic nature of human life, not to mention its complexity and numerous attendant problems, demands the adoption of a critical approach when dealing with Islamic civilization's juristic and intellectual legacies. There are numerous approaches to undertaking such a constructive *ijtihad*, and this article has highlighted several hands-on mechanisms through which the vitality and dynamics of Islamic law can be sustained.

If critiquing *fiqh* to reconstruct Islamic law was part of the Muslims' struggle during the early days of Islam,[89] the current age of globalization must serve as a more vociferous wake-up call that it is time for their descendants to think afresh about how to achieve the same objective. But this time around, given the intimidating size of the challenges, the search for critical

thought must continue with more rigor and without becoming entangled in polemics over the "sanctity" of *taqlid* and the "heresy" of *tajdid*.[90] Therefore a holistic approach is needed, one that can look critically both backward and forward, namely, the critical adoption of still-relevant past interpretations and formulating new laws that deal realistically and practically with contemporary situations that were never faced by previous generations. Cultivating such a culture and resuscitating the spirit of critical thinking, questioning, and reasoned argumentation means that Muslims have to embark upon a gigantic program of reforming how they study, teach, research and articulate *fiqh* and *fiqhi* issues.

Endnotes

1. This article contains ideas that first appeared as part of a research project entitled "Actualization of Critical Thinking in Islamic Jurisprudence," which was funded by the Research and Innovation Centre of the International Islamic University Malaysia, in 2010.
2. For instance, with the exception of some original thinkers like al-Qaradawi, al-`Awwa, al-`Alwani, and others, most contemporary jurists who delineate Islam's position on women, political systems, law of international relations, and other areas reaffirm the articulations of long-dead classical-era jurists without regard to their *ratio legis* and sociopolitical underpinnings. For example, compare Muhammad Salim al-`Awwa, *Fi al-Nizam al-Siyasi li al-Dawlah al-Islamiyah* (Amman: Dar al-Shuruq, 1989), 49-145 with Shawkat Muhammad `Ulyan, *Al-Nizam al-Siyasi fi al-Islam* (Riyadh: Maktabat Malik Fahd, 1999), 6-236. See also Taha J. al-`Alwani, "The Testimony of Women in Islamic Law," *American Journal of Islamic Social Sciences* 13, no. 2 (summer 1996):193.
3. This is a state-of-the-art in *fiqh* schools to which all of their academic members testify. For instance, al-Shili stated: "If you were to scrutinize the proposal for undertaking research on *fiqh* and its *usul*, you would find them plagued with the malady of repeating what previous scholars have contributed. You would find most [students] write on topics, such as the methodology of so and so, or a particular scholar and his methodology, or embarking upon the collection of juristic views pertaining to an issue without adding anything new in it." See Abu Amamah Nawwar al-Shili, *Al-`Aql al-Fiqhi: Ma`alimu wa Dawabitu* (Alexandria: Dar al-Salam, 2008), 9.
4. For instance, see the Islamic Family Law (Federal Territories) Act 1984 as amended in 2002, Malaysia, Hudud Ordinance, 1979 Pakistan.
5. This has been preached by conservative Salafis in the Middle East and their counterpart, the Ahl al-Hadith, in South Asia. For details, see Muneer Ghulam Fareed, *Legal Reform in the Muslim World* (London: Austin & Winfield, 1996) 51-104.

6. This was the trend with such modernists as al-Afghani, `Abduh, and Iqbal. See Sayyid Jamal al-Din al-Afghani, *Ta`limat al-Bayan* (Beirut: Dar al-Ma`rifah, 1878), 2; Muhammad `Abduh, *Al-Muslimūn wa al-Islam* (Kuwait: Dar al-Hilal, 1963), 7; Mohammad Iqbal (1951), *The Reconstruction of Religious Thought in Islam* (Lahore: Sh. Muhammad Ashraf, 1951), 34.
7. This is the call by Ahl al-Hadith and Wahhabi movements. Fareed, *Legal Reform*.
8. Elias A. Elias and Edward E. Elias, *Elias Modern Dictionary* (Beirut: Dar al-Jalil, 1986), 727.
9. Al-Shili, *Al-`Aql al-Fiqhi*, 17.
10. Ibid, 25-33.
11. AbdulHamid A. AbuSulayman, *Crisis in the Muslim Mind*, 2d ed. (Herndon: The International Institute of Islamic Thought, 1997), 7.
12. Wael B. Hallaq, *The Gate of Ijtihad: A Study in Islamic Legal History* (Washington: University of Washington, 1983), 2. It is also held to signify surrendering legislative authority to famous men, an authority that God granted to no human being. Also see Fareed, *Legal Reform*, 136.
13. See Quran 6:74-81.
14. For details, see Fatimah I. M. Isma`il, *Al-Qur'an wa al-Nazar al-`Aqli* (Virginia: Al-Ma`had al-`Alami li al-Fikr al-Islami, 1993), 63-75; also Muhammad `A. Hijazi, *Al-Qur'an wa Manhaj al-Tafkir* (Cairo: al-Zahra, 1993), 94-162.
15. Jamal Badi and Mustapha Tajdin, *Creative Thinking: An Islamic Perspective* (Kuala Lumpur: International Islamic University Malaysia, 2004), 2.
16. Yusuf al-Qaradwi, *Al-Ijtihad fi al-Shari`ah al-Islamiyah* (Kuwait: Dar al-Qalam, 1985), 11.
17. Ahmad ibn al-Husyan al-Bayhaqi, *Al-Sunan al-Kubra* (Multan: Nashr al-Sunnah, n.d.), 10:114.
18. Mahmud M. al-Tantawi, *Al-Ijtihad fi al-Ahkam al-Shar`iyah* (Egypt: Maktabah Wahabah, n.d), 42-68.
19. `Abd al-Salam al-Sulaymani, *Al-Ijtihad fi al-Fiqh al-Islami: Dawabituh wa Mustaqbiluh* (Beirut: Dar al-Qalam, n.d.), 109-210.
20. Historically, in the academic realm jurists treated *ijtihad* as an abstract concept designed to set the process of legal thinking in motion without being reduced to some objective means of legal thinking. They therefore called it *badhl al-juhd wa si`ah* (exertion of effort). Today this discussion is no more a matter of polemics that does not need to be discussed in this study. See al-Qaradawi, *Al-Ijtihad*, 67-71.
21. Ibid.
22. Muhammad al-Shawkani, *Irshad al-Fuhul* (Egypt: Matba`ah al-Sa`adah, 1989), 250.
23. Abu Hamid al-Ghazali, *Al-Mustasfa* (Egypt: al-Matba`ah al-Amriyyah1986), 2:350.
24. Muhammad ibn `Abd Allah al-Zarkashi, *Al-Bahr al-Muhit fi Usul al-Fiqh* (Egypt: Matba`ah al-Sa`adah, n.d.), 488.

25. Jamal al-Banna, *Nahw Fiqh al-Jadid* (Cairo: Dar al-Fikr al-Islami, 1996), 1:71-98.
26. Abu Ishaq al-Shatibi, *Al-Muwafaqat* (Egypt: al-Mataba`ah al-Salafiyyah, 1983), 4:56.
27. Ahmad ibn Muhammad al-Sawi, *Hashiyat al-Sawi `ala al-Jalalayn* (Egypt: Matba`at al-Azhar, 1941), 9:3. Also see Yusuf al-Qaradawi, *Kayfa Nata`amal ma`a al-Turath wa al-Tamadhhub wa al-Ikhtilaf* (Cairo: Maktabat Wahbah, 2004), 63.
28. Fareed, *Legal Reform*, 138-40.
29. Mahmud Shukri al-Alusi, *Ghayat al-Amani fi al-Radd `ala al-Nabhani* (Riyadh: Makatabat Ibn `Abd al-`Aziz, 1970), 1:69. Quoted from Muhammad Salim al-`Awwa, *Tajdid al-Fiqhi*, at www.albayan.ae.com (accessed on 12 March 2009).
30. `Abd al-Barr, *Al-Intiqa' fi Bayan al-Thalathah al-Fuqaha'*, 20.
31. Ibn Qayyim al-Jawziyyah, *`Ilam al-Muwaqqi`in `an Rabb al-`Alamin* (Beirut: Dar al-Kutub al-`Ilmiyyah, 1991), 2:282.
32. Ahmad ibn Idris al-Qarafi, *Al-Furuq* (Beirut: Dar al-Gharb al-Islami, 1992), 3:143. See also Jamal `Atiyah and Wahbah al-Zuhayli, *Tajdid al-Fiqh al-Islami* (Damascus: Dar al-Fikr, 2000), 181.
33. Hassan al-Banna, *Al-Usul al-`Ishrin* (Cairo: Dar al-Da`wah, 1990), 5.
34. Al Qaradawi supports his stand by marshalling numerous Qur'anic verses to this effect. See al-Qaradawi, *Kayfa Nata`amal*, 13.
35. Ibn Qayyim, *`Ilam al-Muwaqqi`in*, 2:32.
36. Ibid., 2:33.
37. Al-Qaradawi, *Kayfa Nata`amal*, 28.
38. Mahathir Mohamad's speech at the International Seminar on the Administration of Islamic Laws. See Ahmad Mohamed Ibrahim and Abdul Monir Yaacob, eds., *The Administration of Islamic Laws* (Kuala Lumpur: Institute of Islamic Understanding Malaysia, 1997), ix.
39. Ibid., xii-xiii.
40. Syed Ahmed Khan, *Tabyin al-Kalam* (Delhi: Idara-Abadiyyat-i Delhi, 1860), 16.
41. Rashid Rida, *Majallat al-Manar* (Beirut: Dar al-Ma`rifah, n.d.), 8:731.
42. Taha Jabir al-`Alwani, "The Crisis in *Fiqh* and the Methodology of *Ijtihad*," *American Journal of Islamic Social Sciences* 8, no. 2 (1998): 327.
43. Mahmud Shaltut, *Al-Islam: `Aqidah wa Shari`ah* (Cairo: Dar al-Qalam, n.d.), 78.
44. Ibn Qayyim al-Jawziyyah, *Al-Turuq al-Hukmiyah fi al-Siyasah al-Shar`iyah*, ed. Muhammad Jamil Ghazi (Cairo: Dar al-Madani, n.d.), 2.
45. See, for example, Subhi Mahmassani, *Al-Qanun wa al-`Alaqat al-Dawliyah fi al-Islam* (Beirut: Dar al-`Ilm li al-Malayyin, 1982), 23. Nevertheless, this article seeks to present the mainstream position among modern juristic works on *siyar*. This observation, therefore, does not hold true for more recent research undertaken by thinking scholars, particularly in the case of pioneering innova-

tive works on the subject, such as those by Hamidullah, al-`Awwa, and others. See Muhammad Hamidullah, *Muslim Conduct of State* (Lahore: Sh. Muhammad Ahraf, 1977).

46. For instance, masters' and doctoral dissertations on Islamic law. A survey of such literature reveals that a majority of them indicate the symptoms of *taqlid* in many ways: school-bound, mainly reproductions of earlier legal works (viz., writing glosses and commentaries on previous works, such as how so and so viewed such and such a topic), containing hazy comparisons with civil law (e.g., comparing a *fiqh* topic with corresponding concepts in statutory law). In the final case, such an exercise is seriously objectionable on methodological lines, since anyone with a legal education knows that statutory laws cannot be understood without reading them with case laws and that a student is not expected to have this skill, among other things. See Ibn al-Shili, who lamented this state of intellectual stagnancy on the part of young researchers in this field in his *Al-`Aql al-Fiqhi*, 133-37.
47. Modern Islamic law codes suffer from various aspects of *taqlid*. Among other factors, they (1) are school-bound even though they define *hukm shar`i* as rules according to recognized schools, (2) are silent on contemporary issues (no quick updates), and (3) embody bad eclective (*takhayyur*) or choice of opinion from across the legal school spectrum. One example of eclective code is Selangore's Islamic Family Law Enactment, 1984, which in s. 2 defines *hukum syara* as "Islamic law according to any recognized *madhab*, and also in s. 47 (2) it requires any divorce to be pronounced before the court. In s. 47 (3) it states that if the court is satisfied that the marriage has irretrievably broken down, the court shall advise the husband to pronounce one *talaq* before the court. This is a very progressive piece of legislation, at least on this point. But what about a triple divorce pronounced at will outside the court? The law is not explicit on this; however, it does say that the party (husband) will be committing an offense which carries a fine not exceeding 100,000 ringgit or a period of imprisonment not exceeding not exceeding six months. Therefore, the divorce still will be valid. This law and the choice of ruling about the occurrence of a triple divorce in such a way invoked a public outcry in Malaysia when the court endorsed Shamsudin`s triple divorce of his wife Fazlina, via S.M.S. For a brief summary of this case, see www.deccanherald.com/deccanherald/sep06/she4.asp (accessed 12 May 2009).
48. *Talfiq* implies the idea of patching together a more flexible legal stand based on rulings from across the legal schools; *takhayyur* implies the idea of expedient choice based upon available juridical interpretations. Although these two methods were rejected by the regimen of *taqlid*, some courageous thinkers have nevertheless broken with this trend. For instance, Sayyid Sabiq wrote *Fiqh al-Sunnah* and al-Qaradawi has classified such a conscious choice of interpretations as a subvariety of *ijtihad* (*ijthad intiqa'i*).

49. Shaltut, *Al-Islam*, 78.
50. Ibid.
51. For the weakness of other arguments, see also Sayed S. S. Haneef, *Homicide in Islam* (Kuala Lumpur: A. S Noordeen, 2000), 94-97.
52. Shaltut, *Al-Islam*, 112.
53. Yusuf al-Qaradawi, *Al-Ijtihad al-Mu`asir bayn al-Indibat wa al-Ifrat* (Beirut: al-Maktab al-Islami, 1998), 33-34.
54. Al-Qaradawi, *Kayfa Nata`amal*, 29.
55. Al-Afghani, *Ta`limat al-Bayan*, 17.
56. Haneef, *Homicide in Islam*, 93.
57. For instance, one of the traditional understandings about the maximum gestation period cannot be sustained in light of contemporary scientific knowledge. For instance, the Hanafis held it to be two years, while the Shafi`is, Hanbalis, and Malikis held it to be four years. The legal stand of the Zahiris and the Shi`is, that it lasted for nine months and never exceeded one lunar year, is in line with modern scientific findings. For details, see Usamah U. S. al-Ashqar, *Mustajiddat al-Fiqhiyah fi Qadaya al-Zawaj wa al-Ṭalaq* (Jordan: Dar al-Nafa'is, 2000), 192-93.
58. For details see, Sayed S. S. Haneef, "Forensic Evidence: A Rethinking about Its Use and Evidential Weight in Islamic Jurisprudence," *Journal of Islam in Asia* 2, no. 1 (2005): 127-40.
59. See Sayed S. S. Haneef and Ashraf MD. Hashim, *`Ibadat (Worship) in Islam: A Comparative Jurisprudential Analysis* (Kuala Lumpur: IIUM Press, 2009), 49.
60. `Atiyah and al-Zuhayli, *Tajdid al-Fiqh al-Islami*, 218.
61. See article 39 of *The Mejelle*, tr. C. R. Tyser (Lahore: Law Publishing Company, 1967).
62. Al-Qarafi, *Al-Furūq*, 1:178.
63. For more examples, see `Atiyah and al-Zuhayli, *Tajdid al-Fiqh al-Islami*, 180-83.
64. The jurists differed on this. The Hanafis and Shafi`is held it to be ninety years, the Malikis said seventy, and Hanbalis ruled it to be four. See Muhammad A. al-Sabuni, *Al-Mawarith fi al-Shari`ah al-Islamiyah* (Beirut: `Alam al-Kutub, 1985), 192-93.
65. Haneef, *Homicide in Islam*, 159.
66. Ibid., 159-65.
67. See Abd al-Rahman al Sabuni, *Nizam al-Usrah wa Halli Mushkilatuha fi Daw` al-Islam* (Beirut: Dar al-fikr, 2001); Aktham Tuffahah Fathullah, "*Hukm al-Ta`dhib al-Zawjah bi al-Darb fi al-Fiqh al-Islami al-Muqaran*," *Majallat Jami`ah Malik Sa`ud* 16, no. 1 (2003); and `Atiyah `Abd al-Mawjud, *Mushkilat al-Zawjiyah wa Hululuha al-Fiqhiyah* (Azhar: al-Maktabah al-Azhariyyah li al-turath, 2000).
68. Muhammad F. al-Nabhan, *Al-Madkhal li al-Tashri` al-Islami* (Beirut: Dar al-Qalam, n.d.), 373.
69. AbuSulayman, *Crisis*, 12.

70. Fazlur Rahman, *Transformation of an Intellectual Tradition* (London: The University of Chicago, 1982), 139.
71. `Abd al-Karim Zaydan, *Ahkam al-Dhimmiyin wa al-Musta'minin fi Dar al-Islam* (Beirut: Mu'assasat al-Risalah, 1985), 49-51, 63-66. Other noted modern scholars who adopt the same approach include `Abbas Shawman, *Al-`Ilaqat al-Dawliyah fi al-Shari`ah al-Islamiyah* (Cairo: al-Dar al-Thaqafah, 1999), 37-38; Subhi Mahmasani, *Al-Qanūn wa al-`Ilaqat al-Dawliyah fi al-Islam*, 101-02; `Ulyan, *Al-Nizam al-Siyasi fi al-Islam*, 163; Muhammad al-Sadiq al-`Afifi, *Al-Islam wa al-`Ilaqat al-Dawliyah* (Beirut: Dar al-Raid al-`Arabi, 1986), 293.
72. Such figures as Fahmi Huwaydi, who articulates this perspective, must be supported by more serious research by individual *fuqaha'*. See Fahmi Huwaydi, *Muwatinun la Dhimmiyun* (Beirut: Dar al-Shuruq, 1985), 177-88. Also see Muhammad S. al-`Awwa, *Al-Fiqh al-Islami fi Tariq al-Tajdid* (Qatar: Jam`iyyat Qatar, 1998), 57-58.
73. Huwaydi, *Muwatinun*, 183-84.
74. Ibid, 110-111.
75. Al-`Awwa, *Mabadi` li Nizam al-Siyasi al-Islami*, 255-58.
76. Ibid.
77. Quoted in Jorgen Nielson, "Contemporary discussions on Religious Minorities in Muslim Countries," *Muslim-Christian Relations* 14, no. 3 (2003): 300.
78. Ibid., 301.
79. Ibn Taymiyyah, *Al-Siyasah al-Shar`iyah fi Islah al-Ra`i wa al-Ra`iyah* (Cairo: Dar al-Kitab al-`Arabi, 1951), 10.
80. `Abduh, *Al-Muslimun wa al-Islam*, 42.
81. This unanimous stand is quite rational, for every law must have some stable part from which it can draw and upon which it can be sustained. `Abduh echoed this after the aforementioned observation. Ibid., 43.
82. Iqbal, *Reconstruction*, 21.
83. Ibid., 24.
84. Abul Kalam Azad, *Tadhkirah* (Delhi: Sahitya Academy, 1968), 8.
85. To be proven as truth, scientific facts must be replicatable in the lab. This is not possible with Darwin's hypothesis.
86. When refuting Turkish intellectual Zia Gokalp's sociological approach to Islamic reform, he remarked as such. See Iqbal, *Reconstruction*, 37.
87. Qur'an 21:85 explicitly states that human beings have only a little knowledge of the things from which they extrapolate.
88. `Abd al-Razzaq ibn Hammam al-San`ani, *Subūl al-Salam* (Cairo: Mataba`at Mustafa Halabi, 1960), 4:119.
89. Al-Qaradawi, *Kayfa Nata`amal*, 4.
90. The divided intellectual perspectives on how to reinstate Muslims laws both hampers the restoration of Islamic law in most countries and leads to their misapplication in those countries that have attempted to reinstate it.