Salvation and *Inqādh* (Deliverance): Two Theological Doctrines in Monotheistic Religions and Their Contemporary Implication in Understanding Islamic Penal Code

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Introduction

This paper is primarily about the contemporary debate on the implementation of the *Sharīʿah*. Evidently, the discourse on *Sharīʿah* in general and Islamic penal code in particular is dominated by issues regarding Islam and modernity, inter-religious dialogue with Christianity and post-colonial state and human rights. The principal issue in such a debate has much less to do with these topics but rather with the fundamental vision of both Islam and Christianity. In addition to that modernity and its sub-discourses on post-colonial state, human rights and others are consequences of the particular history of the Judeo-Christian tradition. Thus, fundamental term such as salvation, which expresses the provision of God for human predicament and redefines the relationship between God and humanity in Christianity in such away that draws the difference between Judaism and Christianity, needs to be studied for a meaningful discourse. Though Islam shares with the Judeo-Christian tradition the story of creation, it has not developed soteriology. Rather it emphasizes "..at birth man stands on the threshold of ethicality, at the zero point of ethical dimension, Islam conceives of his duty as positive deed, as the doing of something new, not as the undoing of something past"[2]. Although al-Fārūqī makes the contrast between *falāh* (felicity) and salvation, it is rather essentially the difference between salvation and *inqādh* (deliverance), both of which are acts of God[3], that is at stake. Indeed felicity presupposes *inqādh*. It is because of *inqādh* the human act will be guided by *hidāyat al-Irshād* (guidance

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[2] Ismāʿīl al-Rājī, al-Fāruqi, Al-Tawḥīd: Its Implication for Thought and Life (Here don: IIIT, 1995) 73.

[3] Ibid. 73.

through the commandments of God). Thus the will of God takes a concrete form in the *Sharīʿah*. It should be noted that Islam like Judaism does not make any theological claims about Adam's sin, but rather the Qurʿān told us that he repented and was forgiven. Much that can be attributed to the story of creation in the Qurʿān, is that it depicts two patterns of behaviour: Adam's response to his misdeed and Iblis' (Satan) attitude of arrogance. Perhaps, the meaning of justice and law can be derived from this story and the story of the two children of Adam.[4] An understanding of the Biblical story of creation within the concept of *inqādh* as in Judaism will mark a sharp distinction between God and humanity. While "salvation" in Christian theology develops a new orientation in the monotheistic vision, *inqādh* retains both the essence of ethics of intent and action and transcendence of God.

This paper deals with the contemporary implications of these two moral visions. The focus will be mainly on the legal narratives regarding contemporary codification of Islamic penal code. This is because the penal code is the most problematic and visible in any discourse on the implementation of *Sharīʿah*. It is equally important that metaphysical postulates of such a debate should be predicated on these two paradigms of salvation and *inqādh.*

Penal Code as the Most visible Form of the *Sharīʿah*

The contemporary discourse on implementation of Islamic penal system has been dominated by Muslim responses to modernity. Even worse it has been either polemical or apologetic in nature. This led to the politicization of *Sharīʿah* and the misuse of the penal system. A more fundamental approach to the issue must address the quality of justice, and the theory of punishment that had to be applied. Most importantly, however, the investigation should have a deep look into the nature of the monotheistic framework. This is because a salvific one will essentially play down the importance of law, in general, while an *inqādhic* one will certainly emphasize the element of law in the religious experience.

By doing so, the details of the penal system will reflect an understanding which is essentially based upon a distinction between the traditional formations of the penal system in *al-Aḥkām al-Sulṭāniyyah* (traditional Islamic Penal system) and the general principles of justice in Islam. Therefore, the articulation of the theory of punishment will be the grand postulate upon which any learned discourse should be established. This research looks into contemporary Muslim narratives on the implementation of the penal system in both the Sudan and Malaysia.[5] The main assumption of this paper is that the

[4] Surah al-Baqarah 2:20, 38. These Qurʿānic verses focus on the story of Adam while al-Māʾidah 5:27, 31 focus on the first crime that has been committed on earth by the son of Adam.

[5] The choice of the Sudan and Malaysia was essentially governed by the fact that both of them have a seizable non-Muslim minority and they share the common law system experience. Most impor-

fundamental difference between traditional formation of the penal system and the general principles of justice in Islam will develop a meaningful discussion that essentially transcends the problems of the post-colonial state, and the politics of the *Sharīʿah*. Therefore, a learned discussion had to address the question whether the flexibility of the *Sharīʿah* is real or not? This, at the metaphysical level, necessitates a thorough analysis of the *tawḥdic* framework and its relationship with the ethics of justice and love within a paradigm that does not separate intent from action. This is essentially an *inqādhic* paradigm.

Obviously what is meant by this question is not a pretentious assertion, but rather a genuine concern about the interplay between *Sharīʿah* and the post colonial state. Since the implementation of non-Islamic laws, during the colonial era in Muslim countries, the issue of the adaptability and relevancy of the *Sharīʿah* to modern world has been debated vehemently. Once again, I would like to emphasize that the question is much less a rhetorical one, but rather an investigation into the *Sharīʿah* and modernity and it is equally important that the *Sharīʿah* is part and parcel of an *inqādhic* monotheistic paradigm. Therefore, the question is focused on the inquiry of the susceptibility of the *Sharīʿah* to change. It should be remembered that, for some, its inner ability to undergo changes or to be modified by modern circumstances is completely denied. However, a considerable number of Muslim scholars will have it as a major postulate that *Sharīʿah* is adaptable. Yet, the *Sharīʿah* essentially does have two sets of laws, one which is meant to reshape the human behavior, while the other set is constantly reformulated by the human conditions. Thus, a distinction is made between the permanent elements and the changeable ones. As a result, the accommodative aspects of the *Sharīʿah* to changing conditions are looked at from the perspective of the strategy of Islamizing the law. More specifically, it is about the harmonization of the common law system with the *Sharīʿah*. Harmonization was originally a common law concept which was utilized by both academics and legislators in the Sudan and Malaysia to guide the process of Islamization of the law. Perhaps, the concept of Islamization is too problematic in a multi-cultural state such as the Sudan and Malaysia.[6]

There are four positions regarding the flexibility of the *Sharīʿah*. However, these positions are based on the assumption that the question of flexibility is a moral and practical, rather than a theological one. This is because flexibility is associated with relevancy. Since the *Sharīʿah* is held by all Muslims as relevant to the social realities, then the very disputation of this theological postulate is tantamount to *fisq* (disbelief). Although the four positions will principally accept the relevancy of the *Sharīʿah*, yet each one of them has its own legal

tantly, perhaps, the proposals for reinstating the *Sharīʿah* started with the Penal system.

[6] It should be remarked that late Tan Sri Ahmad Ibrahim was a towering figure in this regard; Prof. Hashim Kamali continued the efforts in his writings, see "Harmonisation of *Sharīʿah* and Civil Law: The Framework and *Modus Operandi*," IIUM Law Journal II (2003) 149-169.

methodology for the reinstatement of the *Sharīʿah* within the post-colonial state. It should be remembered that their understanding of the issue of the institution of the *Sharīʿah* within the post-colonial state is considerably different. Moreover, their passion for the reinstatement of the *Sharīʿah* and their intellectual zeal for addressing the problems are significantly different. Let it be remembered that it is customary, and not seriously misleading to identify these four positions that provide us with answers concerning the flexibility of the *Sharīʿah*. First, the traditionalist position, which does have a number of distinctive features in its attempt to answer the question. The main characteristic of this position is to emphasize that *ijtihād* (analogical deduction) should be taken as the only process of understanding the text. Second, the modernist position which is characterized by its readiness to sacrifice the Islamicity of the law for the sake of modernity. However, this position will certainly advocate that Islam or Islamic law is not in contradiction with modernity. The third position is represented by the neo-*Mujtahidīn*. Their position seems to be half way between the traditionalists and the modernist. Finally, the fourth position is openly based on a total critique of the tradition, though, it claims to be a legitimate interpretation of Islam. Although it is quite difficult to accept their position from within Islam, yet their persistence of holding the vision of Islam makes it very difficult to disregard their claim without serious examination. However, before a systematic exposition of each position, it is important to outline the general history of the methodology of the *Sharīʿah* itself. Then, this historical background will provide us with an historical context that will be useful for both appreciation and understanding of each position. Perhaps, most fundamentally, is how to understand the process that led to the formation of the relationship between authority, sin as such or grave sin in particular, punishment, repentance and freedom of choice in the history of early Islam. Obviously, this will provide us with the essentials of Islamic monotheistic ideals as they were manifested in history.

Principles of Islamic Jurisprudence and Their Historical Formation

To a great extent, the problem of the renewal of *Fiqh* (Islamic jurisprudence) was expressed in the relationship between the religious traditions of understanding the text and the needs for new *ijtihād*. Should the scholars tread a path marked out for them by their ancestors, or could they find through their own *ijtihād* those rulings and religious principles which could give them a direction in the contemporary world? This question drew our attention to the interplay between tradition and modernity. Most importantly, it emphasized the historicity of the formation of the principles of *ijtihād*.

Needless to say the history of Islamic jurisprudence was shaped by a number of factors. Among these factors is the different process of urbanization that characterized two important regions i.e. Iraq and Ḥijaz. Obviously the forms of

urbanization in the Iraqi and Ḥijazi regions coupled with the movements of the companions of the Prophet and the demographic movements of the Arab tribes left a significant mark on the legal reasoning that developed in these regions. In a similar way, the relationship between the '*Ulamā*' and the state during the Abbasid era, to be specific what came to be known as the *Miḥna* (inquisition), left a considerable impact upon the development of legal theory of Islamic jurisprudence. Evidently, the work of al-Imam al-Shāfi'ī which articulated the principles of Islamic jurisprudence was a creative adaptation of these principles into these historical circumstances. A careful study of al-Risala in its Egyptian version might provide us with some clues into the difference between the Iraqi version which was written before the *Miḥna* and the Egyptian one which was finally edited after the *Miḥna*. One always would like to know why al-Shāfi'ī confined the meaning of "Those in authority among you" to the commander of the Apostle's army, whereas the text of Surah al-Nisa´ is general and could never be restricted to specific interpretation "[Shāfi'ī said]… And He said:

> O you, who believe, obey God and obey the Apostle and those in authority among you. If you should quarrel about anything, refer to God and the Apostle, if you believe in God and the last day. That is better and fairer in the issue [Q iv: 59]

"Some scholars have held that 'those in authority' mean the commanders of the Apostle's army. That is more than one commentator has told us. But God knows best[7]". Then al-Shāfi'ī went on to justify this selection and restriction of the meaning of "those in authority among you" to the commander of the Apostle's army by referring to the fact that "This is in accord with what [God] said, for the Arabs who been around Makka knew nothing about command, and [the idea of] some submitting to the command of others was repugnant to them"[8]. Then, finally al-Shāfi'ī concluded that "If you do not know what God's commands are, you should ask the Apostle, if you are able to reach him, or any one of you who is able to do so. For this is an obligation concerning which there should be no disagreement"[9]. It goes without saying that this position which was taken by al-Shāfi'ī considerably affected the development of Islamic jurisprudence. The Qur'ānic verse of Surah al-Nisa' made it very clear that there are three pillars of obedience in Islam, two of them enjoy an absolute obedience, while the obedience of "those in authority among you" is given a conditional one. And yet, al-Shāfi'ī, may be under the influence of the *Miḥna* decided to select the tradition that restricted obedience to only the Qur'ān and the Sunnah. More seriously, the custodians of these two sources

[7] Al-Imām Muḥammad ibn Idris al-Shāfi'ī, *al-Risāla* (Cambridge: The Islamic Text Society, 1987) 112.
[8] ibid. 112-113.
[9] ibid. 113.

are the *'Ulamā".* Thus, the whole theory of Islamic jurisprudence will revolve ultimately around the activities of the *'Ulamā'.* However, the interpretation of this Qur'ānic verse throughout the Islamic history was known that "those in authority among you" are both the *'Ulamā'* and *'Umarā'* (political leaders). It seems that the only justification that could be given, in this regard, that al-Shāfi'ī had in mind the example of al-Ma'mūn who abused his political power and forced Muslim scholars to follow his interpretation, according to al-Shāfi'ī, of the Qur'ān. Thus to save guard the *Ummah* against such behavior, al-Shāfi'ī decided to limit the political power and to strip the political leaders of any religious claims. Obviously, that interpretation had a great impact on the development of the science of Islamic jurisprudence, where the pillars of obedience, according to al-Shāfi'ī were restricted to Qur'ān and the Sunnah.

Likewise, al-Shāfi'ī's interpretations of the term *Ḥikmah* (wisdom) as the Sunnah certainly is influenced by the project of al-Ma'mūn to translate the Greek sciences under the rubric of *Ḥikmah*. Al-Shāfi'ī sensed the danger of this project for the development of genuine Islamic science. Thus, he pointed to the need for the compilation of the Sunnah and to draw the attention for the importance of the Sunnah as the source of guidance and law. Al-Shāfi'ī stated "Among the things with which [the Prophet] was inspired is his Sunnah. This [Sunnah] is the wisdom which God mentioned [in His Book], and whether he sent down to his as a Book-the Book of God-all these have been given to him as favors from God and by His will"[10]. The history which was reflected in al-Shāfi'ī's selections and adaptations of the principles of Islamic jurisprudence furnished us with a compelling historical formation. Therefore, it seems that al-Shāfi'ī interpretation of both "those in authority among you" and "Sunnah" emerged from the *Miḥna* of Ahmad ibn Hanbal, student of al-Shāfi'ī, by al-Ma'mūn, the Abbasid Caliph. Finally one can say among the important factors to al-Shāfi'ī's success in representing this foundational period of Islamic jurisprudence are his abilities to identify seminal issues, and vital historical events and to accompany these choices with a lively, contextual and insightful legal narrative.

Indeed, this era of Islamic jurisprudence was characterized by the diversity of *A'imah* (religious scholar). Learned scholars and custodian of the tradition like Abu Ḥanīfah and his associates, Mālik, Abdul Rahman al-Qāsim, Abdullah ibn Wahab, al-Laith ibn Sa'ad and others were all working out legal doctrines that represented the *Salaf* (early companions of the Prophet) understanding of Islamic jurisprudence. What dominated the scene, during this period, was the need to identify the sources of the law. In addition to that the issue of *'Ata'* a (patronage of the state) and *Qada'* (office of the judge) represented the degree of independence. Therefore, whoever accepted the gifts or the favors of the state was viewed with great suspicion. Similarly, the acceptance of the office of

[10] ibid. 121.

the judge was looked upon with suspicion.

In contrast to the first period of Islamic jurisprudence the second period was dominated by the confrontation between the Sunnis and the Mu'tazilities. During this era, most of the leading jurists were essentially *mutakalimun* (theologians). Thus, the issues of theology found their ways in the juristic discussions. Thus, scholars like al-Naẓām, 'Abu 'Ali al-Juba'ī, Abu al-Qāsim al-Ka'bī, Abu al-Hasan al-Ash'arī, al-Māturīdī, Ibn Ḥazm al-Ẓāhirī and others dominated the discussion where juristic reasoning was mixed up with theological concerns. Most importantly, while during the first period it was widely accepted to regard the Qur'an, Sunnah as the primary sources of the law and *ijmā '* and qiyās as declaratory authority and analogical reasoning respectively. Ibn Ḥazm al- Ẓāhirī rejected analogical deduction as a legitimate tool of interpretation.

The third period was definitely characterized by an alliance between the *'ulamā'* and the state. Where most of the leading jurists of this period were either judges or holding a ministerial post. Thus, scholars like al-Bāqilānī, al-Māwardī, Abu Y'lā, Ibn Fūrak, al-Jaṣṣāṣ and other, dominated the intellectual scene by their tremendous efforts to apply these juristic principles to the political realities of their time. Thus, instead of the complete independence of both scholars and their theoretical principles from the state apparatus, these leading jurists opted for a position where jurisprudential principles became subservient to the needs of the state. Some might feel that this is rather a strong assertion regarding the relationship between the jurists and the state. But it should be noted, during this time, the state apparatus was a well-defined domain that was principally governed by the jurisprudential principles. Thus, what appeared to be a subservient relationship was in reality more complex and a lot more than banal.

Evidently, at the heart of the final stage of the juristic theory was the type of *'Ulamā'* who turned to be professional *'Ulamā'*. The majority of them were in the payroll of the state, more significantly, during this period, the theory of *Maqāsid al-Sharī'ah* (the objectives of the *Sharī'ah*) was completely developed, and consequently the juristic debate shifted from linguistic strategies of understanding the text to the analysis of social realities. Thus, a distinction was made between *ijtihād* in understanding the text, and *ijtihād* in implementing the text into the specific social reality. While the first type of *ijtihād* was labeled as analytical which was merely confined to the textual strategies and interpretative techniques, the second type was classified as empirical which was devoted to empirical analysis of the social realities. Naming few scholars of this period, one had to mention Imām al-Ḥaramayn, al-Ghazali, Ibn al-'Ārabi, al-Fakhr al-Raẓī, al-Qrāfī, al-Ṭartushī and al-Shāṭibi.

It should be noted that some historians of Islamic jurisprudence made a distinction between *Burhān* and *Bayān*. Where *Bayān* (perspicuous

declaration) dominated the terminology of al-Shāfiʻī, *Burhān* (demonstrative argument) was highly visible in the juristic reasoning of al-Shāṭibī.[11] Although it is quite difficult to draw any conclusions from such superficial distinction, yet one can softly argue that textual *ijtihād* dominated the juristic scene during al-Shāfiʻī era, whereas empirical *ijtihād* was highly visible in the final period. Similarly analogical deduction is a very efficient tool of analysis when it comes to understanding the text, whereas objectives of the *Sharīʻah* will be extremely valuable in understanding the social circumstance upon which the *Sharīʻah* should be applied.[12] Needless to say, the formation of the principles of Islamic jurisprudence was governed completely by both the internal logic of the religious texts and the historical development of the *'Ulamā'* institution. Thus, the answer of the main question of this paper had to be understood within this complex historical formation. It is equally true that the four positions that will be discussed later should be appreciated and understood within this preceding history. It should be remarked that throughout the history of the formation of the jurisprudential principles and their implementation the concept of *Sharīʻah* retained both the essence of law and ethics of intent and action. As a result, it operated within an *inqādhic* framework of monotheism. It should, equally, be remembered that both theologians and jurists in the Islamic context subscribed to a non-salvific concept of religion. This is because of both the close connection between *Sharīʻah and tawḥīd* and the absence of the doctrine of sin in its Christian form. Thus, theology and jurisprudence in Islam are closely linked. In such a way as al-Ghazali stated out of the principles of theology the *Sharīʻah* rulings will be derived.[13] Therefore, one can say that the term theology is not a suitable translation of *Kalām* or *Usul al-Dīn*. The type of theological activity which was developed by Muslim scholar stemed from an *inqādhic* paradigm and it emphasized the transcendence of God, universality of ethics and the freedom of choice within the will of God. Finally, the possibility for juristic activity to be subjected to a process of secularization was rendered to non-entity. This is largely due to the inseparable relationship between *Sharīʻah* and *Kalām* or *Usul al-Dīn* (theology) in Islam.

Four Major Responses to Modernity

As I indicated earlier, these four positions will reveal the dynamics of the interplay between the *Sharīʻah* and the post-colonial state. More generally, it reveals the tension between tradition and modernity within the framework of the post-colonial state.

[11] See Abdul Majīd al-Saghīr, al-Fikr al-Uṣūli wa Ishkāliyyat al-Sulṭah (Beirut: Dār al-Muntakhab al-ʿArabī, 1994).

[12] Muhamad Khalid Masud, Shatibi's Philosophy of Islamic Law (Islamabad: Islamic Research Institute, 1995).

[13] Al-Imam Abu Hamid al-Ghazalī, al-Mustasfa min Usul al-Fiqh (Cairo: BulÉq, 1322H) 3-5.

The first position which is represented by a number of traditional scholars such as ʻĀbdul Wahāb Khalāf[14], Shaykh Abu Zahra[15] and others. Although ʻĀbdul Wahāb Khalāf started the activity of rewriting the classical works of Islamic jurisprudence in a contemporary and more accessible language, yet his contribution would not go beyond repeating the classical argument of the flexibility of the *Sharīʻah* for all seasons. This is, indeed, being done without any real effort to give a new interpretation to the *Sharīʻah* or its interpretative postulates. Undoubtedly the work of Shaykh Abu Zahra is a real contribution along the lines of his teacher ʻĀbdul Wahāb Khalāf to our understanding of the *Sharīʻah* in the contemporary world. A vulgar example of the traditionalist position is given by Dr. al-Mikashfi Ṭahā al-Kabāshī, a Sudanese scholar who played a significant role in Numayri's Islamic experiment. Obviously, in his answer to the previous question of the flexibility of the *Sharīʻah*, he will take it for granted that the *Sharīʻah* is accommodative of changing situations. But he will completely neglect the position of non-Muslims within the post-colonial or the nation-state frameworks. For him everything is being taken care of by the *Fuqahāʼ* (traditional jurists). Thus, the solution to the problems of non-Muslims already existed in the historical formation of *Fiqh*[16]. Using the traditional categories, and implementing the various devices invented by the traditional jurists, he attempted to show the relevancy of these precedents for modern times. More seriously this trend at best will use the eclectic approach as an expedient tool to address a complicated issue like tradition and modernity or pluralism. As it has been proven that this trend did not have a clear legal theory but rather followed what was more convenient and seemingly plausible to them[17]. However, it should be remembered that much of the contribution of the traditionalists is focused on their ability to rearticulate the traditional answers in contemporary language. It might not be reasonably suitable to readdress the issue of non-Muslims in the modern nation-state by using the categories of the jurisprudence of al-*ʻAḥkām al-Sulṭāniyyah*. Moreover, the position of women in the modern society might equally call for afresh *ijtihād*. And yet for this trend the argument for the flexibility of the *Sharīʻah* would not certainly include such items.

Although the second position could be accused by some Muslims as being Westernized, yet it should be noted that the degree of Westernization and their ability to be critical of the West should not be categorized under one rubric. Evidently, modernists like Ḥasan Ḥanafi[18], Muḥammad Arkoun

[14] ʻĀbdul Wahāb Khalāf, *UÎul al-Fiqh* (Cairo: Dar al-Qalam, 1977).
[15] Muḥammad Abu Ẓahra, *UÎul al-Fiqh* (Cairo:n.d.) and *al-Jarimah wa al-ʻUqubah* (Cairo:n.d.).
[16] Al-Mukashfi Ṭāhā al-Kabashi, al-Shariʼah fi al-Sudan bayn al-Ḥaqiqa wa al-Ithāra (Cairo: al-Ẓahra, 1986).
[17] Ahron Layish and G.R. Warburg, *The Reinstatement of Islamic Law in Sudan Under Numayri* (Leiden:Brill, 2002).
[18] Ḥasan Ḥusyn Ḥanafi, *Dirasāt Islāmiyyah* (Cairo: 1977).

will be more likely to do away with the permanent elements of the *Sharī'ah*, if these elements are in open contradiction with modern values. Thus their understanding of the flexibility of the *Sharī'ah* is, by and large, governed by the ethos of the modern society. Obviously, the place of women, non-Muslims and issues of human rights will be taken as a yardstick for the flexibility of the *Sharī'ah*. Anything less than accepting this modern ethos will be considered as an element of rigidity. Even worse this understanding of the *Sharī'ah* that does not accommodate these ethos will be viewed as irrelevant to the modern time. However, with more sophistication and genuinely rooted in the tradition is the attempt of Faẓlur Raḥmān[19]. In his attempt to answer this question a great deal of sensitivity to the issue of Islam and modernity has been exhibited, the hastiness of the modernists has been equally downplayed. It should be noted that the dividing line between him and the previous modernists is that his approach is largely based on a non-salvific understanding of Islam; while they completely regarded Islam as a religion like Christianity. As a result, for them the process of secularization is inevitable. As it was the case with Christianity, Islam had to undergo the same path. Essentially, their position primarily abandoned the *inqādhic* framework and yield itself to the salvific paradigm.

Much of the issues which were left unanswered by the modernists were genuinely tackled by the third position. The neo-*mujtahidīn* are represented by a wide spectrum of scholars and activists. It seems that both their articulation of the problem and their proposed answer are anchored in the tradition. More specifically, their development of terminology and conceptual framework seems to be sensitive to both the tradition and the present time. Most importantly, they certainly operate within the monotheistic paradigm which does not separate between *Usul al-Dīn* and *Sharī'ah*.

It should be remembered that the work of 'Abdul Qadir 'Awda[20] opened new horizons for the discussions of the flexibility of the *Sharī'ah*. It was for the first time, a Muslim scholar who was well grounded in positive law to study the *Sharī'ah* in a systematic way. As a result a number of legal theories were developed regarding the Islamic penal code. More specifically, 'Awda pointed out the process through which the *Sharī'ah* could be codified. Admittedly his comparative study proved, beyond doubt, that the *Sharī'ah* system is relevant to modern time. In his study a valuable distinction was made between the legacy of *Fiqh* and the principles of *Sharī'ah*. While the first is changeable and a result of human experience, the second is the permanent set of principles which is divinely revealed. This work was later developed by El-Awa in a number of

[19] Fazlur Raḥmān, *Islam and Modernity* (Chicago: University of Chicago Press, 1982) and *Islamic Methodology in History* (Karachi, 1965) and also his article entitled *"Law and Ethics"* ed. Richard G.H (Malibu: Undena Publications, 1985).

[20] 'Abdul Qadir 'Awda, *Al-Tashri´ al-Janāi al-Islāmi* (Cairo: 1958).

studies.[21] These two scholars had a great impact upon the learned legislaters who codified the *Sharīʿah* for the Sudanese and Kelantan governments.

Within this framework of analysis, Dr. Ḥasan al-Turābī[22] and other Muslim scholars[23] accepted the distinction between *Fiqh* and *Sharīʿah*. Moreover, al-Turābī made an analogous distinction between *al-Dīn* (absolute form of religion) and *al-Tadayun* (contextual formation of religion). The first represents the external absolute, while the second is the human understanding and implementation of the absolute. The absolute is the "standard" which we seek but will never be attained. In other words the full realization or implementation of the absolute is impossible. What is attainable is to attempt the implementation of that absolute, with the full awareness that we are going to realize something contextual, namely "*al-Tadayun*". From this perspective, as I indicated previously, *Fiqh* is analogous to *"al-Tadayun"* which is both contextual and changeable. On the other hand, *al-Dīn* is absolute, unchangeable, non-contextual, and analogous to *Sharīʿah*. Al-Turabi like other Muslim scholars, will theoretically accept any form that Islamic law might take, if that law represents the consensus of the Muslims and comes through a democratic process. Needless to say for al-Turabi and other Muslim scholars, that includes the process of codification of the *Sharīʿah* which includes reviewing the traditional *Fiqh* through organizing and classifying its corpus. Through this process it is expected that contemporary issues of the nation-state will be reasonably addressed. It should be noted that the people who will be involved in this process will be the 'Ulamā', politicians, Muslim social scientists and non-Muslims as well. What is needed are both the technical knowledge and the consensus of all citizens. This is because the main objective of the *Sharīʿah* is to remove hardship, and its implementation is meant to enhance the quality of justice. Thus, the process of codification of the *Sharīʿah*, and the political process of law-making are governed by the universality of ethical norms which is essentially the most fundamental Islamic value that emanates from the principle of transcendence of God. Needless to say that this position subscribes to the *Inqādhic* paradigm. Obviously, then, it does not accept a Christian understanding of Islam for the sake of modernity, unlike some Muslim modernists who viewed Islam as a religion that should be subjected to the same development as Christianity.

It is generally understood that issue like the place of women, non-Muslims and others will be addressed within this new perspective. For instance, the *Fiqh* of *al-Aḥkām al-Sulṭāniyyah* is regarded as much less relevant to the contemporary time, and consequently the principles that would govern the

[21] Muḥammad Salim *al-Awa Fi Uṣul al-Niẓam al-Janāi al-Islāmi* (Cairo: 1979) and *Punishment in Islamic Law* (Indianapolis: American Trust Publication, 1982).

[22] Ḥasan al-Ṭurabi *"al-Din wa al_Tadayun"* Majalat al-Fikr al-Islami, Khartoum(2) (September, 1984).

[23] See 'Ali Jarīshah, *Shari'at Allah Ḥakīmah* (Cairo: 1977).

relationship between Muslims and non-Muslims should be based on the constitution of the Madina. In that document both Muslims and non-Muslims are equally regarded as one *Ummah*. Although the advocates of this neo-*ijtihād* are very much comfortable with their position and less annoyed by both the traditionalists and modernists, yet the acceptance of their plea for the flexibility of the *Sharī'ah* is subject to the trust and appreciation of the non-Muslims. It is because for them this neo-*ijtihād* is essentially developed to accommodate their needs as co-citizens. Though it is highly unlikely to regard their position as a whole sale for modernity and a compromise of Islamic principles, some traditionists view it that way. But the most important issue in this regard is the paradigm within which one operates whether it is salvific or *inqādhic*. This is precisely what the traditionalists fail to see in the neo-*mujtahidīn* position. Thus, their criticism is essentially beside the point.

Although the fourth position could hardly be accepted as Islamic, its influence in Malaysia[24] and elsewhere made it more desirable to devote a considerable space for both its religious sensibility and rational arguments. This position is represented by the *Jumhuriyyun*, the associates of Maḥmoud Moḥamed Ṭahā, a sufi teacher who was accused by Numayri's regime of apostasy, and executed in January 1984. The main postulate of the *Jumhuriyyun* will be the emphasis on equality between all Muslims and non-Muslims, women and men. This principle of equality must be preserved at all levels, including the political. Thus, the historicist Islamic view on this subject should be abandoned, in order to preserve what humanity had achieved in terms of basic human rights.

The theology[25] behind the acceptance of the principle of equality was part of the message- if not, in fact, the essential message- that the Prophet delivered in the Qur'ān. According to this ideology, the Qur'ān contains two messages: the original message, revealed at Makka, was based upon complete *Ismaḥ* (freedom), while the message that was implemented in Madina during the era of the prophet and afterwards was based upon complete *qiwāmah* (paternalism). The Muslims of the seventh century were incapable of practicing Islam on the level of *Ismaḥ*, therefore, *'ikrāh* (compulsion) was to be implemented. Thus *Sharī'ah*, according to Ṭahā, which was devoid of *Ismāh* and equality, reflected the human situation at Madina, whereas the second message of Islam, which was initially revealed in Makka, was suspended. Clearly the concept of *naskh* (abrogation) plays a significant role in Ṭahā's endeavors to reconcile the tension

[24] See the publications of sisters in Islam and the special place which is given to Prof. 'Abdullah an-Na'im, who was a close associate of Maḥmoud Moḥamed Ṭahā and the one who was entrusted by him to translate his major work the Second Message of Islam. *Hudud in Malaysia*, ed. Rose Ismail (K Lumpur: 'Ilmiah Publishers and Sisters in Islam, 1995). *Sharī'ah Law and the Modern Nation-State* ed. Norani Othman (K Lumpur: Sisters in Islam, 1994) and *Islam, Reproductive Health and Women's Right* ed. Zainiah Anwar and Rashidah Abdullah (K Lumpur: Sister in Islam).

[25] Maḥmoud Moḥamed Ṭahā, *The Second Message of Islam* (Syracuse: Syracuse University Press, 1986).

between tradition and modernity in Islam.

For Ṭahā in the 20th century, with the full maturity of humanity, it is possible and sensible to talk about the level of *Ismah* in Islam, i.e., the "second message" of Islam. For the *Jumhurriyyun*, through real democracy and social justice, human beings will be able to attain complete freedom and self-realization. Therefore, the traditional understanding of Islam- which is the first message of Islam- is irrelevant to the modern age. The "second message" does not undermine the full equality between Muslims and non-Muslims, nor between women and men. The *Jumhurriyyun*, therefore, believe that they solve all the problems and tension between Islam and the national framework through this interpretation of Islam and equally between Islam and modernity.

Admittedly the logic behind this interpretation is very similar to modernists position. However, Ṭahā had a wild claim of him being the messenger of the "second message". By doing so he gave himself the right to abrogate, whatever he deemed necessary to be abrogated. Thus, much of the debate is far less about his conclusion, but rather about his divine authority. Most importantly, perhaps, Ṭahā regarded himself as the *al-Masīh al-Muḥammadī* (The Muhammadan Messiah), redefined monotheism and ultimately renounced the ethics of action. Though it might not be appropriate to summarize Ṭahā's highly complicated theology in few words, it could be said that Ṭahā believed that God has a like but that like does not have a like. This is certainly his point of departure from *Tawḥīd*. Thus through a number of ethical and theological assertions, he completely abandoned the *inqādhic* paradigm and accepted a salvific one. It should be remembered that his understanding of Christianity is in complete contradiction with the Qurʿānic Christology. Moreover, one could say that his position revealed a systematic reading of Christianity in Islam.

Concluding Remarks

Once again the flexibility of Islamic law is dwarfed by its permanent elements. Thus, it is both undesirable and equally unadvisable to talk about absolute flexibility. It should be noted that any system should include permanent elements that provide for that system its identity. In this case, this inseparability between the *Sharīʿah* and *Usul al-Dīn* constitutes the essence of Islam. As a result, both ethics of intent and action must go together. Accordingly, any attempt to undermine this relationship will sacrifice the essence of the system. Thus the superimposition of modernity or Christian categories on Islamic system will certainly result in complete distortion.

It goes without saying that flexibility is a relative term, and consequently the logic of compromises that govern its processes necessitates a mutual degree of sensitivity between Muslims and non-Muslims. Evidently the adherence to a common set of universal human values will certainly facilitate the process of reconciliation between Muslims and others. Finally, these two competing

moral visions of *inqādh* and salvation define the meaning of humanity in its relationship to God.