

What Everyone Needs to Know about Shariah

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Introduction and Summary

The information on Shariah provided in this paper is organized in 52 pages and eight sections, all in question and answer format, and is reflective of the classical Shariah positions and how they are applied or feature in the present-day Muslim countries. Some of the areas where modern reforms and Islamic revivalism of the latter part of twentieth century might have introduced changes are also mentioned. Each section features a number of questions of general interest, some topical and others informative of the state of the art. The purpose is not to provide exhaustive details on any of the themes discussed but to introduce Shariah in a nutshell, as it were, to readers with various levels of familiarity with the subject, Muslims and non-Muslims alike. The eight sections are as follows:

1. The basics of Shariah;
2. Shariah courts and proceedings;
3. Shariah and civil law;
4. Shariah and acts of worship (*'ibadat*);
5. Shariah, Gender and Family;
6. Shariah, banking, *waqf*, and finance;
7. Shariah and Modern Bioethical and Environmental Questions;
8. Shariah, freedom of religion and the rights of minorities.

1. The Basics of Shariah

Q) What is Shariah? Where does the word come from and what does it mean now?

What is the difference between Shariah and Islamic law?

A) Shariah literally means a way to the watering place or the path, one might say, to seeking felicity and salvation. It appears in the Qur'an once (*al-Jathiyah*, 45:18). In the English language, however, the phrase "Islamic law" has been used to refer to both the Shariah, which is revealed, and its interpretation as developed by jurists, called *fiqh*, which is a human construct. *Fiqh* (lit. understanding) is how the jurists understood the Shariah, especially the positivist aspects of Shariah of concern primarily with practical rules pertaining to the conduct of persons. Shariah is thus the wider source from which *fiqh* is derived. This distinction is not made in

the phrase *Islamic law*, but it is important to draw this. As a path to religion, the Shariah is primarily concerned with a set of values and rules that are essential to Islam. Whereas Shariah is conveyed mainly through divine revelation (*wahy*) as contained in the Quran and the exemplary sayings and conduct of Prophet Muhammad, known as Sunnah, *fiqh* refers mainly to the *corpus juris* that is developed by the legal schools (*madhahib*), individual jurists and judges by recourse to independent legal reasoning (*ijtihad*) and issuance of legal verdicts (*fatwa*).

Q) When was Shariah/Islamic law created? How? By whom?

A) The Shariah is contained in the Qur'an, which is God's revealed speech to Prophet Muhammad, received over a period of twenty-three years of his prophetic mission in the early seventh century CE. It was further developed and supplemented by the Prophet Muhammad through his sayings and conduct. Its interpretation and formulation into more specific rulings (*ahkam*) especially with reference to newly arising issues continued to be developed over time, mainly by the jurists (*fuqaha*). Shariah courts also played a role but it was the work mainly of individual jurists who acted in their private capacities as pious individuals in the various parts of Islamic lands. That is why Islamic law is often referred to as 'jurists' law' similar in this respect to Roman law. Almost all of the leading eponyms and imams of jurisprudence were private individuals and teachers. They wrote little themselves but their teachings were subsequently developed by their learned disciples, many of whom authored works that represented the authoritative articulation of their particular schools, or *madhhabs*.

Q) Is Shariah the same or different from other legal systems?

A) Shariah may be described as a "legal system" in a broad sense but it is perhaps more accurate to say that it lays down the fundamental principles of law, religion and ethics all combined. This can give rise to different legal structures, as it has indeed historically given rise to a variety of legal systems, all of which can be said to be based on Shariah, though not synonymous with it. In many cases the Shariah co-existed with an already existing legal system, such as the *adat* in the Malay world, the *zawabit* during the Mughal and the *qanun* during the Ottomans.

Q) Is the concept of Shariah strictly or solely Islamic? Is there a Jewish Shariah? A Christian Shariah?

A) The Qur'an says that each community has been given its own Shariah (*al-Ma'idah*, 5:48), including the people of Moses and Jesus (peace be upon them!). The validity of revealed laws preceding the Shariah of Islam (*shara'í' man qablana*), especially of Judaism and Christianity, is recognized in the Qur'an and also the detailed articulations of Islamic jurisprudence (*usul al-fiqh*). Those revealed laws are not, however, practiced and Muslims are not bound by them unless explicitly affirmed in the Qur'an. This is so because the Shariah of Islam is self-contained. Some of the laws of Judaism, to which the Qur'an has made references, have survived under the Shariah of Islam, but which were then integrated and became a part of the latter. The Jews have a similar legal system which they refer to as Halakha and has many aspects in common with the Shariah. Christianity is basically not a law-based religion and has no elaborate legal system of its own. The Roman law which developed in Christian lands does not claim a divine origin in the religion.

Q) Do Sunni and Shi'i follow a different Shariah?

A) In so far as the Shariah is divinely revealed, Muslims of all schools and sects follow the same Shariah, including Sunnis and Shi'is. However their respective schools of jurisprudence, or *madhhabs*, differ in matters of detail. Such differences are not only seen in Sunni and Shi'i juristic schools, but also among the four leading schools of Sunni jurisprudence as well, that is, the Hanafi, Maliki, Shafi'i and Hanbali schools. That said, since the leading schools of Islamic law recognise one another and each as valid interpretations of the Shariah, under the jurisprudential principle of selection (*takhayyur* or *takhyir*), all schools may select formulas and principles from one another, and integrate them into their own school or *madhhab*. This has in fact happened on many occasions in the twentieth century when Sunni Hanafi countries, for instance, selectively adopted aspects of the Maliki, Shafi'i or Hanbali schools, and vice versa into their own laws. Twentieth century development also saw a partial integration of Shi'i jurisprudence, and modern law reform in some Sunni countries adopted aspects of Shi'i law, especially on matters of women's property rights and inheritance in their statutory law reforms.

Q) What is the relationship between law and theology?

A) Before the systematisation of the different theological doctrines under the umbrella of *'ilm al-kalam* (also known as *'ilm al-'aqa'id* or theology), there was a certain unity and coherence between the different aspects of Islam. The Shariah of Islam consisted of three major but undivided components to begin with, namely of dogma, ethics, and law (*'aqidah, akhlaq and fiqh* respectively). It was during the second century of the advent of Islam that the three branches were separated, and the *fiqh* as we know it today began to operate in many ways separately from theology and ethics. Over time, aspects of Islam pertaining to beliefs were also systematised into the science of theology (*'ilm al-kalam*) while those relating to the human conduct and practical concerns of the applied law fell under jurisprudence (*fiqh*). The part of Shariah that related to behavior but was primarily addressed to individuals and not adopted into positive law were placed under *akhlaq*. That said, law, theology and ethics are intertwined in Islam so that theological suppositions, such as the nature of the human intellect (*'aql*), legal responsibility (*taklif*) and moral concerns on virtues, good and evil (*fada'il, husn wa qubh*) are often the starting points of legal inquiry in works of jurisprudence. Broadly speaking, *fiqh* consists of a concretised articulation of the religious and moral values of Islam. These latter two are mother sources and *fiqh* is basically meant to translate their value structures into practical rules for purposes of enforcement.

Q) What is a fatwa? Who can request a fatwa? Who can issue a fatwa and what are the consequences?

A) *Fatwa* is a legal/religious verdict issued by a qualified scholar (*mufti*) in response to a particular question or issue. Anyone with a question about an aspect of Islamic law and religion can request the scholar for a *fatwa*. The *fatwa* issued in response is essentially non-binding and the person to whom it is addressed is also free to dispense with it and seek the opinions of other *muftis* unless, of course, the *fatwa* in question merely articulates a decisive injunction of the Qur'an or *hadith*. A voluminous genre of literature under the rubric of *fatawa* has developed over time and the tradition continues to this day. The *fatawa* were in the past issued mainly for guidance on a case-by-case basis on issues facing the people. The *muftis* acted much like the lawyers and legal professionals do today. This lay character of *fatwa* is being changed in many present-day Muslim countries that are issuing new

guidelines, including statutory legislation or by-laws, on *fatwa* issuance functions. *Muftis* are nowadays state functionaries in many Muslim countries with specified jurisdictions under their applied statutory laws, and no longer act in their previous capacities. When a *fatwa* is duly issued and gazetted, it also carries a binding force for particular cases and localities. It is debatable whether this can be called a healthy trend or whether it tends unduly to restrict the prospects of scholarly contributions public discourse and the scholars' freedom of expression. This needs to be judged, however, in light of the prevailing conditions of each country and society. Some restrictions are deemed necessary to avoid confusion and misguidance that might be forthcoming from unqualified individuals.

Q) Where and how did one study Islamic law in the past? How do they study today?

A) Some of the basic tenets of Islamic law were taught to Muslims as early as childhood by the parents; but this mostly involved knowledge which is obligatory upon the individual (*fard 'ayn*) such as the manner of performing acts of devotion and worship, cleanliness and ritual purification (*taharah, wudu'*) for prayer and other religious occasions, ritual prayer (*salah*) and fasting. Formal study of the Shariah varied from learning individually with the scholars (*'ulama*) at informal study circles (*halaqah*) in the mosques, seminaries (*madrasah*) and universities (*jami'ah*). Today Islamic law is also studied as part of 'Islamic Studies' curriculum, and part of legal studies or Middle Eastern studies as well as an independent subject in its own right (e.g. degrees in *fiqh* and *usul al-fiqh*) in modern Islamic universities. The renowned Azhar University of Egypt, for instance, offers full degree courses on Shariah and *qanun* (Shariah and modern laws) combined.

Q) What are the sources that jurists use for their legal rulings?

A) The jurists rely on two types of sources: revealed and non-revealed. The revealed sources are the Qur'an and the Sunnah (the latter known through the authoritative *hadith* collections). The non-revealed sources studied under the science of the sources of law (*usul al-fiqh*) include a number of various methods and formulas of extracting legal rules from the revealed sources. The overall exercise of extracting a ruling over a new issue is known as *ijtihad* (literally striving through research). The sub-varieties of *ijtihad* include, in turn, analogical reasoning

(*qiyas*), general consensus of scholars (*ijma'*), juristic preference (*istihsan*), considerations of public interest (*istislah*), blocking the means to an evil end (*sadd al-dhara'i*), presumption of continuity (*istishab*), custom (*'urf*) and unrestricted reasoning in accordance with the general principles of Islam (*istidlal*). Most of these are rational concepts that seek to regulate extraction of rules from the primary sources, and are themselves known as the *adillah* or proofs of Shariah and subsidiary or secondary sources in their own right. They are secondary in the sense that they depend for their validity on their proximity to, and support they can find in, the letter and spirit of the data of the primary sources. These doctrines are studied in considerable detail and each has to meet a number of requirements for it to offer a valid basis of law and judgment. When the judge and jurist resort to Shariah sources in search of solutions to issues, they normally consult the rules of *fiqh* that are found in the recognized manuals of *fiqh*, most of which are, however, still in Arabic. But this situation began to change when Islamic law began to be codified in Western style statutory codes during the 19th and 20th centuries.

The first comprehensive codification of Islamic law was the *Ottoman Mejelle* compiled by a number of Ottoman scholars in 1876 in 1850 articles. During the course of the twentieth century statutory legislation gained momentum in many Muslim countries and Islamic law, especially in the areas of personal status and matrimonial law, has been codified in statutory codes for easy reference by judges and lawyers. The *fiqh* sources are also supplemented by administrative ordinances and decrees issued by the ruling authorities, often consisting of procedural rules and guidelines for court practice. Any standard text on Islamic jurisprudence (*usul al-fiqh*) would refer to the Qur'an and Sunnah as the primary sources of Shariah, followed by detailed sections and chapters on the secondary sources. For instance, Mohammad Hashim Kamali's, *Principles of Islamic Jurisprudence*, is a standard text on *usul al-fiqh*, which is currently in use in most English speaking universities - also available in a Malaysian edition. This book has also been translated into several other languages. The substantive Islamic law, or *fiqh*, has also been compiled in better organised and accessible forms in encyclopedias, manuals and textbooks that

have become available in the major Islamic and Western languages, and they are too numerous to mention.

Q) Are there different schools of Islamic law?

A) There are different schools of Islamic law within the Sunni and Shi'i branches of Islam. The Sunni schools were initially larger in number but were reduced over time to only four, namely the Hanafi, Maliki, Shafi'i and Hanbali, commonly known as *madhhabs*, named respectively after their eponyms of imams. These are not only juristic schools but also combine law and theology, although theological schools proper, such as the Mu'tazilah, the Ash'ariyyah, Maturidiyyah and others are a separate set that are studied under *'ilm al-kalam* (also *'ilm al-'aqa'id*) and are mainly devoted to the exposition of the attributes of God the Most High, the nature of good and evil, matters of concern to the hereafter etc. The schools of law differ from the schools of theology in that the former expound mainly the practical rules of Shariah (*al-ahkam al-'amaliyyah*) pertaining to the conduct and behaviour of the competent person (*mukallaf*) whereas theological schools are concerned mainly with the dogmatics, matters of belief and the *ghaybiyyat*, or the world of the unseen. The Shi'i schools are also divided into three, namely the *Imamiyyah* (that has followers mainly in Iran and Iraq), the *Zaydiyyah* (mainly in the Yemen) and *Isma'iliyyah* (India, East Africa and dispersed elsewhere). The Shi'i schools are at once both theological and legal. For they combine the teachings of their leading imams, who are not merely experts on jurisprudence but also theological figures. The doctrine of imamate under Shi'i Islam is also an integral part of Shi'i theology.

Q) Are jurists bound to follow the rulings of their legal school?

A) Jurists of the highest standing who are qualified to carry out independent reasoning (*ijtihad*) directly through consulting the sources of Islam are not bound to follow the rulings of the legal schools they may be attached to. A jurist who has attained this status, known as *mujtahid*, is not even permitted to follow the opinion of others or exercise imitation (*taqlid*), but must always act on his or her own understanding of the Shariah based on his or her own conviction. That said, it is the tradition of *taqlid* that has for various reasons dominated the much longer history of Islamic scholarship, and it has proven difficult to dismantle its hold over the existing body of Islamic law or *fiqh*. More recently, and ever since early 20th

century, leading Muslim scholars have called for the revival and rejuvenation of *ijtihad*. One particular area that may be mentioned, however, where *ijtihad* finds a limited role to play, is the law of inheritance, on account of the fact that this branch of Islamic law is based mainly in the Qur'an and is fairly self-contained, unlike the other branches of law which are based on juristic reasoning and rules extracted and derived from the sources by the qualified jurists. Thus a jurist capable of *ijtihad* in other areas of law may still follow the rulings of his school of following when it comes to inheritance. Generally speaking, even a *mujtahid* of the highest rank may follow the ruling of an established school of Islamic law, or an opinion or interpretation of individual scholars, if he happens to agree with it and understand its basis. This is not blind imitation or *taqlid*. The discredited *taqlid* is one which is based mainly on mimicry or copying without understanding and conviction on the part of the follower.

Q) How does Islamic law categorise human actions?

A) Human actions are categorized according to a scale of five values, namely those that are obligatory (*wajib*), recommended (*mandub*), permissible (*mubah*), reprehensible (*makruh*) and forbidden (*haram*). The first and last categories, namely the *wajib* and *haram*, mainly originate in the decisive rulings of Qur'an and *hadith* and are limited in scope, whereas the remaining three occupy the much wider space, as they are also largely developed through juristic interpretation and *ijtihad* that is for the most part not binding – unless it is also upheld by general consensus (*ijma'*), in which case it becomes a part of the actionable ruling of Shariah and becomes binding. These five values, known as *al-ahkam al-khamsah*, constitute the main bulk of the positive law, or *fiqh*, which consists mainly of rules pertaining to practical conduct in the sense of attaching value to action. The *wajib* and *haram* pertaining especially to human relations and *mu'amalat* are also enforceable in the courts of Shariah. The other and much wider three categories are not justiciable and fall under the broader rubric of personal choices as they consist mainly of advice, encouragement or discouragement, that should be followed, in the case of *mandub*, and should not be acted upon, in the case of *makruh* – whereas *mubah* is totally neutral and may or may not be acted upon. The advice

may have cultural consequences and affect personal and social relations, but it is not actionable in the way the *wajib* and the *haram* are.

Q) Is it possible to modernise or reform the Shariah?

A) The parts of Shariah that are based on clear injunctions of the Qur'an may be more difficult to change, but a great deal of the Qur'an is also open to interpretation – even in regards to its injunction, or what is known as the *ayat al-ahkam*, or legal rulings. One who is knowledgeable of the rules of interpretation, the structure of words, commands and prohibitions of the Qur'an, and has general knowledge also of Shariah, will be qualified to attempt a fresh interpretation of a text or ruling of Shariah that accommodates a new reality. Broadly the Shariah also validates *ijtihad*, as already mentioned, and a number of formulas such as analogical reasoning (*qiyas*), considerations of public interest (*istislah*) etc., for its own adjustment to new realities and reform, and it has to that extent remained open to interpretation and change by qualified scholars according to context and peoples' needs. There are also areas and features of contemporary studies and practices of Shariah, which were altogether absent, or were present on a smaller scale, in the past, such as codification, law reform through parliamentary legislation, and the development of institutions such as *fiqh* councils, academies and specialised institutions of research in Shariah law. They look into new issues and formulate suitable responses that may constitute the basis of *fatwas* by learned individuals and bodies, or which provide input for new legislation and law reform. The reform of Shariah is gaining ground and the scope of *ijtihad* is likely also to expand further due to the rapid pace of social change and new challenges presented by scientific developments, globalisation and new modes and varieties of trade and transactions in the market place. Certain areas of Shariah law have also remained underdeveloped in relationship, for instance, to constitutional law, the Islamic state ideas, and the jurisprudence of minorities that look into issues and challenges facing Muslim minorities that reside in non-Muslim majority countries. Fresh research and reformist thought in Shariah has been an integral part, in fact, of the call over a century ago for the revival of *ijtihad* by Jamaluddin al-Afghani and his disciples Muhammad 'Abduh and Muhammad Rashid Rida. This is a continuing process.

Q) Do Muslims want Shariah law in Muslim countries? What countries today use Shariah law?

A) Most Muslim countries apply the Shariah in various proportions, often side by side with statutory legislation. The applied family law, inheritance law and bequest in the majority of present-day Muslim countries are on the whole based on Shariah. These aspects of the Shariah have represented the living law and much of it is customarily entrenched in the practice of Muslim societies, which they often follow even without recourse to official proceedings and intervention by government agencies. Even European colonial rulers who dominated legal institutions in Muslim countries under their rule and tried to replace the Shariah with Western laws left the family law largely uninterrupted. Other parts of the Islamic law in the areas of public law, taxation, criminal and commercial laws etc., were either replaced by modern laws of Western origin or modified and mixed with them. In the post-colonial period, and after the onset of the so-called Islamic revivalism and resurgence, many countries of the Muslim world either amended or replaced parts of those laws – yet the parts that had become entrenched, or indeed aspects of Western laws that were compatible with Shariah, were retained. Certain aspects of civil laws and statutory legislation may to this day be also said to be extra-Shariah in parts but much of it is also taken from the Shariah with necessary adjustments, and codified for purposes of enforcement. So the picture you have is a mixture of laws, some based on Shariah and others derived from external sources. Saudi Arabia, Afghanistan, Iran, the Sudan and many other countries use Shariah law more widely than most. Turkey has ceased to apply the Shariah and some countries in the MENA region have replaced parts of the Shariah while others are bringing in more of the Shariah into their legal systems. Most others are mixed. The onset of Islamic revivalism since mid-20th century was to some extent expressive of a public demand for a return to their Islamic heritage, and Shariah is a major component of that identity. This has remained to be a continuing process in many Muslim countries. Islamic banking and finance, Islamic laws of property and contract are also more widely practiced now than they were in colonial times and after.

Q) Do Muslims want to impose Shariah law in the West?

A) Muslim communities in the West have practiced parts of the Shariah pertaining to worship matters, matrimonial law and victuals, and have also often expressed the wish to practice more of the Shariah in personal law matters, but there is no public demand on their part or that of the majority Muslim countries for Shariah to be imposed in the West. Following the advent of Islamic revivalism, Muslims in the West have become more widely observant of Islamic principles in personal lifestyle matters, food, clothing etc., but in the public sphere they have, on the whole, followed the laws and customs of their country of domicile. This is also in keeping with the Islamic position which requires them to observe those laws and customs as law-abiding citizens, provided they do not contradict Islamic religious injunctions.

2. Shariah Courts and Proceedings

Q) What is a Shariah court and how does it work?

A) In the context of modern legal systems, a Shariah court is the court of law applying laws derived from the Shariah in places where the Shariah is recognised as the applied law under the constitution, basic law or statutory provisions. The law often specifies the procedure of enacting legislation or by-laws based on Shariah that will then be applied in Shariah courts in the country. The functioning of Shariah courts is thus regulated by statutory law, and it is often the personal law aspects of Shariah that is the applied law. In arriving at judicial decisions recourse is made by Shariah courts to the codified laws and by-laws as well as the *juris corpus* of Islamic law, including authoritative scholarly views from across the legal schools (*madhahib*), including rules on which there may be differences of opinion (*ikhtilaf*). An official *madhhab* is sometimes adopted by the state law or constitution but there also exists a degree of flexibility through the principles of *takhayyur* and *talfiq* (selection and patching-up respectively) as already mentioned. A Shariah court typically has limited jurisdiction, i.e. it is only applicable to Muslims, and is often confined to family or personal law (e.g. marriage, divorce, child custody) and inheritance. In the past, as it is also the case today in some countries (e.g. Saudi Arabia), there was no need for specifically designated 'Shariah courts' in so far as the legal system itself was based on the Shariah although the ruler frequently issued edicts and regulations of non-shar'i origin, which is allowed under the

doctrine of *siyasa shar'iyah* (Shariah-oriented policy). The courts were thus courts of general jurisdiction that applied the Shariah, as they still do in some countries, and were authorised to adjudicate all types of disputes. That said, a mixed pattern of Shariah courts and other courts tends to prevail in most of the present-day Muslim countries.

Q) Who are *qadis* and how do they differ from *muftis*?

A) *Qadis* are formally appointed judges who preside over judicial proceedings in courts applying the Shariah. *Qadis* are appointed by the ruler or government and their rulings or judgments are enforceable under the law. *Muftis*, on the other hand, are like legal advisors or lawyers – private scholars (i.e. not appointed by anyone, at least in its original sense); they are qualified to give a legal response (*fatwa*) and expound the ruling of Shariah and religion on a particular issue that is put to them by a person or group of persons. Thus both *qadis* and *muftis* are individuals qualified to extract rulings of Shariah from the source evidence to be applied to the issue at hand. Both also rely on each other: just as a *mufti* may refer to previous decisions of the *qadis* in issuing a *fatwa*, so too the *qadi* may cite or solicit the *fatwa* of a *mufti* on certain legal or religious issues. In other respects, *qadis* are different from *muftis*. Whereas a *mufti* may issue *fatwa* upon mere inquiry by a questioner, a *qadi* only works with actual cases brought to him in court. Whereas the *qadi's* decision is binding and enforceable, a *fatwa* is non-binding and the person seeking the *fatwa* is free to consult other *muftis* for alternative views. A *qadi* should not mix the positive laws of *fiqh* with theology and ethics (*'aqa'id and akhlaq*) but the *mufti* is expected to offer advice regardless of these boundaries. In some countries today, however, the office of the *mufti* is incorporated into state bureaucracy and consequently there exist also "official" state *muftis* who are appointed by the state and whose views may form the basis of a government ruling or law upon being gazetted.

Q) How many witnesses are necessary for different types of cases? How are the testimonies of men and women treated?

A) The number of witnesses required is as follows. If the testimony concerns property and other civil transactions, the requirement is two men, or two women and a man, or one male witness plus a solemn oath by the plaintiff. If the

testimony does not relate to civil transactions, only two male witnesses may testify though the Hanafi school holds that two women and a man may testify for all disputes other than the prescribed *hudud* penalties (see below). If the testimony is about fornication or sodomy, it requires four male eyewitnesses. If the testimony concerns matters which men do not typically handle, such as childbirth, then it is sufficient to have two male witnesses, or a man and two women, or even one woman alone, as female testimony in such matters carries greater weight than that of male witnesses. The stipulation that two women take the place of one man in property and commercial disputes is explained by the fact that in the past, women customarily did not attend to commercial transactions or judicial disputes, and their retentiveness was consequently deemed to be weaker than that of men. These positions have been changing though and many Muslim countries nowadays admit not only female witnesses but also appoint female judges. This is reflective of the larger presence of women in the public sphere and most other areas of concern to court litigation – hence their competence to act as witnesses and judges.

Q) What are *hudud* punishments? How have they been administered in the past? How are they administered today?

A) *Hudud* (sing. *hadd*) literally means “limits” but what has been passed on as *hudud* offences are those for which punishment has been specified by the Qur’an or authentic Sunnah, and they are four, namely, theft (*sariqa*) (Q 5:38-39) adultery and fornication (*zina*) (24:2), slanderous accusation of adultery (*qadhf*) (24:4), and highway robbery (*hirabah*) (5:33). Many jurists also include wine drinking (*shurb*) and apostasy (*riddah*) under *hudud*, but this is disputable, as the Qur’an does not specify a punishment for them. The words *hadd* and *hudud* are nowhere used in the Qur’an in the sense of fixed and mandatory penalties. Looking at the Qur’an verses on *hudud* there is room for repentance and reform in the adjudication of *hudud* crimes. This is because every one of the verses on *hudud* referred to above specifies the crime and its punishment and then adds that if the accused ‘repents and corrects himself, then Allah is Forgiving and Merciful.’ This phrase appears regularly in all the *hudud* verses, yet has been almost completely ignored in the *fiqhi* formulations of the *hudud*. The present writer has written a book on the subject with a plea for reform that takes a holistic approach to the Qur’an, one that

would make space for repentance and reform, and which would thus entail a departure from the fixed and mandatory status of the *hudud* in the existing *fiqh* manuals. In the past punishment for these offences and judicial sentences were based on the textual injunctions of the Qur'an and *fiqh* manuals. In modern legal systems, with written and codified laws and constitutions, for *hudud* punishments to be enforceable, they would have to be explicitly codified and adopted by statutory legislation.

Q) Does Islamic law uphold "an eye for an eye"? What is the compensation for someone who causes another personal injury or death?

A) The law of just retaliation or *qisas* – "an eye for an eye" – predates Islam and can be traced back even to the laws of Hammurabi. By Qur'anic standards, just retaliation is permissible only for intentional acts causing death or personal injury. Retaliation in Shariah applies when exact parity in the infliction of injury can be ascertained. This is often difficult to establish, for example, in the case of a broken tooth, leg, or even eye, exact parity in the inflict of injury is often difficult to visualise, which is why additional legislation has been necessary to regulate the application of *qisas*. In cases involving death, retaliation is executed by the next of kin. Retaliation by way of *qisas* constituted the mainstay of tribal justice which already existed in the Arabian social milieu even before the coming of Islam. Retaliation may be commuted to payment of blood-money (*diyyah*) if the family of the deceased person agrees so. The Prophet Muhammad used to advise forgiveness, peaceful settlement and compromise in most *qisas* cases that came to his attention. Nowadays the state and Attorney General representing the community (and the Right-of-God or *haqq* Allah aspect of the crime) may impose additional punishments even when the family accepts a *diyyah* or a peaceful settlement. The *fiqh* books specify the amounts of monetary compensation for death (*diyyah*) and for bodily injuries (*arsh*) often in gold and silver, or livestock, such as one hundred camels of certain description form *diyyah* and other amounts for injuries. These have often been converted to their monetary equivalent in countries that apply them.

Q) What is the penalty for adultery and for the false accusation of adultery?

A) The penalty for adultery as stipulated in the Qur'an for both parties to the act is to be flogged one hundred lashes of the whip (*al-Nur*, 24:2). False accusation of adultery carries the penalty of being flogged with eighty lashes and it additionally permanently disqualifies the person so punished from acting as a witness in the court of justice (24:4). Yet these are basically meant for a society where marriage is made easy, where promiscuity and suggestiveness are suppressed and nullified, and where virtue, piety and remembrance of God are kept fresh in the minds and hearts of people, and where the Shariah is applied, not selectively as it is today for the most part, but in its entirety. Enforcement of *hudud* should also preclude doubtful applications, and it is difficult to ascertain absence of all doubt in a society where changed economic conditions and social customs have also been espoused with the increase of promiscuity and where marriage is not as easy as it was meant to be. Furthermore, for adultery to be punished, the Qur'an requires four eyewitnesses for proof, which is extremely difficult, almost impossible to produce. In most cases, adultery is proven by confession or pregnancy, both of which are liable to distortion and caution is advised not to over-rely on them. In rape cases, for instance, the pregnant woman is charged but she is often required to prove the case against the male person, and this is very difficult to achieve – hence frequent instances of miscarriage of justice, and a case also for innovative reform of the laws on adultery and *zina*. This has already taken place in some countries but much of it may still be said to be work in progress.

Q) What is the penalty for theft?

A) The punishment for theft according to the Qur'an is amputation of the hand, but only when a number of conditions (about 14 conditions in all) are duly fulfilled. These are not easy to fulfill, and when a shadow of doubt exists, the punishment is to be commuted to *ta'zir*, that is, a deterrent penalty determined by the judge in light of the conditions of the case and that of the offender. This is often done by the judges. Generally judges have also shown reluctance to apply amputation, and impose prison sentences instead. Twentieth century codification movement in Muslim countries that have formulated penal codes or criminal codes tended to impose prison sentences for property offences including theft. There is a demand now by advocates of the Islamisation of such laws to replace them with their

Islamic equivalents – hence the *hudud* debate that is still unfolding in many Muslim countries.

Q) What is the penalty for drinking alcohol and for gambling?

A) There is no fixed punishment for drinking and gambling in the Qur'an or *hadith*. The penalty for drinking alcohol according to classical rulings is to forty lashes of the whip. For gambling the judge may apply a discretionary deterrent (*ta'zir*) punishment. This is because the Qur'an has condemned gambling (*maysir*) and described it "as dirty work of the devil" but stops short of specifying a punishment for it. Gambling is consequently a transgression (*ma'siyah*) which is punished under the *ta'zir* offences.

Q) Can someone appeal the decision of a Shariah court?

A) Islamic law validates appellate review, especially in cases where the court decision departs from the clear injunctions of the Qur'an, the Sunnah and general consensus (*ijma'*), or when fresh evidence comes to light after the initial court judgment, or indeed when a serious procedural flaw is in the picture. Many of the present-day Muslim countries where Shariah courts operate have also established a Shariah appeal court or tribunal, and often a full-fledged three-tiered structure of Shariah courts equipped with appellate jurisdictions.

Q) Does Islamic law permit Muslims to lie in certain circumstances? (What is *taqiyyah*?)

A) The unlawfulness of lying is established by the Qur'an, Sunnah and general consensus but there are three exceptions that originate in the sayings of the Prophet: during warfare; when a lie can help save life or settle a raging conflict between two persons; and when a man tells a white lie to flatter and please his wife. But even then the condition is such that substantive justice and moral rectitude are not compromised – rather that they are positively served. The Qur'an and Sunnah proscribe, on the other hand, espionage, acting on suspicion, backbiting, and infliction of harm (*darar*) on others. Only the Shi'ites have validated the doctrine of *taqiyyah* (dissimulation) in exceptional situations that may permit one to conceal, for example, one's religious belief if disclosing it would mean persecution or torture. Sunni jurisprudence does not recognize the validity of

taqiyyah. That said, lying, fraud and misrepresentation are generally forbidden and unacceptable and that goes for all Muslims, Sunni and Shi'ah alike.

3. Shariah and Civil Law

Q) What principles govern political life for Muslims? Does Islamic law prescribe a particular political system?

A) Neither the Qur'an nor the legal corpus developed from it prescribe a political system or model, be it caliphate, sultanate or emirate. Instead politics and government are guided by a set of objective principles, such as human dignity, justice, accountability, consultation and trust. Islamic governance may further be characterised as civilian (*madaniyah*), which is, however, neither theocratic nor totally secular but has characteristics of its own. It is a limited and a constitutional form of government whose powers are constrained by reference to the injunctions and guidelines of the Qur'an and the authentic *Sunnah*. It is also rooted in the notions of trust (*amanah*) and vicegerency (*khilafah*) of man as God's trustees and custodians of the earth (this is different from caliphate as a political structure) and its principal assignments are to administer justice and secure the welfare (*maslahah*) of the people. The state represents the community to which it is accountable. The Islamic system of rule may also be described as a qualified democracy which is elected by the people and must conduct its affairs through consultation.

Q) Does Islam accept the separation of religion and state?

A) To speak of the separation of religion and state is to speak of the separation of two institutional authorities. Yet it should be noted that speaking of the separation of religion and state in Islam is not the same as in the western context, since Islam has no institutionalised religious authority, such as the Pope and institutionalised church, to speak on its behalf, but instead entrusts every believer with moral responsibility as God's trustee and vicegerent (*khalifah*) on earth. Religious consciousness pervades the life of Muslims. In an essentialist sense, Islam's teaching on justice, fair dealing and moral virtue etc., does not preclude politics. Yet a functional separation of powers is not only possible but that it had existed all

along: executive power rested with the head of state and ministers; legislative power essentially with the *mujtahids* and *ulama*; and judicial power with the judges; they all had, as they still do, recognized spheres of operation that they observe, while the head of state supervises them all. The state is also not allowed to regulate matters of dogma and belief, nor has any substantive powers to determine acts of worship.

The jurists have moreover drawn a distinction between religious obligations (*wajib dini*) and juridical obligations (*wajib qada'i*), and courts of Shariah only concern themselves with the latter. Additionally, in the renowned scale of five values of Shariah, only two, the obligatory (*wajib*) and forbidden (*haram*) can have legal and judicial implications. The ruler is also authorised to issue administrative regulations and decrees for the sake of public interest (*maslahah*) under the doctrine of *siyasah shar'iyah* (Shariah-oriented policy) and indeed in most civilian affairs the Qur'an and Sunnah are silent, which may call for the exercise of discretion, policy initiatives and regulations by the ruling authorities. In matters of concern, for instance, to economic development, science and technology, and what it takes to offer appropriate responses to the challenges of globalisation and so forth, one would expect the extra-Shariah and essentially civilian authority of the state to fill the space, with the general proviso that the essential tenets and principles of Islam are not violated. When this proviso is carefully observed, the ruling is likely to qualify as Shariah-oriented policy. But none of these, one might add, is equal to a total "separation" of religion and state.

Q) Does Shariah require the leadership of a caliph, an Imam or an ayatollah?

A) There is no such a requirement to have any leadership under these designations. This is because the Qur'an or *hadith* make no reference to a state, government or a particular system of leadership. The question as to whether or not the Muslim community is under a religious obligation to form a government or a system of rule – or put differently, is having a government a religious obligation – has been debated among early scholars, but the balance of the scale tilts in favour of formation of a government – this is because enforcement of the Islamic principles requires a system of rule – hence an obligation by inference. This is

confirmed by the practical example of the Prophet himself. He did form a system of rule, which was however combined in his case with the mission of prophethood. Government in Islam is meant for the most part to administer and govern the civilian and community affairs of Muslims, not their beliefs. The ayatollah is a distinctly Shi'i concept and a religious office under Shi'i theological traditions. The ayatollah being entitled to levy a certain religious tax and discharge certain functions. The institution of caliphate as a political system of rule and that of Imam are subsequent developments not dictated by scripture.

Q) Do Muslims want to return to a caliphate?

A) There have been voices calling for a return to the historical caliphate but this is neither feasible under the currently ubiquitous nation-state system, with their own (nationalist) constitutions, now adopted by virtually every one of the 57 states of the present-day Muslim world, nor is it a requirement under Shariah. Yet the possibility is open for some form of political unity that may unite the world Muslim community (*ummah*) under a unified system of leadership, in the name of a caliphate. What we have seen of the so-called Islamic State militants, ISIS and its claim to caliphate, has been espoused with so much brutality and violence that cannot go together with the idea of a legitimate caliphate.

Q) How does Islamic law relate to civil law? In the lives of Muslims, which takes precedence?

A) In so far as Islamic law operates also in the moral domain, it can be the guiding principle for civil law and open to receptivity from civil law; the two need not be seen as mutually exclusive. During the colonial period, many Muslim countries have actually taken from or adopted the Code of Napoleon, just as it is known that the latter itself took from Maliki jurisprudence. Civil law can moreover be the 'matter' upon which the spirit and principles of Shariah can find expression. In all legal systems and traditions – Islamic included – moral values are accorded a high status, which may well be the bridge between Islamic and civil law. Retaining the ethical content of civil law is undoubtedly important, particularly when strict application of the law produces onerous and unjust results (e.g. Nazi law explicitly authorised the Holocaust). Moreover, Islamic law, or at least the part of Islamic law known as *mu'amalat* (civil transaction), which is primarily concerned with the

regulation of human relations, is civilian and positivist for the most part. This would preclude dogma and worship, which are primarily religious. Hence a black and white division between Islamic and civil law may be less than accurate. Civil law, or statutory legislation of primarily non-religious content, in most of the Muslim majority countries draws heavily from the Shariah, especially in the sphere of matrimonial, property, and family laws, and more recently in the spheres of commercial law and contracts – especially with the rapid spread of Islamic banking, finance, and Islamic insurance (*takaful*).

Q) Does Islamic law encourage Muslims to observe the civil laws of the countries where they live? Does it ever mandate breaking the civil law?

A) In practice Islamic law has always co-existed with some form of civil law of non-revealed origin even in the past, such as the Malay *adat*, the Mughal *zawabit* and the Ottoman *qanun*. Moreover, the doctrine of *siyasa shar'iyah* authorised the ruler to issue administrative regulations that he saw fit to further the public interest (*maslahah*). Obedience to the civil laws of the country is analogous to obedience to the ruler which is much emphasised in the legal and theological discourses of Islam. Thus obedience is due as long as it does not entail violation of the religious beliefs and worship matters. Breaking the civil law is justified under certain conditions, when for instance, civil law mandates or authorise ethnic cleansing, or in the unlikely situation of requiring the Muslim to renounce his faith. Refusal to obey under such circumstances is permitted in Islam based on the renowned hadith that "There is no obedience in transgression; obedience is required in pursuit of right conduct."

Q) Is Islamic law compatible with democracy? With political pluralism?

A) A democratic system of rule is on the whole compatible with Islam because democracy is about fundamental rights and liberties, the rule of law, a representative and participatory government, separation of powers, and equality before the law. Broadly, Islamic law approves of most of these and takes affirmative positions on the protection and realisation of people's welfare and their rights, a consultative government committed to accountability and justice. Political parties are acceptable if they are deemed to be effective means of protecting people's rights and interests against dictatorship. Islamic law also recognises the

validity of all monotheistic religions and allows their followers to practice their own personal laws and customs. Political pluralism in the sense of power sharing and recognition of different voices and political parties is essential to consultation (*shura*) which is a Qur'anic requirement over the management of community affairs. This is also another description of the Islamic jurisprudential principle of reasonable disagreement (*ikhtilaf*), which is not only recognized but encouraged if it would lead to more refined and inclusive solutions. In the end it is general consensus (*ijma'*), however, that should be nurtured as no community can be expected to live comfortably with endless *ikhtilaf*. *Ijma'* is admittedly a jurisprudential principle but its inherent application and strength in the political life of people is also undeniable.

Q) What are the rights and duties of a non-Muslim in an Islamic state?

A) There is no mandate as such of "Islamic state" (*al-dawlah al-islamiyah*) per se in the sources of Islam, a phrase which fell in vogue only in recent times and perhaps traces its origin in the early 20th century discourse in the works of Rashid Rida, Mawdudi and Sayyid Qutb. The rights and duties of non-Muslims living under Muslim rule are basically the same as those of Muslims. This is the purport of the renowned saying of the fourth caliph of Islam, 'Ali Abu Talib who said in reference to non-Muslim citizens that "They are entitled to what we are and they bear the same obligations as we do – *lahum ma lana wa 'alayhim ma 'alayna*." That said, as a matter of historical and academic interest, classical jurists have differentiated their rights and responsibilities. For instance, non-Muslims (called the *dhimmi*s in classical literature, a term which is now suggested to be abandoned (see more below) - were required to pay the *jizyah* (poll-tax-in return for protection), which is parallel to the Islamic obligatory tax of *zakah*. They were not allowed to proselytise Muslims, and they were exempted from participating in military mobilisation and *jihad*, which was obligatory upon Muslims only. Both *zakah* and *jihad* are religious duties and therefore it seemed improper that non-Muslims should be bound by them. Poll tax is no longer required since the introduction of uniform taxation laws in Muslim countries.

Q) Does Islamic law curtail certain freedoms protected by most Western countries?

A) Islamic law is protective of the personal liberties of individuals much along the same lines as that of the western countries. The state and courts of law are not allowed to interfere in the private and personal rights (*haqq al-adami*) or liberties (*al-hurriyat*) of individuals so long as they are exercised within the limits of the law and observance of peace and public order. The one limitation Islamic law is known to impose is on freedom of religion – or at least one aspect of that freedom: the freedom to renounce Islam – is also debatable, simply because the Qur'an explicitly recognises the freedom of conscience. Women also suffer from certain restrictions on their freedoms compared to men. Both of these issues have, however, come under fresh scrutiny by Muslim scholars and jurists in recent decades. In some instances the restrictions were elaborated and given juridical grounding by medieval scholarship and due to the so-called 'closing of the door of *ijtihad*' as early as the eleventh century CE, and those restrictions have more or less remained. Statutory legislation of 20th century origin in many Muslim countries has also taken measures to address relevant issues and realise an egalitarian system of family law, although challenges of innovative *ijtihad* still remain. If Islamic scripture is emphatic on human dignity, fairness and justice, as is indeed the case, there should be ways to articulate them into the details of women's rights to equality.

Q) Does Islamic law protect freedom of speech?

A) Islamic law is affirmative on freedom of speech and expression and protects it in much the same way as other world traditions. It also regulates the valid exercise of freedom of speech, encourages it as a matter of principle, but also places restrictions on it, for instance, in respect of blasphemy, defamation, slander, obscenity, lying, sedition and incitement to crime. On the affirmative side, Islamic law devotes separate chapters to freedom of opinion (*hurriyat al-ra'y*) and its advocates, historically known as *Ahl al-Ra'y*, promotion of that which is good and rejection of what is evil and harmful (*amr bi'l-ma'ruf wa nahy 'an al-munkar*), giving of sincere advice (*nasihah*), consultation (*shura*) in public affairs, freedom to offer a constructive criticism (*hurriyat al-ta'ardud*, also known as *hurriyat naqd al-hakim*) and independent interpretation (*ijtihad*) – all of which are premised in the recognition of freedom of speech and expression. It may be mentioned that the

present writer has published an award-winning book, entitled *Freedom of Expression in Islam*, which expounds most of these concepts in detail.

Q) Does Islamic law protect freedom of religion?

A) The Qur'an is affirmative of religious freedom and maintains that faith must be through one's own free will and volition. Protection of religion (*hifz al-din*) is also one of the higher purposes of Shariah (*maqasid al-Shariah*). The Qur'an declares that "there shall be no compulsion in religion" (*al-Baqarah*, 2:256). This is endorsed in a number of other places in the Holy Book to substantiate freedom of religion. It can be seen, for example, in the Prophet Muhammad's assignment in respect of *da'wah* (call to faith) in a question that begs a certain answer, as in the following verses: "If God had willed, everyone on the face of the earth would have been believers. Are you then compelling the people to become believers?" (*Yunus*, 10:99). In other verses one reads "Let whosoever wills – believe, and whosoever wills – disbelieve" (*al-Kahf*, 18:29), "And you are not to compel the people, so remind by means of the Qur'an those who take heed" (*Qaaf*, 50:45), and also when the Prophet is instructed to "Say to the unbelievers: unto you is your religion, and unto me, my religion" (*Kafirun*, 109:6).

Q) Does Islamic law protect human rights? Is the concept of human rights different in Islamic law?

A) If by human rights one means the rights a person is entitled to by virtue of being human, then Islamic law does protect and promote human rights but the manner of their articulation may differ from the articulations of human rights in other legal traditions and secular law codes. In fact the concept of human rights itself is diverse enough to accommodate a variety of perspectives. Human rights as articulated in the Universal Declaration of Human Rights 1948 are not only acceptable to Islam but the state is under obligation, under the respective constitutions of Muslim countries (in particular their chapter on fundamental rights and liberties) currently in force, substantially to protect them. The Shariah goes a long way also to protect essential human rights. If there are differences, such as regarding the *fiqhi* articulations of freedom of religion and those of gender equality, as mentioned above, there are also challenges for the future of reformist *ijtihad* and law making in Muslim societies. Many Muslim countries have taken reformist

measures, and are still engaged, in varying degrees, to support human rights in their applied laws.

Q) Have any Western countries considered adopting aspects of Islamic law or instituting Shariah courts?

A) The issue does not arise within the Shariah itself as there is clear recognition that Shariah should be implemented within Muslim territories and jurisdictions. In the present setting, while Western countries do not officially recognise the Shariah as a source of law, Shariah courts do exist in some western countries (in the UK, e.g.) though not as part of the legal system, or indeed as legally binding at all. In addition, the presence of Islamic banking and finance in the West will require some form of adoption or incorporation of Islamic law, which may augur well with laws allowing parties to settle disputes via arbitration instead of courts. This too has made possible the presence of Muslim tribunals in many non-Muslim majority countries such as India and Singapore. Some Western leaders, like the former Archbishop of Canterbury Rowan Williams and Lord Phillips, a senior English judge, have even hinted at adoption of some parts of Shariah, especially those relating to matrimonial law.

4. Shariah and Acts of Worship

Q) According to Islamic law, how often should a Muslim pray? What are the different types of Muslim prayers?

A) Muslims are obliged to pray five times a day. Prayer (*salah*) is the second of the five pillars of Islam, after the testimonial of faith. Prayers are due at dawn (*fajr*), early afternoon (*zuhr*), late afternoon (*'asr*), after sunset (*maghrib*) and late night (*'isha*). These ritual prayers are well-regulated and performing them takes up roughly a few minutes at a time, but the person must be in a state of purity and take an ablution before praying. Apart from the daily obligatory prayers, there are also prayers which are obligatory upon the community as a whole (*fard al-kifayah*) to uphold them and not allow them to fall into total neglect, but not obligatory upon all of its individual members, such as the funeral prayer (*salat al-janazah*) when a person passes away. If some members of the community perform them, the rest are absolved. There are many optional or non-obligatory but recommended

prayers, such as the supererogatory prayers (*salat al-nawafil*) before and after the obligatory prayers; prayers at specific times of the day such as the prayer during night or early morning hours (*tahajjud*); prayers at certain specific times of the year, such as the day of 'id (*salat al-'id*), *tarawih* prayer after 'isha' during the fasting month (Ramadan); and on specific occasions such as the prayer of gratitude (*salat al-shukr*), prayer in time of need (*salat al-hajat*), and a few other varieties.

Q) According to Islamic law, how often should Muslims come together as a congregation to pray?

A) The daily obligatory prayers are recommended to be performed in congregation as often as possible, but it is obligatory to pray in congregation at least once a week, i.e. the Friday prayer (*salat al-jum'ah*) every Friday afternoon (preceded by the Friday sermon) which replaces the regular early afternoon (*zuhr*) prayer. In addition, some non-obligatory prayers are not only recommended but are also performed in congregation, such as the *tarawih* prayer and prayer on the day of 'id.

Q) What are the laws for purification with regard to prayer and Muslim life?

A) Cleanliness in Islam is a part of faith (*iman*) and thus Muslims are generally required to be in a state of cleanliness in their daily lives. However specific rules are also laid down when purification is required, for instance, before ritual prayer (*salah*) and is done through ablution with water (*wudu'*) or dry ablution (*tayammum*), such as with clean sand, if water is not available. The ablution involves washing the hands, face, nose, arms (up to the elbow), feet up to the ankles, gargling and wiping of ears and head. In addition, the clothes and the place of prayer must also be clean and free from impurities. A purificatory bath (*ghusl*) is also required after sexual intercourse. Spiritually, purification of the self (*tazkiyat al-nafs*) is a continuous part of the religion, and this typically involves self-appraisal (*muhاسباب*), repentance (*tawbah*), seeking forgiveness from God (*istighfar*) and fellow humans, constant remembrance (*dhikr*) of God. Asking for forgiveness those one might have offended is also highly recommended.

Q) Does Islamic law require Muslims to fast? When and how?

A) Muslims are required to fast during the month of Ramadan (according to the *Hijri* or Islamic calendar) as one of the five pillars of Islam. An aspect of the *Hijri*, as opposed to solar, calendar is that it rotates over the years and allows different

geographical regions to experience different lengths of the daytime and seasonal changes. Fasting involves abstinence from food, drink and sex from dawn to dusk. The daily fasting is preceded by a pre-dawn meal (*sahur*) and ends with the breaking of fast (*iftar*) at the arrival of sunset. While fasting one also abstains from other sins such as lying, cheating, backbiting, obscenity, etc. Fasting is also an option and sometimes obligatory, in the form, for instance, of freeing a slave, or giving of charity as expiation for certain sins, and recommended on certain occasions (e.g. Monday, Thursday) and the day of *'arafah* as a part of the *hajj* rituals.

Q) Does Islamic law require Muslims to give to charity? How much? And how?

A) Muslims are obliged to pay the alms tax (*zakat*) which is a poor-due every year at the rate of two and a half per cent of their assets or income on assets. Muslims must also give to the poor the religiously obligatory alms marking the end of Ramadan (*sadaqat al-fitr*). There is no limit otherwise to supererogatory charity and helping the poor, and it is highly recommended to be generous. Giving charity is nowadays widely recognized as a means of cleansing impermissible incomes and profits that have been realised by Islamic banks and financial institutions. This is quite frequent as many of the existing investment portfolios in Islamic financial institutions involve marginal and often unavoidable impermissible or interest-based income. When this is the case, that portion has to be given to charity.

Q) Does Islamic law require the pilgrimage to Makkah?

A) The pilgrimage to Makkah, known as the *hajj*, is also one of the five pillars of Islam. It is obligatory upon those who are able and can afford it once in a lifetime during certain times of the year. A supererogatory minor pilgrimage to Makkah, known as *'umrah*, may be performed at any time of the year. All pilgrims must wear the *ihram* clothes, just two pieces of unsown garment. This helps to eliminate distinction of race, rank and status among pilgrims, an aspect of Islamic rituals that is inherently egalitarian and internationalist.

Q) What is *jihad*?

A) *Jihad* literally means 'striving' but technically it can mean two things: struggle against one's lower self, which according to the Prophet (pbuh) is the 'greater *jihad*', and armed combat against the enemies, which is the 'lesser *jihad*'. *Jihad* in

the former sense is an all-embracing concept in the sense that one is engaged at all times in the struggle to educate and improve oneself and fight for a just and fair social order and healthy environment one lives in. This veritable meaning of *jihad* is all too often distorted by hardline and trigger-happy interpreters of the religion. Almost all conditions of a valid *jihad* are being regularly ignored by present-day unruly *jihadists*, who involve themselves in unjustified violence and the killing of innocent civilians. One of the conditions of military *jihad*, for instance, is that it must be declared by the lawful leader – otherwise it could be a recipe for chaos. This is an important condition, which is however, completely ignored.

Q) Does Islamic law require Muslims to engage in *jihad*?

A) *Jihad* in the sense of striving against one's lower self is a requirement for all Muslims at all times. In classical rulings, *jihad* in the sense of military engagement is a personal obligation (*fard 'ayn*) of Muslims in only when the enemy has actually besieged the Muslim territory. Otherwise it is a collective obligation (*fard al-kifayah*) of the community and when carried out by some, the rest are exempted from the obligation. But today this task is assigned to professional soldiers. The most meaningful *jihad* in the sense of striving to, say upgrade education and the spread of knowledge at all levels can be pursued by Muslims. This would qualify as an aspect of contemporary *jihad*. Fighting poverty and disease would qualify in the same way, whether performed individually or collectively in cooperation with others.

Q) Does Islamic law place limits upon the use of violence?

A) Violence as a rule is prohibited, but under exceptional circumstances it is permitted, based on the legal maxim, "harm shall not be inflicted nor reciprocated" (*la darar wa la dirar*). This evidently means that one must not inflict harm, but when one is a victim of harm and violence, it is not for one to reciprocate but to seek judicial relief. Violence is permitted in warfare or in self-defense. The rule of law, and rule of Sharia generally envisage a law-abiding citizen who shuns violence and observes peace and order at all times. Violence against persons without a just cause is punishable, and it is the duty of lawful government, law enforcement agencies and the judiciary to uproot all unlawful violence.

Q) Does Islamic law permit or encourage terrorism or suicide bombing?

A) Under no circumstances is suicide, let alone suicidal terrorism and bombing, permitted in Islamic law. The Qur'anic prohibition against killing (*al-An'am*, 6:151) and suicide ("And kill yourselves not [*la taqtulu anfusakum*], for God is merciful to you" – *al-Nisa'*, 4:29) is supported by various sayings of the Prophet (pbuh). Elsewhere the Qur'an addresses the believers to "throw not yourselves into the mouth of danger," (*al-Baqarah*, 2:195) be it out of despair, ignorance or adventurism. These prohibitions subsume all forms of violence and self-destruction, including suicide bombing.

5. Shariah, Gender and the Family

Q) Does Islamic law require the separation of men and women?

A) Segregation is neither a genuine Islamic nor Arab tradition. It was originally an ancient Persian practice that was adopted by some Muslim communities and became widespread in course of time. During the time of the Prophet, women had freedom of movement, work and even took part in military expeditions. Yet, Islam discourages free mixing between men and women, especially when they are alone, but not all forms of interaction. They may socialise or work together within the bounds of dignified decorum free of promiscuity, touching, secret meetings or flirting, according to the general rules of interaction between the genders that emphasise modesty and restraint against temptations.

Q) Does Islamic law have requirements regarding how women should dress? Does Islamic law require men to dress or groom themselves in certain ways?

A) The Shariah requires covering the private parts (*'awrah*) of both men and women, and there are some rules that the *fiqh* books elaborate on this. In the case of women, it is clear that the face and the hands are not included in *'awrah*. For men, their *'awrah* refers to the part of the body from the navel (not inclusive) to the knees (inclusive). Religion advises cleanliness of body and attire. Men should not indulge in decorating themselves by wearing gold and silk. What is modest and dignified in clothes and appearance is also to some extent determined by general

custom (*'urf*). What the society considers decent is also deemed acceptable to Islam. This is the purport, in fact, of the often-cited *hadith* (or the saying of Companion 'Abd Allah b. Mas'ud) providing: "what the Muslims deem to be good is good in the sight of Allah - *ma ra'ahu al-muslimuna hasanan fa-huwa 'ind Allahi hasan.*"

Q) What does Islamic law say about marriage?

A) Islam is a strong advocate of marriage, and there is no place for celibacy in Islam. Marriage is considered as a religious duty of all able-bodied youth and decent individuals who can make responsible parents. It is also considered a moral safeguard as well as a social necessity. Marriage is a contract between a man and a woman to live as husband and wife in a life of mutual harmony and devotion to one another. Marriage is primarily a civil contract concluded by mutual agreement of two competent persons, but one which has a devotional (*ta'abbudi*) aspect and is regarded as a holy union of two individuals to form a family and bring up children. This contract may be terminated by divorce or judicial separation on certain grounds, such as marital abuse and infliction of harm (*darar*), infertility, lack of sexual fulfillment, lack of financial support by the husband, adultery, dishonourable behaviour, and irreconcilable differences.

Q) Does Islamic law permit men to have multiple wives?

A) Polygamy has been the practice of ancient societies long before the advent of Islam. Islam accepted it partly as a social necessity of the time and later of its own predicament at a time when frequent wars had brought about a population imbalance plus a large numbers of orphaned girls. Polygamy was permitted but limited to the maximum of four wives under certain conditions. Such conditions include the infertility of the existing wife, the just character of the husband and his financial ability to maintain a second wife, but also when there is a lawful benefit involved, for instance, when the existing wife is invalid or chronically ill and in need of help. The Qur'an strictly demands the equitable treatment of co-wives.

Q) Does Islamic law permit Muslims to marry non-Muslims?

A) There is no disagreement among the scholars that a Muslim man may marry from the "peoples of the book – *the Ahl al-Kitab*," i.e. Christians or Jews. The conversion of the wife to Islam is not a requirement, but the children will legally be regarded as Muslims. But in the case of a Muslim woman, she may not marry a non-Muslim man. The reason given is that the husband is the head of the household and his religion influences the children of the marriage. Besides, Islam accepts Christianity and Judaism as valid religions, but Islam itself is not given the same recognition. A Muslim husband of a Christian woman can thus be expected to respect her faith but the same is not expected of a non-Muslim husband who marries a Muslim wife.

Q) Does Islamic law require or encourage arranged marriages?

A) The fundamental principle of Islam is the right of free will, freedom of choice, and consent. Islam allows arranged marriages if both of the parties enter the marriage contract with free will. But forced marriage is not allowed in Islam, as a valid marriage contract is formed by mutual agreement, consisting of a proposal and acceptance (*ijab* and a *qabul*). If an adult woman is married without her consent, the marriage contract is considered null and void.

Q) Does Islamic law permit child marriage?

A) Child marriage was once a globally accepted and a practiced phenomenon. It still exists to a significant extent in some parts of the Muslim world especially among tribal populations. The father or grandfather of a boy or a girl may, however, contract a minor person in marriage only if it is in the child's manifest interest. But due to widespread abuses of this privilege, legislation in Muslim countries have generally stipulated a legal age and registration formalities for a valid marriage, which practically overrule the validity of child marriage. The Qur'an describes marriage as a "strong solemn covenant- *mithaqan ghalizan*" (*al-Nisa'*, 4:21). According to Islamic law, a child below the age of majority has no legal capacity to enter such a contract, or any contract for that matter, nor is capable to create a firm bond as such.

Q) What does Islamic law say about divorce?

A) The basic outlook of Islam on divorce is embodied in a renowned *hadith* which identified divorce as “the worst of all permissible things in the sight of God.” Divorce should only be resorted to when there is no chance of reconciliation. Traditionally divorce was a prerogative of the husband, something that led to widespread abuse. Modern law reform of Shariah law has opted for judicial divorce which means that a divorce in order to be valid must be approved by the court of justice. This has been due largely to widespread abuse of the husband’s unilateral power of *talaq*. Most of the present day Muslim countries have restricted that in one way or another or transferred the power to the court of justice, but instances of violation are still too high and in some countries the law of divorces has not been subjected to reformist legislation as in some other countries the Muslim world.

Q) Does Islamic law permit women to initiate a divorce? Is it more difficult for women to obtain a divorce than it is for men?

A) Women are entitled to seek judicial divorce in circumstances that are specified in the law, such as a husband’s insanity, incurable disease, failure to maintain, and cruelty. In fact, the *fiqh* rules make provisions, in addition to unilateral divorce (*talaq*) by the husband, for divorce by mutual consent (*mubarat*), and divorce in which the wife initiates the divorce proceedings (*khul’*), and also delegated divorce (*talaq al-tafwid*) in which the husband delegates his power of unilateral *talaq* to the wife, which she may then exercise at her own initiative.

Q) How does Islamic law treat custody of children in case of divorce?

A) According to Islamic law, the custody of the infant (*hadanah*) is a woman’s right unless she gets married or until the child if a male reaches seven years of age, and if female, nine years of age. If the mother of the child gets married and the father disputes with her over custody, then the court may transfer the custody to the father or mother, whichever is deemed to be in the best interest of the child. If she is not fit, only then the custody will be transferred to the father. When the child reaches seven or nine years of age, he or she may choose between staying with the mother or father. If the father cannot handle the responsibility or he neglects the child or he is a man of bad character, then the mother will take the custody right.

But financial assistance and support of children is the sole responsibility of the father until they reach the age of puberty.

Q) What does Islamic law say about domestic violence?

A) Violence, be it physical, sexual or verbal insult and abuse, and aggression are entirely forbidden by the Shariah. According to the Qur'an, the interaction between the spouses should be based on compassion and kindness. The wife is entitled to seek judicial relief and the husband, if proven guilty of abusive behavior and violence, may be punished by the court of justice.

Q) What does Islamic law say about female genital mutilation?

A) Female genital mutilation was a pre-Islamic practice in Arabia, and has survived in some places mainly in Africa to this day. It has no religious validity and represents a violation of the religion. Islamic law does not permit female genital mutilation and the practice originates in local usages with no religious basis. The religion has only mandated circumcision of the male child. Cliterodectomy and infibulation are in any case considered to be forbidden – *haram*.

Q) What does Islamic law say about rape?

A) Violation of chastity of a woman, whether she belongs to one's own state and community or to an enemy state, and whether she follows Islam or belongs to another religion, or has no religion at all, is forbidden in Islam. According to Islamic law, a woman must be respected and protected under all circumstances. No one may outrage her modesty under any circumstances. All promiscuous relationships are forbidden and constitute a crime, irrespective of the status or position of the woman, whether the woman is a willing or an unwilling partner to the act.

Q) What does Islamic law say about inheritance and bequests? Are women and men equal in inheritance law? Can non-Muslims inherit from Muslims?

A) Inheritance law is very much embedded in the clear Qur'anic text and bears therefore an obligatory character for the most part. The category of recipients and the quantum of their shares are stipulated in the Qur'an. The Qur'an improved the

legal and financial status of women by identifying their share in inheritance. Of the twelve Qur'anic sharers, known as *dhawil-furud*, eight are women. The Shariah entitles the male to a double share of the female relative in the same degree of relationship to the deceased. Muslim jurists explain this aspect of inheritance by looking at Islamic law in its entirety, which makes it the responsibility of men to provide maintenance and safe environment to women throughout their lives, that is, before and after marriage. Difference of religion is a bar to inheritance, as stipulated by the majority of Muslim jurists. Non-Muslims can be, however, beneficiaries of gifts and bequests from Muslims. Gifts and bequests can also be used to rectify technical imbalances that may arise from the mandatory structure and share distribution in inheritance in certain particular combinations as specified in the relevant *fiqh* manuals.

Q) What does Islamic law say about fornication? What does Islamic law say about adultery?

A) Islam has completely prohibited both consensual and non-consensual sexual intercourse between a man and a woman, who are not bound to each other by a legal marriage, and everything that leads to it or contributes to it also falls under the same prohibition. The main reason for that is the need to preserve lineage (*hifz al-nasl*), which is one of the five overriding objectives, or *maqasid* of *Shariah*. It should be clear that the actual sexual intercourse qualifies as *zina* for which the punishment is mentioned in the Quran at one hundred lashes for each of the sex partners. Death by stoning of adulterous married men or women is not mentioned in the Qur'an. Stoning was a Jewish practice that was initially taken up by Muslims until the Qur'anic verse (*al-Nur*, 24: 4) addressed the subject and provided a uniform punishment of 100 lashes for both adultery and fornication.

Q) What does Islamic law say about homosexuality?

A) Homosexuality is not only a sin, but also a punishable crime under Islamic law. The four leading Sunni schools of law differ on the form of punishment for homosexuality. While some draw an analogy between *zina* and homosexuality and assign the same punishment for both, others have considered this a discrepant analogy and opt for other still more severe punishments. The reasons for the

prohibition of homosexuality are as follows. 1) It clashes with the natural order in which God created human beings; 2) it violates the integrity of the family unit and the institution of marriage; and 3) it leads people to ignore God's guidance and destroys the moral fabric of a Muslim society.

Q) What does Islamic law say about honour killings?

A) It is prohibited absolutely and considered as a great sin and is a punishable crime under Islamic law. There is no recognition whatsoever of the concept of honour in that order in Islamic law.

Q) What are the consequences for violating Islamic law vis-à-vis the family?

A) It is considered a sin and a violation. Marriage in the Qur'an is described as "friendship, protection, and kindness," and a "firm bond – *mithaqan ghaliz*." Observance of the ties of kinship (*sillat al-rahim*) is also an integral part of the Islamic ethos and culture. Violating the sanctity of these values is a transgression and sinful.

6. Shariah and Finance

Q) What are the principles that govern or influence Muslims' economic transactions?

A) The core principles of *Shariah* that govern economic life of Muslims include the following. Firstly, humans are considered to be trustees of the wealth they own, while God the Most High is the real owner of all wealth. In their capacity as God's vicegerents and custodians of the earth, humankind must manage wealth according to a set of principles laid down in *Shariah*, which seeks to promote social justice and forbids activities that violate other people's rights or which may harm society, including waste and mismanagement of resources. Muslims have rights to enjoy whatever wealth they have lawfully earned and spend in ways that benefit them, their families and the general public. They are forbidden from wrongful appropriation of the property of others and engagement in fraudulent activities and

businesses. Secondly, material pursuits should be balanced with an individual's spiritual needs. Thirdly, an individual's material needs must be balanced with society's needs, all of which are manifested in a set of moral and religious principles in Islam. The wealthy are required, for instance, to pay a certain percentage of their wealth on poor-due, or *zakah*, and also help those in need through voluntary charity. Fourthly, economic transactions should be conducted within a just, responsible, free-market economy where individual enterprise is encouraged and so is the free and unhindered flow of market transactions. Lastly, in support of these principles, Islamic law prohibits business transactions based on usury, excessive speculation and risk taking, hoarding, gambling, and trading in a certain number of prohibited substances.

Q) Does Islamic law support free market capitalism? Does it support socialism?

A) Islam allows free-market economy where supply and demand are determined through the natural flow of market operations, but it directs the functioning of the market mechanism through a set of rules and guidelines. In fact, Islam emerged in a free-market environment. The Prophet himself was involved in the conduct and management of commercial activities, but showed considerable interest in market regulations. Profit making and free enterprise are acceptable but hoarding, profiteering and cornering the market are not. Whereas in capitalism, the profit motive and private ownership do not admit of any restrictions based on religion, Islam regulates Muslims' economic transactions by certain principles, with the main purpose of promoting social justice, a balanced distribution of wealth and opportunities wherein wealth is not concentrated in the hands only of a few while most others suffer in poverty. These guidelines also ensure that the basic norms of law and morality are not violated.

The sympathy and support that socialist principles exhibit towards the under-privileged resonate well with the Islamic outlook and rules on social justice. Yet Islam protects individual's rights to property, free enterprise, and accumulation of wealth through Shariah-compliant means. It also maintains economic justice and balance in society by encouraging circulation and distribution of wealth among

diverse social strata through both obligatory levies (such as *zakah*, tithes, and inheritance laws) and voluntary spending (such as voluntary charities, *waqf* charitable endowments and bequests).

Q) How does Islamic law consider economic development?

A) Islam encourages economic development through productive labour and exploitation of the natural resources that contribute to human welfare and comfort. This is the principal *motif* of the Qur'anic assignment of Muslims to build the earth (*i'mar al-ard*, or what ibn Khaldun calls as *'umran*) and a just social order wherein people's needs are met and no one suffers from lack of the essentials of life. Earning one's living through lawful work is an obligation of all able-bodied individuals, just as they have obligation to support their families and dependents. The ruler and ruled have shared responsibilities for the establishment of a fair and stable economic environment. Economic development and increase of wealth are encouraged through all lawful means, and ways that contribute to the wellbeing of others in the society, and to the safety also of the natural environment. Islam's concept of economic development is premised in the mobilisation of labour and capital together, and not the latter alone where usurious applications of capital generate wealth at the expense often of the user of capital or those in debt. Market activities should also relate to the real economy and proceed over goods and services that benefit the people. This conception of development and finance discourages market financialisation of the kind where transactions are often reduced to paper exchanges and the money generated tends to enrich the wealthy corporate entities and persons. For debt-based operations and money generated through highly financialised market operations burden the real economy and lead to the kind of results that the world has seen, of financial crises of global proportions. The European debt crisis and huge bailouts of the major banking institutions invoked the often-cited expression of the "privatisation of profits and socialisation of losses." This is precisely what the Islamic conception of economic development will not entertain.

Q) How does Islamic law view banking? How are Islamic banks different from Western banks?

A) Islamic banks began to emerge in the early 1970s. A number contracts and recognised modes of transaction in *fiqh*, such as partnership (*musharakah*), commenda partnership (*mudarabah*), deferred payment sale (*bay' al-mu'ajjal*- also known as *bay' bi-thaman aajil*), profit added sale (*murabahah*), leasing (*ijarah*) and a few other nominate contracts lie at the center of the whole idea of Islamic banking. Islamic banks distinguished themselves from Western banks by their commitment to interest-free banking and the promotion of equity financing and partnership by way of profit and loss sharing. The bulk of Islamic banking transactions proceed over trade financing that is tied to exchange of goods and services, and not so much over debt and credit based financing. Transaction over pure debts, the substance of what leads to the so-called 'asset bubble' is not accepted in Islamic banking and finance. The main principles of Islamic finance include equity participation, risk sharing and the prohibition of usury (*riba*), trade financing, avoidance of excessive risk-taking (*gharar*) in contractual agreements, prohibition of hoarding, profiteering and gambling, and avoidance of transactions that proceed over certain prohibited substances, such as pork, alcohol, pornography and arms trade.

Q) How do Muslims living outside Muslim-majority countries handle their banking?

A) Muslim minorities living in the West face the challenges of a secular consumerist culture as well as issues of identity and citizenship that have taken a turning for the worse in the aftermath of 9/11 and upsurge in extremism and violence almost everywhere.

Muslims living outside Muslim-majority countries who do not have access to Islamic banking may continue banking with conventional banking institutions but make an effort to avoid interest-based financing. In countries and localities where Islamic banks do exist and banking through them does not involve hardship, they should go to Islamic banks. Yet, the present day non-Muslim democracies do provide space for their Muslim citizens to practice their religion and follow the *Shariah* in their personal lives as they may wish, but also expect them to be law-abiding citizens. They are granted the rights to form private societies and associations to find

innovative ways and find right solutions for their challenges in accordance with their own beliefs.

The *fiqh* tradition is elaborate on the position of non-Muslim minorities living in Muslim majority countries but not so with regard to Muslim minorities living in non-Muslim majority countries. This has prompted 20th century Muslim scholarship to mark the beginning of a new branch of *fiqh*, the so-called *fiqh al-aqaliyyat*, or jurisprudence of minorities and it is, as such, a work in progress. Broadly, Muslim minorities are expected to observe the religious and ethical guidelines of Qur'an and *hadith* concerning their religion and also their relations with followers of the scripture. They must accordingly cultivate mutual respect and friendship with their host communities. The same holds true with regard to the treatment of religious minorities living in Muslim majority countries. It is important, however, that text and scripture are read and interpreted in the light of historical and contemporary realities and developments.

Q) How does Islamic law look upon property rights?

A) Islamic law protects private ownership and ownership rights are sacrosanct in much the same way as they are under western law. It is also a shared concern, for the most part, of both Islamic and western laws that the legitimate uses of ownership rights do not involve inflicting harm on others. Most of the limitations on property rights, such as usurpation, trespass, and property offences such as fraud, embezzlement and theft etc., are also in common between the major world traditions. Certain varieties of ownership, such as collective ownership, communal property and state ownership of public places and facilities are also recognised. Islamic law similarly makes provisions for expropriation in some cases of private property for public benefit purposes against payment of fair price, such as building of roads, parks and places of worship etc., and the relevant positions in Islamic law are also not very different in both the Islamic and western legal systems. Islamic law prohibits hoarding and profiteering, aggressive monopolies as well as gambling perhaps more strictly than some other legal systems.

Q) Does Islamic law govern trade and contracts of sale? How does it affect commerce in Muslim-majority countries?

A) Islamic law recognises the freedom of contract, and also specifies a number of nominate contracts – about 25 in number – which serve different purposes and are regulated in accordance with their characteristics. These are classified under several categories and clusters. The basic contours of contract law tend to be common to all the major legal traditions. The essential feature, for instance, that all contracts are based on the mutual agreement of contracting parties, runs through all of them. Recognition of the basic freedom of contract also means that the contracting parties may create new contract varieties that may serve their interests provided they do not violate the basic principles of equivalence in the exchange of values, morality and justice. Apart from the element of consent that consists of exchange of a valid offer and acceptance of two competent parties, the subject matter of contract in Islamic law of contract should also be in principle legal, existing at the time of contract, valuable, usable, capable of ownership/title, capable of delivery/possession, specified and quantified and the seller must have its title and ownership – although there may be exceptions to some of these requirements in respect of certain contracts, or new varieties thereof. The contract must also be free of any prohibited activity and not contradict public interest and morals. Most of these principles find common grounds with other major legal traditions. Islamic laws of contract and commerce may generally be said to advocate ethical investment and trading which observe the basic norms of equivalence and fair exchange.

Q) How much should Muslims give to charity? How is charitable giving organised?

Q) Charity (*sadaqah*) in Islam includes both obligatory and voluntary varieties. *Zakah* (poor due) is an obligatory donation, payable by every Muslim who has enjoyed for one complete year full ownership of assets above the *quorum* (*nisab* - for silver, 200 grams, and for gold, 85 grams or equivalents thereof). The amount of *zakah* to be paid on income and certain varieties of capital assets is 2.5% (1/40). It is considered a religious duty and one of the five pillars of Islam. Obligatory alms also include a variety of religious taxes such as *sadaqat al-fitr*, a religious poll tax

payable at the end of the fasting month of Ramadan by every Muslim to the poor at certain specified amounts; the tithe (*'ushr*), is levied at ten per cent on (non-irrigated) agricultural produce, treasure troves and mines, etc. Muslims often pay the *zakah* directly to the poor at their own initiative without any official demand by the state authorities. Yet, during the early years of Islam, the state took the responsibility for *zakah's* collection and administration. The government may appoint collectors and administrators for that purpose. *Zakah* revenues are to be spent on welfare assistance, preferably on the poor and needy of the same locality where the *zakah* revenues originate, and should not be mixed with the general state budget. The Qur'an has identified eight groups of recipients of which the poor and needy top the list, but they also include insolvent debtors, freeing of slaves, helping the beggars, travelers and wayfarers, and even the *zakah* collectors who may be paid a salary out of the *zakah* revenues (*al- Tawbah*, 9:60).

Q) What is a charitable endowment (*waqf*)? Who can establish one and how does one do so?

A) *Waqf* is a voluntary charity and a religious endowment in perpetuity. The owner relinquishes his ownership and transfers it in perpetuity nominally to 'God's ownership.' People may thus donate buildings, plots of land, books, plants and equipment, or even cash for the benefit of society and in support of welfare objectives. The donated and accumulated assets are held by a charitable trust. A person founding the *waqf* is called *waqif*, who must be an adult and sound of mind, capable of handling financial affairs and not under interdiction or bankruptcy. Being Muslim is not a requirement for the beneficiary of *waqf*. Non-Muslims also can be recipients or even founders of *waqf* endowments. Historically *waqf* endowments supported education and mosque-related activities, animal welfare, health facilities ranging from hospitals to homes for the disabled, provision of drinking water, welfare of prisoners, rest rooms for travelers and caravans, helping young people to get married and the like, all on voluntary basis by pious individuals throughout the Muslim world. Since *waqf* once established is an endowment in perpetuity, vast amounts of *waqf* assets accumulated throughout the ages and they still exist but are not very well managed. But this is going to change as *waqf* assets are drawing

attention of the finance world and are seen as another area of great potential, next for instance to Islamic banking and finance. New ideas, formulas, institutions, laws and guidelines are being designed and developed at a rapid rate to tap the vast resources of *waqf* in beneficial and income-generating ways. All this is geared toward overcoming the historical legacy of mismanagement and neglect of the *waqf* properties due partly to legal constraints, specifications of the *waqf* deeds and the expressed wishes of the *waqif*.

Q) Does Islamic law accept slavery? Is slavery still practiced in Muslim countries?

A) Generally, the Shariah forbids all types of forced labour and entitles every worker to full and fair payment for the work accomplished. Slavery existed for thousands of years before Islam. Islam addressed the reality of slavery by bringing new legislation on fair treatment of slaves that aimed at raising their status and eventually securing their freedom. The slaves are accordingly entitled to marry, divorce, study as well as to be a witness in court litigations regardless as to whether the litigants are freemen or slaves. Islam also encouraged the freeing of slaves and even established certain rules to compel the owners to free them; it has articulated many ways on how the slaves can earn their freedom. In fact, the Qur'an specifies securing freedom for slaves as one of the eight heads of expenditure on which the *zakah* revenue may be spent (cf., *al-Tawbah*, 9:60). Islam opened other opportunities for termination of slavery. Slaves were to be freed in situations, for instance, when they were able to pay their master through labour or other assets. Similarly, when a slave girl gave birth to the child of her master, the child automatically became a free person. Also when a slave was owned by two persons and only one of them decided to free him to the extent of his portion, it became the responsibility of the state to pay the balance and secure his freedom. Freeing a slave is also a most meritorious act of charity, and the Shariah has made many provisions for freeing of slaves in the context of expiations (*kaffarat*) and atonements for sins and transgressions.

7. Shariah and Modern Bioethical & Environmental Questions

Q) How does Islamic law view contraception?

A) Islamic law permits contraception to preserve the health of the mother and the well-being of the family. In the event where the family is poor and has a second infant below two years of age that is in need of breast-feeding/ nursing, his/her needs take priority and may justify use of contraception by the mother. Family planning is in principle acceptable. Pregnancy is strongly discouraged in the event where an illness of one or both parents is likely to affect normal growth of the offspring. Contraception with the aim of having a permanently child-free marriage (sterilisation) is, however, not acceptable. This is because procreation of the human species is the primary purpose (*maqсад asli*) of marriage in Shariah. Although this would still not hinder the marriage of elderly persons who may be unable to be parents. Yet insertion of an explicit condition in the marriage contract for fit persons to preclude childbirth will be deemed as invalid and unenforceable. Contraception may also be used for reasons of health based on medical advice, and there may be situations that justify recourse to the rules of necessity (*darurah*), which the Shariah has regulated separately.

Q) Is abortion permissible under Islamic law? Under what circumstances?

A) Abortion is permissible with the agreement of the spouses before the completion of forty days of conception that signifies according to Islamic beliefs the event of ensoulment, or the beginning of life. Abortion is not permissible in Islam between forty and one hundred and twenty days of pregnancy except in two situations: first, when continued pregnancy would endanger or substantially harm the mother's life and health, and second, when it is established that the fetus would be invalid or permanently deficient and the deficiency is incurable. After the inception of life (120 days), abortion is held to be *haram* and equivalent to a crime committed in respect of a living person. Abortion is in all cases permitted in situations of necessity (*darurah*) subject to expert medical advice. In severely distorted and stressful situations where the mother cannot decide and is in need of advice and guidance, there may be room for a *fatwa* and juristic advice by qualified and duly accredited Shariah experts.

Q) How does Islamic law view artificial insemination? Surrogate motherhood?

A) The principle is that resorting to artificial insemination and surrogate motherhood is permissible if it achieves a valid purpose and benefit and when only the husband and wife are involved. It is completely unlawful to use a third party's (donor) sperm or eggs due to the importance of the preservation of lineage and identity of the child. If the sperm of a man is inserted into his own wife, it is permissible because on both sides the two people are legal and religious spouses. It is immaterial whether this procedure is through sexual intercourse or medical means. The other type of artificial insemination, when a stranger's sperm is inserted into the womb of someone else's wife or another woman, is illegal as it violates the identity of the child and lineage.

Surrogate motherhood introduces a third party into the family equation, which is likely to throw into confusion the issue of the identity of the child and raises questions also as to who is the child's mother. The Qur'an mentions that "Their mothers are only those who gave them birth" (*al-Mujadalah*, 58:2), so the surrogate mother who carries the child to its full term and then gives birth to it will be considered the real mother. It may be relevant to mention that the Shariah recognises fosterage and foster mother, one who breast-feeds the child below two years of age. A foster mother is treated like a real mother in some respects. She is a family member and a relative, in that the child is not permitted to marry her or her close relatives, and she merits to be honoured and respected by the child and family.

Q How does Islamic law view organ donation? Blood donation?

A) The human body, dead or alive, is sacrosanct and immune against aggression and manipulation that violate its God-ordained dignity. Mutilation of human body parts is normally forbidden, but is permitted on medical grounds if it will save life. There are two opinions regarding organ donation. The majority of the Indo/Pakistan scholars are of the view that organ donations and transplant are not permissible, while the Arab scholars and some scholars of the Indian subcontinent permit them under certain conditions. It is unlawful (*haram*) to transplant or use an organ on

which life depends, such as taking a heart from a living person to be transplanted into another person. It is permitted to transplant an organ from a dead person, or one who is in his last moments and certain to die, to a living person when his life depends on receiving that organ, or when vital functions of his body are otherwise impaired, on condition that permission is given either by the person before his death or by his legal heirs or guardian. The sanctity of life and its protection is one of the higher purposes (*maqasid*) of Shariah and strongly emphasised in the Qur'an. Organ donation would thus qualify as an act of great merit when it is in accordance with proper medical advice and espoused with consent of the donor and intention on his part to save life or help reduce the suffering of another human being. It is generally permitted to transplant an organ from one person's body to another, if it is an organ that can regenerate itself, such as skin and blood, provided that the donor is mature and fully understands what he is doing, grants his consent, and that all the relevant Shariah conditions are met.

Q) How does Islamic law view euthanasia?

A) The destruction of life in all of its forms is forbidden in Islam, and this also applies to euthanasia (Arabic: *qatl al-marhamah* or mercy killing). In the event, however, where medical evidence conclusively declares a patient's condition to be beyond recovery and there remains no prospect of survival, euthanasia may be permissible strictly on a case by case basis and reliable medical evidence and situations of intolerable suffering. The basic position is that God only is the Creator of life, and it may be taken by His will and command alone. Since we do not create our own life, we are not authorised to put an end to it either. Since it is also difficult to draw a clear distinction between active euthanasia and passive euthanasia, and determine objectively and exactly as to what is intolerable suffering, the case by case approach is recommended and the evidence in each case would need to be examined and careful conclusions drawn while assuming that every case is governed by the general principle of the sanctity of human life. Only when continuation of a vegetative life amounts to what may be deemed as decidedly harmful, one may be able to make a carefully considered decision to end intolerable suffering. Moreover, in situations where keeping the frail and terminally ill patient

who wants to die artificially alive at great costs while medical and hospital resources may be so short as to be insufficient to cater even for those who have a good chance to recover; such a scenario may well count as a contributing factor for the experts to concur with the request of the euthanasia patient to end his or her life. But no one, including the experts, legal guardian, the *ulama'* or the state has the authority under Shariah to impose a decision to end the life of a patient in the name of mercy killing.

Q) How does Islamic law view human genetic engineering and human cloning?

A) Islam urges people to study and conduct experiment as long as this is for the benefit of humanity and is in keeping also with the basic principles of Islam. Genetic engineering applications on plants are permitted in Islam if they aim to increase benefit to humankind. Genetic engineering applications, which are used fundamentally to alter human nature and God-ordained design and make up of the human constitution, are considered a violation and prohibited. Should there be a specific application of genetic engineering that seeks to offer definitive cure for an incurable disease, this will most likely be acceptable on grounds of necessity (*darurah*), provided it is well-defined and geared specifically toward that purpose. The Qur'an enjoins Muslims to "Take not a position over that of which you have no knowledge," (*al-Isra'*, 17:36). Definitive knowledge of the nature and consequences of any particular application of genetic engineering is a prerequisite so that human safety and existence are not subjected to doubtful experimentation. Careful scientific assessment of each application should also stand in harmony with the higher purposes (*maqasid*) of Shariah and reason, and the consequences of such application to the individual and the society at large must be carefully verified. In the event of a direct conflict between the interest of the individual and that of the society at large, then according to a legal maxim of Islamic law "a private harm may be tolerated if it would avert harm to the general public." According to another legal maxim "A lesser harm may be tolerated if it would avert a greater harm."

Q) How does Islamic law view genetically modified crops?

A) The Islamic perspective on genetically modified food is complex and goes deeper than simply a determination of whether a certain food is *halal* or not. Whether Islam approves or disapproves of genetically modified foods does not have a straightforward answer, and many jurists and commentators continue debating this issue. The Qur'anic position is that any attempts to modify living things that seek to alter the God-ordained nature thereof would be considered sinful. However, if the purpose behind the modification is to secure an essential or beneficial result or done to prevent an intolerable harm and promote the welfare of all, then such a modification is permissible. This may not be so much of a religious issue but one of rationality and scientific evidence to be determined by expert opinion. Definitive knowledge is once again a requirement both of the Shariah and science. Altering the genome of plants and (staple) foods for commercial purposes while not knowing the long term consequences to human safety and health and their environmental impact would also go against the purport of a *fiqh* maxim, which provides that "certainty may not be overruled by doubt." The state of certainty here is the natural goodness of wholesome food and agricultural produce that should not be overruled in favour of some material gain or doubtful long term benefits that are, however, not a matter of certainty and definitive knowledge.

Q) What does Islamic law say about treatment of the environment?

A) The Qur'an contains numerous guidelines about our treatment of the earth and the rest of God's creation highlighting the sacredness of nature and the divinely-ordained balance in nature and the created world. A closer look at the Qur'an and the Prophetic *hadith* reveals a set of principles that point to a rich reservoir of environmental ethics with far-reaching socio-economic and political ramifications. The Qur'anic notions of the vicegerency (*khilafah*) and trusteeship (*amanah*) which designate mankind, individually and collectively, as God's custodians of the earth, and place upon them the responsibility to safeguard not only the rights of their fellow humans, but of nature and other inhabitants of the earth make mankind the guardians and gatekeepers of the earth and responsible for preservation of the divinely-ordained balance of its resources. Scientific evidence shows that the harmful effects of industrial pollution have reached alarmingly dangerous levels that

threaten dire consequence for humans and other life forms on planet earth. The ever-increasing production of fossil fuels and other pollutants, careless and persistent deforestation, expanding desertification, and wasteful consumerist behavior, have accelerated resource depletion, climate change and water supply problems. The results are alarming for human health and safety especially of the poor countries and economies that are ill-equipped to protect and defend themselves against them. There is incontrovertible evidence to show disturbance of the natural balance envisaged in the scriptural sources of Islam. Remedial action and protective measures are therefore necessary and urgent. The renowned *hadith-cum-legal* maxim which stipulates that “Harm may neither be inflicted nor reciprocated – *la darar wa la dirar fi’l-Islam,*” would authorise legal action against violators, be they individuals, corporate bodies, multi-nationals or states. They can be held responsible under Shariah to compensate for the harm they have inflicted.

8. Shariah, Religious Freedom and the Rights of Religious Minorities

Q) Is Islamic law tolerant of non-Muslims?

A) Yes. The evidence of the Qur’an and the *Sunnah* is supportive of equality and justice for all and protection of their human dignity and fundamental rights. Justice in Islam is not only for Muslims but for everyone and all alike. Muslims are advised to extend hospitality to non-Muslims, and nurture good neighbourly relations with them. The Qur’an clearly permits Muslims to eat food prepared by non-Muslims, including meat that is slaughtered by Jews and Christians, and in this way contribute to an atmosphere of friendship and amicable social relations with them. Islam also upholds the validity in principle of all monotheistic religions and beliefs, and takes further steps to recognise the personal laws and customary practices of non-Muslim minorities living in Muslim countries. They may practice their personal laws and cultural traditions so long as they observe peace and order in society. The Qur’an also recognises freedom of religion explicitly by declaring that “there shall be no compulsion in religion” (al-Baqarah, 2: 256). Islamic history also compares favourably with that of other countries and traditions over the treatment of non-

Muslims that lived in Islamic lands. In the multi-religious societies in which we live today, it is not only good religion but good advice generally to treat people of all faiths well and nurture good relations with them in the true spirit of the human fraternity (*ukhuwwah insaniyyah*) that Islam has also advocated.

Q) What is a *dhimmi*? Are *dhimmis* second-class citizens?

A) *Dhimmi* is derived from the word '*dhimma*', which means "commitment" in the sense that the state in Islam is committed to the protection of its non-Muslim citizens. *Dhimma* also signifies a legal contract that is concluded between two parties. It is a permanent contract that once concluded even the state is not authorised to dissolve and terminate it save for specific reasons, such as treason or joining the enemy forces. *Dhimmis* are permanent non-Muslim residents of Muslim-dominated territories. They are not second-class citizens, but citizens with their own identity in personal and customary matters and religion. Equality is the basic norm of Shariah that must apply to all citizens, Muslims and non-Muslims alike. They may hold the post of ministers and be elected to parliament. Only the head of state in a Muslim majority state is to be a Muslim by convention, but even on this point, there is no clear text to say so in the Qur'an or *hadith*. The fourth caliph of Islam, 'Ali b. Abu Talib (d. 661CE) is often quoted for the statement he made with regard to the *dhimmis* that "they have the same rights as us and bear the same obligations as we do."

The historical context has evidently changed due to new political realities. The modern nation state has effectively removed the earlier distinctions among citizens based on religion. The laws of citizenship and constitutional guarantees of equality before the law have, on the whole, departed from the earlier positions of differentiation based on religion in favour of citizens' equality in rights and obligations. Many Muslim scholars have gone on record to say that non-Muslim minorities have the same rights and obligations as other citizens - they pay tax and participate in military service just like other citizens. The *fiqhi* expression *dhimmi* (non-Muslim citizens) should also be replaced perhaps by *muwatinun* (compatriots); for they are citizens and compatriots in the full sense entitled to be treated equally before the law, as explained below.

As already noted, *dhimma* is a contract that is concluded between two parties. It is not a ruling or *hukm* of Shariah of permanent standing and has no independent existence unless it is created by the contracting parties. *Dhimma* exists when the parties to it are in existence. In historical terms, *dhimma* came to an end with the onset of colonial rule in the Muslim lands, because the parties to it no longer existed, hence neither the *dhimma* nor its bearer *dhimmi* existed any longer. This was because the Western colonial state did not apply the regime of *dhimma* and no *dhimmis* could therefore be said to exist as of that time. The whole concept of *dhimma* has therefore given way to *muwatanah* (citizenship).

Q) In the past, have non-Muslims in countries ruled by Muslims been forced to pay a special tax? Does this practice continue today?

A) Yes, they were required to pay the poll-tax (*jizyah*), which is at about the same rate as that of poor-due, or *zakah*. Since *zakah* is a religious duty in Islam, non-Muslims are not required to pay it; they pay *jizyah* as a contribution to the costs of protection and security that the state incurs. Non-Muslims were exempted from military service as it partook in *jihad*, again a religious duty for Muslims. But if non-Muslims themselves wished to serve in the army, they were to be exempted from the payment of *jizyah*. Also, the sick and disabled, the elderly, children, women and monks were not required to pay it. This practice does not continue today due to the general nature of taxation laws that no longer proceed on the basis of religion.

Q) Are non-Muslims living under Shariah forced to obey it?

A) Broadly, only in the sphere of public law and secular affairs, such as constitutional and criminal laws, economic activity and commerce, the Shariah applies equally to both Muslim and non-Muslim citizens, but non-Muslims are free to follow their own laws and traditions in religious, customary and personal matters that may be said to be closely associated with religion, such as marriage and divorce, or inheritance. Non-Muslims are not subject to the jurisdiction of Shariah courts, and may only refer to civil courts, unless they request to seek judicial relief through Shariah courts. Most of the present-day Muslim countries have a variety of other specialised courts, such as criminal courts, administrative courts, commercial

courts etc., which operate side by side with the Shariah courts. Only in Saudi Arabia are the Shariah courts of general jurisdiction. In most other countries that do have separate Shariah courts, their jurisdictions are also confined to matrimonial law, inheritance matters and religious offences, with the overall result that non-Muslims are not likely to go to Shariah courts but mainly to civil courts.

Q) What are the consequences for non-Muslims who break Shariah?

A) Non-Muslims are free to practice their own customs which may conflict with the Shariah such as wine-drinking or the consumption of pork but should not promote these practices among Muslims. They are free to follow their own rules on these matters, and also in respect of their own personal laws such as marriage, divorce, inheritance etc. They are not treated differently, however, when they commit crimes of violence and property or harm others without a just cause.

Q) What is the origin of blasphemy laws? What constitutes blasphemy? Which countries have blasphemy laws and how are they enforced?

A) Insulting and mocking of God and the Prophet is considered as blasphemy. It is a blatant violation of the right of God. In history, blasphemy and apostasy were dominantly political offences which had religious overtones. In the early years of Islam, it was equivalent to high treason and posed a serious threat to both the religious and political foundations of the new community and state in Madinah. Today, it consists of a violation of public rights. It continues to be a dangerous offence, which can incite violence and loss of life, and pose a threat to law and order in society, as was seen in the aftermath of Salman Rushdie's misguided venture, and that of the Danish cartoons. There is no prescribed punishment for blasphemy, hence it falls under the category *ta'zir* offences and its punishment is open to a measure of discretion and the influence of circumstantial factors.

Q. Does Islamic law permit a Muslim to leave Islam? Or what does Shariah say about apostasy?

A) The Qur'an does not explicitly provide any punishment for apostasy. The main Qur'anic principle is that "there shall be no compulsion in religion" (*al-Baqarah*, 2:

256). The substance of this declaration is confirmed in a number of other verses in the Qur'an. The basic position in Islamic law is supportive of the freedom of individual to profess the religion of his or her choice without compulsion. Neither the Prophet Muhammad himself, nor any of his Companions compelled anyone to embrace Islam, nor did they sentence anyone to death solely for renunciation of the faith, and there is evidence in the Qur'an to that effect. The handful of cases of apostasy reported during the Prophet's time are in effect offences of treason: the individual would renounce Islam, leave Madinah, join the pagans of Quraysh and fight the Muslims - all in rapid succession. This was the scenario at a time when the two communities were actively at war. There were no neutral grounds under those circumstances. Bear in mind also that there were over 26 instances of military engagements between Muslims and the non-Muslims - mainly the pagans of Quraysh - in the space of about ten years, hence an active state of war. This was the context in fact of utterance of the Prophetic *hadith* which says, "One who changes his religion shall be killed." Although it was most likely a temporary legislation (*tashri' zamanai*) to begin with, in course of time it became standard law to the extent of even suppressing the Qur'anic position, due most probably to the outbreak of religious wars, the so-called 'wars of apostasy' (*hurub al-riddah*) during the time of the second caliph Abu Bakr. They were, in reality, tribal rebellions staged mainly to reject the payment of *zakah*, but they were fought in the name of apostasy nevertheless. Such was the hold of the idea of religion and sensitivity over the success or possible collapse of Islam at that juncture of history that political upheavals were also subsumed under religion - hence the wars over *zakah* thus became 'wars of apostasy.' The *hadith* just quoted also needs to be interpreted as its standard wording would otherwise fail to convey its purpose. For the standard wording would penalise even a Jew who became a Muslim! According to the rules of Islamic jurisprudence, when a text becomes open to one level of interpretation, it is automatically reduced from the level of definitive (*qat'i*) to that of speculative (*zanni*) and may be subjected to further levels of interpretation, which may in this case be that this *hadith* had envisaged treason as a capital offence and not apostasy as such.

Q) How does Islamic law view non-Muslims who proselytise Muslims?

A) Islamic law prohibits non-Muslims who are living under the Muslim authority from proselytising Muslims with the intention of inciting them to renounce Islam. Christian missionary activity in the Muslim lands became widespread in colonial times and since then. The issue also touched on Muslim sensitivities in a multi-religious society such as Malaysia, with about 40 per cent of its population being non-Muslims. Hence many of the Islamic by-laws or Enactments in the various states of Malaysia do not permit non-Muslims to proselytise Muslims. Even the Muslims themselves are not allowed to propagate Islamic doctrines among their fellow Muslims due to the sensitivity of the matter and incidence, whether intentionally or otherwise, of 'propagation of false doctrine.' On a comparative note, this is not a major issue in some other Muslim countries, such as Turkey and Afghanistan, and even Indonesia with homogenous populations of almost 100 percent or close to that mark of Muslims.

Q) How does Islamic law view Muslims who proselytise?

A) The Qur'anic guidelines on disputation and dialogue in religious matters, including the call to religion, is that it must be conducted in the most courteous and reasonable manner possible. It could be only in the form of a persuasive example and advice, but Islam forbids Muslims from the use of coercive methods in propagating their faith. The basic principle of Islam is that there shall be no compulsion in religion.

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