Toward Our Reformation: From Legalism to Value-oriented Islamic Law and Jurisprudence

Mohammad Omar Farooq
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Understandably, Muslims tend to bristle at the common quip by non-Muslims (especially in the West) that Islam is badly in need of a "Reformation" – referring to the sixteenth-century Protestant Reformation that, despite the violence it unleashed in Europe for the next two centuries, did actually engender some positive changes within the Catholic church. No people, regardless of who they are or where they live, like outsiders telling them that they need to set their house in order.

This book, by contrast, is written by an insider telling other insiders (Muslims) that Islamic law needs serious revamping, a weighty charge indeed. The author faces an extra hurdle based on the fact that he does not belong to the traditional ulama class, the gatekeepers of Islamic jurisprudence. Farooq earned a Ph.D. in economics at the University of Tennessee, taught in the United States for over a decade, and now heads the Bahrain Institute for Banking and Finance's Centre for Islamic Finance. Rashid Rida would have said in his day that Farooq represents the new face of the ulama: one well versed in many aspects of the Islamic sciences and yet, because of his parallel expertise in the modern sciences, one who could provide indispensable guidance to society in the name of Islam.

Why does Islam need a reformation? Much of the book seeks to expose the abuse, misapplication, and distortion of the Shari'ah committed by states and individual ulama alike, for it "is being used to rubber stamp extremist, violent behavior, the abuse of women, and the unfair control and imprisonment of human beings" (p. 16). Speaking of South Asia in particular, he writes that the following are "prevalent": "[t]he torture and persecution of brides over their dowry, the throwing of acid onto girls who do not either want to accept a proposal of marriage or to concede to extramarital sex, the practice of honor killings and so on …" (p. 86).

Yet Farooq reserves his most stinging criticism for what he sees as the root problem, namely, the general centuries-long movement in Islamic legal circles toward "legalism and literalism," that is, focusing on textual rules and regulations to the detriment of considering the values these texts actually promoted and that would necessarily find different expressions in different times and climes. Perhaps the most damning case is slavery. Even though the Qur'an

expressly – and frequently – promotes the unconditional dignity of every human being, "[t]he classical orthodox position erroneously argues that the Prophet never specifically or categorically prohibited the practice [of slavery]" (p. 193). Thus, the clear injunction against enslaving free people was turned on its head to mean that people already enslaved or captives of war were meant to remain in that condition. In turn, this attitude led to Imam Malik's preposterous position that the *ḥadd* penalty for drinking wine was reduced to half for a slave and to the Hanafi rule that a slave could marry only up to two wives. In essence, a slave had only half the value of a free person.

In light of these and many more rather egregious applications of law, Farooq broaches the topic of reformation in four steps. Chapters 3 to 5 dispell long-held and deeply cherished Muslim myths about the uses of hadith, *ijmā'* (consensus), and *qiyās* (analogical reasoning). In other words, only one of the four traditional sources of the Shari'ah is "divine" and therefore entirely reliable. He insists again and again that the Prophet's Sunnah is absolutely essential to guiding the community properly. Yet less than a dozen *aḥādīth* are *mutawātir* (containing a reliable chain of transmission, since nearly all prophetic reports have only one source [*aḥad*]). This means that the second source of knowledge for the Shari'ah is "probabilistic."

As for the two sources of jurisprudence that involve a more direct human involvement, *ijmā'* and *qiyās*, their reliability turns out to be very shaky in his eyes. If even the most reliable *aḥādīth* cannot be seen as "divine" (only the Qur'an is God's direct word), how much more so these human tools that are, by definition, so tentative? Leaning as he does on various scholars – the number of block quotations is so high that it resembles a dissertation – Farooq agrees with AbdulHamid AbuSulayman that "the simple, traditional concept of *Ijma* is no longer suitable for a non-classical social system" (p. 164). In fact, quoting from Ziauddin Sardar, the community's early "democratic spirit" was soon hijacked by "the clerics and religious scholars" who "removed the people from the equation" – with the result that "authoritarianism, theocracy and despotism reigns supreme in the Muslim world" (p. 163).

Just as with many other domains of human knowledge, law progresses largely on the basis of analogical reasoning. Thus no one can deny that *qiyās* has played a key role over time in its development. Still, as Farooq deftly demonstrates, Muslim scholars disagreed about many aspects of this tool. For instance, what constitutes the *'illah* (the reason) for a particular command or prohibition in the first case, and on what basis can one extrapolate it from the text? What is the relationship between the original case (*aṣl*) and the new case? How many conditions must be present to establish that connection? In the end, no clear consensus existed about any of these issues.

That said, the main problem with the ulama's use of *ijmā'* and *qiyās* was that they came to be seen as infallible means of discerning God's will for humanity. Worse yet, their tunnel vision reduced jurisprudence to texts and the mechanics of deriving new laws from them without referring to their underlying divine intentions. "Text-centeredness" engendered a kind of legalism that reduced the "application of Shari'a" in several countries to "a few harsh laws and punishments under authoritarian regimes devoid of reference to broader Islamic values and principles" (p. 225).

Farooq's positive strategy, therefore, or his fourth step toward renewal, is laid out in his last chapter: "Islamic Fiqh (Law) and the Neglected Empirical Foundation." To be fair, his first step was already anticipated in the second chapter, "Value-Orientation" (pp. 63-90), where he offered thirteen values emanating from the Qur'an and the "Prophetic legacy." The last one could have served as a transition to the book's final chapter: "Embracing Life-Experience as Part of the Collective Learning Curve." Indeed, as the Qur'an urges its readers to "observe, think, and reflect" on the world around them, law will remain stultified and irrelevant unless it incorporates not just the values stemming from the divine will but also a keen and curious exploration of the surrounding phenomena, whether in the physical world or the dynamics of human society, as Ibn Khaldun did centuries ago. In particular, Farooq the economist pleads with his readers to learn from the social sciences so they will understand that the prohibition of *ribā* is meant to curb exploitive practices that oppress the poor. But research shows that if all kinds of interest were banned, it is unlikely that any economy could be grown and that inflation could be tamed.

At its core, this book promotes a new *uṣūl al-fiqh*, but without starting from scratch. The author's antagonists are the "traditionalists" or "puritans" (see his very long quote from Khaled Abou El Fadl, pp. 62-63) for whom the medieval Sunni consensus is "Shari'a" and therefore sacrosanct.

Farooq, obviously in the company of many other specialists ranging from conservative to far more progressive, advocates a fresh legal philosophy and methodology with the Qur'an as the only reference point and an approach that shuns traditional *ijtihād* in favor of diligent research into a society's real-life conditions. Along with this, he asserts that a firm moral compass be calibrated with those values and purposes revealed in the Qur'an. Interestingly, he no longer favors the use of *maqāṣid al-Sharī'ah* on the grounds that it is a jurisprudential term vulnerable to legalistic "takeovers." He would rather use the more theologically meaningful term *maqāṣid al-Islām* (Islam's higher purposes).

This last point also highlights one of the work's weaknesses. While he raises many important questions and, in my estimation, makes an excellent

case for rethinking Islamic legal theory, his proposed solutions contain some ambivalence and ambiguity. A central issue is the word "Shari'ah," which is conspicuously absent from the title. Perhaps his indignation over its long-term abuse has led him to leave it aside and focus on "Islamic law." In any case, at times he uses it as God's will writ large in contradistinction to *fiqh*; at others he writes that "the Shari'ah is essentially a human construct" (p. 93). He rails against how the *ḥudūd* penalties are applied in some places, and yet for someone who so emphasizes human solidarity and universal values he nevertheless implies they still need to be applied.

Understandably, as Farooq has raised a host of far-reaching questions, he can only go so far in solving them in one book. As all of his quotations and endorsements included in the book amply attest, many others are moving in similar directions. Rethinking – or "reforming" – Islamic law in the present context is, after all, a collective enterprise.

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