The Political Economy and Underdevelopment of the Muslim World: A Juridico-Philosophical Perspective

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Abstract

This paper studies the relation between Islam and economic development from a juridico-philosophical perspective. A fresh review of this issue is timely because of the ongoing laggardness of Arab and Muslim economies from decades of pareto-inferior poverty traps. We disentangle the viewpoints on the Islamic-economic nexus and determine that the Muslim economies' backwardness is due to the retrograde outlook of the jurists (*fuqahā'*). This flawed jurisprudential reasoning is instrumental in the paucity of financial instruments, markets, and institutional development. We also scrutinise the jurists' co-option by the ruling elite which thereby legitimises the elite's autocracy. We conclude by recommending a salient strategy critical in fostering economic development and growth.

Keywords

ijtihād, economic underdevelopment, *ḥiyal*, intellectual stalemate, *ribā*

1 Introduction

The Muslim world trails the West in job creation, education, technology, and productivity; however, many of the economic troubles of the Arab world are still blamed on globalization and Western economic domination... [1]

The ongoing civil upheaval in several of the Islamic states in the Middle East and North Africa (MENA) highlights the frustration of the masses at decades, possibly even centuries, of economic, political, and social underdevelopment. This underdevelopment is not only peculiar to these Arab states but reverberates generally around the Muslim world. Given the relative economic superiority of the Muslim world over Europe for much of the pre-modern age, the ongoing uprisings bring to the fore the criticality for a deeper understanding of Islam in regard to economic development. Specifically, in this

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1 T. Waywell, 'A failure to modernize: The origins of 20th. century Islamic fundamentalism', *Concord Review* 16 (Spring): 159-190.

paper, we aim to discuss the internal and external institutional factors which have impeded the progress of the Muslim world and to present an institutional strategy to recover some degree of economic parity with the so-called developed world.

Thus, our study aims to scrutinise the historical stasis of institutions in the Muslim world from a juridico-philosophical perspective. The literature widely accepts the crucial role which institutions historically play in economic development.[2] Institutional evolution (or stagnation) over time can explain how businesses flourish (or wither away) due to decreasing or increasing transaction costs. This evolution can favourably or unfavourably affect society. Here we elaborate on how religious beliefs are contingent on the interpretation of the scriptures of the Qur'an and *Sunna* – the normative practices of the Prophet Muhammad – by scholars (*ᶜulamāʾ*). Particularly influential amongst this group are the jurists (*fuqahāʾ*) whose task is to derive religious law (*ijtihād*) from the sacred sources.[3] Consistent with Keeley, the pursuit of this line of enquiry can establish the link between development and juridical rulings.[4] Furthermore, because of this enquiry, we derive valuable policy recommendations to boost economic growth and development

Our efforts yield the following observations. First, we identify the pareto-inferior poverty traps of the Muslim states to the hysteresis fundamentally linked to the retrospective outlook of the jurists and their inability to undertake adequate and robust jurisprudential reasoning (*ijtihād*). We document this by illustrating the shortcomings of the jurists' rationale by focusing on a crucial injunction in Islam pertaining to the protection of property rights (*ribā*).[5] The misunderstanding of *ribā* has led to a failure to establish institutions which protect these rights and those which advance financial development.[6, 7] Historically, this issue has also led jurists to condone, and at times even legitimise, the rent seeking practices of monarchs and autocrats.[8] This hysteresis

2 D. Acemoglu, S. Johnson & J.A. Robinson, 'Institutions as a fundamental cause of long-run growth', in P. Aghion & S.N. Durlauf (eds.), *Handbook of Economic Growth* (Amsterdam: Elsevier, 2005) Vol. 1 Part A, 385-472.

3 Our reference to the jurists is based primarily on the literature developed by them over the course of Islamic history. This literature has been at times updated by the legal opinions of *muftīs* (scholars, whose role is to issue opinions and verdicts). However, in the main, the literature has been compiled by author-jurists, i.e., scholars whose activity involved writing legal treatises and expanded commentaries. After the crystallization of Islamic law into the major schools of thought, it is almost impossible to find legal opinions in the law pertaining to financial transactions diverging from the views expressed in the literature of the classical age. This is why our generalized reference to the jurists, treating them as a monolithic group, is in our opinion justified. For more on the legal specialists, see W. Hallaq, *Introduction to Islamic Law* (Cambridge: Cambridge University Press, 2009).

4 L. Keely, 'Comment on: People's opium? Religion and economic attitudes', *Journal of Monetary Economics* 50 (2003): 283-287.

5 See M.S. Ebrahim, A. Jaafar, P. Molyneux, & M.O. Salleh, '*Agency Costs, Financial Contracting and the Muslim World*', Working Paper, Durham University Business School, Durham University, 2016.

6 Pryor reiterates this when he terms *ribā* as an "*obscure Arabic word, which most Muslim scholars have interpreted as 'interest' but which some consider it as 'usury'*"'. Since key economic issues have not been interpreted precisely, it is not surprising that Pryor fails to find any Muslim economic system with a unique Islamic identity. F.L. Pryor, 'The economic impact of Islam on developing countries', *World Development* 35 (2007): 1818.

7 L. Angeles, 'Institutions, property rights, and economic development in historical perspective', *Kyklos* 64 (2011): 157-177.

8 See also F.L. Pryor, 'The economic impact of Islam on developing countries', *World Development* 35 (2007): 1815-1835; M.Coşgel, T. Miceli & R. Ahmed, Law, 'State power and taxation in Islamic history', *Journal of Economic Behavior and Organization* 71 (2009): 704-717; *ibid.*, Angeles.

reconciles the opposing theories in the literature on Islamic-economic development, whilst at the same time positing that Islam, the religion, is not the reason for impeding the advancement of the Muslim world.[9, 10]

Second, for regions of the Muslim world to advance, there needs to be greater refinement in the manner in which jurisprudential reasoning (*ijtihād*) is conducted. An overhaul of the educational institutions, which currently serve only to perpetuate intellectual stagnation, could facilitate this refinement. This overhaul needs to be followed by the structuring of institutions to promote property rights and to encourage good governance. Further, it should include a financial architecture aligned with Islam that promotes growth.

This paper is organised as follows. The following section discusses the institutional background of the Muslim world. Section 3 reviews the literature on the economic performance of Muslim countries. Section 4 provides a diagnosis of what has gone awry with the Muslim world from an Islamic legal perspective. Section 5 concludes with a strategy for stemming the tide of economic malaise and reviving growth.

2 The Institutional Background of the Muslim World

Despite representing approximately 21 percent of the world's population, Muslim countries lag far behind other nations, contributing a mere 8 percent of the world's Gross National Product. This reiterates the poor results reported in the Human Development Index (HDI) published by the United Nations Development Program (UNDP).[11] Out of the 57 Muslim countries, 21 received low scores, 31 secured medium scores, and only 5 attained high scores in the HDI.[12]

Recent research on the political economy and underdevelopment of the Muslim world, such as by Haber, attributes the problem to the 'democratic deficit' which it argues is linked to desert institutions.[13] Haber maintains that moderate rainfalls engender agriculture, thereby promoting urbanisation, trade, and state-building. In contrast, arid land undermines the evolution of a modern state, which is an essential condition for democratisation. Malik and Awadallah identify the cause of the Middle East's long-term failure to a flawed model of development that hinges on inefficient forms of intervention and redistribution and that is financed through external windfalls.[14] Chaney attributes the lack of democracy in parts of the Muslim world to its

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9 Pryor*, ibid.*

10 Weede is of the view that two unimplemented features of the Islamic religion make the Muslim society more conducive to capitalism, thus inducing growth. One is that the religion encourages economic ventures as Prophet Muhammad himself was a merchant. Second, religious constraints curb unjustified taxes and deficit increases. E. Weede, 'Long-run economic performance in the European periphery: Russia and Turkey', *Kyklos* 64 (2011): 138-156.

11 The HDI incorporates three variables: life expectancy at birth, educational attainment and effort, and per capita income. See http: //hdr.undp.org/en/statistics/hdi/

12 See also, Pryor, *supra* note 8; M.U. Chapra, 'Ibn Khaldun's theory of development: Does it help explain the low performance of the present-day Muslim world?', *Journal of Socio-Economics* 37 (2008): 836-863.

13 S. Haber, 'Rainfall and democracy: Climate, technology, and the evolution of economic and political institutions', Working Paper, Department of Economics, Stanford University, (2012).

14 A. Malik & B. Awadallah, 'The economics of Arab Spring', *World Development* 45 (2013): 296-313.

conquest by the Arab armies following the death of the Prophet Muhammad.[15] This impacted the conquered societies for centuries, eventually turning them into autocratic states.[16, 17]

According to several studies (described below), the underdevelopment of the Muslim world is not a recent phenomenon. It stretches back as far as the Middle Ages; and rather than being a consequence of Western imperialism or another external factor, scholars have attributed it to a variety of internal systemic problems linked to religion, society, and politics. One such theory, proffered by Timur Kuran contends that the Muslim world's degeneration is due to its failure to develop robust civil institutions that could both serve as a check on the power of the ruling classes and facilitate economic growth.[18] He finds that Islamic law is a major impediment to economic development in the region.

The thrust of Kuran's thesis is that a developed financial system contributes significantly towards a nation's growth. We agree with Kuran that financial systems do indeed play a vital role in advancing intermediation by mitigating market frictions, facilitating efficient investment decisions, allocating scarce capital, and transmitting financial transactions. This role in turn stimulates decisions on capital accumulation and innovations that are crucial to delineating a nation's long-term economic path.[19]

Innovation is a crucial energising force in economic growth. Arguably the Muslim world has been economically emasculated of this element due to the constraining force of orthodoxy. Certainly, there is a body of evidence that shows that religious constraints, amongst other factors, form the backdrop of inertia in commercial organisations.

Shatzmiller's study is representative of this theme. The study contrasts the concentration of occupations stemming from commerce (private commercial enterprises) with that of the bureaucracy and the military (executive) and the education

15 E. Chaney, 'Democratic change in the Arab world, Past and Present', *Brookings Papers on Economic Activity* (Spring Issue, 2012).

16 The papers by Haber and Chaney stem from 'endowment' and 'law' perspectives respectively, while Malik and Awadallah amalgamate these two perspectives. The aim of our essay, however, is radically different from that of the above studies. We focus on the errors of the *de facto* religious authorities (*fuqahā'*), who made the Muslim world submit passively to the *de jure* autocratic leaders. This impacted on institutional building, and thus, economic development. Our perspective is consistent with the hypothesis of Stulz and Williamson and Acemoglu et al. that emphasizes the impact of culture (i.e., values extracted from religious scriptures) on policies and institutions. Stulz and Williamson (p. 346) contradict the perspective of Chaney by stating that '*indigenous culture eventually can reassert itself* (against that of the conquering or colonizing one) *with a bang*.' There are also examples of countries deemed 'democratic' by either Haber and/ or Chaney, where the judiciary is deeply emasculated by the meddling of the executive branch that it leads to the weakening of property rights, and thus, underdevelopment. Acemoglu et al., *supra* note 2; Haber, *supra* note 13; Chaney, *ibid.*; Malik & Awadallah, *supra* note 14; R.M. Stulz & R. Williamson, 'Culture, openness, and finance', *Journal of Financial Economics* 70 (2003): 313-349.

17 Huntington in *The Third Wave* attributes the lack of democracy in the natural resource rich Arab states to the 'lack of accountability' emerging from an absence of taxation. That is, citizens are denied representation when they are not taxed. S.P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman, OK: University of Oklahoma Press, 1991).

18 T. Kuran, 'Why the Middle East Is economically underdeveloped: Historical mechanisms of institutional stagnation', *Journal of Economic Perspectives* 18 (2004): 71-90; T. Kuran, 'The logic of financial westernization in the Middle East', *Journal of Economic Behavior and Organization* 56 (2005): 593-615; T. Kuran, *The Long Divergence: How Islamic Law Held Back the Middle East* (Princeton, NJ: Princeton University Press, 2011).

19 R.G. King & R. Levine, 'Finance, entrepreneurship and growth', *Journal of Monetary Economics* 32 (1993): 513-542.

and legal (including religious) sectors in Arab-Islamic regions during two consecutive eras: 701-1100 and 1101-1500.[20] In the first period, which encompasses the formative period of Islamic law, the Arab-Islamic world had 233 distinct commercial occupations, including sellers, middlemen, brokers, weighers, appraisers, and financiers. In the second period the number of occupations was 220, roughly the same (see Figure). Remarkably, the number of unique commercial occupations in the bureaucracy and military tripled and the number of educational, legal, or religious occupations more than quintupled. This issue illustrates the inertia in commercial organisations and the stagnant commercial productivity, with the latter in particular constituting an absence of a key driver for economic growth.

[Insert Figure about here]

Furthermore, the data shows that between 1101-1500 the proportion of new commercial occupations was relatively low. Whereas more than four-fifths of all occupations in the bureaucracy, military, education, law, and religion were new, only half of the commercial occupations were so (see Table 1). According to Kuran, '[This] relatively low occupational turnover in private commerce is consistent with loss of organizational dynamism'.[21] This underdevelopment contrasts with Manchester, England, in 1903 where 77.2 percent of the total commercial occupations had emerged over the previous century.

[Insert Table 1 about here]

3 The Economic Performance of Muslim Countries

There are two broad theories in the literature on Islam and its impact on economic growth: the *impediment theory* and the *facilitator theory*. Neither provides a decisive explanation of the Islamic-economic nexus.

3.1 *Impediment Theory*

Since the mid-1990s, studies have focused on the problems in the Middle East, which had once enjoyed a high standard of living by global standards. Their basic contention is that the underdevelopment stems from certain Islamic beliefs that then became formalised in the teachings, practices, laws, and institutions. Kuran is one of the best-known advocates of this position.[22] For him, the Qur'anic prohibition of interest hampered the development of financial institutions that could compete and prevent European entities' domination of the region. He also argued that the Islamic law of commercial partnerships 'limited enterprise continuity,' that the Islamic inheritance system 'hindered capital accumulation,' that the *waqf* (charitable endowment) system 'inhibited the pooling of resources' by other financial intermediaries, and that the Islamic legal system's aversion to the concept of legal personhood 'enfeebled private

20 M. Shatzmiller, *Labour in the Medieval Islamic World* (Leiden: E.J. Brill,1994).
21 Kuran, *supra* note 18, p. 69.
22 *Supra* note 18.

organisations'.[23] Kuran contends that some of these institutions became sources of inefficiency. Thus, 'if the impetus for financial modernization ultimately came from abroad, the fundamental reason is that Islam's traditional institutions blocked indigenous paths to financial development'.[24]

Balla and Johnson find that the absence of the institutionalisation of property rights led to the eventual collapse of the Ottoman Empire in the nineteenth century.[25] They argue that although the Christian-French and Muslim-Ottoman fiscal institutions faced similar fiscal crises in the beginning of the seventeenth century, the uncertainty with respect to property rights led to different institutional outcomes. In France, tax collectors were successful in restraining the monarch from imposing collective action costs. In contrast, tax collectors in the Ottoman Empire faced excessive transaction costs in organising the same. Thus, fiscal contracts were more secure in France than in the latter. This security explains why Christian-French institutions strengthened, whilst those of the Muslim-Ottoman Empire crumpled.[26]

Similarly, Rubin argues that institutional differences in Islam versus the Christian West contributed to the broader economic divergence. This is demonstrated through a game theoretic approach that models the conflict between the political and religious authorities in both the Middle East and the West. The outcome of the model is contingent on the extent to which early Islamic political authority derives their legitimacy from religious ones. This approach involves a feedback mechanism where improving economic conditions in Europe led to the relaxation of interest restrictions, simultaneously diminishing the powers of the Church. These interactions did not take place in the Muslim world, despite similar economic conditions.[27]

3.2 *Facilitator Theory*

Chapra traces the degeneration of the Muslim world to the political illegitimacy of the Mu'awiyah's dynasty in 679 A.D. in which hereditary succession was initiated that disregarded the consensus of the community.[28] The lack of transparency in the absence of genuine democracy gradually affected the Muslim socio-political economy (i.e., freedom of speech, abuse of public funds, corruption, poor governance, and injustice).

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23 T. Kuran, 'The logic of financial westernization in the Middle East', *Journal of Economic Behavior and Organization* 56 (2005): 594.

24 *Ibid.*, p. 612.

25 E. Balla & N.D. Johnson, 'Fiscal crisis and institutional change in the Ottoman Empire and France', *Journal of Economic History* 69 (2009): 809-845.

26 An equivalent perspective is espoused in Weede in the cases of Russia and Turkey with respect to Western Europe. Weede, *supra* note 10.

27 Rubin's analysis departs from the usual welfare approach studying the conflict of interest between borrowers and lenders, from an agency theoretic perspective. His study demonstrates the economic disparity between the Muslim and Christian worlds by modelling the conflict of interest between the ruling elite and the religious establishment. His theoretical result, however, deviates from the contemporary real world practice. This is because the co-option of the religious establishment by the political elite, especially in the economically well-off Arabian Gulf countries, should result in the decline of 'Islamic' banking services. The opposite result, i.e., an upsurge in demand for these services and the conscious decision by established Western banks to expand their repertoire of services, is a stark contrast to the prognosis of Rubin. J. Rubin, 'Institutions, the rise of commerce and the persistence of laws: Interest restrictions in Islam and Christianity', *Economic Journal* 121 (2011): 1310–1339.

28 M.U. Chapra, 'Ibn Khaldun's theory of development: Does it help explain the low performance of the present-day Muslim world?' *Journal of Socio-Economics* 37 (2008): 836-863.

'As far as Islam is concerned, it is itself a victim rather than the trigger mechanism'.[29] Chapra further maintains that illegitimacy in the political field affected the development of Islamic jurisprudence (*fiqh*), which had far-reaching adverse consequences on Muslim society. The disregard of Islamic values in the political field remains at the root of dissent between the jurists and the rulers. The rulers either penalised or prosecuted more conscientious and vocal jurists. Thus, the jurists confined themselves to their religious schools and lost touch with the rapidly changing environment. Consequently, discourse in the field of jurisprudence suffered and lacked the dynamism which it had enjoyed in earlier centuries.[30]

Malik associates the degeneration of the Muslim world with the evolution in its political economy.[31] The structure of the Ottoman Empire was one of an 'absolutist political system' that endorsed initiatives furthering the political masters' supremacy. Therefore, any form of innovation that had the potential to destabilise their political power was either outright curtailed or moderated by lack of private incentives.[32] Malik questions the rationality of Kuran's view on the backwardness of Muslim states in comparison with the West.[33] To him, there is a configuration of reasons that underpinned the success of some European nations, such as geographical advantage, trading acumen, and political economy. Thus, Europe's commercial success was not achieved by 'internal processes alone' but was 'aided by a combination of commerce, coercion and colonisation'. European firms invented new organizational forms and financing mechanisms against this backdrop of interstate competition, overseas expansion, and long-distance trade that ultimately manifested in the establishment of Western corporate innovations: (i) impersonal and permanently lived organisations, (ii) separation of ownership and control, and (iii) the mobilisation of long-term capital through joint stock companies. Furthermore, many of these legal and corporate innovations were partly a response to the needs of war-making states and overseas commercial ventures.

In this paper, we contribute to the discourse around Islam and development by building on and providing an important corrective to the work of Timur Kuran; we investigate a factor hitherto unexplored in the academic literature – the contributory role of the jurisprudential interpretation (*ijtihād*) in shaping the present economic landscape of Muslim states. This is in conformity with the view of political scientist Michael Fish who states:

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29 *Ibid.*, p. 846.

30 *Ibid.* Our major disagreement with Chapra's analysis is his absolving the jurists from blame. Historically, however, political rulers have derived their legitimacy from the religious elites. This contentious issue is discussed in the second last section.

31 A. Malik, 'Was the Middle East's economic descent a legal or political failure? Debating the Islamic law matters thesis', *Centre for the Study of African Economies (*CSAE), Working Paper WPS/2012-08, Oxford University (2012).

32 Goldstone (2003) too is of the view that Kuran's analysis is incomplete as there is no mention of the technological upsurge in the West especially from the sixteenth and seventeenth centuries onwards. He is of the view that several problems specific to the Middle East, but not attributed to Islam, are not addressed by Kuran. These include: (i) autocratic regimes; (ii) tribalism; (iii) guilds; (iv) deterrence to investment in human capital; and (v) reluctance to the undertaking of innovations. J.A. Goldstone, 'Islam, development, and the Middle East: A comment on Timur Kuran's analysis' (2003) Retrieved July 23, 2013 (http: //mercatus.org/publication/comments-timur-kurans-why-middle-east-economically-underdeveloped-historical-mechanisms).

33 A. Malik, 'Islamic law and development. A response to Kuran's "The Long Divergence"', in *Eighth International Conference on Islamic Economics and Finance in Qatar* (Doha, 2011) 5.

> ...it is as dubious to try to locate the source of social practice and order in scripture in Islamic settings as it is to try to locate them there in Christian and Jewish settings, because as with all holy injunctions based on sacred text, interpretive traditions are powerful and ultimately determine practice.[34]

Thus, we undertake an evaluation of the role of the preeminent interpreters of Islam, namely the Muslim jurists (*fuqahā*'), in impeding institutional change. We focus on their interpretation of *ribā*. We also argue that their failure to recognise that the Qur'ānic ban on *ribā* as one involving the protection of property rights has led to flawed rationalisations that miss the divine injunction and contributes to a weak institutional framework which caves in to rent seeking autocrats.[35]

4 Contextualising the Institutional Stasis and Underdevelopment in the Muslim World

This section delineates the factors responsible for the historic economic regression of the Muslim world and identifies the requisites to stimulate growth and development.

4.1 *The Criticality of Jurisprudential Interpretation (*Ijtihād)

Muhammad Iqbal, the well-known poet-philosopher of the Indo-Pak Subcontinent, describes *ijtihād* as the elixir of Muslim legal thought. Although the ultimate spiritual basis of all life, as conceived by Islam is 'eternal and reveals itself in variety and change, that is, in an ever dynamic universe',[36] it must also allow for the inevitability of movement and change which is so characteristic of the human experience. The key principle which allows for adaption in Islam is *ijtihād*.

Ijtihād means 'to exert' in the terminology of Islamic legal theory. It is described as 'the total expenditure of effort by a mujtahid (capable scholar) to infer with a degree of probability the rules of the Shari'ah (Islamic law) from the detailed evidence in the source*s*'.[37] Kamali reformulates the definition of jurisprudential interpretation in a recent monograph on Islamic law with a view to overcoming what he describes as 'difficulties which encumber the conventional theory of *ijtihād* and to properly make it an integral part of the contemporary legislative processes'; thus, in Kamali's new conceptualization, *ijtihād* is a 'creative and comprehensive intellectual effort by qualified individuals and groups to derive the juridical ruling on a given issue from the sources of Sharī'ah in the context of the prevailing circumstances of society'.[38] The idea is most clearly adumbrated in the Prophetic tradition (*ḥadīth*): '...when a judge gives a decision, having tried his best to decide correctly and is right, there are two rewards for him; and if he gives a judgment after having tried his best (to arrive at a correct decision) but erred, there is one reward for him'.[39] Moreover, the traditions in which

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34 M.S. Fish, 'Islam and authoritarianism', *World Politics* 55 (2002): 37.

35 See Q (4: 161).

36 M. Iqbal, *The Reconstruction of Religious Thought in Islam* (Lahore: Sheikh Mohammad Ashraf, 1977), 148.

37 M.H. Kamali, *Shari'ah Law: An Introduction* (Oxford: One World Publications, 2008), 162.

38 *Ibid.*, p. 165.

39 See *Ṣaḥīḥ Muslim*, translated by A.H. Siddiqui (Kitab Bhavan, New Delhi, 1986), Chapter 692, *ḥadīth* No. 4261-4263.

the Prophet is reported to have openly encouraged independent thought, or tacitly approved of it, are too numerous to ignore. His Companions, both in his presence and after his death, applied their reason to problems in a relatively unencumbered way.

However, the first significant political expansion of Islam circumscribed the opportunity for unfettered *ijtihād*. The doctors of the law, both independent scholars and appointees of the State, largely agreed on what was considered the 'correct method' for *ijtihād*. The jurists limited the method to several schemas and the type of person qualified to perform it. Once the accumulated wealth of legal thought found a final expression in the orthodox schools of law, it comprised just three degrees of *ijtihād*: (i) *complete authority in legislation* which is practically confined to the founders of the schools; (ii) *relative authority* which is to be exercised within the limits of a particular school; and (iii) *special authority* which relates to the determination of the law that is applicable to a particular case unexplored by the founders.[40] Since *Sunnī* orthodoxy established the theoretical foundations of Islamic law, it made the qualifications for this post nigh impossible to attain at a practical level. Thus, the possibility of developing and evolving new theoretical and hermeneutical frameworks became virtually impossible.

By 820, *ijtihād* had virtually become reducible to deductive reasoning (*qiyās*) in large part due to the jurist and legal theoretician al-Shāfi^{c}ī whose efforts circumscribed the unfettered use of opinion.[41] A rudimentary and almost unconscious analogical method was always present in Islam. When jurists were faced with a new, or refined, complex issue, they referred to a verse in the Qur'an, a general principle, or a specific case in the practice of the Prophet or the early Muslims (*Sunna*) to make a decision on its application with regard to the present issue. But in both the choice of the model and the discernment of the point of resemblance, the jurists had almost unbridled liberty in their decision making that produced results that varied between sound analogy on the one hand and almost complete arbitrariness on the other.

Inductive reasoning (*istiqrā'*) was another widely used method of legal reasoning prior to the second half of the eighth century. However, by al-Shāfi^{c}ī's time, it was seldom used because it was a casualty of the sustained attempt of mainly Shāfi^{c}ī jurists to create analytical consistency and standardise the law.[42] The ratiocination of jurists, with very few exceptions, thereafter revolved around the effective cause (*^{c}illa*) of an existing legal judgement, rather than constituting an applied attempt to extend the law based on the objectives or economic rationale (*ḥikma*, *maqāṣid*). The jurists believed that effective cause was an objective attribute that did not vary from person to person

40 For more information on the construction of orthodoxy by the religious authority (*'ulamā'*), see A. El Shamsy, 'The social construction of orthodoxy', in T. Winter (ed.) *The Cambridge Companion to Classical Islamic Theology* (Cambridge: Cambridge University Press, 2006) 97-118.

41 For this development, see F. Rahman, *Islam and Modernity: Transformation of an Intellectual Tradition* (Chicago, IL: University of Chicago Press, 2002). On al-Shāfi^{c}ī's role in the early development of Muslim legal theory, see J. Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1967). It should be noted that jurists of the Ẓāhirī school of law, Shī^{c}a jurists and some Mu^{c}tazila theologians were opposed to analogical reasoning as a method in law.

42 Inductive reasoning did find continued life, to some degree, in the doctrine of public interest (*maṣlaḥa*), and equity (*istiḥsān*). For more on these two juristic tools, see M.H. Kamali, *Principles of Islamic Jurisprudence* (Cambridge: The Islamic Texts Society 2003), 275-278.

or change with circumstances. It was therefore deemed the most suitable foundation for developing the law.[43]

In many legal cases, this textualistic approach to legal reasoning resulted in glaring errors of judgement.[44] For example, jurists failed to establish the correct rationale for the injunction pertaining to barter (i.e., inequitable spot exchanges referred to in the Islamic literature as *ribā al-faḍl*) – namely the expropriation of wealth due to the inefficiencies of the same. Instead, they determined the *ratio legis* as an attribute intrinsic to the specific commodities stated in the well-known tradition (*ḥadīth*)*.* This determination led to the contrasting interpretations amongst the jurists of the main schools of Islamic legal thought around a series of corollary issues (see Table 2).[45] With respect to the injunction pertaining to the exchange of deferred financial claims (*ribā al-nasī'ah*), the jurists uniformly prohibited it for loans, because they believed the rationale for the injunction to be the fact that money is not productive and therefore no interest, however insignificant, can be charged for credit. Ebrahim et al. find that the promotion of property rights is the economic rationale (*ḥikma*) behind the injunction of *ribā al-nasī'a* (see Table 3).[46] This promotion is premised on the Qur'ān and the Sunnah that eschew any kind of expropriation for both parties in a contract. The prohibition of *ribā al-nasī'a* promotes: (i) the pricing of a financial facility to avoid financial repression as well as negative leverage; (ii) the alleviation of financial fragility; and (iii) the mitigation of financial exclusion of the underprivileged.[47]

The first constraint reinforces economic sustainability. The second constraint alleviates a financial crisis. And the third constraint brings about the cohesion of disparate social classes. This cohesion mitigates civil strife to build a harmonious society. These issues are of importance especially in the aftermath of the recent subprime crisis.[48] Understanding the rationale behind the injunction of *ribā al-nasī'a* is critical for economic development and thus on advancing growth. The business history literature especially illustrates how the misapprehension of the third constraint has led to the underdevelopment of institutions to help the poor and underprivileged in the Muslim world.[49] The jurists made exceptions for commutative exchange with commodities which they deemed to be free of the attribute of *ribā* (termed as non-*ribawī* commodities or *māl-ghayr-ribawī*). For example, the jurists deemed the exchange five cubits of a specific cloth for six of the same as permissible, or an egg for two, or a sheep for two, on the condition that the exchanges were on the spot. Only the deferment of a payment of either counter value rendered the exchange impermissible.[50] These views were never challenged until the age of the great reformers of the nineteenth and early twentieth centuries.

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43 I.A.K. Nyazee, *Theories of Islamic Law: The Methodology of Ijtihād* (Chicago, IL: Kazi Publications Inc., 1994).

44 Rahman, *supra* note 41.

45 Ibn Rushd, *The Distinguished Jurist's Primer – Bidayat al-mujtahid wa nihayat al-muqtasid* (Reading, Berkshire: Garnet Publishing, 1996), Vol. 1, 160.

46 Ebrahim et al., *supra* note 5.

47 *Ibid*.

48 A. Kirman, 'The economic crisis is a crisis for economic theory', *CESifo Economic Studies* 56 (2010): 498-535.

49 P.D. Martino & S. Sarsour, 'Microcredit in Palestine (1995-2008): A business history perspective', *Business History* 54 (2012): 441-461.

50 W. Al-Zuhayli, 'The juridical meaning of *riba*', in A.S. Thomas (ed.) *Interest in Islamic economics: Understanding riba* (New York, NY, USA: Routledge, 2006) 28.

[Insert Tables 2 and 3 about here]

However, when the jurists failed to draw boundaries because of the paucity of philosophical or economic insight, they facilitated the circumvention of the prohibition pertaining to property rights (*ribā*) by individuals and firms by using ruses. The outcome was that Islamic financial structures were legalised with the exception of those that the jurists had delineated as non-commodities. If the jurists had identified the expropriation of wealth – or, in other terms, the protection of property rights – as the categorical *ratio*, then history might have unfolded in a different way (see Table 3). Because pre-modern economies were not developed like the economies of today, the short-term consequences of the jurists' failure were perhaps not severe. But, because modernity brought with it more complex market structures, the effect of their failure was devastating in the long term.

Indeed, with the onset of modernity, the lack of enterprise on the part of jurists, and more importantly, the entering of traditionally trained jurists into spheres of human life which demanded technical knowledge, began to have implications for the development of Muslim societies. To date, there is still no clear formulation by the jurists on the economic rationale behind the core Islamic injunctions related to financial matters, which leads to the apparent disconnect in the present practice of Islamic banking and finance.

4.2 *The Incoherence of 'Islamic' Banking and Finance*

The incoherent jurisprudential interpretation (*ijtihād*) manifests itself in Islamic banking and finance in the form of ruses (*ḥiyal*). Khan terms ruses as a 'de-facto conventional financial transaction' under an 'Islamic terminology', in other words, 'duping'.[51] Thus, the intriguing issue is: What then is the primary reason behind the use of ruses (*ḥiyal*) in Islamic banking and finance?

From the perspective of Muslim jurists and theologians, Islamic law assesses every action, whether of the limbs, mind, or heart, as seemliness or conformity (*ḥusn*) or unseemliness or deformity (*qubḥ*). Furthermore, these qualities (according to the majority of theologians and jurists) cannot be known by reason or natural law but rather by divine revelation alone.[52] This logic holds true whatever the action is, and even when it is self-evidently a crime, such as murder and theft. Anderson asserts that the dominant theological school in Islamic history (i.e., the Ashᶜarīs) 'firmly denied that man's reason is competent to apprehend the differences between virtue and vice, or even that such categories exist of themselves, or have any meaning at all, apart from divine revelation'.[53] In essence, God does not command or prohibit an act because it is either intrinsically good or intrinsically evil, but rather his command of an act *makes* that act good and his prohibition of an act *makes* that act evil.

We find the most serious implication to the Muslim world is that its theologians and jurists have not worked out a system of ethics that can serve as a foundation for

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51 F. Khan, 'How "Islamic" is Islamic Banking?', *Journal of Economic Behavior and Organization* 76 (2010): 818.

52 S.A.J. Stelzer, 'Ethics', in T. Winter (ed.) *The Cambridge Companion to Classical Islamic Theology* (Cambridge: Cambridge University Press, 2008) 161-79.

53 J.N.D. Anderson, 'Law as a social force in Islamic culture and history', *Bulletin of S.O.A.S.* 20 (1957): 14.

natural law or human positive law. Furthermore, since Islamic law very early in its history became a static edifice of strict laws, a cleavage between theory and practice arose. And although customary law had no official *locus standi* in jurisprudence, the fact is that people act on what conforms to their predilections.[54] This is often outside of the legal framework, where people conduct their day-to-day dealings in accordance with the real world.

The jurists, in their attempt to respond to the need of people to dispense with the strict rules of the law, began to produce the extensive literature on ruses. By these means, the interested parties, who were confronted by strict laws, could achieve desirable results by perfectly legal means in the economic conditions of their time. As elaborated by Schacht, 'The earliest ḥiyal (ruses) were merely simple evasions of irksome prohibitions by merchants, but very soon the religious scholars themselves started creating little masterpieces of elaborate juridical constructions and advising interested parties in their use'.[55] The position of the overwhelming majority of jurists was one of acceptance.[56] Even Ibn Qayyim al-Jawziyya, otherwise a staunch advocate of the law, discusses ruses at great length and cites numerous works dedicated to this theme.[57] He distinguishes 'lawful ruses', by which a lawful end is to be achieved by lawful means from those which are 'forbidden' and which he declares invalid. The first group comprises numerous devices in the field of commercial law.

For example, one fundamental error that involves a ruse is a 'credit sale' which imitates a collateralised interest-bearing loan (i.e., termed as a banking *murābaḥa*). This ruse arose as the jurists misconstrued the injunction of *ribā* literally as an 'increase' or 'growth'; and thus, segregated commodities into two types, those with and those without the characteristics of *ribā* (i.e., *māl-ribawī* and *māl-ghayr-ribawī* respectively – see Table 2). The assets with the characteristics of *ribā* were generally used in lieu of money or commodities, which provided sustenance. Some schools defined these assets as fungible goods which are measurable by volume or weight.[58] This definition again leads them to conclude erroneously that the historic credit sale (*murābaḥa*) is permissible because it involves an exchange of an asset devoid of *ribā* (such as a property) on the spot with an asset endowed with *ribā* (such as money) deferred.

The misconception persisted because the early jurists were making their decisions during the times of the Prophet Muhammad and that of the following generations which was an era of bare subsistence in which no financial intermediaries existed (as we have in modern times). They made these decisions without understanding the economic implications of the credit sale as we do today. Financial economists rationalise credit sales to the absence of financial markets in the medieval era. This is articulated in Sen: '...when financial markets are imperfect, a seller can find it optimal to offer a menu of

54 *Ibid.*, p. 14.

55 J. Schacht, 'Problems of modern Islamic legislation', *Studia Islamica* 12 (1960): 102.

56 The Traditionists (*ahl al-ḥadīth*), in keeping with their general approach to questions of religious law, rejected ruses (*ḥiyal*). Bukhārī (d.256/870) too devoted a whole 'book' (no. 90) of his *Ṣaḥīḥ* to combating them. According to Schacht some followers of the Hanbalī school too, are on record as opponents of *ḥiyal*. J. Schacht, 'Hiyal', in *Encyclopaedia of Islam*, Second Edition [EI2], (Brill Online, 2012).

57 Ibn Qayyim al-Jawziyya, Shams al-Dīn Abu ᶜAbd Allah Muhammad, *Iᶜlām al-muwaqqiᶜīn ᶜan rabb al-ᶜālamīn*. (Beirut: Dar Al-Kotob Al-ilmiyah, 2004).

58 W. Al-Zuhayli, 'The juridical meaning of *riba*', in A.S. Thomas (ed.) *Interest in Islamic economics: Understanding riba* (London: Routledge, 2006) 26-54.

deferred payment plans'.[59] That is, credit sales fundamentally enhance the demand for goods in the real sector of the economy because they are contingent on the elasticity of demand of the asset being sold.[60]

The ruse of credit sales (i.e., banking *murābaḥa*), on the other hand, does not incorporate the elasticity of demand of the asset supposedly being 'sold'. It is priced using an interest-based index and suffers from the same flaws as conventional debt. That is, it is a fragile facility endowed with the capacity to extricate assets and financially exclude the underprivileged. However, it is *not* economically efficient even though it alleviates adverse selection, moral hazard, and the agency cost of debt due to the collateralised nature of the debt.[61]

The legitimisation of the banking *murābaḥa* by the jurists has led to yet another violation of Islamic law in the form of non-collateralised conventional loans known as *tawarruq* (literally, monetisation). This facility is structured by employing a pretentious purchase of a real asset in conjunction with a simultaneous sale of the same asset to a third party.[62] The consequence of this stratagem is that it yields a financial facility which suffers not only from adverse selection and moral hazard but also a high agency cost of debt because it is not collateralised. This stratagem also ranks lower than a ruse of a credit sale on the efficiency scale because of the high cost of funding, which yields a low debt capacity.

These two examples illustrate that the current practice of Islamic banking, which is based on implementing medieval (and often inefficient) Islamic financial instruments, is nothing less than the failure of the religious establishment to engage in jurisprudential interpretation (*ijtihād*). This issue is reiterated in Ebrahim and Rehman, who find inefficiency in the medieval Islamic forward sale in contrast to conventional futures.[63]

4.3 *Rationalising the Shortcomings of the Jurists*

When the Qur'ānic imperative outlawing *ribā* (i.e., the charging of interest on loans as deduced by the jurists) was first revealed in the final years of the Prophet Muhammad's mission, it was nothing short of a command to the believing Muslim to act with loving kindness towards his fellow human beings. The Qur'an (2:276) in particular issued a command to adhere to the virtues of cooperation and mutual support via charitable lending.[64] Should a Muslim ever be in a position of creditor, he is entreated to lend without interest, even though he is vulnerable to actual and potential financial deprivation. The Qur'ānic imperative conflicts with the rules of natural law which find

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59 A. Sen, 'Seller financing of consumer durables', *Journal of Economics and Management Strategy* 7 (1998): 435.

60 M. Rashid, & D. Mitra, 'Price Elasticity of Demand and an Optimal Cash Discount Rate in Credit Policy', *Financial Review* 34 (1999): 113-126.

61 A banking *murābaḥa* is generally more expensive than a *ribawī* debt contract due to reduced economies of scale and the incremental expenses of documenting the subterfuge, i.e., paying Sharīᶜa scholars for their approval. See M.S. Ebrahim & M. Sheikh, 'Debt Instruments in Islamic Finance', *Arab Law Quarterly* 30 (2016): 185-198.

62 C. Imber, *Ebu's-su'ud: The Islamic Legal Tradition (Jurists: Profiles in Legal Theory)* (Edinburgh: Edinburgh University Press, 1997).

63 M.S. Ebrahim & S. Rahman, 'On the Pareto-optimality of Conventional Futures over Islamic: Implications for Emerging Muslim Economies', *Journal of Economic Behavior and Organization* (2005) 56: 273-295.

64 W. Al-Zuhayli, 'The juridical meaning of *riba*', in A.S. Thomas (ed.), *Interest in Islamic Economics: Understanding Riba* (London: Routledge, 2006) 26-54.

no objection to an agreement freely entered into by two parties. Even in that instance where complete freedom falls into doubt, such as in the case of an impoverished borrower in dire need of a loan and who, from his desperation, accepts unfair contractual terms, natural law considers it fair for a creditor to impose a moderate rate of interest on his loan. He is, after all, risking the total loss of his money if the borrower defaults or absconds with the funds. Moreover, even if the debt is repaid, the creditor is deprived of the use of his own money for the duration of the loan period.

It seems that the demands of the market constituted an irrepressible force that precluded an *in toto* ban on loan interest by Muslim authorities; this fact is abundantly clear from the Islamic legal literature, as jurists of all legal schools from at least the ninth century onwards were keen to limit the meaning of *ribā* and, by extension, its application in the real world of financial transactions. Overwhelmingly, Islamic jurists decided that the remit of *ribā* was specific to fungibles measured in volume or weight, which added a further condition of oneness of kind. Those commodities measured by any other criteria, such as length or number, were not deemed *ribawī.* Neither were non-fungibles considered *ribawī,* such as animals, carpets, lands, houses, and trees.[65] For these, the jurists considered an exchange in unequal amounts as lawful, irrespective of the fact that the very rationale for the prohibition of *ribā,* which the jurists themselves had pointed out, was being undermined.

The question arises, why had the judgemental errors of the jurists not come to light sooner? One possible reason is that financial economics as a separate field only evolved in approximately the last 60 years. In contrast, the rudiments of Islamic financial law, which developed almost 1,200 years ago, had remained a static edifice, as its formulators did not keep pace with the changing intellectual or socioeconomic environment. As Robinson explains:

> Religious authority, and the capacity to produce authoritative interpretation, derived from the Quran and the life of the Prophet, lay with the 'ulamā [scholars]. They were the recipients of the traditions of Islamic scholarship which had built up through time. They were proud of the many ijāzahs [authorisations] they possessed, permitting them to transmit the great scholarly works of the past. They relied on the authority of these and other works as they strove to make revelation in the form of law relevant to the problems of their time. Throughout they strove to prevent others muscling in on their monopoly, whether they were sufis or sultans. [66]

The monopoly that the jurists fought hard for, and indeed enjoyed, has had a detrimental effect on the recent history of Muslim communities, especially in the realms of economics, political leadership, and social policy. It also provides ammunition to critics who allege that Islam has held back progress of the Muslim world. A further twist of the knife is the fact that some jurists extricate economic surplus from the industry, as Khan contends.[67, 68] This issue is also corroborated by Kahf:

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65 *Ibid.*

66 F. Robinson, 'Crisis of Islam: Crisis of authority?', *Royal Asiatic Society of Great Britain and Ireland* 3 (2009): 344.

67 It is ironic that the religious establishment legitimizes its monopoly by misconstruing the Qur'ānic verses 8: 29 and 57: 28, which promises to endow God-fearing people the criterion between truth and falsehood. Yet, it does not pay any heed to the saying of the Prophet (*ḥadīth*), which restrains

> The *'ulamā* [scholars] in the 1950s had weather-affected, dried skin hands and humble clothing, sitting in the cold, teaching on the ground of mosques in Cairo, Damascus, Aleppo and Baghdad, are now replaced with soft-living *'ulamā* who are used to luxurious garments and services of five-star hotels and expensive restaurants. This new life style of Islamic banks' *'ulamā* has resulted in certain changes in viewpoint as well. Many of them are now accused of being bankers' window-dressers and of over-stretching the rules of the Sharī'ah [Islamic law] to provide easy fatāwā [religious rulings] for the new breed of bankers. [69]

Kahf's point is further corroborated in an extensive study by Zaman who illustrates that the *ᶜulamā'* in recent times have found Islamic Finance to be a very useful way of re-empowerment after more than a century of having virtually no role to play except in judgements relating to personal status law and ritual practice.[70]

A second reason why the errors of the jurists did not come to light sooner is the crystallisation of the various sects (schools) together with their respective doctrines in Islam. This process has stifled to some extent the possibilities of critical thinking because Muslims are exhorted to think strictly in line with their school of thought. This process has also led to what Al-Alwani describes as a 'crisis in *fiqh* (jurisprudence),' that is compelled by an agglomeration of errors in what is a static jurisprudential interpretation (*ijtihād*).[71] This description contrasts with the dynamic jurisprudential interpretation that Ibn Qayyim Al-Jawziyya espouses.[72] The crisis began to beleaguer Muslim economies when people unquestioningly followed the rigid rules of law and began blindly following the rulings of the jurists. This blindness stripped *ijtihād* of its dynamism from the earliest centuries of Islam. It is thus unsurprising that Islamic law became stagnant. This closed-mindedness has contributed to the inability of the society as a whole to grasp their situation in a rapidly changing environment. It has made them languid with respect to establishing institutions which protect property rights and foster good governance. And it has contributed to their eventual subjugation by either colonial masters or indigenous dictatorships, with little might to control their own destiny.

A third reason, advanced by the late M. Amir Ali emphasises the decline in scientific leadership of the Muslim world to the narrow interpretation of religious scholars. He terms it the 'development of the dichotomy of sciences,' where the scholars narrowly perceive religious knowledge from the Qur'an, *ḥadīth* (tradition of the Prophet), *sīra* (biographical data on the life of the Prophet Muhammad), and perhaps the history of Islam as the only true knowledge (*ᶜilm*); whereas disciplines such as Mathematics, Physics, Chemistry, Astronomy, and Medicine are disregarded as real sciences, probably due to their association with Western ideals. He states:

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them from going beyond their mandate into temporal matters, which are highly technical in nature (see *Ṣaḥīḥ* Muslim, *supra* note 39, Chapter 986, *ḥadīth* No. 5831).

68 Khan, *supra* note 51.

69 M. Kahf, 'Islamic banks: The rise of a new power alliance of wealth and *Sharī'ah* scholarship', in C.M. Henry & R. Wilson (eds.) *The Politics of Islamic Finance* (Edinburgh: Edinburgh University Press, 2004) 17-36.

70 M.Q. Zaman, *The Ulama in Contemporary Islam: Custodians of Change* (New Jersey: Princeton University Press, 2002).

71 T.J. Al-Alwani, *Ijtihād* (Herndon, Virginia: International Institute of Islamic Thought, 1993).

72 Ibn Qayyim al-Jawziyya, *supra* note 57.

> The consequence of such thinking is that the most honorable learning in the eyes of Muslims is to become an ᶜālim (scholar) of the Qur'an, ḥadīth and fiqh (Islamic Jurisprudence) – labelled collectively as 'Uloom al-Islamiyah' or Islamic sciences. The learning of natural and social sciences is considered a mundane activity propelled by greed to make money or gain prominent positions. Such thinking is against the teaching of the Qur'an, and has reduced Muslims…to the world's most disgraced people due to their backwardness, illiteracy, poverty and weakness in every indicator of modern progress within the Islamic context.[73]

The above demonstrates the confluence of structural weaknesses in jurisprudential interpretation (*ijtihād*) and highlights the limitations of the jurists to guide the Muslim world in temporal matters, especially in economics and social policy.

4.4 *The Historic Economic Underdevelopment of the Muslim World*

In the view of the authors, the intricate issue of what Kuran describes as 'the long divergence' of the Muslim world is principally a consequence of the jurists' lack of understanding of the economic aspect of injunctions like that of *ribā*.[74] This deficiency in understanding a crucial economic injunction has led the Arab world to give in to autocratic rule for centuries without resistance, eschew the development of an independent judiciary to protect the property rights of the masses, and to overlook the development of institutions for their economic advancement.

First, the protracted presence of autocratic rule in the form of monarchy (although censured in the Qur'an as well as the *Sunna*) serves to advance the economic interest of a narrow elite at the expense of the majority.[75] Throughout Muslim history, there have been countless numbers of highly influential jurists who have legitimised the expropriation of wealth by monarchs and autocrats.[76] This is in contrast to the vital check provided by many of them on the power of the rulers in early Islamic history.[77] Over time, however, due to the effect of reforms, the ruling class has integrated the jurists into their regimes. This integration has allowed unbridled and unchecked executive power to be the norm. Henceforth, Islamic law has been less of a force for legitimate rule and has specialised more in family and civil matters.[78] This *modus vivendi* (between the two classes) has helped in legitimising the ruling classes' monopoly over wealth and helped them to further extract economic surplus from their

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73 M.A. Ali, *Removing the dichotomy of sciences: The integration of Islamic sciences with natural sciences, A necessity for the growth of the Muslims*. (Chicago, IL, USA: Institute of Islamic Information and Education, 2002), 1-2.

74 T. Kuran, *The Long Divergence: How Islamic Law Held Back the Middle East* (Princeton, NJ: Princeton University Press, 2011).

75 The Qur'an (27: 34) quotes the Queen of Sheba (Bilqīs) as saying "*Kings, when they enter a country, despoil it, and make the noblest of its people its meanest*". The *Sunna*, on the other hand, predicts 'distressful' conditions of Muslims at the hands of monarchs (see Book No. 17 – The Office of Commander and *Qāḍi*, *Mishkāt Al-Maṣābīḥ*, translated by J. Robson, *Mishkāt Al-Maṣābīḥ* (English Translation) (Lahore, Pakistan: Sh. Muhammad Ashraf, 1981).

76 Coşgel et al., *supra* note 8.

77 N. Feldman, *The Fall and Rise of the Islamic State* (Oxford: Oxford University Press, 2009).

78 *Ibid*.

citizens. In short, the jurists have dutifully supported the diverse policies of the ruling elites, even when they lacked a basis for this in Islamic law.

In addition to expropriation, various monarchs and autocrats have also endeavoured to weaken the private sector to deter the emergence of an autonomous social group. Malik and Awadallah elaborate:

> A singular failure of the Arab world is that it has been unsuccessful in developing a vibrant private sector that survives without state crutches, is connected with global markets, and generates productive employment for its young… With few exceptions, the private sector is generally weak and dependent on state patronage; success in it is determined more on patronage than entrepreneurship. With the public sector acting as the main avenue for job creation, the region suffers from a precarious employment strategy and is left unprepared to deal with demographic pressures.[79]

Thus, the jurists at various points in history have supported the ruling elite by condoning their tyrannical behaviour and failing to censure unjust laws. The apparent narrow interpretation of *ḥadīth* as commanding Muslims to obey rulers 'as long as they pray' portrays the failure to grasp its deeper meaning which broadly implies the observance of Islamic law (in spirit as well as in the letter) that includes the upholding of property rights.[80]

Second, in most Muslim countries, the judiciary is dysfunctional and instrumental for the executive branch of the government.[81] In early Islam, there is a precedent for the separation of the judiciary from the government, as in the case of the second successor of Prophet Muhammad, ᶜUmar ibn al-Khaṭṭāb, who appointed ᶜUbāda ibn Ṣāmit as a judge and preacher of Syria to ensure the upholding of just and proper governance.[82]

Third, in terms of modern economies, financial innovations, which give rise to efficient organizational forms delivering goods to their customers at competitive rates, have failed to keep pace in the Muslim world. This failure can be attributed to not undertaking a dynamic jurisprudential interpretation (*ijtihād*), with profound ramifications. It has impacted on the competitiveness of Muslim entrepreneurship and has, furthermore, led to a failure to establish financial institutions which promote the economic interests of the poor and underprivileged, as highlighted in the Qur'ān.[83]

The results of the above three issues have been devastating for the Muslim world, as they have led to 'poverty traps' emanating from a sequence of Pareto-inferior equilibria. For example, the economic and intellectual decline along with a repressed majority made the Muslim countries vulnerable to colonisation by European countries. The economic wedge of the colonies widened partly due to 'institutional reversal' by the colonial masters.[84] That is, the institutions created by the colonial masters were designed to protect their self-interest whilst disregarding the people of the land.

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79 A. Malik & B. Awadallah, 'The economics of Arab spring', *World Development* 45 (2013): 296.
80 A.H. Siddiqui, *Saḥīḥ Muslim* (English Translation) (New Delhi: Kitab Bhavan, 1986), *ḥadīth* no. 4569.
81 B. Daragahi, 'Against the law', *Financial Times* (November 1, 2013): 11.
82 A.H. Siddiqui, *Saḥīḥ* Muslim (English Translation) (New Delhi: Kitab Bhavan, 1986), footnote no. 2028, *ḥadīth* no. 3852.
83 See Q (30: 39).
84 Acemoglu et al., *supra* note 2.

The aftermath of colonial rule has still not improved the status of the Muslim world, as explained by Waywell:

> Overall, colonialism not only hindered modernization efforts through military and commercial domination, but also encouraged autocratic tendencies by repressing the liberties of the people and limiting the expression of opposition to the government,' as long as 'they do not interfere with the goals of government policy... Overall, this indifference creates an impression that to the West, human rights simply do not matter in the Muslim world.[85]

Thus, we attribute 'the long divergence' to the retrogressive outlook of the jurists, their flawed interpretation (*ijtihād*), and their co-option by the ruling elite. Given the above, will a real Islamic financial architecture (accompanied by political reforms) reverse centuries of underdevelopment in the Muslim world? Our response to this, described below, draws from the 'development', 'institutional' and 'sociological' perspectives.

One, it is mandatory to have an information architecture, where property rights, foreclosure procedures needed for assets to serve as a collateral, along with accurate methods of valuing the underlying assets are well established.[86] This issue goes beyond the mere titling of assets. It must be followed by a number of politically challenging steps. For instance, it should incorporate the efficiency of judicial systems, re-writing bankruptcy codes, and restructuring financial market regulations.[87]

The empirical studies show a link between a strong (weak) legal system and high (low) corporate valuations, corporate finance, and the efficiency of capital allocations.[88] That is, countries with more (less) effective protection laws for investors tend to make shareholders and creditors more keen (reluctant) to invest in firms, thereby driving up (down) the price of corporate securities and decreasing (increasing) the cost of capital.

Two, financial innovations should yield efficient organizational forms that support the delivery of the products that their customers demand at the lowest price by mitigating transaction costs.[89] This result is aligned with the seminal paper by Miller that connects organizational forms with its underlying capital structure.[90] These pre-conditions would foster the development of efficient financial instruments, markets, and institutions. For this condition to be satisfied, the Muslim world needs to promote political institutions that: (i) impose checks and balances on those holding political authority, (ii) bestow political power on a broad group with significant investment opportunities, and (iii) limit the power holder's ability to extricate economic surplus from the remaining members of society.

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85 Waywell illustrates his assertions with the following examples: (i) Libya's representation on the United Nations Human Rights Commission despite its notoriety for human rights violation; (ii) the funding of Afghani fundamentalists during the Cold War by the United States; and (iii) disregard for human rights abuses in American allied states, Egypt, Saudi Arabia and Turkey. Waywell, *supra* note 1, pp. 178 and 184.

86 R. Levine, N. Loayza & T. Beck, 'Financial intermediation and growth: Causality and causes', *Journal of Monetary Economics* 46 (2000): 31-77.

87 N. Bose, A.P. Murshid & M.A. Wurm, 'The growth effects of property rights: The role of finance', *World Development* 40 (2012): 1784-1797.

88 R. Levine, 'Law, endowments and property rights', *The Journal of Economic Perspectives* 19 (2005): 61-88.

89 See R.H. Coase, 'The nature of the firm', *Economica* 4 (1937) *New Series* 16: 386-405; A.A. Alchian, 'Uncertainty, Evolution and Economic Theory', *Journal of Political Economy* 58 (1950): 211-221.

90 M.H. Miller, 'Debt and taxes', *Journal of Finance* 32 (1977): 261-275.

Three, a development strategy for the Muslim world which dissociates the indigenous culture (i.e., religious, moral, and ethical values) is bound to end in frustration. In contrast, a strategy with a proper understanding of the Islamic *Weltanschauung*, that appropriates a clear appreciation for the objectives of Islamic Law and consideration for Muslim culture, may have a greater chance of success in the overall advancement of these countries. Furthermore, a policy leading to political reforms and the restoration of genuine democracy may ultimately empower human resources (including women) and improve the environment for the open and honest exchange of ideas, scientific research, and the reconstituting of jurisprudential interpretation (*ijtihād*).

5 Conclusions

The Arab Spring which began in earnest in the early months of 2011 is currently stalled. Middle Eastern countries that have witnessed revolutions are still facing huge impediments in the form of: (i) Islamists unaware of the institutional weaknesses of the jurists (in the case of Tunisia), (ii) military establishments (in the cases of Egypt and Yemen), (iii) rival militias (in the case of Libya), and (iv) the emergence of ISIS/ISIL in the case of Iraq and Syria with its implications for both neighbouring states and Europe.

The path to establishing a civil society for the Arab and Muslim world will inevitably present hurdles. An intellectual infrastructure must be established first and foremost in accordance with the Lipset-Przeworski-Barro Modernization hypothesis.[91] This is because intellectual dynamism has atrophied and has left the Muslim world vulnerable to fundamentalisms, extremisms, and other modes of retrograde thinking. This study establishes the error of intellectual stagnation, one which has beleaguered Islamic jurists. It has critiqued Islamic banking as it is practised today, one that has evolved into a model far from the Islamic ideal. Yet, far from seeking to deride the religious establishment, the aim of this study is to articulate the point that their retrogressive and reductionist outlook in the domain of economics and sociology has had significant bearing on the lack of development in the Muslim world.

The Muslim world is perhaps in denial regarding the gravity of the situation it faces; it has, after all, yet to shape sound economic policies and lay the groundwork for institutions that can stimulate economic growth. This is the reason why the studies that demonstrate a causal link between Islamic beliefs, behavioural outcomes, and economic performance are at best speculative. This study also reconciles the two views in the literature on whether Islam is an impediment or a facilitator of economic development and thus, of growth. We absolve Islamic Law from holding back the progress of Muslims.

If the Muslim world is to make any headway out of its current morass, it clearly needs Islamic jurists to take a new approach because for centuries they have been the *de facto* formulators of correct practice in Islam. This new approach necessitates the reformulation of the way in which jurists undertake jurisprudential interpretation

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91 The modernization hypothesis discusses the changes in social and political institutions stimulated by development. See E.L. Glaeser, R. La Porta, F. Lopez-de-Silanes & A. Shleifer, 'Do institutions cause growth?', *Journal of Economic Growth* 9 (2004): 271-303; T. Suri, M.A. Boozer, G. Ranis & F. Stewart, 'Paths to Success: The relationship between human development and economic growth', *World Development* 39 (2011): 506-522.

(*ijtihād*) in Islamic Law and the reformation of the educational institutions, which presently continue to perpetuate a retrogressive outlook. Restructuring the educational institutions should include: (i) the exchange of ideas between the various legal and theological schools without sectarian bias; (ii) the inclusion of the social sciences and humanities; (iii) the promotion of creativity and a clear position against uncritical acceptance of medieval jurisprudence; and (iv) the separation of normative Islam from historical Islam.

Finally, we recapitulate our central finding – that the jurists stand to jeopardise the very survival of the Muslim world by entering a technical field without seeking the guidance of experts, as entreated in the Qur'ān (16: 43).[92] Furthermore, not seeking guidance constitutes a violation of the objectives (*maqāṣid*) of Islamic law (Sharīᶜa), which the jurists are tasked with safeguarding. Rather than making unilateral decisions, they should conduct a joint jurisprudential interpretation (*ijtihād*) by working with financial economists to: (i) develop institutions that enforce contracts, thus promoting property rights; (ii) foster good governance and to provide a conducive environment for private initiative; and (iii) to structure a financial infrastructure that promotes growth.

92 See Q (16: 43).

Tables

Table 1: New Occupations in Arab-Islamic World, 1101-1500.

Sector	Preexisting occupations (% of total)	New occupations (% of total)
Commerce	42.7	57.3
Bureaucracy, military	10.9	89.1
Education, law, religion	16.1	83.9
All	22.2	77.8

Note: The above table has been constructed from data obtained from Kuran, *supra* note 18.

Table 2: Classical Sharīᶜa scholars' perspective on the *ribā* prohibition.

<table>
<tr><td colspan="2">Category</td></tr>
<tr><td>Ribā al-faḍl - the hidden ribā</td><td>Ribā al-nasī'a - the evident ribā</td></tr>
<tr><td colspan="2">Application</td></tr>
<tr><td>Relates to spot exchanges</td><td>Relates to deferred exchanges</td></tr>
<tr><td colspan="2">Legal Cause</td></tr>
<tr><td>Excess in exchange without an equivalent counter value</td><td>Delay in payments with an increase above the original amount at the settlement date; or vice-versa (i.e., lowering the debt in return for an accelerated payment)</td></tr>
<tr><td colspan="2">Specifically prohibited in transactions involving the six commodities in the Sunna (see Saḥīḥ Al-Bukhārī Vol. 3, 34:2134; Ṣaḥīḥ Muslim Vol. 4, 22:1584). Impermissibility of other commodities is generally based on the nomenclature developed by the Sharīᶜa scholars from the major Sunnī schools of thought, namely: (i) intrinsic or monetary value and (ii) volume or weight.
However, there are additional conditions that are not shared amongst the major Sunnī schools, that is: (i) the commodity being edible, nutritious, or storable; (ii) the threshold for which the condition on weight or volume becomes applicable; and (iii) the interpretation on 'oneness in kind' or genus of the exchanged commodities.
Following this nomenclature, commodities that do not have these characteristics are excluded from the ribā prohibition: (i) non-fungibles or (ii) fungibles that are measured by length or counted which may in effect be significant. For example, in the exchange of animals or cloth.</td></tr>
<tr><td colspan="2">Rationalisation</td></tr>
<tr><td colspan="2">The ribā prohibition is aimed at avoiding exploitation and fraud for the protection of one's property, fairness, and justice. The injunction of ribā al-faḍl arises as blocking means to the evident ribā that prevents access to a greater evil. The restriction on the exchange of the six commodities in the Sunna extends from them, representing food staples and currencies which during the period of the Prophet Muhammad and Caliphs (successors) were essential for survival and measure of price, respectively.</td></tr>
</table>

Source: Ebrahim et al., *supra* note 5.

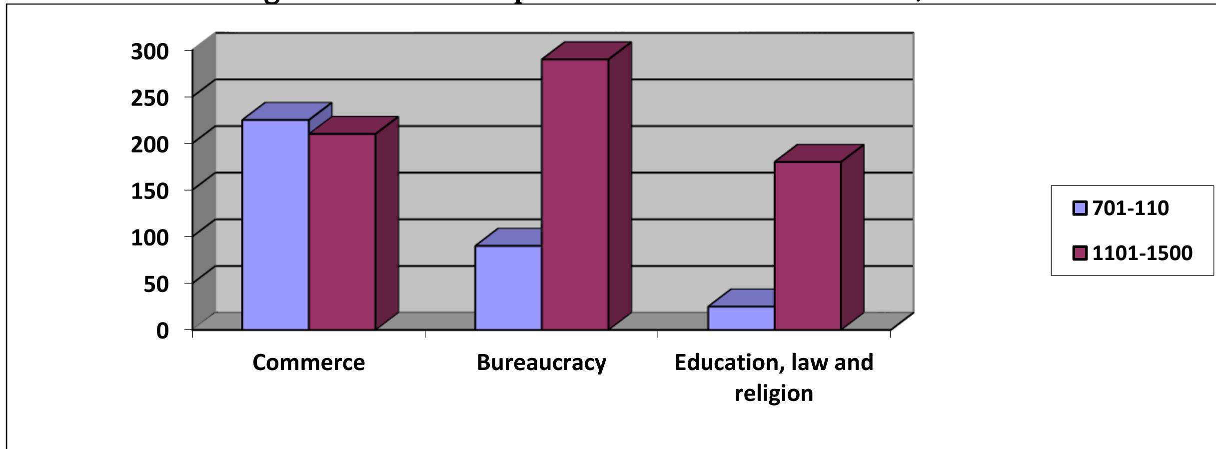
Table 3:
Economic perspective of the *ribā* prohibition.

Category	
Ribā al-faḍl **–** the hidden *ribā*	***Ribā al-nasī'a*** - the evident *ribā*
Application	
Barter transactions [This category can also include, market manipulations, seigniorage etc.]	Plain vanilla or structured debt contracts. [This category can also include excessive or inadequate compensation packages, inequitable taxes etc.]
Rationalisation	
Exchange is inefficient, as it has the potential to expropriate assets of either party in the exchange of goods	The contract is (i) inefficient and has the potential to (ii) expropriate assets of either lender or borrower; (iii) exacerbate financial fragility and (iv) induce financial exclusion
In general, the *ribā* prohibition delineates protection of rights of both contracting parties. This is retrospective of the Sharī^{c}a that accords *protection of property rights* as one of the five essential elements of the objectives of the law.	

Source: Ebrahim et al., *supra* note 5.

Figure

Figure: Distinct occupations in Arab-Islamic World, 701-1500.



Note: The above figure has been constructed from data obtained from Shatzmiller, *supra* note 20.