

2. Sources of Islamic law

2.1 INTRODUCTION

A Muslim's life ideally is ruled by Islamic religious law, the sharia. Literally, the word 'sharia' can be translated as 'the path that leads to the spring' (Ramadan 2004, p. 31). Figuratively, it means 'a clear path to be followed and observed'. Islamic religious law springs from various sources. These are discussed in this chapter, along with the different ways in which the law is interpreted. Separate attention is paid to the question of how Muslims living among a non-Muslim majority should observe the sharia.

2.2 PRIMARY AND SECONDARY SOURCES

There are various sources of Islamic legal knowledge. The first one of course is the Quran itself, which, Muslims believe, was revealed to the Prophet Muhammad, also called the Messenger of God (Rasulullah), by the angel Jibril (Gabriel). The second one is the sunna, that is, the deeds, utterances and tacit approvals of the Prophet, as related in the ahadith or traditions (the singular *hadith* is also used for tradition in general), handed down through a dependable chain of transmitters.¹ Sometimes, the term sunna is used in a wider sense, including the deeds of Muhammad's Companions and successors.² Note that this is not a critical study of the origins of Islamic law. We try to understand the Muslim view of Islamic law. Eminent Islam scholars such as Joseph Schacht (1902–69), following Ignaz Goldziher (1850–1921), argued that the sunna is in reality the practice of the Umayyad rulers of Damascus, only supported by ahadith of dubious authenticity (see Schacht 1949, 1975, p. 4). More recent scholarship, however, tends to concentrate on the authenticity of individual ahadith, rejecting wholesale branding of the ahadith as forgeries (Motzki 2008; Sentürk 2007). All this, however, lies outside the purview of this book.

The Quran and the sunna are the primary sources. They are thought to contain God's infallible and immutable will, or sharia in a narrow sense. Of course present-day Muslims, living some 15 centuries after the time of Muhammad, see themselves confronted with problems on which the

Quran and the sunna are silent. The Hadith dwells at great length on such subjects as ‘the sale of gold necklace studded with pearls’ (Muslim, book 10, chapter 38) and ‘the selling of the camel and stipulation of riding on it’ (Muslim, book 10, chapter 42), but contains precious little on, say, corporate government, public utilities or intellectual property, let alone complex financial products. Furthermore, the Quran and the sunna leave room for different interpretations. Muslims therefore often have to resort to secondary sources of law. Sharia in a wide sense includes all Islamic legislation. In so far as this is based on secondary sources, it is not necessarily valid for all times and all places.

In the authoritative classification developed in the early ninth century by al-Shafii (the founder of the Shafii school of law, see below), there are two secondary sources of law: *ijma*, or consensus, and *qiyas*, or analogy. Together with the primary sources they are the four principal *usul al-fiqh* or roots of law in Sunni Islam (Table 2.1).

- *Ijma*, consensus. The underlying idea of *ijma* as a source of law is that truth is safe with the community of believers (Cragg 1964, p. 145). Support is provided by a hadith according to which Muhammad said that ‘my community will never agree on an error’ (Esposito 2003, p. 134). Thus, after Allah and the Prophet, the Muslim community or *umma* can also be a source of law (Cragg 1964, p. 16). The trouble is that there is no consensus about what consensus consists of. Some, following al-Shafii, define consensus as agreement among the entire community of believers whereas others restrict *ijma* to agreement among the scholars. Some political modernisers in the Muslim world give a liberal twist to consensus and see it as a foundation for democracy, with parliament as the body that produces *ijma*.³

Table 2.1 Sources of Islamic law

Primary sources	Quran sunna, Hadith
Secondary sources	<i>ijma</i> (consensus) <i>qiyas</i> (analogy) <i>ijtihad</i> (individual interpretation) <i>ray</i> (expert private interpretation)
Some principles	<i>istihsan</i> (juristic preference) <i>istislah</i> (public interest) <i>urf</i> (custom) <i>darura</i> (necessity)

- *Qiyas* or analogy is the second important secondary source, or the fourth ‘root’, of Islamic law. The idea is that, if a ruling is required on a situation not covered in the Quran or the sunna, a comparison can be made with situations which the Quran or the sunna did provide for. If, for instance, the Quran prohibits the use of wine, the use of other toxicants, with similar deleterious effects, can be assumed to fall under the prohibition as well (Cragg 1964, p. 145).

The classification is not logically watertight, in the sense that it covers all sources of law without overlap. *Ijma*, for instance, may use *qiyas*, and other sources of law are also accepted by many Muslims. It is not surprising, therefore, that al-Shafii’s classification has not been universally followed. Many scholars, down from al-Ghazali (Abu Hamid al-Ghazali, 1058–1111), see *ijtihadh* as the third secondary source of Islamic law.

- *Ijtihad* is the independent reasoning by a qualified jurist leading to new legal rules. Such a jurist may, or rather should, use *qiyas* (El-Gamal 2006, p. 17).

There is no unanimity on the question of whether there is still a place for *ijtihadh* in the modern world. Some Muslim scholars opine that the ‘door of *ijtihadh*’ or ‘gate of *ijtihadh*’ was closed early in the tenth century, as at about that time scholars of the law schools felt that all important questions had been settled (Schacht 1982, p. 70). Others say it took place in the thirteenth century (El-Gamal 2006, p. 24). A modern case of (collective) *ijtihadh*, according to Yaqubi (2000), are the accounting standards developed by the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) (see Section 5.4.4). In Sudan *ijtihadh* was reintroduced in 1983 by the military dictator Jafar al-Numayri when he established Islamic law as the law of the state (Esposito 2003, p. 301). In cases not foreseen in statute law, the Sudanese civil court may apply the sharia as it interprets it and if necessary exercise *ijtihadh* (Layish 2004, p. 99). It is in the character of *ijtihadh* laws that they can be changed if circumstances change, which allows many economic laws to be adapted to new circumstances (see, for example, Maududi 1999, p. 295).

A special case of *ijtihadh* in early Islam was *ray*.

- *Ray* is expert private interpretation or personal reasoning. *Ray* was involved in the instructions that the Prophet and the early Caliphs gave to the people responsible for the administration of justice in conquered territories and in their *ex post* sanctioning of it (Gardet 1967, pp. 79–81; *A Field Guide*). It did not use *qiyas*, as there were not yet rules or examples that could be used as an analogy. According to Schacht, by the ninth century *ray* was no longer acceptable (Schacht 1982, p. 70).

Instead of following al-Shafii's classification, it would perhaps be more logical to group *ijma* and *ijtihad* together, as these concepts bear on the people who are qualified to make binding rules, whereas *qiyas* refers to a method that can be applied in *ijma* and *ijtihad*. Indeed, some regard *ijtihad* as the main secondary source, encompassing *ijma* (Ramadan 2004, pp. 44–5).

If *qiyas* is not sufficient to find an answer, jurists may also base their rulings on considerations of *istihsan*, *istislah*, *urf* and *darura*.

- *Istihsan* means 'juristic preference' and points to exceptions that a jurist can make to strict or literal legal interpretations (Esposito 2003, p. 152; Schacht 1982, pp. 37, 299). *Istihsan* can be applied when *qiyas*, or any other method, does not provide a definite answer, or when a ruling based on *qiyas* would put unreasonable burdens on the believers. *Istihsan* is concerned with equity.⁴
- *Istislah* literally means 'seeking the good' (Ramadan 2004, p. 38), or taking the public interest, *maslaha*, into account.⁵ Jurists have differed over the scope of *istislah* or *maslaha* as a source of law. Some see no place for it, others want to consider it as legal only to the extent that it can be seen as part of another source of law, such as *qiyas*, but still others accept *istislah* or *maslaha* as an independent source of law, even in cases where it cannot be based on quotations from the Quran or the sunna. The principle of *istislah* can be invoked, for instance, in decisions about blood transfusions and organ transplants, where there are no historical precedents and *qiyas* therefore cannot show the way (Esposito 2003, p. 152).
- *Urf* is custom. It can be an argument behind *istihsan* and *istislah*. Custom can also function as a supplementary source of law in contract law. It will determine the rights and duties of contracting parties in cases where no conditions have been stipulated (Libson 1997, pp. 153–4).
- *Darura* or necessity. The principle of necessity says that a law need not be followed in cases where it would be unreasonable to demand strict obedience to the laws and rules. This is simply the old adage that necessity knows no law. It can be seen as a kind of source of law, even if it is a principle that is not used to formulate laws, but only to determine when laws should not apply. A ruling under the heading of *darura* may be based on custom (Libson 1997, p. 138). In the Quran itself a case of *darura* can be found in Chapter, or Sura, 2:185, where it is said about travellers and the ill, who are not able to observe the rules of fasting: '(. .) whoever is ill or upon a journey shall fast a similar number of days later on. Allah intends your wellbeing and

does not want to put you to hardship.’ To those for whom fasting is under any circumstances difficult, such as the old and infirm, Quran 2:184 offers a choice: ‘For those who can not endure it [for medical reasons], there is a ransom: the feeding of one poor person for each missed day.’ The message is that Islam does not demand the impossible from the believers.

The sharia distinguishes between things and actions that are strictly forbidden, or *haram*, and those that are permitted, or *halal*. But decisions on whether something is permissible or not are not simple yes or no questions. The permissible, or *halal*, things and actions in their turn can be subdivided into four categories:

- First, we have duties that have to be performed by all Muslims, called *fard*.
- Second, we have things that are advisable to do, *mandub*.
- Third, things about which religion is indifferent, *ja’iz*.
- Fourth, things that can better be refrained from, undesirable or *makruh*.

Duties for all Muslims, *fard*, include the ‘five pillars of Islam’:

- the profession of faith or *shahada*
- prayer or *salat*
- charity or *zakat*
- fasting or *sawm*
- pilgrimage to Mecca or *hajj*.

Additional prayers on specific occasions are *mandub*, air travel is *ja’iz* and certain kinds of fish are *makruh* (Fyzee 2005, p. 17).

The sharia ideally governs all actions of a Muslim, but religious law leaves some options open. It is left to the believer to make up their mind about undesirable things.

In situations where it is not clear what sharia law requires from a Muslim, individuals or a court of law can ask a legal opinion or *fatwa* (pl. *fatawa*) from a qualified Islamic fiqh scholar, a *mufti*.⁶ Fiqh is the science of Islamic law, and the general term for a fiqh scholar is *faqih*, pl. *fuqaha*. *Fatawa* may also be promulgated by *ulama* or *fuqaha*, individually or in group deliberation, by assemblies such as the Indonesian Council of Ulama (MUI or Majelis Ulama Indonesia)⁷. In Sunni Islam a *fatwa* is not binding, but in Shia Islam a *fatwa* is binding for those who requested it (Haase 2001). A *fatwa* issued by a highly-respected *mufti* is

the closest equivalent in the Muslim world to a case law precedent in the Anglo-American legal system (Masud et al. 1996, p. 4). One complication is that there are different law schools whose followers may follow different principles of jurisprudence. To these schools we now turn.

2.3 LAW SCHOOLS

Muslims differ in their views about the applicability of the various principles and secondary sources of Islamic law. There are different schools of law, *madhahib* (sing. *madhhab*), each with its own fiqh or science of law. There are four leading Sunni schools of law (before the fourteenth century there were more such schools). They may hold different views on many subjects, but these are in general mutually accepted as valid from an Islamic point of view. The four madhahib are the Hanafi, Maliki, Shafii and Hanbali Schools.

- The Hanafi school. This is the oldest one. It derives its name from Abu Hanifa, an Iranian who taught in Iraq and died in 767. It is the most flexible of the four schools, emphasizing private interpretation, ray, juristic interpretation, istihsan, and reasoning by analogy, qiyas. Ijma, consensus, is also accepted and the Hanafi school even allows a new consensus to cancel an old one (Ramadan 2004, p. 45). Hanafis furthermore grant a much larger place to custom, urf, than the other schools (Libson 1997). The Moguls in India and the Ottoman rulers were Hanafis. They can accordingly be found in Turkey, Central Asia, the Balkans, Iraq, Afghanistan, India, Pakistan and Bangladesh. Reformist movements, which try to accommodate Islam to the modern world, often are to a greater or lesser extent Hanafi (*A Field Guide*). Still, Pakistan's traditionalist Hanafi ulama believe that ijtiḥad and ray can no longer be allowed, as all necessary interpretations have already been made long ago (Adams 1966, p. 386; Engineer 2000).
- The Maliki school. This school was founded by Malik ibn Anas, who died in 795 in Medina. It accords qiyas a larger place than the other schools, as Malik seems to have given priority to qiyas over ahadith with a weak chain of transmitters (Al-Mukhtar Al-Salami 1999, p. 22). Nonetheless, the Malikis strongly rely on the Hadith and also on the ijma of the scholars in Medina, where Muhammad lived after he had fled Mecca. Many of the customs of Medina arguably were granted the status of hadith, which fits in with the fact that Maliki scholars from the first centuries of the Muslim era

hardly ever explicitly referred to custom (Libson 1997, pp. 133–4). But even if custom is not formally seen as a source of law, in actual practice Maliki scholars seem to refer to it quite frequently (Libson 1997, p.136). Maliki scholars may further take the principle of public welfare, *istislah*, into consideration, though not all accept *istislah* and *maslaha* as an independent source of law. Malikis are concentrated in Upper Egypt, Tunisia, Algeria, Morocco, Mauretania, Libya, Kuwait, Bahrain, Dubai and Abu Dhabi.

- The Shafii school. Its founder was Muhammad ibn Idris al-Shafii, an Arab who died in 819 or 820 in Egypt. He rejected the personal view of scholars (*ijtihad* in the form of *ray*), juristic interpretation (*istihsan*), and considerations of public welfare (*istislah*), but fully accepted consensus (*ijma*). Reasoning should be based on *ijma* and go along the line of analogy (*qiyas*). Many Shafiite ulama follow al-Shafii in his rejection of public welfare as an independent source of law, because of the danger of unrestricted subjective human opinions and also because public welfare varies over time and between places (Esposito 2003, p. 152). Apparently, in their view public welfare is too slippery a concept to provide a firm basis for rulings. Al-Shafii was the first jurist to emphasize the Hadith as an unassailable source of law but also applied a rigorous rational criticism to it, verifying every link in the chain of transmission and establishing criteria by which to judge the transmitters (Ergene n.d.).⁸ Indonesia, Malaysia and the Muslim minorities in South-East Asia and the Philippines are exclusively Shafiite. Furthermore, Shafiites live in Lower Egypt, the Sudan, Ethiopia, Somalia and Yemen.
- The Hanbali school, founded by disciples of Ahmad Hanbal, who died in 855 in Baghdad. The Hanbali base themselves exclusively on the Quran and the sunna, and the only *ijma* that is accepted is the consensus of the Companions of the Prophet, among whom the rightly-guided Caliphs. The leading Hanbali scholar Ibn Taymiyya (1263–1328) emphasized the literal truth of the Quran and rejected independent reasoning, in line with his rejection of Aristotelian logic. Allah, after all, is not bound by human logic (Stein 2005). Ibn Taymiyya was not a typical middle-of-the-road Hanbali. His writings influenced Muhammad ibn Abd al-Wahhab (1703–92), the founder of the puritan Wahhabite sect of Saudi Arabia. Whereas the followers of the four orthodox schools accept each other as true Muslims, Wahhabites are the exception in that they regard the Hanbali School as the only legitimate one. Hanbalis live on the Saudi Arab peninsula and Qatar and the Saudi courts apply the Hanbali interpretation of the sharia (Ahmed 2005, p. 102).

Some countries follow exclusively one school, other countries have more than one school inside their borders and in Egypt all four main schools are present. To add to the confusion, whereas Syrians, Jordanians and Palestinians follow Hanafi laws, they predominantly observe Shafii rites (Gardet 1967, pp. 86–7).

Besides the four great law schools there have been others. A very strict one was the Zahiri school, whose founder Abu Sulayman Daud al-Zahiri died in 884. Laws should according to the Zahiri school be exclusively based on the literal meaning, *zahir*, of the Quran and the sunna, excluding *qiyas*, *ray* and *istihsan*. The only *ijma* that is legally valid is the consensus of the Companions of the Prophet. Zahiri represented a traditionalist reaction against the great schools of law, in particular the Hanafi and Maliki schools. It seems that, even if the school itself was extinct by the fourteenth century, Zahiri elements could quite recently still be found in the Moroccan law system (Saleh 1986, p. 156). The Zahiri view is shared by other traditionalists who want to go back directly to the Hadith.

A still existing group with a law system peculiar to its own is the Ibadi sect, which is found in Oman, on Zanzibar, in Algeria and Libya and on the Tunisian island of Jerba (Saleh 1986, p. 4; Schacht 1982, p. 66). They follow a literal interpretation of the Quran and have no place for *ijma* or *qiyas*, but accept *ray* (Gardet 1967, pp. 100–101; Williams 1961, p. 215).

Shiites, who are concentrated in Iraq, Iran, Afghanistan, Yemen and India, follow their own rules. The Jafari law school of the largest group in Shii Islam, the Twelvers (Ithna Asharis), accepts *ijma* provided its validity was recognized by Muhammad himself or an infallible Shiite imam. It also accepts *ijtihad* by selected scholars, predominantly living in the holy cities of Shiism such as Qum. *Ray* and *qiyas* are anathema to Ithna Ashari and some other Shiites as well (Fysee 2005, p. 22). It may be noted that Al-Azhar University in Cairo in 1959 designated the Jafari law school as the fifth school along with the four Sunni schools (Esposito 2003, p. 154). As far as its positive content is concerned, Shii doctrines do not differ more widely from those of the Sunni law schools than these last differ among themselves, except for inheritance law (Schacht 1982, p. 16).

2.4 HOW STRICT SHOULD ONE BE IN OBSERVING THE *SHARIA*?

Liberal-minded Muslims question a literal interpretation of the Quran and the Hadith. In the sharia a distinction is made between *ibadat*, devotional matters, and *muamalat*, dealings in the political, economic and social spheres. *Ibadat* includes the five pillars of Islam. Islamic finance, of course,

falls under muamalat, but the wider field of Islamic economics also includes zakat, one of the five pillars, and is therefore not restricted to muamalat. Liberals argue that as far as muamalat is concerned, the revelation of the sharia provides general principles and that details are to be decided upon by every generation depending on time and place, guided by maslaha, public interest. After all, Islamic law is there for the wellbeing of the believers (see Quran 2:185). One leading Islamic economist, Mohammad Nejatullah Siddiqi, contends that ‘We should never lose sight of the reality that the divine part of modern Islamic finance, though crucial, is very small. The rest is man-made resulting from *Ijtihad* (efforts in understanding and applications)’ (Siddiqi 2001). In one of the publications of the Minaret of Freedom Institute in Bethesda, Maryland, which is close to the very liberal pro-free-market Austrian School, it is argued that the Hadith should not be seen as a series of injunctions, but as a window on the sunna, whereas the sunna in its turn provides an illustration of how to arrive at the right way to solve problems. The sunna ‘must be understood as illustrations of the application of principles rather than blindly imitated’ (Imad-ad-Dean Ahmad 2004, p. 2).

The Muslim world is deeply divided over these issues. Traditionalists routinely accuse the liberals of being corrupted by detestable Western ideas. It must be noted that it is not always easy for Muslims to take up a liberal position, as activists of less liberal persuasions often are ready to see any deviation from their version of strict orthodoxy as a reason for takfir, branding someone an apostate. This is an accusation not to be taken lightly (see Section 1.4). But reducing the matter to a dichotomy between liberals and traditionalists would be too simplistic, as the Western Muslim scholar Tariq Ramadan argues. Ramadan distinguishes six major approaches in contemporary Islam to reading the sources, without pretending to be exhaustive (Ramadan 2004, pp. 24–8).

- Scholastic traditionalism. This current is marked by strict and sometimes even exclusive reference to one school of jurisprudence. The scope for interpretation of texts is very limited and does not realistically allow development. There is no room for *ijtihad* and the opinions of scholars that were codified between the eighth and the eleventh centuries rule the views on applying the sharia. Examples are the followers of the Deobandi movement in the border area between Pakistan and Afghanistan, which runs thousands of religious schools, *madrassas*. Deobandi students are called Taliban. It is in favour of reimposing *hudud* law, the most strict form of Sunni law, which demands flogging, amputation and capital punishments for a number of offenses (from *hudud Allah*: boundaries established by Allah). Ramadan further mentions Indo-Pakistani groups in the

UK and the USA and Turks in Germany as scholastic traditionalists. They are concerned mostly with religious practice and isolate themselves from their non-Muslim environment.

- Salafi literalism. This current rejects any mediation of the law schools when it comes to approaching and reading the holy texts. Its followers call themselves *salafis* because they are concerned to follow the *salaf*, that is, the title given to the Companions of the Prophet and to pious Muslims of the first three generations of Islam. They take the primary sources literally. Salafis keep themselves as much as possible apart from any non-Islamic environment. In their worldview there is a sharp distinction between *dar al-Islam*, the house or territory of Islam, on the one hand, and *dar al-kufr*, the house or territory of the infidels, and *dar al-harb*, the territory of war, on the other.
- Salafi reformism. This, too, refers back to the salafs, but in contrast to salafi literalism, its approach is to adopt a reading based on the purposes and intentions of the law and jurisprudence. Salafi reformists see *ijtihad* as necessary. They use reason when applying the primary sources in dealing with present-day developments in society. Prominent salafi reformists were maulana Maududi and Sayyid Qutb. Salafi reformists in the Western world aim to protect the Muslim identity and religious practices, but do not isolate themselves from their non-Muslim environment.
- Political literalist salafism. This is the label given to people, often former followers of salafi reformism, who have turned into political activists or even radical revolutionaries. Ramadan cites repression in the Muslim world as the main cause. Political literalist salafists want to reinstitute the Caliphate, seen as the only true Islamic state. The Caliphate covered the period from the death of Muhammad until 1924 when Caliphs nominally ruled the Islamic world as the successors of Muhammad.⁹ The Western world is uncompromisingly seen as *dar al-harb*. Any collaboration with it is treason and the only thing a Muslim ought to do is wage a holy war, *jihad*, against it. One group seeking the return of the Caliphate is Hizb ut-Tahrir, or Liberation Party, which is actively recruiting supporters in Western Europe, among other places.¹⁰
- Liberal or rationalist reformism. This is essentially born out of the influence of Western thought during the colonial period. The social and political system that resulted from the process of secularization in Europe is welcomed by liberal or rationalist reformers. They supported Atatürk's reshaping of Turkey as a secular state and in the West they are in favour of integration or even assimilation of Muslims. They set not much store by the daily practice of religion

and have no need for special Islamic dress. They do not turn to the Quran and the sunna for every detail of conducting their life.

- Sufism. Sufis are mainly oriented toward the spiritual life and mystical experience, but that does not necessarily prevent them from becoming involved with the wider community. The holy texts have, in their view, a deep meaning that requires time for meditation and understanding. Most Sufi orders, certainly in the West, provide support to their own members and keep themselves to themselves.

Apart from these currents or movements, there are all kinds of sects that see themselves as the only ‘true’ Muslims and are quick to brand Muslims of another ilk as unbelievers, kuffar, which effectively is a call to kill them. Perhaps there is also a sizeable group that can be placed between salafi reformism and liberal reformism. It has been noted that in Turkey the rise of Islamic capitalists helps to moderate the stance of political Islamists, at least of reformist salafist convictions. In his PhD thesis on Turkey, Jang (2005) finds support for the hypothesis that the transformation of the Islamic political party from a fundamentalist one to a moderate one is connected with the more important role played by the Islamic bourgeoisie. They want to make profits and have an interest in political stability, friendly relations with other countries and the rule of law. Such people have no interest in alienating non-Muslims or building walls around themselves. They would often prefer pragmatism over dogmatism.

Salafi reformism is the cradle of the project of an Islamic economy and Islamic finance. It grew from the attempts by maulana Maududi and his contemporaries to find an Islamic answer to the challenges of the twentieth century. It appears, however, that many Muslims with less outspoken ideas also feel attracted to Islamic finance, because it offers a way to practise Islam in the modern world and emphasize their identity without isolating themselves. This is particularly important for Muslims living among a non-Muslim majority. They are the subject of the next section. Political literalist salafists of course have other ideals. Their ideas on the economy, based on a strict dividing line between the Muslim world and the rest, will be discussed in Section 3.6.

2.5 MUSLIMS AMONG A NON-MUSLIM MAJORITY

Muslims living in countries with a non-Muslim majority are a separate group with its own problems. They are bound by laws that do not even pretend to obey the sharia and it stands to reason that the growth of the Muslim population in Europe and the USA has led to an increasing

demand for legal opinions on the ways they should adapt to their new environment. What makes things complicated is that Islamic jurisprudence is not bound by precedent and that fatawa from one scholar may deviate from previous legal opinions given by other sharia scholars (Jobst 2007). Partly to solve this problem, in 1997 the Fiqh Council (Council of Islamic Law and Jurisprudence) was established in the USA and the European Council for Research and Fatwas in Europe (Ramadan 2004, p. 53). Still, unanimity is far to seek; no surprise given the enormous disparity between the various currents in Islam as depicted in Tariq Ramadan's survey.

The four orthodox Shia law schools themselves also differ on the rules to be followed by Muslims living among a non-Muslim majority. Muslims are bound to follow the sharia even in countries where they form a minority, but there are circumstances where they cannot be expected to fulfil each and every obligation from the sharia. For such cases, the fiqh scholars, the fuqaha, accept exceptions to the rules. Especially the Hanafi school allows liberal recourse to *darura* (necessity) in order to lighten the lives of Muslims in non-Islamic countries. Most Hanafi jurists, for instance, would not rule that Muslims must strictly observe the ban on interest in their dealings with non-Muslims in the non-Muslim world, though Hanbali, Maliki and Shafii fuqaha are less lenient (Saleh 1986, p. 31; Schacht 1982, p. 199). The Hanafi school more generally sees contracts that would not pass muster in a Muslim environment as permissible for Muslims outside *dar al-Islam* and allows Muslims to trade with non-Muslims following the rules in force in their countries (Jum'a 2005; Ramadan 2004, p. 96). In the same vein, the leading Iraqi Shiite Ayatollah Sistani issued fatawa allowing Muslims in countries where they form a minority to deposit funds with banks against interest and to take out mortgage loans against interest (El-Gamal 2006, p. 19).

These solutions still maintain a sharp distinction between the Islamic and non-Islamic worlds. There is a widespread tendency among Muslims, first of all political literalist salafis, to distinguish between *dar al-Islam*, the abode of Islam, and *dar al-harb*, the territory of war. In *dar al-Islam* Islamic law prevails, whereas *dar al-harb* denotes territory that does not have a treaty of non-aggression or peace with Muslims. From this it follows that there is a third category, encompassing those territories that do have a treaty with Muslim territory. This category is called *dar al-ahd*, the abode of treaty, a concept applied by a number of Islamic scholars to international organizations such as the United Nations or the Organisation of African Unity; or alternatively *dar al-sulh* (*sulh* means amicable settlement).

These distinctions date from the early days of Islam, when the Muslim community was heavily involved in armed conflicts. The use of this

terminology today only helps to sour relationships. A much more positive attitude of Muslims in the West toward their country of residence is possible and defensible from a Muslim point of view. Tariq Ramadan (2004, pp. 63ff, 239) argues that the concepts of dar al-Islam and dar al-harb do not figure in the Quran or the sunna, apart from three ahadith of debatable authority, and do certainly not belong to the universal principles of Islam that have to be followed always and everywhere. But even if one insists on making a distinction, the non-Muslim world need not be seen as hostile, as dar al-harb: the Hanafi school denotes as dar al-Islam any country or territory where Muslims are secure and have nothing to fear by practicing their religion. Dar al-harb by contrast are those territories where Muslims are not free to practice their religion. Ramadan argues that, following the Hanafi strand of thought, one can only arrive at the conclusion that most of the Western world is dar al-Islam, much more so than the great majority of countries with a Muslim majority. This appears to tally with the views of leading Muslims such as Abdurrahman Wahid, president of Indonesia from 1999 to 2001 and earlier the leader of the Muslim mass organization Nahdlatul Ulama, with a claimed membership of 40 million, who stated that from a Muslim point of view the form of government is not very important, as long as Muslim communities are free to carry out their religious duties (Lubis 2004).

Ramadan is dead-set against applying the concept of dar al-ahd to the Western world, as it would imply that Muslims living there should always keep aloof and shun the company of others. He takes issue with the binary view of a Muslim world that is fundamentally hostile to a non-Muslim world, a view on which the concept of dar al-ahd also rests. It is a view that is no longer appropriate in today's world. If there is one view held by the ulama of the past that fits the present world, it is the Hanafi view of dar al-Islam as any territory where Muslims are free to practise their religion. Ramadan would prefer to use the concept of *dar al-dawa*, a 'place for inviting people to God', presenting what Islam is and spreading its message (Ramadan 2004, pp. 72, 239). The corollary is that Muslims in Western countries should not stand with their backs to the society in which they live, but should fully participate, at the same time observing their religious duties as much as possible. This would mean that, if they see the ban on riba as applying to the present forms of interest, they would prefer to set up Islamic banks and other financial institutions. Unlike Ramadan's political literalist salafists, they would not be in implacably hostile opposition to conventional finance, but just demand their own place in the financial landscape. For the rest, if Muslims live in the West, they have a kind of tacit or implicit agreement with their country of residence, which commits them to respect the laws of the country of which they are citizens (Ramadan 2004, pp. 94–5).

Not all problems faced by Muslims can be satisfactorily solved in this way, but it is also an accepted principle by fiqh scholars that in the real world often a choice has to be made between imperfect solutions (Ramadan 2004, p. 162). It should be noted that Ramadan, even if he enthusiastically preaches participation, is deeply opposed to the dominant economic system, which in his eyes is not only based on interest, *riba*, but also on speculation and is, in addition, very exploitative. It is the duty of Muslims to develop alternatives, jointly with critics of the system from other faiths, but one should not place oneself outside the system: 'if it is impossible to get involved outside the system, unless one is very wealthy, one must find liberation by stages' (Ramadan 2004, p. 198).

2.6 CONCLUSIONS

The variety of views among Muslims is probably as great as in Christianity or Jewry. There is not one common view on the authority of the various sources of Islam nor on their applicability to the modern world. This means that the ideas on Islamic finance and an Islamic economy in general to be described in the chapters that follow are not shared by all Muslims. They originate with salafi reformists, but the interesting thing is that they also seem to appeal to Muslims without a strong attachment to any particular movement or current.

NOTES

1. Muslims do not universally agree on these chains. Shiites in particular have their own ahadith, though they also accept part of the Sunni Hadith. The most authoritative collections of ahadith are those by Bukhari, or Muhammad ibn Ismail al-Bukhari (816–878, or 870 according to others) and Muslim, or Abul Husain Muslim bin al-Hajjaj al-Nisapuri (824–883, or 875 according to others).

A wide supply of Hadith collections in Arabic with English translation is available from Islamic bookstores; see, for example, www.halalco.com. Complete Hadith collections in English translation can also be found on the Internet. Particularly comprehensive sites are those of the University of Georgia, www.uga.edu/islam/, the University of Southern California, www.usc.edu/dept/MSA, and the Library of GC University, Lahore, www.gcu.edu.pk/Library/islam.htm.

2. Muhammad's companions were people who interacted with Muhammad. Sunnis consider them the most authoritative sources of information about the views and conduct of Muhammad. They themselves are also seen as guides for the believers. Shiites hold against many of the Companions that they supported the first three Caliphs (Esposito 2003, p. 55). These are not acknowledged by Shiites, as they were not relatives of Muhammad's.
3. Sinanovic (2004) reviews the discussion on whether only scholars or all believers can participate in *ijma* and on whether unanimity or a majority is required. The spiritual

founder of the state of Pakistan, Muhammad Iqbal (d. 1938), saw parliament as the only suitable vehicle for *ijma* in the modern world (Pal 1999, p. 146).

4. See Opwis (2008) for part of the history in Islamic legal thought on the role of *istihsan*.
5. The word *maslaha* is from the same root as *istislah* (Ramadan 2004, p. 235).
6. Unlike judges, muftis can be women or physically handicapped people (blind or mute). There are no formal requirements for a mufti; if a scholar's judgements are seen as authoritative by a community, they can function as a mufti (see Masud et al. 1996 on the requirements for becoming a mufti). Alongside these private muftis, Islamic countries have official, state-paid muftis representing the different law schools in that country. The highest-ranking official mufti in the Ottoman empire, from the start of the fifteenth century, used to be known as *shaykh al-Islam*. A special place is taken by the fatwa committee of al-Azhar University in Cairo. Fatwas issued by this committee, made up of scholars representing the four Sunni schools of law and existing since 1935, are held in particularly high esteem (Haase 2001; Masud et al. 1996).
7. In Indonesia there are four main bodies issuing *fatawa*. These can be seen as the result of collective *ijtihad*. Muftis are unknown in Indonesia (Gillespie 2007, pp. 206–7).
8. For a more detailed account of the somewhat complicated question of the place of *ijma* in Shafii's thought, see Schacht (1982, pp. 58ff).
9. Strictly speaking, the Caliphate ended in 1258, when Baghdad was sacked by the Mongols. The Sultans of Turkey later assumed the title of Caliph. The father of the Turkish republic, Kamal Atatürk, abolished the Sultanate in 1922 and the Caliphate in 1924.
10. See http://en.wikipedia.org/wiki/Hizb_ut-Tahrir, www.hizb-ut-tahrir.org and www.hizb.org.uk on Hizb ut-Tahrir.