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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 due to decades of Pareto-inferior poverty traps. We disentangle the viewpoints on the Islamic-economic nexus and determine that the backwardness of Muslim countries' economies is due to the retrograde outlook of the jurists (*fuqahā'*). 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 legitimises the elite's autocracy. We conclude by recommending a salient strategy critical to 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 peculiar to these Arab states; it 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

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1 T. Waywell, 'A failure to modernize: The origins of 20th. century Islamic fundamentalism', *Concord Review* 16 (2006): 159-190.

the criticality of a deeper understanding of Islam for improving economic development. Specifically, in this paper, we discuss the internal and external institutional factors that have impeded the progress of the Muslim world and present an institutional strategy to recover some degree of economic parity with the so-called developed world.

Our study scrutinises the historical stasis of institutions in the Muslim world from a juridico-philosophical perspective. The literature widely accepts the crucial role that institutions have historically played 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 how scholars (*ʿulamāʾ*) interpret the scriptures of the Qurʾan and Sunna – the normative practices of the prophet Muhammad. 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] Valuable policy recommendations to boost economic growth and development can also be derived from such an enquiry.

Our efforts yield the following observations. First, we identify the Pareto-inferior poverty traps of the Muslim states to the hysteresis that is 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, focusing on a crucial injunction in Islam pertaining to the protection of property rights (*ribā*), which the jurists have misunderstood.[5] This misunderstanding has led to a failure to establish institutions that protect these rights and so advance financial development.[6, 7] Historically, this misunderstanding has also led jurists to condone, and at times even to legitimise, the rent-seeking practices of monarchs and

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), 1:385-472.

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 it 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 crystallisation 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 generalised 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(1) (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* 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 unsurprising 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(11) (2007): 1818.

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

autocrats.[8] This hysteresis reconciles the opposing theories in the literature on Islamic economic development, whilst at the same time positing that Islam, the religion, has not impeded the advancement of the Muslim world.[9, 10]

Our second observation is that 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 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. Section 2 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 per cent of the world's population, Muslim countries lag far behind other nations in terms of development, contributing a mere 8 per cent of the world's Gross National Product (GNP). This reiterates the poor results reported in the Human Development Index (HDI):[11] of the 57 Muslim countries in the HDI, 21 received low scores, 31 secured medium scores, and only 5 attained high scores.[12]

Recent research on the relation between political economy and underdevelopment in the Muslim world, such as by Haber, attributes underdevelopment in the Muslim world 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 as being 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

8 See also Pryor, *supra* note 6 at 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; Angeles, *supra* note 7.

9 Pryor, *supra* note 6 at 1815-1835.

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 Published by the United Nations Development Program (UNDP), 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 6 at 1815-1835; 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 the Arab Spring', *World Development* 45 (2013): 296-313.

Muslim world to its 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; rather, it stretches back as far as the Middle Ages. Also, scholars have attributed it to a variety of internal systemic problems, linked to religion, society, and politics, rather than to Western imperialism or other external factors. 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] Kuran 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 to a nation's growth. We agree with Kuran that financial systems 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, a body of evidence 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 and legal (including religious) sectors in Arab-Islamic regions during two consecutive eras: 701-1100 and

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15 E. Chaney, 'Democratic change in the Arab World: Past and present', *Brookings Papers on Economic Activity* 2012(1): 363-414.

16 The papers by Haber (*supra* note 13) and Chaney (*supra* note 15) stem from 'endowment' and 'law' perspectives respectively, while Malik and Awadallah (*supra* note 14) amalgamate these two perspectives. The aim of our paper, 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 on economic development. Our perspective is consistent with the hypothesis of Stulz and Williamson – R.M. Stulz & R. Williamson, 'Culture, openness, and finance', *Journal of Financial Economics* 70 (2003): 313-349 – and Acemoglu, Johnson and Robinson (*supra* note 2) that emphasises 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 or Chaney, or both, where the judiciary is deeply emasculated by the meddling of the executive branch, leading to the weakening of property rights and thus to underdevelopment.

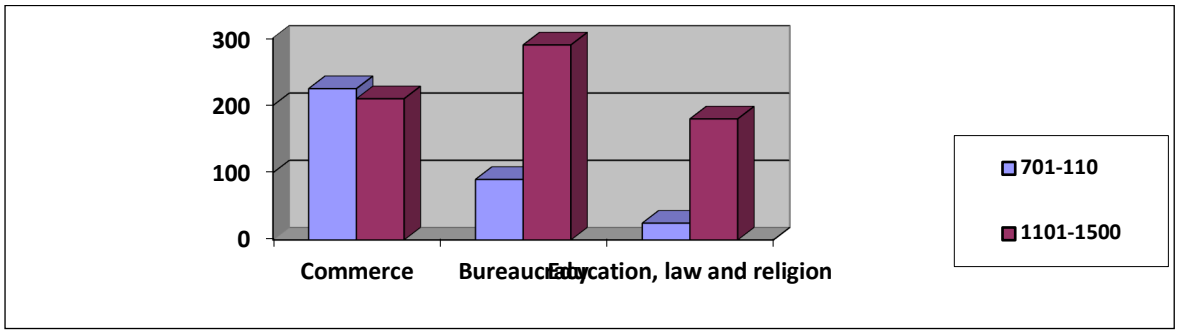
17 Huntington attributes the lack of democracy in Arab states, which are rich in natural resources, to the 'lack of accountability' emerging from an absence of taxation. That is, citizens are denied representation when they are not taxed. S.P. Huntington, *The Third Wave: Democratization in the Late 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.

1101-1500.[20] In the first period, 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 1). 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.

FIGURE 1 *Distinct occupations in Arab-Islamic world, 701-1500*



Note: Figure 1 has been constructed from data obtained from Shatzmiller, *supra* note 20.

Furthermore, the data shows that between 1101 and 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 per cent of the total commercial occupations had emerged over the previous century.

TABLE 1 *New occupations in Arab-Islamic World, 1101-1500*

Sector	Pre-existing 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.

3 The Economic Performance of Muslim Countries

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

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 comprehensive explanation of the Islamic-economic nexus. However, their influence in the literature necessitates an elaboration before advancing our perspective.

3.1 *Impediment Theory*

Since the mid-1990s, studies have focused on underdevelopment in the Middle East, a region of the world that once enjoyed a high standard of living by global standards. These studies contend that underdevelopment stems from certain Islamic beliefs that became formalised in the teachings, practices, laws, and institutions of the region. Kuran is one of the best-known advocates of this position.[22] He identified a number of Islamic beliefs that impeded development: the Qur'anic prohibition of interest hampered the development of financial institutions that could compete and prevent European entities' domination of the region; the Islamic law of commercial partnerships 'limited enterprise continuity'; the Islamic inheritance system 'hindered capital accumulation'; the *waqf* (charitable endowment) system 'inhibited the pooling of resources' by other financial intermediaries; and the Islamic legal system's aversion to the concept of legal personhood 'enfeebled private organisations'. [23] 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 argue that the Ottoman Empire eventually collapsed in the nineteenth century because property rights had not been institutionalised.[25] Although the Christian-French and Muslim-Ottoman fiscal institutions faced similar fiscal crises in the early seventeenth century, uncertain property rights in the Ottoman Empire led to different institutional outcomes. In France, tax collectors successfully restrained 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 weakened.[26]

Using a game-theoretic approach that models the conflict between the political and religious authorities in the Middle East and the West, Rubin also argues that institutional differences between the Islamic Middle East and the Christian West contributed to the broader economic divergence. . The outcome of the model is contingent on the extent to which early Islamic political authority derives its legitimacy from religious authority. This approach involves a feedback mechanism where improving economic conditions in Europe led to the relaxation of interest restrictions, simultaneously diminishing the

22 *Supra* note 18.
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.

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 Mu'awiyah's dynasty (r. 661-684), in which hereditary succession was initiated, disregarding the consensus of the community.[28] In the absence of genuine democracy, a lack of transparency gradually affected the Muslim socio-political economy, engendering restrictions on freedom of speech, abuses of public funds, corruption, poor governance, and injustice. 'As far as Islam is concerned, it is itself a victim rather than the trigger mechanism'.[29] Illegitimacy in the political field also 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, losing touch with the rapidly changing environment. Consequently, discourse in the field of jurisprudence suffered and lacked the dynamism it had enjoyed in earlier centuries.[30]

Malik associates the degeneration of the Muslim world with the evolution of its political economy.[31] The structure of the Ottoman Empire was one of an 'absolutist political system' that endorsed initiatives that furthered the political masters' supremacy. Any form of innovation that might destabilise their political power was either outright curtailed or moderated by lack of private incentives.[32] Malik questions the rationality of

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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 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) contrasts starkly with 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.

29 *Ibid*., p. 846.

30 *Ibid*. Our major disagreement with Chapra's analysis is that he absolves the jurists from blame. Historically, however, political rulers have derived their legitimacy from the religious elites. This contentious issue is discussed in Section 4.

31 A. Malik, *Was the Middle East's Economic Descent a Legal or Political Failure? Debating the Islamic Law Matters Thesis*, Working Paper WPS/2012-08, Centre for the Study of African Economies (CSAE), Oxford University, 2012.

32 Goldstone, too, is of the view that Kuran's analysis is incomplete because it fails to mention the technological upsurge in the West, especially from the sixteenth and seventeenth centuries. He is of the view that Kuran fails to address several problems specific to the Middle East, but not attributed to Islam, including: autocratic regimes, tribalism, guilds, deterrence to investment in human capital, and reluctance to the undertaking of innovations. J.A. Goldstone, *Islam, Development, and the Middle East: A Comment on Timur Kuran's Analysis*, Forum Series on the Role of Institutions in Promoting Economic Growth, Mercatus Center, George Mason University, June 24, 2003. Retrieved July 23, 2013: http://mercatus.org/publication/comments-timur-kurans-why-middle-east-economically-underdeveloped-historical-mechanisms.

Kuran's view on the backwardness of Muslim states in comparison with the West.[33] To him, a configuration of reasons underpinned the success of some European nations, such as geographical advantage, trading acumen, and political economy. 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 organisational forms and financing mechanisms against a backdrop of interstate competition, overseas expansion, and long-distance trade, ultimately manifesting in the Western corporate innovations of impersonal and permanently lived organisations, the separation of ownership and control, and the mobilisation of long-term capital through joint-stock companies. 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 the work of Timur Kuran and providing an important corrective to it. We investigate a factor hitherto unexplored in the academic literature: how jurisprudential interpretation (*ijtihād*) has shaped the present economies of Muslim states. This is in conformity with the view of political scientist Michael Fish, who states that '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]

We evaluate the role of the pre-eminent interpreters of Islam, namely the Muslim jurists (*fuqahā'*), in impeding institutional change. We focus on their interpretation of *ribā*, arguing that their failure to recognise the Qur'anic ban on *ribā* as one protecting property rights has led to flawed rationalisations that miss the Divine injunction and contributes to a weakened institutional framework that caves in to rent-seeking autocrats.[35]

4 Contextualising 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*) to Development*

Muhammad Iqbal, the well-known poet-philosopher of the Indo-Pak subcontinent, describes *ijtihād* as the elixir of Muslim legal thought. For him, although the ultimate spiritual basis of all life is 'eternal and reveals itself in variety and change, that is, in an ever dynamic universe',[36] there must also be a mechanism that accommodates for movement and change, which are so characteristic of the human experience. The key principle that allows for adaption in Islam is *ijtihād*. *Ijtihād* means 'to exert' in the terminology of Islamic legal theory. Kamali describes it as 'the total expenditure of effort by a mujtahid (capable scholar) to infer with a degree of probability the rules of the

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.

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.

Shari'ah (Islamic law) from the detailed evidence in the sources'.[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 conceptualisation, *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 the Prophet is reported to have openly encouraged independent thought, or tacitly approved of it, are too numerous to ignore. His Companions, both during his lifetime and after his death, applied their reason to problems in a relatively unencumbered way.

However, the first significant political expansion of Islam (in the eight century) circumscribed the opportunity for unfettered *ijtihād*. 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*: complete authority in legislation, which is practically confined to the founders of the schools; relative authority, which is to be exercised within the limits of a particular school; and special authority, which relates to the determination of the law that is applicable to a particular case unexplored by the founders.[40] Since Sunni orthodoxy established the theoretical foundations of Islamic law, it made the qualifications for this post almost 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-Shāfiᶜī (d. 820), 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 either to a verse in the Qur'an, or to a general principle, or to a specific case in the practice of the Prophet or the early Muslims (Sunna). 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, a liberty that produced results that ranged from sound analogy to almost complete arbitrariness.

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

38 *Ibid*., p. 165.

39 See A.H. Siddiqui (trans.), *Ṣaḥīḥ Muslim* (New Delhi: Kitab Bhavan, 1986), chap. 692, *ḥadīth* nos. 4261-4263.

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-Shāfiᶜī's role in the early development of Muslim legal theory, see J. Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon, 1967). It should be noted that jurists of the Ẓāhirī school of law, Shīᶜa jurists and some Muᶜtazila theologians were opposed to analogical reasoning as a method in law.

Inductive reasoning (*istiqrā'*) was another widely used method of legal reasoning prior to the second half of the eighth century. However, by al-Shāfiᶜī's time, it was seldom used, as it was a casualty of the sustained attempt of mainly Shāfiᶜī jurists to create analytical consistency and standardise the law.[42] The ratiocination of jurists, with very few exceptions, thereafter revolved around the effective cause (*ᶜilla*) of an existing legal judgment rather than constituting an applied attempt to extend the law based on the objectives (*maqāṣid*) of Sharīᶜa or on economic rationale (*ḥikma*). The jurists believed that effective cause was an objective attribute that did not vary from person to person 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.[44] For example, jurists failed to establish the correct rationale for the injunction pertaining to barter (i.e., the inequitable spot exchanges referred to in the Islamic literature as *ribā al-faḍl*). 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 money to be unproductive, so 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'ah* (see Table 3).[46] This promotion is premised on the Qur'an and the Sunna, which eschew any expropriation for both parties in a contract. Prohibiting *ribā al-nasī'ah* erects three constraints in particular: itensures that financial facilities are priced to avoid financial repression as well as negative leverage; it alleviates financial fragility; and it mitigates the 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 and builds a harmonious society. These issues are especially important in the aftermath of the recent sub-prime crisis. [48] Understanding the rationale behind the injunction of *ribā al-nasī'ah* is critical for economic development and thus for advancing growth. The business history literature especially illustrates how the jurists' misunderstanding of the third constraint has led to the underdevelopment of institutions that might have helped the poor and underprivileged in the Muslim world.[49] The jurists made exceptions for commutative

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.

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

exchange with commodities that they deemed to be free of the attribute of *ribā* (termed as non-*ribawī* commodities or *māl-ghayr-ribawī*). For example, they deemed the exchange of 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 first challenged only in the age of the great reformers of the nineteenth and early twentieth centuries.

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

TABLE 2 *Classical Sharīᶜa scholars' perspective on the* ribā *prohibition*

Category	
Ribā al-faḍl - the hidden *ribā*	***Ribā al-nasī'ah*** - the evident *ribā*
Application	
Relates to spot exchanges	Relates to deferred exchanges
Legal Cause	
Excess in exchange without an equivalent counter value	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)
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 Sunni schools of thought, namely: intrinsic, or monetary, value and volume or weight. However, additional conditions are not shared amongst the major Sunni 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.	
Rationalisation	
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 were essential during the period of the prophet Muhammad and Caliphs (successors) for survival and measure of price respectively.	

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'ah*** - 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 because it can expropriate either party's assets 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 Sharīᶜa 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.

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 that 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 *ḥiyal* (ruses). Khan terms ruses as a 'de-facto conventional

financial transaction' under an 'Islamic terminology', in other words, 'duping'.[51] What, then, is the primary reason behind the use of *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 having the quality of *ḥusn* (seemliness or conformity) or *qubḥ* (unseemliness or deformity). These qualities, according to most theologians and jurists, cannot be known by reason or natural law – they can only be known by Divine revelation.[52] This logic holds true whatever the action, and even when an action is self-evidently a crime (e.g., murder or 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; rather, his commanding an act makes that act good, and his prohibiting 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 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 people's need to dispense with the strict rules of the law, began to produce the extensive literature on *ḥiyal*. 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 overwhelming majority of jurists accepted these *ḥiyal*.[56] Even Ibn Qayyim al-Jawziyya, otherwise a staunch advocate of the law, discusses *ḥiyal* at great length, citing numerous works dedicated to them.[57] He distinguished 'lawful ruses', by which a lawful end is achieved by lawful means, from those that are 'forbidden', which he declares invalid.

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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), 161-179.

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

54 *Ibid*.

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 *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 Ḥanbalī 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).

The first group comprises numerous devices in commercial law. For example, one fundamental error that involves a ruse is a 'credit sale', which imitates a collateralised interest-bearing loan (i.e., a banking *murābaḥa*). This ruse arose because jurists, misconstruing the injunction of *ribā* literally as an 'increase' or 'growth', segregated commodities into two types: those with the characteristics of *ribā* (*māl ribawī*) and those without them (*māl ghayr ribawī*) (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 (i.e., goods that are measurable by volume or weight).[58] This definition led them to conclude, erroneously, that the historic credit sale (*murābaḥa*) is permissible because it involves an exchange on the spot of an asset devoid of *ribā* (such as a property) with an asset endowed with *ribā* (such as money) deferred.

The misconception persisted because the early jurists made their decisions during the time of the prophet Muhammad and of the generations that followed him, which was an era of bare subsistence in which no financial intermediaries existed (such 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 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: 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] This stratagem yields a financial facility that suffers not only from adverse selection and moral hazard but also from a high agency cost of debt because it is not collateralised. It is also less efficient than a credit sale 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,

58 Al-Zuhayli, *supra* note 50 at 26-54.

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* (Edinburgh: Edinburgh University Press, 1997).

represents nothing less than the failure of the religious establishment to engage in jurisprudential interpretation (*ijtihād*). This issue is reiterated in Ebrahim and Rahman, who find that the medieval Islamic forward sale is less efficient than conventional futures.[63]

4.3 *Rationalising the Shortcomings of the Jurists*

When the Qur'anic 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] Muslim creditors are entreated to lend without interest, even if vulnerable to actual and potential financial deprivation. This Qur'anic imperative conflicts with the rules of natural law, which find no objection to an agreement freely entered into by two parties. Even when it is doubtful that both parties are acting completely freely – such as when an impoverished borrower out of desperation accepts unfair contractual terms on a loan – natural law considers it fair for creditors to impose a moderate rate of interest on loans. Creditors, after all, risk losing all their money (e.g., if borrowers default or abscond with the funds). Moreover, even if the debt is repaid, creditors are deprived of the use of their own money during the loan period.

The demands of the market constituted an irrepressible force that precluded an *in toto* ban on loan interest by Muslim authorities. This fact is made abundantly clear by Islamic legal literature, as jurists of all legal schools from at least the ninth century 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. Commodities measured by any other criteria, such as length or number, were not deemed *ribawī.* Neither were non-fungibles (e.g., animals, carpets, land, houses, and trees).[65] For these, the jurists considered an exchange in unequal amounts to be lawful, even though this undermined the very rationale for the prohibition of *ribā,* a fact that the jurists themselves had pointed out.

Why have the jurists' errors not come to light sooner? One reason might be that financial economics has only evolved as a separate field in approximately the last sixty years. In contrast, the rudiments of Islamic financial law, which developed almost 1,200 years ago, remained a static edifice, as its formulators failed to keep pace with the changing intellectual and socio-economic 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. 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

63 M.S. Ebrahim & S. Rahman, 'On the Pareto-optimality of conventional futures over Islamic forward contracts: Implications for emerging Muslim economies', *Journal of Economic Behavior and Organization* 56(2) (2005): 273-295.

64 Al-Zuhayli, *supra* note 50 at 26-54.

65 *Ibid.*

> 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 those critics who allege that Islam has held back the progress of the Muslim world. It does not help that some jurists extricate economic surplus from the industry.[67, 68] This issue is also corroborated by Kahf:

> The *'ulamā* 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 to provide easy fatāwā for the new breed of bankers.[69]

Kahf's point is further corroborated in an extensive study by Zaman, which illustrates that the *ᶜulamā'* in recent times have found Islamic finance to be a very useful way of regaining power after more than a century of having had virtually no role to play except in judgments related to personal status law and ritual practice.[70]

The jurists' errors also did not come to light sooner because the various schools, together with their respective doctrines in Islam, sedimented, which to some extent stifled critical thinking (insofar as Muslims were 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)', driven 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 jurists' rulings. This blindness stripped *ijtihād* of the dynamism it had enjoyed from the earliest centuries of Islam. It is thus unsurprising that

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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 legitimises its monopoly by misconstruing Qur'anic verses 8: 29 and 57: 28, which promise 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*) that restrains them from going beyond their mandate into temporal matters, which are highly technical in nature (see Siddiqui, *supra* note 39 at chap. 986, *ḥadīth* 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* (Princeton, NJ: Princeton University Press, 2002).

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

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

Islamic law stagnated. Partly because of this close-mindedness, society has been unable to grasp its situation in a rapidly changing environment. It has made Muslim society delay in establishing institutions that might protect property rights and foster good governance, and it has contributed to Muslim countries, with little power to control their own destiny, being subjugated either by colonial masters or by indigenous dictatorships.

A third reason, advanced by the late M. Amir Ali, attributes the decline in the scientific leadership of the Muslim world to the narrow interpretation of religious scholars. Ali termed it the 'development of the dichotomy of sciences', where scholars narrowly perceive religious knowledge from the Qur'an, *ḥadīth*, *sīra* (biographical data on the life of the Prophet Muhammad), and perhaps the history of Islam as the only true knowledge (*ʿilm*); disciplines such as mathematics, physics, chemistry, astronomy, and medicine are disregarded as real sciences, probably due to their association with Western ideals:

> The consequence of such thinking is that the most honorable learning in the eyes of Muslims is to become an ʿālim (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*

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 – without resistance – to autocratic rule for centuries, to 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 in the Sunna) has advanced the economic interests of a narrow elite at the expense of the majority.[75] Throughout Muslim history, countless

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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: Institute of Islamic Information and Education, 2002), 1-2.

74 Kuran, *Long Divergence*, *supra* note 18.

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 J. Robson (trans.), *Mishkāt al-Maṣābīḥ* (Lahore: S.M. Ashraf, 1981), bk 17, 'The Office of Commander and *Qāḍī*'.

highly influential jurists have legitimised monarchs and autocrats' expropriating wealth.[76] This contrasts with the vital check many early Islamic jurists provided on rulers' power.[77] Over time, however, due to reforms, the ruling class has integrated the jurists into its regimes, allowing 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 legitimise the ruling classes' monopoly over wealth and has helped them to extract further economic surplus from their citizens. In short, the jurists have dutifully supported the diverse policies of the ruling elites, even when those elites have lacked a legal basis for such policies.

In addition to expropriating wealth, 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 jurists at various points in history have supported the ruling elite by condoning their tyrannical behaviour and by failing to censure unjust laws. The apparently narrow interpretation of the *ḥadīth* as commanding Muslims to obey rulers 'as long as they pray' fails to grasp the *ḥadīth*'s deeper meaning, which broadly implies the observance of Islamic law (in spirit as well as in the letter) and which 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 separating the judiciary from the government, as in the case of the second successor of prophet Muhammad, ᶜUmar ibn al-Khaṭṭāb (r. 634-644), who appointed ᶜUbāda ibn Ṣāmit as a judge and preacher of Syria to ensure that just and proper governance was upheld.[82]

Third, in terms of modern economies, financial innovations, which give rise to efficient organisational forms that deliver 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 led to a failure to establish financial institutions that might promote the economic interests of the poor and underprivileged, as encouraged in the Qur'an.[83]

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76 Coşgel, Miceli & Ahmed, *supra* note 8.
77 N. Feldman, *The Fall and Rise of the Islamic State* (Oxford: Oxford University Press, 2009).
78 *Ibid*.
79 Malik & Awadallah, *supra* note 14 at 296.
80 Siddiqui, *supra* note 39 at *ḥadīth* 4569.
81 B. Daragahi, 'Against the law', *Financial Times*, November 1, 2013, 11.
82 Siddiqui, *supra* note 39 at fn. 2028, *ḥadīth* 3852.
83 See Q (30: 39).

These three issues have led to 'poverty traps' emanating from a sequence of Pareto-inferior equilibria that have been devastating for the Muslim world. 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.

The status of the Muslim world has still not improved, even following the end of colonial rule, as Waywell explains:

> 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 in which property rights and 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 improving the efficiency of judicial systems, rewriting bankruptcy codes, and restructuring financial market regulations.[87]

Empirical studies show a link between a strong legal system and high corporate valuations, corporate finance, and the efficiency of capital allocations.[88] That is, countries with laws that more effectively protect investors tend to encourage shareholders and creditors to invest in firms, thereby driving up the price of corporate securities and decreasing the cost of capital.

Second, financial innovations should yield organisational forms that efficiently support the delivery of the products that their customers demand at the lowest price by

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84 Acemoglu, Johnson and Robinson, *supra* note 2.

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

mitigating transaction costs.[89] This result is aligned with Miller's seminal paper, which connects organisational forms with their underlying capital structure. [90] These preconditions 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 impose checks and balances on those holding political authority, bestow political power on a broad group with significant investment opportunities, and limit the power holder's ability to extricate economic surplus from the remaining members of society.

Third, a development strategy for the Muslim world that 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*, one that appropriates a clear appreciation of 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 early 2011, is currently stalled. Those Middle Eastern countries that have witnessed revolutions still face huge impediments to establishing a civil society: Islamists are unaware of the institutional weaknesses of the jurists (Tunisia), military establishments persist (Egypt and Yemen), rival militias continue to battle for power (Libya), and ISIS/ISIL has emerged (Iraq and Syria), with its implications both for neighbouring states and for Europe.

The path to establishing a civil society for the Arab and Muslim world will inevitably contain hurdles. An intellectual infrastructure must be established first and foremost. This is because intellectual dynamism has atrophied and has left the Muslim world vulnerable to fundamentalisms, extremisms, and other modes of retrograde thinking. This paper has established the error of the intellectual stagnation that has beleaguered Islamic jurists. It has critiqued modern Islamic banking for having evolved into a model far from the Islamic ideal. Yet, far from seeking to deride the religious establishment, the aim of this paper is to articulate the point that their retrogressive and reductionist outlook in the domain of economics and sociology has significantly impeded 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 or lay the groundwork for institutions that might stimulate economic growth. This is why studies that demonstrate a causal link between Islamic beliefs, behavioural outcomes, and economic performance are at best speculative. This paper 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, Islamic jurists must adopt a new approach, because for centuries they have been the de facto

89 See R.H. Coase, 'The nature of the firm', *Economica* 4 (1937): 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.

formulators of correct practice in Islam. They must reformulate how they undertake jurisprudential interpretation (*ijtihād*) in Islamic law and must also reform their educational institutions, which perpetuate a retrogressive outlook. As they restructure their educational institutions, they must: exchange ideas between the various legal and theological schools, without sectarian bias; include the social sciences and humanities; promote creativity and a clear position against uncritical acceptance of medieval jurisprudence; and separate normative Islam from historical Islam.

Our central finding is that jurists, by entering a technical field without seeking the guidance of experts, as entreated in the Qur'an (16:43), risk jeopardising the economic foundation and thus the very survival of the Muslim world.[92] Furthermore, failing to seek guidance violates the objectives (*maqāṣid*) of Sharīᶜa, which the jurists are tasked with safeguarding. Rather than making unilateral decisions, jurists should conduct a joint jurisprudential interpretation (*ijtihād*) by working with financial economists to: develop institutions that enforce contracts, thus promoting property rights; foster good governance and provide a conducive environment for private initiative; and structure a financial infrastructure that promotes growth.

92 See Q (16: 43).