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CONTEXTUALISING THE FIQH -- OR LAW -- OF JIHAD

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SEPTEMBER 11 has brought into prominence the issue of jihad in Islam. In the debate, some argue the need for Muslims to revisit the notion of jihad as armed struggle and focus on “the greater jihad”. This refers to the spiritual struggle to cleanse oneself from evil and desire and strive towards personal development. Some even advance the argument to the extent of calling Muslims to renounce the notion of armed jihad, along the lines of principled pacifism so that there may emerge in the future a “Muslim Gandhi”. Still other suggestions were advanced for Muslims to reexamine their curriculum, which, among others, defines how the concept of jihad is taught.

Admittedly, Muslims will not embrace all the suggestions. There is however a general lack of understanding of Islamic tradition and Muslim history on jihad. This should not stop Muslim scholars from being introspective on the issue or be satisfied with the status quo.

Ijtihad

Islam is a reform-centric religion. It requires from Muslims a continuous performance of ijtihad on religious matters. Ijtihad refers to intellectual effort by Muslim scholars to extract religious ruling from the Quran and the Prophet’s tradition (Sunnah). History shows that the spread of the notion that the door of ijtihad is already closed has contributed to the stagnation of Muslim intellectual tradition and its subsequent decline.

Classical Muslim scholars have left a rich corpus of work on fiqh or law of jihad, which continues to remain relevant for providing a broad framework for jihad similar to the Just War Theory for the conduct of modern warfare. However, works dated hundred years ago cannot be unconditionally relied on to provide solutions to the contemporary situation. Adjustment, adaptation, and re-ijtihad are needed to suit the changing context.

The on-going debate regarding who is a civilian and thus not a legitimate target in war provides a stark example. Muslim scholars agreed that certain categories of people cannot be targeted in war. They however differed in determining what constitutes participation or contribution in war, and thus allowing nullification of protection. In addition, the list deployed by classical scholars is not exhaustive, and fails to address the entire spectrum of civilians and non-combatants in today’s context. The reason behind the differences is their difficulty in accepting the authenticity of some hadith (the Prophet’s Traditions) on the issue, their interpretations, and the changes of opinion among the scholars over time due to situational changes.

This is just one of many examples that illustrates the potential disparity between the fiqh of jihad and contemporary conduct of warfare. Another example is the ambiguity in the types of weaponry that can be used in contemporary warfare, although the guiding principle is clear

that Islam does not allow the use of weapons that will cause indiscriminate killing and destruction. This principle would clearly call into question the desire of some jihadi groups to acquire weapons of mass destruction.

Integrating with international law

In this respect, it is important to integrate international law into the study and learning of fiqh of jihad for students of Islamic studies and would-be Muslim scholars in madrasahs and Islamic universities.

This suggestion is based on the arguments that, firstly, the underlying values and spirit of international humanitarian law and on war are similar to the fiqh of jihad, which seeks to limit the destructive nature of war by imposing a code of conduct. The code that was developed by Islamic scholars over time has many similarities with the Just War Theory, which was partly the basis for international humanitarian law.

The second argument has to do with the concept in international law of the civilians being a non-combatant and a non-combatant being a non-participant in fighting, or incapable of fighting. This is similar to the opinion held by a majority of classical Islamic scholars, who prohibited killing in war of those who did not participate in a conflict.

Thirdly, there is a similarity in the underlying principle of international humanitarian law and the fiqh of jihad. Since this is the case, and since the concept of a non-combatant coincides with the opinion of the majority of Muslim scholars, contemporary international humanitarian law on the protection of civilians and non-combatants could be considered as customary law recognized by the shari'ah. The principles of Islamic jurisprudence recognize customs and conventions as secondary sources of law as long they do not contravene any principles of shari'ah.

Fourthly, Islam recognizes and embraces the importance of context in law formulation and implementation. Due recognition of customs, as mentioned above, is one example. It has also been agreed by all Muslim scholars that law should be tailored, adjusted and changed in accordance to changes in time and place.

Fifthly, all classical Muslim scholars agreed that authorities have the power to limit the category of people not allowed to be killed in war, even if there are no explicit prohibitions on it in the scriptures. The authorities also have the power to exclude certain types of combatants, or people who contribute in war, from been targeted. The decision should be made based on context, which suits the best interests of people in accordance with the broad principles of Islam.

Relevance of the Geneva Conventions

Therefore, the ratification of the Geneva Conventions by Muslim countries binds Muslims who are citizens of those Muslim states. Muslims in non-Muslim countries are also bound, based on the above points, to follow the law. In addition, Islam requires Muslims to abide by rules of their respective countries as long as they do not contradict the shar'iah. Thus, ignoring international humanitarian law on the basis it neither originates from Islam nor is part of non-Islamic institutions such as the United Nations is not in keeping with the contextual character of Islam.

Finally, failure to abide by international conventions will put Muslim states, Muslim communities and Islam in a negative light in the eyes of the international community. Muslim

states risk being sanctioned, which is against the interest of the ummah. Furthermore, Islam does not prohibit Muslims from learning and gaining benefit from others, as long as the new approaches do not contradict the shari'ah. The Prophet has said: "Wisdom/knowledge is like something that was lost by the believers. Whoever finds it, he is entitled to it."

Widening the scope in the study of the fiqh of jihad beyond its primary sources and classical works will encourage a more contextual view and open up a greater opportunity for re-ijtihad on the issue.

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