Contents

Acknowledgements xi

About the Contributors xiii

Preface: The Hope of Alignment xvi

Introduction xvi

From the Past to the Present xvii

The African Religious Health Assets Programme (ARHAP) xix

When Religion and Health Align xxiii

Section 1

Overview and State of the Field

1. The Continued Paradigm Shift in Global Health and the Role of the Faith Community 2

Christoph Benn

Introduction 2

Developments in the Last Decade 3

AIDS as a Catalyst for Equity in Global Health 5

A Paradigm Shift In Global Health Ethics? 6

Can the Faith and the Health Communities Find a Common Language? 9

Conclusion 13

2. Discovering Fire: Changes in International Thinking on Health Care—The Challenge for Religion 16

Gillian Paterson

3. ‘An FB-oh?’: Mapping the Etymology of the Religious Entity Engaged in Health 24

Jill Olivier

Mapping the ‘Faith-Based Organisation’ Landscape 24
Exploring the Terminological Battlefield: Why Does it Matter? 30
A Clash of Paradigms and Forms of Evidence 32
The Power in Naming 36
Conclusion: Power and Resistance 38


Steve de Gruchy, James R Cochrane, Jill Olivier, Sinatra Matimelo

An Historical Overview 44
Four Key Ideas Behind PIRHANA 45
The Theoretical Foundations of PIRHANA 47
An Overview of the PIRHANA Tool 50
Technical Research Matters 54
What Does Participatory Inquiry Achieve and What Not? 56
Conclusion 59

5. Boundary Leaders: Seeing and Leading in the Midst of the Whole 62

Mimi Kiser

Institute for Public Health and Faith Collaborations 63
Recognising the Systems Nature of Health Challenges 63
Leadership that Sees the Self in the Whole 66
Liberative Pedagogy 68
Analysis 70

6. Liquid Boundaries: Implications for Leaders
Mobilising Religious Health Assets for Transformation 75

Gary Gunderson

Section 2
HIV AND AIDS

7. A Purpose-Driven Response: Building United Action against HIV & AIDS for the Church in Mozambique 86

Geoff Foster, Carina Winberg, Earnest Maswera, Cynthia Mwase-Kasanda
8. Challenges and Possibilities of Religious Health Assets: Charting an Islamic Response to the HIV and AIDS Pandemic  
*Muhammad Khalid Sayed*

- Introduction 105
- Potential Problems of an Orthodox Islamic Response to HIV and AIDS 107
- Islamic Marriage and the Risk to Women of Contracting HIV 108
- The ‘Islam-centred’ Response by Positive Muslims to HIV and AIDS 110
- Islamic Jurisprudence for an Orthodox-Centred Response Effective Against HIV and AIDS 111
- Conclusion 116

9. Tough Negotiations: Religion and Sex in Culture and in Human Lives  
*John Blevins*

- PIRASH Workshops: The Research Findings of a New Methodological Tool 119
- Findings from the Workshops 120
- Conclusion from the Workshops and Further Questions 122
- Christian Theology and Sexuality 123
- Religion, Sexuality and Identity 124
- Critiquing Modern Power, Grounded in Social Justice 127
- Towards Religious Communities with many Sexual Subjects 129

10. On the Pedagogy of HIV and AIDS: Conversations with Indigenes  
*Sepetla Molapo*

- Introduction 135
- On the Pedagogy of HIV and AIDS: A Brief Overview 136
On Defeated and Contaminated Blood: Understanding the Causes of HIV and AIDS among Indigenes 139
What about Safe Sex? Indigenes on Sex that Involves the Use of Condoms 142
Concluding Remarks 145

Section 3

Practice

11. Trustworthy Intermediaries: Role of Religious Agents on the Boundaries of Public Health 150

James R Cochrane

Introduction 150
The Context 151
The Challenge 152
Building Trustworthy Intermediaries 155
Assessing GSOs, and Beyond .... 158
Conclusion 160

12. The Relevance of Healthworlds to Health System Thinking About Access 164

Lucy Gilson

Introduction 164
Understanding Access and Addressing Access Barriers 165
Unpacking Acceptability 167
Bridging the Worlds of Patients and Providers: What Role for Trust? 170
What are the Implications of These Insights for Improving Health Care Access? 173
To conclude 176


Frank Dimmock with Tali Cassidy

Introduction 178
Method of CHAs Study 179
Historical Background of CHAs 179
14. The Memphis Model: ARHAP Theory Comes to Ground in the Congregational Health Network 193

Teresa Cutts

Introduction 193
The Memphis Landscape 194
Theories and the Logic Model 195
Covenant Committee Design 199
Programme Expansion and Structure 200
Evaluation of CHN 203
Early Mapping Efforts and Data Snapshots 204
Summary and Lessons Learned 206

Section 4

LOOKING BEYOND AND AHEAD

15. Frontiers of Public Health and Social Transformation: Faith at the Table 212

Katherine Marshall

Setting the Scene 212
Caveats and Definitions 214
Navigating Disconnects and Tensions around Religion and Development 215
Trends in International Development, Faith, and Health 220
Faith and Health: Moving towards More Concrete Action 224
Malaria and Faith – A Case Study 228
Ideas on Paths Forward 231

Index 235
Introduction

Since the launch of the African Religious Health Assets Programme (ARHAP) there has been a plethora of literature on the interface between religion and public health, especially about one of the biggest public health challenges, the HIV and AIDS pandemic. Religious traditions are often considered to possess an ability to contribute positively to the struggle against HIV and AIDS while at the same time posing certain challenges.

The positive values often cited are compassion, social justice, caring for the sick, a mobilising ability on the part of religious leaders and encouraging responsible sexual behaviour. The challenges often cited are stigmatising of people living with HIV and AIDS (PLWHA) associated with religious laws that condemn people who engage in extra-marital sexual relations, aversion to the use of contraception and imbalanced gender relations in religiously sanctioned marriages that tend to provide men with unlimited and unrestrained sexual access to their wives (Keough & Marshall 2007:20).

ARHAP has developed the idea of Religious Health Assets (RHAs). Cochrane (2006:2) cites general religious functions such as prayer, resilience, compassion, social justice, responsibility and mobilisation as intangible assets that can be leveraged for purposes of well-being. In addition, when pointing out the possible contribution of religious traditions to the struggle against HIV and AIDS in Africa, Schmid et al. (2008:84) assert that religious leaders are often the first respondents to community needs. While the very general intangible assets are useful indeed, I feel that these assets can lose their leveraging ability when approached from an orthodox perspective by orthodox religious leaders.
who are the agents of religious mobilisation. I will explain this in some
detail below.

The tension that exists between hindering ideas and positive
values, particularly when keeping this asset of mobilisation on the
part of traditionally trained religious leaders in mind, comes to the
fore when exploring the dimensions of an Islamic response to HIV
and AIDS. Describing Islam as ‘inherently complex’ with regards to
its contribution to the struggle against the HIV and AIDS pandemic,
Keough & Marshall (2007:29) go on to assert that the Islamic tradition
poses serious challenges and major possibilities for effective intervention
by religious leaders.

Given the centrality of mobilisation on the part of religious leaders,
it is essential that these ‘inherent’ complexities be identified and
discussed in light of the mainstream orthodox Islamic theological and
legal traditions in which the religious leaders, the ulama, have been
and continue to be socialised at the Islamic seminaries, madrasas. The
ideas flowing from these traditions have historically been markers of
identity in Muslim societies in general. Asserting that religious leaders
are central to mobilisation in public crises, Cochrane (2006:23) further
states that for effective religious mobilisation against the pandemic to
occur, RHAs crucially need to be leveraged in a manner compatible with
the religious orthodoxy.

Certain central Islamic theological ideas and legal rulings in which
the ulama are schooled and which they in turn promote can seriously
hinder the ability for Islam as a religious tradition to mobilise positively
in light of the HIV and AIDS pandemic. Examples of these will follow
in the discussion. Furthermore, some of these ideas, such as the gender
bias in marriage laws, could actually place women at high risk of
contracting HIV. It is, however, also within this same conservative and
orthodox paradigm, particularly the Islamic legal tradition, fiqh, that
specific intangible RHAs can be leveraged to subvert the negative ideas
and rulings. Moreover, these can also add legally binding principles
that could ensure that religious scholars and ulama direct Islamic legal
rulings to avert the spread of HIV in ways that go beyond the common
rhetoric of condemning sex outside of marriage.

It is within this context that I argue that the orthodox Islamic
theological and legal traditions, as adhered to by the ulama in general,
paradoxically present both serious problems for an Islamic response to
HIV and AIDS as well as concrete legal principles that can be leveraged to
subvert some of these problems and contribute positively to the struggle
against the HIV and AIDS pandemic.

I will begin by assessing the positive values, or intangible RHAs, such
as social justice and behavioural change, in the context of grounded
orthodox Islamic theological and legal ideas widely accepted by the
ulama. Next the focus will be on the legal nature of Muslim marriages
and their gender bias as they appear in the Islamic legal texts, followed
by a brief assessment of the response to these problems attempted by the Cape Town-based Muslim AIDS awareness group, Positive Muslims. Finally, I will discuss the concrete Islamic legal principles that appear in orthodox texts studied at the seminaries, principles that are widely accepted by the *ulama* as binding. I will place these principles in conversation with problems which many orthodox approaches to behavioural change and Islamic marriages pose and consider them as possible means of mitigating the HIV and AIDS pandemic.

**Potential Problems of an Orthodox Islamic Response to HIV and AIDS**

The orthodox theological ideas and legal rulings that I deem relevant for discussion concerning HIV and AIDS are those to which the *ulama* have been exposed in the textbooks at the seminaries and which have become widely accepted by the vast majority of religious leaders, *ijma’atan*. While my own focus for this chapter is on just two of these positive values or assets, it should be noted that observers cite a variety of potential, yet very general positive religious values for the HIV and AIDS struggle, which can actually be compromised by some of these central orthodox tenets.

One such often-cited positive value or asset that is open to compromise by orthodox tenets is that of social justice. Keough & Marshall (2007:22) assert that the value of social justice that Islam incorporates serves as a critical element of a broad set of interventions to address HIV and AIDS and the care and treatment of people living with the disease. This turn to social justice as a Qur’anic principle that can lay a foundation for an Islamic response to HIV and AIDS in fact characterises the ‘theology of compassion’ approach adopted by the Cape Town based Muslim HIV and AIDS awareness and counselling group, Positive Muslims (Esack 2004:51). However, a problem arises when this is approached from an orthodox theological perspective. The mainstream Sunni position on divine justice, *‘adl*, does not allow for human conceptions of justice. Furthermore, the Sunni position makes it extremely difficult to define justice and to act upon what rational minds may consider injustice.

In the book, ‘*Umdat al-Saalik wa ‘uddat al naasik*, a prescribed text at many Sunni seminaries, especially those in Cape Town, the revered theologian and jurist, Ahmad ibn Naqib al-Misri (1999), provides a detailed description of the Sunni position on divine justice. His description not only makes it difficult to determine what justice is but also defines every single material structure and/or attitude as having a divine origin, thus rendering it rather pointless to draw distinctions between justice and injustice based on human understandings. Ibn Naqib (1999:821) writes that everything besides God exists through His action, proceeding from God’s justice in the best, fullest, most perfect and equitable way. Hence, the very existence of HIV and AIDS, the suffering of people as a result as well as their unfair treatment may all be viewed as
part of the natural, just order determined by God. Ibn Naqib (1999:821) adds that God’s justice is not comparable to the understanding of justice of His servants. Clearly, from this lens, by stating that it is unjust for poor people to be denied access to HIV and AIDS treatment and education and for people living with the disease to be ostracised, may be viewed as projecting human understandings of justice and oppression on to God, thereby limiting His absolute power.

Another problematic aspect of orthodox Islam with regard to values that observers see as potentially complicating attempts to prevent the spread of HIV is the role of religion in conflict zones. Keough & Marshall (2007:23) assert that powerlessness and instability can foster the spread of HIV. If we view powerlessness as a product of political subjugation, as we see in most Arab and Islamic countries, then the orthodox doctrine of political authority may be viewed as a definite structural hindrance to an Islamic response to HIV and AIDS. Indeed, it has been a famous long-standing rule in the Sunni legal and theological traditions that a politically unjust and/or sinful ruler ought still to be obeyed as long as he is Muslim and offers the five daily prayers to God (Ibn Naqib 1999:1000).

The above describes two very general problems, from which particular stifling challenges concerning HIV and AIDS can be inferred. A more specific value-related complexity tying directly to public health and HIV and AIDS is that of behavioural change. Keough & Marshall (2007:22) assert that the most recognisable role of religion concerning HIV and AIDS is the promotion of behavioural change. Schmid (n.d.:11), rightly describes this complexity as also being the most controversial. While religious emphasis on behavioural change can in principle largely prevent the transmission of sexually transmitted diseases, it can also engender a retributive discourse that can negatively affect those who may have contracted HIV and AIDS through sexual intercourse outside of marriage.

While this is a common discursive element amongst most religious traditions, its significance in the Islamic context is that it is legally entrenched. The Islamic legal texts prescribe formal laws of punishment for those who engage in sex outside marriage, zina. The prescribed punishments, hadd, for the two people not married to each other but engaging in sexual intercourse is one hundred lashes in public; for adultery, it is stoning to death (Fyee 1955:91).

**Islamic Marriage and the Risk to Women of Contracting HIV**

A far more direct problem posed by the Islamic legal tradition lies in the implications that flow from Islamic marriage. By its legal definition, Islamic marriage, nikah, places the wife at high risk of contracting HIV from her husband. The specific laws governing Islamic marriage also pose a central problem in this regard.
Classical Islamic jurists defined marriage as a contract of exchange, the primary purpose of which is to render licit sexual relations between a man and women. This contract is called 'aqd al-nikah, literally, a contract of coitus, and has three essential elements: the offer, ijab, by the women or her guardian, wali; the acceptance, qabul, by the man; and the payment of dowry, mahr, a sum of money or any valuables that the husband pays or undertakes to pay to the bride before or after consummation. In discussing the legal structure and effects of the contract, classical jurists often used the analogy of the contract of sale and alluded to parallels between the status of wives and female slaves, to whose sexual services husbands/owners were entitled, and who were deprived of freedom of movement. Abu Hamid al-Ghazali (1998), the twelfth century Muslim philosopher and jurist, in his monumental work, Ihya 'Uloom al-Din, devoted a book to marriage, in which he echoed the prevalent view of his time. Al-Ghazali’s Ihya is considered in contemporary times to be an essential practical guidebook for both Islamic scholars and non-professionals, especially those who follow the Shafi’i school of Islamic law. In the Ihya, al-Ghazali (1998:89) writes, ‘it is enough to say that marriage is a kind of slavery, for a wife is a slave to her husband. She owes her husband absolute obedience in whatever he may demand of her, where she herself is concerned, as long as no sin is involved.’ In its very definition, a legal Islamic marriage may be viewed, because of the payment of dowry, to be a sanction for Muslim men to demand sexual intercourse from their wives.

The thirteenth century Shi’ite jurist, Muhaqiq al-Hilli (1985:428) in his Shara’i al-Islam min ahkam halal wal haram is more direct in this regard. It must be noted that this particular text has for centuries been the textbook of Islamic jurisprudence, fiqh, at Shi’ite seminaries around the world. Al-Hilli (1985:428) writes, ‘Marriage etymologically is uniting one thing with another thing; it is also said to mean coitus and to mean sexual intercourse ... it has been said that it is a contract whose object is that of domination over the buz’, vagina.’ This resonates with Haddad’s (2002:95) assertion that practices such as bride price, lobola, in some African traditional cultures may contribute to women’s vulnerability to acquiring HIV from their husbands. By virtue of its definition, in a legally binding Islamic marriage, a woman cannot refuse her husband sex if she thinks he may have HIV or even if she knows that he does, a woman cannot ask her husband to wear a condom if he has HIV, nor can she ask him to get tested before consummating the marriage or during the marriage. The legal obligations set out for a valid Islamic marriage can perpetuate this degree of sexual ownership that the definition grants to husbands over their wives. Two concepts are of particular importance in this regard, tamkin, obedience and nafaqa, maintenance. Tamkin, defined in terms of sexual submission, is a man’s right and thus a woman’s duty; whereas nafaqa, defined as the provision of shelter, food and clothing is a women’s right and man’s duty. A woman becomes entitled to nafaqa
only after consummation of the marriage, and she losess her claim to it if she is in a state of *nushuz*, disobedience. Not granting the husband intercourse when he wants it and in whatever manner he wants it, except for anal sex, is considered to be an act of disobedience for which the majority of jurists allow the husband to physically beat his wife, albeit lightly (Ibn Naqib 1999:979).

An example of the influence of this type of religious legitimisation of undue sexual access that places women at high risk of contracting HIV from their husbands is the case of Sumaya, an HIV-positive women counselled by Positive Muslims. Speaking about the violent sexual experiences that she had to endure at the hands of her husband, Sumaya said, ‘And there were many times when I didn’t want to sleep with him and then he beat me so that I slept with him. He hit me like this...he hit me so that I ended up in hospital. This is how he hit me with a whip. He believed that he could sleep with me whenever he wanted. This was his attitude.’ Sumaya’s husband is now deceased and Sumaya contracted HIV (Esack 2004:51). This vulnerability on the part of women like Sumaya is due to their inability to refuse sexual intercourse with their partners.

**The ‘Islam-centred’ Response by Positive Muslims to HIV and AIDS**

When Farid Esack, the founder and director of Positive Muslims, cited the example above and highlighted marital abuse related to unrestricted sexual access on the part of males as a serious problem which may contribute to Muslim women being at risk of contracting HIV, he drew on a verse from the Qur’an which calls people to rise up as witnesses against themselves. Esack used this juxtaposition to request and motivate Muslim men to cede some of their ‘power’ to allow women to take ‘ownership’ of their bodies (Esack 2004:51). While this request is indeed useful, Esack’s use of the Qur’anic verse, in my opinion, is far too general in application. This type of general interpretation and argument does not mitigate Muslim men from taking recourse to the Islamic tradition which is considered sacrosanct and which the *ulama* may cite. It is indeed worth noting that Esack does not cite any Islamic legal injunction to subvert this type of behaviour; a drawback because it is at the level of jurisprudence that the orthodox approach gains sway over communities.

The inadequacy of the unorthodox approach to developing an Islamic response to HIV on the part of Positive Muslims is more clearly illustrated by Esack’s utilisation of general values, which he derives directly from the Qur’an, which, in so doing, surpasses the orthodox methodology of relying initially on the rulings and principles set out by jurists of the past. Urging Muslims to open their hearts to people living with HIV, Esack (2004:28) cites the value of compassion from the following verse of the Qur’an: ‘What will convey unto you what the path is?’ Liberating
others, providing food on a day of hunger to an orphan or relative, or to someone disadvantaged and in a bad situation. Then you become of those who believe, who encourage one another to persevere and encourage each other to become compassionate.’ While this is indeed a clear message from the Qur’an that calls for compassion towards the disadvantaged, in Muslim communities in which a religious orthodoxy tied to Islamic legal manuals holds sway, this type of hermeneutic unfortunately may have very little effect.

A final further example in this regard is Esack’s (2004:32) general reference to self-righteousness as a sin where he links self-righteousness to a dominant Muslim response of ostracising people who have acquired HIV. While this approach is useful, once again it lacks engagement with the Islamic legal rulings on the punishments for sex outside marriage and the hindering discourse that this raises. A turn to an Islamic legal principle, such as the one described below, which could be used to abrogate or suspend the punishment in the context of the HIV and AIDS pandemic could be more useful in creating a more mobilising effect among the religious orthodoxy and through them of those who follow their teaching.

**ISLAMIC JURISPRUDENCE FOR AN ORTHODOX-CENTRED RESPONSE EFFECTIVE AGAINST HIV AND AIDS**

Many of the potential problems within the orthodox Islamic tradition that challenge an Islamic response to HIV and AIDS flow from the Islamic legal tradition, *fiqh*. It is thus appropriate to subject these problematic areas to the very principles of Islamic jurisprudence, *usool fiqh*.

*Deduction of Laws, Ijtihad*

When approached from a historical angle, we find that the legal injunctions that pose problems to an Islamic response to HIV and AIDS, such as the punishments for sex outside marriage or the gender biased marital laws, were themselves results of classical jurists’ engagements with and interpretations of the Qur’an and the utterances, actions and tacit approvals of the Prophet Muhammad, the Sunnah.

Male scholars in male-dominated societies from the ninth to thirteenth centuries deduced those rulings; and the gendered context may have played a major role in this regard. It should also be noted these classical jurists themselves, whose rulings and definitions are now quoted by religious leaders, did not take their interpretations and rulings to be the absolute truth. In the very texts they variously wrote, they state that it is possible for them to be proven wrong by the engagements of other scholars with the Qur’an and Sunnah. Indeed, all classical texts prescribing the punishments for fornicators and adulterers and providing definitions and rulings on Islamic marriage end with the phrase ‘and God knows best’ (Ali 2003:165).
This admittance of the possibility of intellectual error and the influence of historical context on the part of the jurists has made it possible for the principle of *ijtihad* to become central in *fiqh*. *Ijtihad* is the process by which legal rulings are thought of, deduced, abrogated and suspended under changing circumstances and due to new readings of the sacred texts (Hallaq 1994:38). Theoretically, this opens up the possibility for relevant laws to be reassessed in light of a changing circumstance that is claiming the lives of many, in this case, the HIV and AIDS pandemic.

Based on the principle of *ijtihad*, certain gender biased rulings on marriage as well as the very nature of marriage could possibly be changed if scholars engage with the Qur’anic verses regarding marriage. There are numerous verses in the Qur’an in which husbands and wives are instructed to conduct affairs with each other in a dignified manner; there is also the instruction for there to be mutuality in their relationships. For example, in verse 71 of chapter 9, it is stated that a man and a woman united in marriage are protectors of one another (Ali 1989:523). Hence, if one partner has HIV, it would be in keeping with the protective ethic of this verse for him or her to inform the other partner of his or her status so as not to cause harm to the partner by engaging in unprotected sexual intercourse.

*Elimination of Harm, al-Darar Yuzal*

While the above form of engagement with the Qur’an and its emphasis on protection is indeed useful, there is still need for an approach that is more relevant to the legal socialisation of the religious orthodoxy and to AIDS as a harmful disease. This entails drawing on a legal principle prescribed by the jurists that deals directly with the idea of protection from and elimination of harm. The hermeneutical imagination required in this regard, in fact, would be less than in the previous possibility described. According to Kamali (2002:90), classical Islamic jurists agreed that the most comprehensive objective, *maqasid*, of Islamic law is that of preventing and eliminating harm under all circumstances, *al-darar yuzal*. They derived this objective from the following, often quoted tradition, attributed to the Prophet Muhammad, ‘Harm is neither inflicted nor reciprocated in Islam.’

Although this particular objective does not specify the particular type of harm, according to Kamali (2002:90) the classical jurists from all four Sunni schools of Islamic law, namely, Hanafi, Shafi‘i, Maliki and Hanbali, agreed that priority should be given to harm that threatens the safety of the five essential values, *al-darruriyyat al-khamsah*, of faith, life, intellect, property and lineage. The Maliki jurist, Shihab al-Din al-Qarafi, added *al-‘ird*, that is, personal honour to this set of essential values (Kamali 2002:90). Given that AIDS is a deadly disease, AIDS awareness and HIV prevention measures are essentially about protecting at least two of these values, namely, life and lineage. Hence, AIDS awareness and HIV prevention measures become Islamically ordained responsibilities.
We can infer, that based on the objective of protecting life and lineage, gender-biased Islamic marriages need to be reassessed in ways that make it incumbent on both partners to reveal their HIV status to one another and to engage in safe sex, as failure to do so could result in loss of life and the discontinuing of lineage, including through the infection of one’s children with HIV.

Furthermore, the sixth essential value of protecting personal honour, added by al-Qarafi, can be leveraged in order to subvert stigmatisation of people living with HIV and AIDS. Stigmatising, especially in religious communities where sex or adultery outside of marriage is a social taboo and where people link HIV and AIDS to premarital sexual activity, is indeed a cause of harm to personal honour. This particular value could also be leveraged to abrogate or suspend the punishments for those who are found engaging in premarital sex. The recourse to *ijtihad* would be appropriate in light of the fact that, as mentioned previously, a discourse of stigma against people affected by HIV and AIDS is intensified by the actual punishments for sexual ‘offenders.’

*Tolerance of a Lesser Harm so as to Eliminate a Greater Harm*

The *ulama*, however, may consider any move towards abrogating part of the marriage laws, encouraging the use of contraception and suspending the punishments for sex outside of marriage as acts of jurisprudential wrongdoing. In this case, we can still argue that such deduction of legal rulings is permissible, *halal*, according to the principles of Islamic jurisprudence. For this, we can leverage the legal principle which states that a lesser harm may be tolerated in order to eliminate a greater harm, *al-darar al-ashadd yuzal bi al-darar al-akhaff* (Kamali 2002:91). Averting the harm to the essential values caused by HIV infection and stigma outweighs the preservation of the details of specific rulings on marriage, prescribed punishments and contraception. This position is aided by the recognition that the latter rulings were deduced by scholars of the past, over which a degree of difference of opinion existed and which are not stated amongst the five essential values. To illuminate this argument for tolerance of a lesser harm to eliminate a greater harm, in the context of HIV and AIDS, it would be in line with orthodox Islamic legal principles for religious leaders to make it mandatory for both parties in a marriage to know each other’s HIV status. Further, if one partner is infected, they could also impose the use of preventive measures such as condoms, even if condoms also act as means of contraception. In fact, they could introduce these measures even if they are likely to be seen as running counter to the legal definition of marriage as ownership by the husband of his wife.

*Necessity Rendering the Unlawful as Lawful*

Another principle of Islamic jurisprudence that can be used to strengthen this particular approach is the principle that declares that necessity makes
the unlawful lawful, *al-darurat tubih al-mahzurat*. Kamali (2002:93) asserts that this principle reflects some of the Qur’anic verses on the subject of necessity, namely, chapter 2, verse 173 and chapter 5, verse 3, and also represents an indisputable guideline of Islamic law. The jurisprudential definition of necessity ties this allowance directly to the rethinking of laws that may impinge on an effective Islamic response to HIV and AIDS and, in particular, on measures that could limit the spread of the pandemic. According to Mubarak (1998:28), necessity in this case is defined as a situation which prevents fear of destruction or substantial harm to one of the five essential values involving oneself or another human being; the fear is perceived either with certainty or strong probability in such a way that the destruction or damage will occur, either immediately or later, if action is not taken to prevent it.

Even if one were to cite the distinction which the classical jurists drew between necessities of the first degree, as mentioned above, and necessity of the second degree, *hajiyaat*, which refer to interests, the neglect of which leads to hardship but not to direct harm, the allowance which the *fiqh* provides for the necessities of the first degree will still be applicable in the case of HIV and AIDS. According to the Hanbali jurist, Ibn Taymiyyah (1965:64), who is considered to be the most puritanical of all jurists in Islamic history, jurists generally only held this distinction to be good in respect of individuals; in respect of the community as a whole the two become one and the necessity of the second degree is elevated to that of the first rank. Thus, even if we assert that HIV does not always cause death but merely hardship, the necessity to introduce measures that contain AIDS may indeed be considered a necessity of the highest degree – even if this means the suspension of some Islamic laws. This is because the pandemic is affecting communities and not just isolated individuals.

*Unrestricted Public Interest*

This priority afforded to the well-being of the public – which allows us to conceive of HIV and AIDS beyond individual harm – is concretised even more by the legal principle of *maslahah mursala*, unrestricted public interest. According to al-Ghazali (1937:139) *maslahah mursala* consists of considerations that secure a benefit or prevent a harm occurring to the broader public as a whole; such considerations are in harmony with the protection of the five essential values mentioned previously. *Maslahah* is legislated through the process of *istislah*, juristic preference of one contradictory legal opinion over another for the sake of public interest under a particular circumstance (Kamali 1991:268).

Given that HIV and AIDS is a pandemic affecting many people and thus potentially harms the entire public and all of their life and lineage, it will be in keeping with the principles of the Islamic legal tradition for *istislah* to be applied about legal rulings that impact on an Islamic response to HIV and AIDS. In August 2008, Democratic Alliance
parliamentarian and senior Muslim cleric, Maulana Rafeeq Shah, called on the ulama of South Africa to issue a fatwa, a legal opinion that demands that religious leaders insist that both partners in a marriage know each other’s HIV status before the marriage ceremony is conducted and sanctioned. Indeed, Shah (2008) went a step further, calling for HIV tests and mutual disclosure as mandatory conditions in legally valid Islamic marriages, thereby adding another legal condition to the validity of an Islamic marriage. Thus, he contradicted the dominant legal opinion that does not permit any new conditions to be added to the validity of a marriage. However, given that there have been classical jurists in the past who added other conditions to the validity of marriage and that HIV and AIDS is currently a pandemic that threatens the very life and lineage of the public as a whole, Shah’s suggestions fall within the ambit of maslahah mursla, unrestricted public interest. Its istislah, juristic preference of one contradictory legal opinion over another for the sake of public interest under a particular circumstance, still falls within the range of requirements to satisfy the legal tradition.

Finally, we can subject the consideration of public interest and juristic preference to the strict condition set by most jurists that the nature of the public interest and the juristic preference must not be in conflict with any clear nass, textual proof, from the Qur’an and sayings attributed to the Prophet Muhammad. However, even in the case of a recourse to the principle of public interest contradicting a clear injunction in a tradition attributed to the Prophet Muhammad, the possibility remains strong for the principle of public interest when it pertains to preventing harm, to be leveraged in as creative a manner as possible for the purpose of limiting the spread of HIV and AIDS. The perspective presented by the prominent Hanbali jurist, Najm al-Din al-Tufi (1970) is essential in this regard. Al-Tufi (1970:138) maintains that if the sayings attributed to the Prophet Muhammad happen to conform to the interests of the public in a particular case, they should be applied forthwith, but if they oppose it, then the interests of the public should take precedence over the textual proofs. Al-Tufi (1970:138) further argues that the conflict is not between the textual proof and the public interest, but between one textual proof and another, the latter being the tradition attributed to the Prophet Muhammad, stating that ‘Harm is neither inflicted nor reciprocated in Islam.’ According to Al-Tufi (1970:139) then, one must not fail to act upon the text that materialises the public interest. Note the link drawn by al-Tufi between prevention of harm and public interest, and, most importantly, the preference given to the tradition that encourages mitigating harm. This is a definite asset that can be leveraged for an effective Islamic response to HIV and AIDS that is well grounded within the orthodox legal tradition, with a clearer chance of mobilising religious leaders to engage their communities on prevention and safety measures—one of the most necessary strategies in the fight against the pandemic.
CONCLUSION

The illustration and assessment in this chapter of certain elements in the theological and legal landscape of Islamic orthodoxy in conversation with certain basic details of the HIV and AIDS pandemic vis-a-vis the idea of RHAs shows that charting an effective Islamic response to HIV and AIDS pandemic is a complex exercise. The orthodox Islamic tradition poses both serious challenges and valuable possibilities for an effective Islamic response to it that is acceptable to all.

Concerning possibilities, classically grounded Islamic legal principles serve two essential functions associated with an Islamic response to HIV and AIDS. Firstly, these principles can be utilised to suspend and/or abrogate Islamic legal rulings that breed stigmatising of PLWHA, and which present high risks of HIV contraction. Secondly, these principles can be used to introduce relatively new legal rulings, such as mandatory mutual disclosure of HIV status as a condition for valid Islamic marriages, to the corpus of the Islamic tradition in light of the deadly HIV and AIDS pandemic. The efforts of organisations like Positive Muslims, who serve the needs of people living with HIV, will be enhanced if the challenge is resonated at a level of jurisprudence rather than in purely general terms.

REFERENCES


Religious Health Assets: Charting an Islamic Response to HIV


