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### Responding to Orientalists' Misconceptions in the Domains of Discretion and Imitation

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#### ABSTRACT

This study is aimed to clarify the claims of orientalism in the domain of discretion and imitation. It analyzes these allegations objectively without fanaticism. It demonstrates the falsehood of the orientalist's sayings in one place and the validity of their sayings in other places. The importance of discretion in Islamic legislation has been presented through the study. Islamic nations can't make advancement without it. It is opposite to the orientalism views, which believes that discretion cannot be achieved due to the depletion of the Islamic legislation sources and their distance from reality. Besides, the consensus has impeded the discretion process, which has been proven in this research. The research also highlights the importance of reconsidering many issues that need discretion. It recommends the necessity of encouraging Muslim scholars to pursue discretion. They need to provide its means and to oppose the orientalist thought through objective research and criticism based on facts that are far away from fanaticism.

#### 1. Introduction

The discretion issue is one of the most important and central issues of the Islamic nations. Therefore, scholars, in the past and present, have performed research and studies. They have set conditions and controls which regulate the process of discretion. The scholars differ between supporters to close the discretion domain and oppositions. Moreover, orientalism has presented this issue as a contradiction to Muslim scholars. The concept of discretion is trying to destroy the basis on which it is based. It is challenging the effects which have resulted from it. It has distorted the effort of scholars who have played a prominent role in laying out the rules of Islamic legislation.

It is found from the literature that there are very few independent studies that have addressed the orientalist's claims of discretion. The oriental study of

fundamentals of Jurisprudence is critical research by Al-Shanqeeti Abd al-Aziz Ibn Yahya Al-Mawlid at the Department of Islamic Knowledge. It is not independent research on discretion and imitation. Rather, the research has covered these topics within its topics. It has highlighted some of the texts contained in the Department of Knowledge, but it has not addressed its criticism. Moreover, the study on the orientalist's view of jurisprudence in the role of imitation has identified some of the claims of orientalism in the discretion and imitation issues. However, in response to criticism of the claims of orientalism of discretion, the research has not paid sufficient attention to respond to the suspicions. Rather, it has touched upon sub-issues such as proving the authenticity of the Prophet's Sunnah, clarifying the issue of tricks in Islamic jurisprudence, presenting the views of Muslim scholars in the ranks of the discretion, and defining discretion and imitation.

Therefore, this study is focused to respond to the claims of orientalism and to acknowledge the truth. It presents the claims of orientalism about closing the discretion domain and the following imitation in Islamic legislation. It emphasizes the reasons for closing the discretion domain and their effect of imitation from the orientalist perspective. It throws light on the Islamic viewpoint on the issue of closing the discretion domain. It discusses and analyzes the orientalism views to clarify their validity. It highlights the impacts of following the imitation and has discussed it in light of their claims. It seeks to present the discretion issue in terms of reasons and consequences from the orientalist perspective. It is aimed to analyze and criticize objectively the orientalism views in the case of discretion. It shows the past and present situation of the Muslim scholars in the imitation.

## **2. Research Methodology**

The research uses the descriptive method. It presents the suspicions of orientalist about the research, analyzes those suspicions, and objectively responds to these without subjectivity. It comprises of two sections. The first section deals with the orientalist view of the reasons for closing the discretion domain. It criticizes the orientalist vision of the reasons to close the discretion domain. The second section presents the orientalist view of the effects of closing the discretion domain. It criticizes the orientalist vision of the effects of closing the discretion domain.

## **3. Orientalist Vision for Reasons to Close the Discretion Domain**

If the people follow the orientalist's views of the discretion domain and imitation in Islamic jurisprudence, then they would find that orientalism deals with the problem of closing the discretion domain from a perspective that is consistent in some aspects with some Islamic thinkers and jurists. However, it differs in terms of substance and content. Because orientalism has stated that the discretion domain was closed in the fourth century AH. It was recognized by Muslim scholars. It was not the subject of criticism over the ages by some Muslim jurists such as Ibn Hazim and Ibn Taymiyyah. But the orientalist

perspective differs from the Islamic belief in the fact that the former attributes the closing of the discretion domain to several reasons.

Abandoning of the discretion domain includes the exhaustion of the sources of Islamic jurisprudence. Orientalism attributes the closing of the discretion domain to the inability of Islamic sources to be developed. As they are constant sources that do not change by changing circumstances and conditions. Therefore, these sources have been exhausted by the early jurists, and are no longer able to keep pace with the following eras. So, Coulson argues that if the discretion domain is closed and imitation has replaced the discretion, then every jurist has become an imitating of those who have preceded him. This attitude is not due to external factors as dictated by circumstances. The internal process is represented in the exhaustion of the sources of Islamic jurisprudence once their contents are finally determined. It is also believed that the process of interpreting and expanding texts is finished by those extraordinary scholars whose efforts have formulated the correct final form of jurisprudence (Coulson, 1992 AD). The approach has been preceded. It claims that the motive behind the scholar's advisory opinion of the fourth century to close the discretion domain is that all the main issues have been discussed and organized. The rules have been restricted. Every new activity is determined in the explanation, application, and interpretation of those rules which are organized by the schools of Jurisprudence. This is the exact tradition that emphasizes to accept the establishment of the schools of jurisprudence without reservation or discussion. Moreover, the one who is entitled to the discretion is called an imitator (Zayed, 2017 AD).

It is also comprised of the idealism of Islamic law and its distance from reality. Here, orientalism believes that Islamic legislation is based on the morality principle which has no connection with reality. This legislation is not in line with changes and developments. In this regard, Coulson says that "In fact, Islamic legislation has been ideal in its foundation since this legislation has not developed from the work of the courts or their rulings, such as the Roman law. It is based on litigation in its development, or as the English customary law that has evolved from judicial decisions. It has helped the fundamentalist quadruple view that is completed in the tenth century AD. It has excluded the authority of the courts' work completely which are resulted in a curriculum isolated from reality. Thus, this approach has become a purely speculative science once jurisprudence is separated from realistic legal work" (Coulson, 1992 AD).

Moreover, it contains the consensus and its role in closing the discretion domain. Coulson (1992 AD) believes that the consensus theory is one of the stalemate factors in jurisprudential discretion. It is said with the infallibility of consensus when he says that "Consensus in opinion is considered infallible." It is considered that the results of deduction from the Qur'an and the Sunnah have become expressions of God's judgment. These are the subject of agreement in the general public among jurists and these are infallible and unacceptable to debate (Coulson, 1992 AD). Schacht has preceded Coulson to this view by

saying that “The principle of the infallibility of consensus of the discretion has played its role in narrowing and hardening the doctrine of jurisprudence. Finally, once the proposal has come to close the discretion domain, it officially reflects the lived reality in all its dimensions” (Al-Hajj, 2000 AD).

#### **4. Criticism on Orientalist’s Vision for Reasons for Closing the Discretion Domain**

After presenting orientalism’s vision regarding closing the discretion domain, the research presents criticism of those reasons in this section. The scholars have called the discretion rhetorical, once they have found that Coulson's words are collapsing before the investigation of the sources of Islamic legislation. The legislation is based in some parts on stipulated sources i.e. Qur’an and the Sunnah (Al-Hefnawi, 1995 AD). This rhetorical discretion varies according to people's conditions and ages. There are many examples of this including the permissibility of pricing. The Prophet, Peace Be Upon Him (PBUH), has not quoted and prevented Omar from the recording of the writings and the inclusion of the manufacturer. Besides, he (PBUH) has not forbidden Othman to increase in Ethan with the calling for pray (Shalabi, 1981 AD).

The issue of those who have behaved according to their hearts includes a text. But the deduction differs according to the different interests of the people. The differences of scholars in the method of deduction have made the Qur’an and the Sunnah two sources of legislation that should not be discussed. Islamic legislation has not come in the Noble Qur’an and the Sunnah of the Prophet (PBUH) in the form of a legal structure for every incident. Rather, it has come in the form of general principles and absolute foundations. These principles are comprehensive for all aspects of life. These do not contain detail of all the calamities and incidents occurring. It is the role of scholars in devising rulings. The scholars in the past have differed in deriving rulings and legislations based on their different understanding of the general principles of legislation. This difference is subjected to many factors, including the time factor, customs, and the difference of place. Ibn Abdin has said about the Hanafi School that many of the rulings stipulated by the owner of the doctrine are based on what is in his custom and time. These have changed with the change of times, due to the corruption of the people of time, or the general necessity. It includes the insertion of care for people with his violation of the doctrine rule. It is the guarantee of the one who is directly responsible, and not the one who commits the offense. However, advisory opinions of his guarantee have rebuked the people's corruption in this time (Ibn Abdin, 1971 AD).

This is in addition to other sources of legislation that are not stipulated in it. These are closely related to reality. These are renewed in the regeneration of events, once the evidence of legislation is used in a situation that is not stipulated. These include measurement, desirability, reclamation, custom, and others (Al-Asnawi, 2008 AD; Omar, 1993 AD). The renaissance in activating these principles has raised the Islamic jurisprudence by abandoning imitation and fanaticism. In these principles, it is allowed for moving jurisprudential and

knowledge production, if these are activated, operated, and invested. The knowledge of the legislation's purposes is considered as one of the discretion foundations. The legislator does not fall into an advisory opinion which does not satisfy the Islamic legislation purposes. These are based on considering people's interests. The purpose of some matters does not necessitate its permissibility. Besides, if the purpose is permissible, then that act may have corruption that prefers its interest. Legislation law came to collect interests and complements. It suspends and reduces evil. Otherwise, all forbidden things are prohibited. Polytheism, alcohol, gambling, immorality, and injustice may have benefits. But once its evils outweigh their interests, God and His Messenger (PBUH) have forbidden these (Ibn Taymiyyah, 2001 AD). The interpretation would not be corrected except by looking at the intent and consideration of the text. So that the purpose is to look at the ruler of the discretion and its controls and the interpretation does not destroy the street intentions that it observes in its legislation. It comes on top of the renewable reclamation sources and is considered one of the most fertile legislative methods with no text in it. A matter that has an interest and you do not find any evidence of caring for it or its cancellation. So, you weigh that interest with your mind firmly which is established in understanding the meaning of the legislation and details which are ruling for the content which is matched with it (Hussein, 2010 AD).

Thus, it becomes clear that there is no chance of the depletion of the Islamic legislation sources or their limitations on one era without the other. Concerning the Islamic legislation idealism, Coulson (1992 AD) has said that it is not developed due to its unreality. Because it does not depend on the lawsuits and issues, and the way we accept it. It has ruled for centuries that are considered golden ages for the Islamic nations. It was not connected with reality throughout those centuries. Therefore, there were no basis and legislation which were serving in those times. This contradicts the logic of reason and reality. The witness also contradicts Coulson's sayings. If the matter is as Coulson has claimed, then he must explain the change of an advisory opinion and judgments. Islamic legislation is full of issues in which the advisory opinion has changed based on changing interests, times, or norms. These include many examples like Al-Sarkhasi has mentioned that Imam Abu Hanifa was in the early era of the Persians in Islam. His difficulty in pronouncing Arabic has allowed non-heretics to read the prayer in a way that is not an accepted interpretation from the Qur'an in the Persian language. Once their tongues have grown soft on the one hand, and the aberration and innovation spread on the other hand (Al-Sarkhasi, 1989 AD). It includes that Othman bin Affan has found people to owe to the devastation of sins as divorcing women in case of death to deprive them of inheritance. Like, Abdul-Rahman divorced his wife in his death and his wealth was inherited by Tamadur al-Assad (Malik, 1991 AD). The Muslims do not freeze the texts once they devote themselves to their expressions. Rather, they measure things similar to their near and far, which are controlled by the origins of the law and its purposes (Al-Khademi, 2001 AD).

After presenting these models, some of which are date back to the time of the companions, the research has found itself in front of an inevitable conclusion. If Coulson's claim is true allegedly then the advisory opinion has not changed in consideration of the people's interests. It has remained rigid and fossilized. Concerning the consensus, the research would not go into the arguments. But it can be said that it was never a hindrance to discretion. It is also evidenced by the fact that the leading schools of jurisprudence have approved it. It has not prevented them from absolute discretion, and the different advisory opinions among them. Al-Shafei (1939 AD) said at the end of the consensus chapter that "Rather negligence is in the group while for the congregation. There cannot be all negligence about the meaning of a book, a Sunnah, or a measurement." Here, he acknowledged unanimously. Despite that unanimity, it has not prevented him from absolute diligence and establishing a jurisprudence school.

The research proceeds to mention the actual reasons for closing the discretion domain and to work by imitation. According to Muhammad Abu Zahra's opinion, it is comprised of four reasons. The first reason consists of the followers of each scholar's generation who have come before them. It is the sequence and strength of this followership as time progresses. The second reason is the imitation of the judgment that has followed a specific doctrine. It has spread among the people. It has taken care of its transmission and publication. Hanafi School was the most fortunate person in this domain. The third reason is the immense wealth of jurisprudence produced by scholars of the first three centuries. Until solutions were found for most of the issues, these jurists have left from their sayings. The fourth reason is sectarian fanaticism. It has arisen as a result of the emergence of the disagreement and controversy science (Abu Zahra, 2018 AD). It can be said that the imitation in the Islamic nation has not arisen out of a void. Rather, it is paved for reasons and motives. Some of these are happened due to fatigue in the minds and lukewarm resolve. In addition to the denial of those who have claimed diligence, and it is accused of innovation.

##### **5. Presenting the Orientalist's View for Closing the Discretion Domain Effects**

As for Jurisprudential rigidity, Coulson (1992 AD) believed that the jurisprudential development was initiated by Al-Shafei. It has determined the future general path of Islamic legislation. It is achieved with the spread of the legislative field governed by divine revelation. It is an arising type of increasing jurisprudential rigidity. The field for discretion has been steadily reduced. It happened because of attempts to attach various partial rulings to revelation. It is dependent on the sayings that the source of jurisprudential consideration has always provided Islamic legislation in its early stages. It has depleted the elements of initiation and scrutiny gradually. Until the current situation has reached a point of stagnation, and Schacht believes that Islamic jurisprudence has been characterized by stability and rigidity after the Abbasid era. It is the stagnation characteristic of Islamic jurisprudence that has enabled

it to be stable through the ages. It has witnessed the decline of Islamic political systems (Al-Hajj, 2000 AD).

While considering the deficiency of the jurists and scholars' role in the imitation era, orientalism has dealt with an issue that has happened to Muslim scholars because of closing the discretion domain and following imitation. Coulson (1992 AD) believed that the jurisprudential activities bound by the imitation principle have been confined to scrutinizing, analyzing, and explaining the previous rulings. It is believed to be an impressive level in the advisory opinion field. He has specified the appearance of the advisory opinion effect in jurisprudential writings since the tenth century AD. He has said that "This effect is represented in the explanations contained in the works of the early jurists and compilers of Malik, Al-Shaibani, and Al-Shafi'i schools. Then, the comments are added to these annotations" (Coulson, 1992 AD). At the end of his Schacht research that is related to Islamic jurisprudence development, he has described his efforts as a lack of creation and creativity. After closing the role of the advisory people in the development of the discretion domain, he has not added new to the Islamic jurisprudence, if their tasks are defined in explaining some rulings to ordinary people who are asked about them. However, he has noticed the importance of this work. So, the advisory opinions have been collected in books so that these have provided undeniable historical benefits. Also, these advisory opinions have shown us the practical applications of jurisprudence in a specific period and the extent of their suitability and legislation rulings. So, the scholars have accepted its correctness. They believe that it should be considered and should be recorded in the same doctrine books. Moreover, Schacht believed that the judgments and decisions of the judges have not received the attention and have not contributed to the development of Islamic jurisprudence since its formation at the beginning of the Abbasid era (Al-Hajj, 2000 AD). They do not deny that the jurisprudential writings have been fallen into a kind of rigidity, and sectarianism. The fanaticism has appeared, and the role of discretion has gradually disappeared. It has become limited to discretion within the doctrine. It is a fact that orientalism is not limited to mention the facts only. Rather, it has claimed that discretion should be limited to the early jurists, so the encyclopedia has mentioned it (Schacht, 1998 AD).

The closing of the discretion domain is necessary for the Islamic world, and orientalism has played a dangerous role. Here, the reasons mentioned for closing the discretion domain are real and cannot be questioned. Hence, claims are being made to close the discretion domain in religion. It is suggested to block the nation's knowledge and civilization horizon. They have admitted that "The imitation rule is not accepted without any opposition." However, it is believed that the later jurists have rejected closing the discretion domain. It is also believed that there are discretion people of every age, and they have seen in themselves the ability to practice discretion according to the conditions required therein. However, if these claims have affected positive law, it remains a theoretical statement. Everyone, who has called for this opinion, has

not proposed an independent interpretation of legislation. Other jurists have rejected the imitation principle. These include Dawoud bin Khalaf the leader of the Zahiriyah School, Ibn Tumart the founder of the Almohad state, Ibn Taymiyyah, and his student Ibn al-Qayyim al-Jawziya. It is dangerous and it is forbidden in legislations to follow the ideas of any person blindly, regardless of his position in religious matters, and Islamic jurisprudence except for the Prophet (PBUH). Thus, the rejection of imitation has become the most important principles of Zahiriyah School. Although, it does not allow its freedom to be followed by individual consideration realistically more than it has allowed other schools (Al-Hajj, 2000 AD). Orientalism continues to show those who say that imitations are not needed. Once it is not needed and that evidence is required in the appearance of the contravention outside the nation's habits, so the Encyclopedia Department says that "They were Sunni militants" (Schacht, 1998 AD). The Encyclopedia has also mentioned that "However, from time to time, the individuals who were motivated by ambition and the denial of stagnation to return to discretion in the first sense. They have justified themselves to strive hard according to their opinion. These rely on the first texts these include Ibn Taymiyyah and Al-Suyuti" (MacDonald, 1998 AD).

## **6. Criticism of Orientalist's Vision for Closing Discretion Domain Effects**

In response to the implications of closing the door of the discretion domain from the orientalist perspective, the research has addressed some issues. Regarding the first concern, the research does not deny the stagnation of Islamic jurisprudence. It is due to many reasons, some of which may have become the cause for closing the discretion domain. As previously explained, others are due to the general state of stagnation that has afflicted the Islamic state for many centuries. This stagnation is not due to the nature of Islam in any way. The second concern is regarding the prevalence of the method of texts and abbreviations. The research acknowledges the negative effects of imitation in more than one field. It mainly depends on classification and composition. It also relies on the devotion of latecomers to work which is motivated by fanaticism and advocacy of the doctrine. But it does not exist in any case. The nature of Islam is ordered people to think and insult the imitation and intolerance. Almighty Allah says in a disparaging imitation that "And if they were told to follow what Allah hath revealed, they said, but we follow what coming under our fathers even if their parents do not understand anything, not guided" (Qur'an 2:170). The Qur'an has called people to think and forethought. Almighty Allah says that "If they don't think what God created the heavens and the earth, and their only true and for the name, though many people meet their Lord for disbelievers" (Qur'an 30:8). Also, the Qur'an has urged the man to abandon rigidity and imitation. It has explained that those who miss the mind grace would come down to the animal rank as the Almighty Allah says that "I have urged unto much hell of jinn and their hearts do not understand them and their eyes do not see them and their ears do not hear by those like cattle, but they misled those are heedless" (Qur'an 7:179). Almighty Allah



emphasizes that disrupting the mind leads its owner to the hill. As the Almighty Allah say that “And they said: If we were to hear or understand what we were among the companions of the fire” (Qur’an 67:10). The Prophet (PBUH) has warned the people’s difference in the deduction. He (PBUH) has said that “God vectored a man who heard saying from the prophet and saved it till he informs others, maybe the jurisprudence holder to one who’s less knowledgeable, and perhaps the holder is not a deep understanding of Islam” (Al-Tirmidhi: 2656). The Prophet (PBUH) has granted the Companions with the discretion chance in his presence. It was later known as the Determination Sunnah as he has urged on discretion and the use of the mind. The Prophet (PBUH) said that “If the ruler decides, and he works hard, then he was wrong, he has the payment” (Al-Bukhari: 7352).

Concerning the third issue, it is supposed that those who have believed throughout Islamic history have advocated the old schools of jurisprudence. It is reported from Imam Ahmad bin Hanbal that he used to say that “Do not imitate me, nor imitate Malik, or Al-Awza’i, Al-Nakha’i or others, and make judgments from where they took, from the Qur’an and Sunnah. No one should issue an advisory opinion except he knows the scientist’s sayings in a legal advisory opinion, and to know their schools of thought” (Ibn Al-Qayyim, 1973 AD). About later generations, scientists have believed that there was no time without discretion person. Like Ibn Hazm, many of his books were burnt. He used to say: “It is not permissible for anyone to imitate someone alive or dead, and every one of discretion is according to his potentials” (Ibn Hazm, 1979 AD). Some other scientists like Ibn Daqiq Al-Eid who was died in 207 AH, Al-Suyuti who was died in 119 AH, and many others have had similar beliefs. Besides, concerning the fourth issue, it is believed that one must rely on previous experiences and the experiences of the first man in any domain of science. Because the scientific task in any domain is complementary, whether these are humanistic or experimental sciences. Therefore, it is not possible to simply wipe out the jurisprudence discretion and their efforts and strike them aside to get rid of these because of the rigidity and recession that occurred in the Islamic world. Rather, we can benefit from the sayings of the predecessors who have presented in rulings and advisory opinions in which the purposes of the legislation are not affected by changes in times, places, and the interests of the people. The research can also derive judgments of the new or changed incidents from the main sources of Islamic legislation as the previous ones have done. It is said by Imam Abu Hanifa that “They are men, and we are men” (Al-Sarkhasi, 1989 AD).

The most prominent and important issue emphasizes that discretion is a necessity of the times. Unlike, orientalism says that the Islamic nation was not lacked behind except by closing the discretion domain, and discretion is the need of time. There is a need to reconsider many issues in addition to the new issues. It is well known that no text is included in every incident, and that is not imagined either (Al-Shahristani, 1968 AD). In this regard, Al-Shatibi (1997 AD) has said that “Because the facts in existence are not confined, it is not

correct to enter these under the limited evidence. Therefore, there is a need to open the door to discretion in terms of analogy and other things. There is no discretion for the first people in it.” Here, it is not purposed to make the discretion domain a cause for controversy and confusion on the part of those who are not qualified for discretion. The appropriate conditions must be met to exclude such people from the leaders of politics and identity. Therefore, the early adopters have endeavored to lay down the rules of jurisprudence theology. It is the main engine of the discretion process. It has developed over the ages and in turn, led to the development of Islamic jurisprudence and the methods of research in it. Al-Haramain Al-Juwayni has said in *Kitab al-Ijtihad* that “They are unanimously agreed that it is not permissible for the one who has hardened something of knowledge to issue the advisory opinion, but it is permissible for him to issue an advisory opinion, and it is permissible for others to accept his statement in the advisory opinion if he has gathered descriptions” (Al-Juaini, 1408 AH). The knowledge of the jurisprudence fundamentals and the rules governing the discretion process should never be a hindrance to discretion. These have not caused to leave the discretion domain without restrictions or controls. It has opened the field for the pursuit of desires in rulings, and the enactment of laws contrary to legislations.

## 7. Conclusions and Recommendations

After analyzing the orientalist’s claims regarding the discretion and imitation of Islamic legislation, this research has found the reasons for closing the discretion and imitation domain. These are not affected by the nature of Islamic religion and orientalism attributes to the Islamic jurisprudence sources and principles. It has become clear through the study that both the Qur’an and the Sunnah are referred to the status and position of discretion by urging consideration, thinking, understanding, and denouncing imitation. The study has clarified the importance of the need to open the discretion domain to keep pace with changes and new realities in the world. It is determined that there has been opposition to close the discretion domain throughout the ages. It has been recognized that the Islamic legislation sources are renewable and can accommodate all temporal and spatial changes. Because the legislation texts are contained in the Qur’an and Sunnah to clarify the rulings in them, these are rhetorical miracles, comprehensive objectives, and holistic of the provisions of religion in general. It is revealed through this research that an independent and absolute jurisprudence maybe existed in the first three centuries despite the existence of consensus. It proves that consensus has not impeded discretion.

There is a dire need to urge scholars to work on discretion. For this, it is necessary to provide them with means of aid and adopting their opinions in the courts and the role of an advisory opinion. It is essential to keep the scholars away from fanaticism and to denounce the discretion without justifications based on a scientific basis. It is suggested to spread the culture of difference, to accept the other opinion, and to provide an opportunity for constructive criticism which may help in progress and advancement. It is strongly

recommended to get benefits from our jurisprudential heritage which is the result of the effort and work of scholars in the early Islamic eras in calamities and facts which are not subject to factors of change. It is also suggested to get the advantage of their methods of deduction and inference. The time requires establishing the research centers for oriental studies. It would provide an opportunity for researchers in this field and would encourage further researches in this domain.

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