

THE CONCEPT OF LAW IN ISLAM

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There is a popular misconception of Islam as a religious tradition that is overly legalistic, and of Muslims as a people who are blind to the spirit of the law in their attempt to follow it to the letter. As early as 1910, the Hungarian orientalist, Ignaz Goldziher, felt it necessary to try and correct this misconception:

Fairness demands the admission that in the teachings of Islam, as of other religions, there is "a force working for the good": that a life lived in the spirit of Islam can be an ethically impeccable life, demanding compassion for all God's creatures, honesty in one's dealings, love, loyalty, the suppression of selfish impulses, and all the other virtues that Islam derived from the religions whose prophets it acknowledges as its teachers. A true Muslim will lead a life that satisfies stringent ethical requirements¹.

Indeed, there is a parallel that can be drawn with the portrayal of the Pharisees in the Christian gospels, most notably the Gospel according to Matthew. Modern Jews, heirs to the Pharisaic tradition (as well as other traditions in Judaism), have also often been accused (usually by non-Jewish scholars) of a legalism that obscures the true

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1. Ignaz Goldziher, *Introduction to Islamic Theology and Law*, trans. by Andras and Ruth Hamori, (Princeton: Princeton University Press, 1981), p. 18. However, traditional Muslims would object to the notion that Islam was "derived" from other religious traditions.

meaning of the law. However, among the believers, there is no truth to these accusations, and the law is lived, loved, and celebrated.

Such is the case with the Islamic tradition, in which the law occupies an important position. Muslims believe the law, like all things, to be deeply rooted in the Divine. By the nineteenth century, a borrowing from the Christian tradition had introduced the phrase "*al-qanun al-Islami*", or "Islamic (canon) law" into the Arabic-speaking world². Within the Islamic tradition itself, the Arabic word most associated with "law" is *shari'ah*, which is usually translated as "way" or "path". Again, there is a parallel with the Jewish usage of "*halacha*", or "the way one should walk".

Shari'ah derives from the root verb 'Sharā'a', meaning "to lay down law, to ordain, to enact", which occurs three times in the Qur'an (42:13, 42:21, 7:163)³. The word "*shari'ah*" itself occurs once in the Qur'an at 45:18: "*shari'ahin min al-amri*", which Yusuf Ali translates as "the (right) way of religion"⁴. The cognate word "*shir'ah*" also occurs once in the Qur'an at 5:48: "*ja'alna minikum shir'ahan wa minhajan*, to each among you have We prescribed a law and an open way". The word "*shari'ah*" is also found once in the singular in the Hadith literature, and many times in the plural form⁵.

Because of its Qur'anic usage, *shari'ah* is also sometimes referred to as "divine law". For Muslims, the Qur'an is the very word of God. As such, it serves as the guide for all aspects of Muslim life. In the traditional Islamic world, a judge would rule not only on religious

2. Norman Calder, "Law", in John L. Esposito, ed., *The Oxford Encyclopedia of the Modern Islamic World*, (New York: Oxford University Press, 1995), p. 450.

3. The definition of *Shara'a* and the incidences of its occurrences in the Qur'an are found in Hanna Kassis, *A Concordance of the Qur'an*, (Berkeley: University of California Press, 1983), p. 1142.

4. A. Yusuf Ali, *The Holy Qur'an: Text, Translation and Commentary*, (Maryland: Amana Corporation, 1983). Unless otherwise specified, all subsequent references to the Qur'an are to this edition.

5. Norman Calder, "*Shari'a*" in C.E. Bosworth *et al.*, eds., *The Encyclopaedia of Islam*, New Edition, v. 9, fasc. 153-154, (Leiden: E.J. Brill, 1996), p. 321.

matters, but also on "...many aspects of family law (marriage, divorce, inheritance, testamentary bequest), ...charitable endowments,...the significance and validity of contracts, and civil disputes"⁶. With this in mind, it is easy to understand why there 'is no distinction between "religious" and "civil" law in Islam. For Muslims, all acts are rooted in the Divine Reality, and are therefore "religious"⁷.

The Qur'an is not a book of law, or a code of conduct, but it does contain laws and rules of conduct. It is these laws, which Muslims hold to be of divine origin, that form the basis of the various legal schools of thought in the Islamic tradition. For this reason, Muslims distinguish between "*shari'ah*" and "*fiqh*", or jurisprudence. This distinction is best described by Norman Calder:

The *Shari'a*[h], contained in God's revelation ([Q]ur'an and *hadith*), is explained and elaborated by the interpretive activity of scholars, masters of *fi*[q]*h*, the *fu*[q]*aha*'. Since this is in practice the only access to the law, the two words are sometimes used synonymously, though *shari'a*[h] retains the connotation of divine, and *fi*[q]*h* that of human⁸.

Another distinction between *shari'ah* and *fiqh* as described by Calder is that: "For Muslims, the *shari'ah* evokes loyalty and is a focus of faith; *fiqh* evokes at best respect for juristic scholarship and for a literary tradition..."⁹.

6. Calder, "Law", p. 454.

7. In this respect, traditional Islam is no different from other monotheistic traditions such as Judaism and Christianity, which in their traditional forms also have a holistic understanding of the law. Indeed, it can be argued that the distinction between "religious" and "civil" law in these traditions occurs when the religious tradition is not the dominant tradition. For example, in the first century, the Christian tradition was subordinate to the much larger Roman Empire, resulting in conflict. This has some interesting repercussions for modern Islam when dealing with countries (such as Canada) where the Islamic tradition is not the dominant tradition, and this will be discussed later in this article.

8. Norman Calder, "*Shari'a*", pp. 322-323.

9. Norman Calder, "Law", p. 450.

The *fiqh* literature is usually described as belonging to one of two categories, *usul al-fiqh* (the roots of jurisprudence), or *furu' al-fiqh* (the branches of jurisprudence). In the Sunni tradition (the Shi'i tradition will be described later¹⁰), there are four roots of jurisprudence: the Qur'an, the Sunnah (traditions of Muhammad, which are made up of the Hadith literature), *ijma'* (consensus), and *qiyas* (analogy)¹¹. Each of these four roots will be discussed in turn.

As mentioned previously, the Qur'an is the supreme source of guidance for Muslims. While not a book of law as such, it does contain a great many statements about what is lawful and unlawful, and what type of conduct is to be expected from those who call themselves Muslims. For this reason, the Qur'an is the first source of law in Islam. However, the Qur'an often does not go into detailed explanations of why certain things are lawful, or give great amounts of detail on how the law (or what is lawful) is to be carried out. As an example, prayer is one of the activities that the Qur'an requires all Muslims to perform. The Qur'an does give some guidelines about prayer, but it does not contain a comprehensive list of the exact times of prayers, the exact number of steps within each prayer, specific guidelines for ritual preparation before prayer, etc. It is to the Sunnah that Muslims turn for these sorts of details.

For Muslims, there is great importance given to the nature of the Qur'anic revelation. Believed to come from a heavenly archetype, the Qur'an was revealed in a particular language (Arabic), to a particular person (the Prophet Muhammad), during a particular time period (610-632 A.D.) in Muhammad's life. As such, there is a special relationship between Muhammad and the Qur'an. Muslims believe that Muhammad was the perfect embodiment of the life that the Qur'an requires for believers. It was to him and through him that God "spoke"

10. There is no implied superiority of the Sunni tradition over the Shi'i tradition. Since the Sunni tradition is representative of some 75% to 80% of the Muslim world, it will be discussed in greater detail, and the Shi'i tradition will be contrasted with it.

11. For a more detailed discussion of these four roots, see Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*. (Malaysia: Pelanduk Publications, 1989).

to humanity, and so Muhammad's life is seen as exemplary. The things that Muhammad said and did are recorded in a body of literature known as the Hadith. It is the Hadith that make up the Sunnah (tradition). In the words of Mohammad Kamali, "Hadith differs from Sunnah in the sense that Hadith is a narration of the conduct of the Prophet whereas Sunnah is the example or the law that is deduced from it"¹².

In the Sunnah, one finds the sort of detail that is sometimes absent in the Qur'an. However, it is also in the Sunnah that differences in detail also occur¹³. For Sunni Muslims, there are six different accepted collections of the Hadith¹⁴, and these do contain minor differences and variant sayings. These differences were picked up on by Orientalist scholars, who claimed that many of the Hadith were not contemporary with Muhammad and his companions, and were instead forged by later generations for the sake of justifying their own practices as legitimate. The Muslim tradition, while accepting that some Hadith were later forgeries, has for the most part rejected these arguments. Within the tradition, there is a science of Hadith criticism that has developed over the centuries.

For Muslims, the Sunnah forms the second source of the law. The term "*ijtihad*" (opinion) is often used in this context, and one who performs *ijtihad* is referred to as a *mujtahid*. Kamali defined *ijtihad* as: "lit. exertion and usually the effort a jurist [*mujtahid*] makes in order to deduce the law, which is not self-evident, from its sources"¹⁵.

12. Kamali, p. 59.

13. Of course, there are differences of opinion when it comes to the interpretation of the Qur'an, but there is virtually no disagreement among Muslims about the content of the Qur'an (some minority Muslim groups have slightly variant readings of the Qur'an). With the Sunnah, one has both different contents, and different opinions about those contents.

14. The two most authoritative collections are those of Muhammad ibn Isma'il al-Bukhari and Muslim ibn al-Hajjaj. The other four collections are those of Abu Dawud Sulayman ibn Ash'ath, Ahmad ibn Shu'ayb al-Nasa'i, Muhammad ibn 'Isa al-Tirmidhi, and Abu 'Abdallah ibn Maja. Other collections are those of Malik ibn Anas and Ahmad ibn Hanbal.

15. Kamali, p. 511.

If one cannot find something in the Qur'an, one then turns to the Sunnah to see if it was mentioned by Muhammad or one of his companions. However, with the tremendous growth and spread of Islam after the death of Muhammad, there arose many situations which were not discussed explicitly in the Sunnah. It is here that the third source of the law, *ijma'* (consensus), becomes relevant.

Kamali defined *ijma'* as: "the unanimous agreement of the *mujtahidun* [plural of *mujtahid*] of the Muslim community of any period following the demise of the Prophet Muhammad on any matter"¹⁶. The principle of *ijma'* is supported by the well known Hadith ascribed to Muhammad, "My community will never agree on error"¹⁷. This is an important principle, as it allows the community, using the Qur'an and Sunnah, to determine what is normative or "orthodox". Goldziher described the principle of *ijma'* as follows: "Whatever is accepted by the entire Islamic community as true and correct must be regarded as true and correct. To turn one's back on the *ijma'* is to leave the orthodox community"¹⁸.

The fourth source of law is *qiyas*, or analogy. According to Kamali: "A recourse to analogy is only warranted if the solution of a new case cannot be found in the Qur'an, the Sunnah or a definite *ijma'*"¹⁹. It is this use of analogical reasoning that really allows for creativity among legal scholars. Not surprisingly, the use of *qiyas* can also be controversial, and the schools of Sunni law differ as to when and how it is allowed to be used. Before describing these various schools of law, it is necessary to discuss law in the Shi'i tradition²⁰.

16. Kamali, p. 213.

17. Cited, for example, in Goldziher, p. 50.

18. Goldziher, p. 50.

19. Kamali, p. 248.

20. The discussion of Shi'i law is brief, and those interested in it are referred to two excellent collections, both edited by Seyyed Hossein Nasr, Hamid Dabashi, and Seyyed Vali Reza Nasr: *Shi'ism: Doctrines, Thought, and Spirituality*, (Albany: State University of New York Press, 1988), and *Expectation of the Millennium: Shi'ism in History*, (Albany: State University of New York Press, 1989).

Within the Shi'i tradition, the Qur'an is also used as the primary source of law. As in the Sunni tradition, Muhammad is seen as the primary interpreter of the Qur'an. However, as distinct from the Sunni tradition, there is an emphasis on the Imams, beginning with 'Ali, as the authoritative interpreters of the Qur'an after Muhammad. Consequently, the interpretation of the Qur'an and the legal points that are subsequently derived from these interpretations differ among Sunni and Shi'i scholars.

As with the Sunni tradition, the Shi'i tradition also recognizes the Sunnah as the second source of law. However, the Sunnah used in the Shi'i tradition is quite different from that used in the Sunni tradition. In the Shi'i tradition, the Hadith literature consists of not only the sayings of Muhammad and his companions, but also the sayings of the Imams. As such, the Shi'i tradition has its own collection of Hadith literature, which is distinct from the six collections of Hadith in the Sunni tradition. In the Shi'i tradition, there are four main collections²¹.

Ijma' is used in a very limited way as a source of law in the Shi'i tradition. According to Hossein Tabataba'i: "*Ijma'*, i.e., the unanimity of the views of all Shi'i jurists on a certain legal question, is not a source on its own, but it can become a means through which the opinions of the Imams may be discovered"²². Shi'i scholars limit the use of *ijma'* to the opinions of very early jurists, and use these early opinions to arrive at the views of the Imams.

In the Shi'i tradition, *qiyas* is not used as a source of law. In its place, Shi'i jurists use the concept of '*aql*, or reason. As described by Tabataba'i: "By 'reason' as a source for Shi'i law is meant categorical judgements drawn from both pure and practical reason. A clear

21. These four collections are: "Muhammad ibn Ya'qub al-Kulayni's *Kitab al-kafi*; Muhammad ibn 'Ali ibn Babawayh's *Man la yahduruhu al-faqih*; and Muhammad ibn al-Hasan al-Tusi's *Tahdhib al-ahkam and Al-istibsar*". Quoted by Abdulaziz Sachedina, "Shi'i Schools of Law", in Esposito, p. 463.

22. Hossein Modarressi Tabataba'i, "The Shi'i Principles of Jurisprudence", in *Expectation of the Millennium*, pp. 67-68.

instance is the judgement of practical reason that justice is good and injustice is evil"²³. Of course, reason never supersedes revelation, but is instead used "as a valid source for the judicial decision that was essentially deduced from revelation"²⁴. Before discussing the various schools of law in Sunni and Shi'i Islam, a brief mention will be made of the other category of jurisprudence, *furu' al-fiqh*, the branches of jurisprudence.

In the Islamic legal tradition, works of *furu'* assign all acts to one of five categories: that which is obligatory; that which is not obligatory but is recommended; that which is not recommended but is permissible; that which is deplored but is not prohibited; and that which is prohibited. The literature of *furu'* is itself divided into two different types. The first of these types is referred to as *mukhtasars*, and consists of summaries of judicial works, which are sometimes used for teaching purposes²⁵. The second type is referred to as *mabsuts*, which consist of voluminous commentaries on legal decisions, replete with exhaustive proofs²⁶.

In the Sunni tradition, there are four recognized schools (*madhhab*, plural *madhahib*) of law. These four legal schools operate simultaneously, alongside the one recognized Shi'i legal school. Together, these five legal schools provide an extraordinary example of multiplicity, or multivocality: five distinct schools, operating simultaneously, all of which are "Islamic", and all of which give voice to different expressions of Islam.²⁷ The schools differ in their use of the different sources of law.

23. Tabataba'i, p. 68.

24. Sachedina, p. 463.

25. Kamali, p. 512.

26. Calder, "Law", p. 453.

27. This notion of multiplicity has recently been explored by Salman Rushdie in the context of trying to define India and what it means to be "Indian". For example, see his recent articles: "India at Five-O", *Time*, vol. 150, no.6, August 11, 1997, pp. 22-24., or "Damme, This is the Oriental Scene for you!", *The New Yorker*, June 23 & 30, 1997, pp. 50-61.

The first of the four Sunni schools of law is the Hanafi school, named after its "founder"²⁸, Nu'man ibn Thabit, who was known by the epithet Abu Hanifah. Abu Hanifah lived in the area of Kufa in Iraq from 699 to 767. His school incorporated the traditions in Iraq, and was quite liberal in its use of *qiyas* (analogy). In fact, "His liberal use of opinion in the formulation of analogy and preference caused his school to be dubbed the People of Opinion..."²⁹. Historically, it was the dominant school of the 'Abbasid Empire, and the official school of the Ottoman Empire.

The Hanafi school is the most widely distributed school in the Islamic world, with one estimate having it representative of over one-third of the Muslim population³⁰. Currently, it is prevalent in Egypt, Syria, Lebanon, Iraq, Jordan, Palestine, and the Indian sub-continent.

The second Sunni school is named the Maliki school, after its "founder", Malik ibn Anas al-Asbahi. Malik lived in Medina, the city of the Prophet, from 713 to 795. This school incorporates the traditions of Medina, and so was originally known as the School of Medina. Malik is most famous for his collection of traditions on jurisprudence, *al-Muwatta'*. The Maliki school does use consensus, but uses analogy in a more limited way than is used in the Hanafi school. The Maliki school also "...evidences some conservative attitudes, particularly with regard to women"³¹. From its origins in Medina, the Maliki school has spread to Morocco, Algeria, Tunisia, Libya, Sudan, and the Gulf countries.

The third school is named the Shafi'i school, after its founder, Muhammad ibn Idris ibn al-'Abbas ibn 'Uthman ibn Shafi', who lived

28. In the technical sense, none of the schools had a single founder, but developed over time. They are named or attributed after the person most associated with them. This is certainly true of the Hanafi and Maliki schools, although the case can be made that the Shafi'i and Hanbali schools do represent in the majority, the views of a single person.

29. Farhat J. Ziadeh, "Sunni Schools of Law", in Esposito, p. 457.

30. Ziadeh, p. 459.

31. Ziadeh, p. 459.

from 767 to 820. Shafi'i was born in Palestine, and travelled to Medina to study with Malik. After Malik's death, Shafi'i moved to Baghdad, and then to Egypt, where he wrote his major work, *al-Risalah*. Shafi'i regarded himself as a traditionist, and held that "...the traditions were superior in the formulation of laws to the customary doctrines of the earlier schools"³². The Shafi'i school spread from Egypt to trans-Jordan, Iran, Yemen, India, Pakistan, and Indonesia.

The fourth of the Sunni legal schools is named the Hanbali school, after Ahmad ibn Hanbal, who lived from 780 to 855 in Baghdad. Ibn Hanbal travelled widely and collected a great many traditions. Indeed, while his collection of Hadith is not considered one of the six authoritative Sunni collections, it is still greatly respected. With his high regard for traditions, it is not surprising that Ibn Hanbal emphasised them in his legal school. His school used the Qur'an and Sunnah almost exclusively as sources of law, and only used "...reasoning by analogy when absolutely necessary."³³ Ibn Hanbal did not use *ijma'* (consensus), and the reason for this is understandable when one considers his life experiences.

The Hanbali school is often seen as quite rigid and conservative, inflexible in its refusal to use community consensus. However, those that hold the above view often fail to mention that Ibn Hanbal was imprisoned and tortured for his beliefs, in defiance of the prevailing temper of the times. For the reign of three Caliphs, the Mu'tazilite theological school³⁴ enjoyed an official, favoured position. All judges, of which Ibn Hanbal was one, had to publicly profess the Mu'tazilite view. Ibn Hanbal defiantly refused to do this, and in the Inquisition that followed, he was jailed. However, the Mu'tazilite view was later rejected in favour of the Ash'arite view (which remains to this day as the orthodox theological school in Sunni Islam), and Ibn Hanbal was released from prison. Having undergone this experience, it is not

32. Ziadeh, p. 460.

33. Ziadeh, p. 461.

34. For a more detailed description of the Mu'tazila, see Goldziher, pp. 86-115.

surprising that Ibn Hanbal had no use for theological trends, and instead stuck to the traditions.

In later times, the Hanbali school was championed by Ibn Taymiyah, and adopted in the eighteenth century by Muhammad Ibn 'Abd al-Wahhab. The Hanbali school became the official school of Saudi Arabia and Qatar, and is also important in Palestine, Syria, and Iraq³⁵.

The major Shi'i school of law is the Ja'fari school, which is named after both Abu Ja'far Muhammad al-Baqir, and Ja'far al-Sadiq, respectively the fifth and sixth Imams of the Shi'i tradition. This school is also sometimes referred to as the Fifth school, as it was accredited along with the four Sunni schools by the rector of al-Azhar (the oldest and perhaps most prestigious university in the Sunni world, located in Cairo) in 1959³⁶. As stated above, this school uses the Qur'an, Sunnah, reason, and consensus as the sources of law.

In the modern period, there has been much legal reform in both the Sunni and Shi'i traditions. Both traditions have had to contend with modernization and westernization, and the imposition of foreign occupation and colonization. In the Sunni tradition, there were reforms undertaken in much of the Muslim world, most notably in Egypt (under Muhammad 'Abduh, 1849-1905), India (under Sayyid Ahmad Khan, 1817-1898; and Muhammad Iqbal, 1875-1938), and in South-East Asia.

In the Shi'i tradition, modern reforms have taken place in Iraq and Iran. One of the main controversies centred around the role of *ijtihad*, or opinion. Opponents of the use of *ijtihad* were known as the Akhbaris, and held to the use of tradition. The Akhbari position, although initially dominant, was defeated by the Usuli position, which

35. Ziadeh, p. 461.

36. Sachedina, p. 463.

allowed for the use of *ijtihad* and a much broader application of Shi'i jurisprudence³⁷.

For both the Shi'i and the Sunni alike, the modern world has brought some interesting changes and problems to the idea of law. With the rise of modern nation-states and the break-up of the Islamic empire into more and more of these states, questions arise about the nature of the law. Increasingly, states have to define themselves, create their own legal codes, and decide how they will relate with one another.

The problems become even more important in countries where Islam is not the dominant tradition. In these countries, such as Canada and the United States, Muslims struggle with how to apply their law in a setting in which Islamic law is not the law of the land. This situation leads to a great many difficulties. For example, how is the prohibition of alcohol to be enforced in countries where it is actively sold and marketed? Or, how does one celebrate religious holidays when those holidays are not officially recognized, and one cannot get "time-off" from work? Or, how is the traditional prohibition on interest to be followed in a society in which the payment of one sort or another of interest is almost unavoidable? In having to argue from these positions, the Islamic legal system is faced with being in a subordinate position with regard to the dominant (non-Muslim) legal system. As such, the future of law in the Islamic world promises to be a very interesting one.

37. For a detailed discussion of these opposing viewpoints, see "The Usuli-Akhbari Controversy" in *Expectation*, pp. 280-286.