



## Untangling the Complex Web of Islamic Law: Revolutionizing the Sharia

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The Foundation of the sharia is wisdom and the safeguarding of people's interests in this world and the next. In its entirety, it is justice, mercy and wisdom. Every rule which transcends justice to tyranny, mercy to its opposite, the good to the evil and wisdom to triviality does not belong to the sharia although it might have been introduced therein by implication. The sharia is God's justice and mercy among His people.

—Ibn al-Qayyim al-Jawziya, Medieval Muslim Jurist

Seeking knowledge is mandatory for every Muslim.

—Prophet Muhammad (PBUH)

### The Concept of Law in Islam

When scholars, politicians or lay observers speak of "Islamic law," it is presumed that they are referring to "the sharia." However, as demonstrated in this analysis, there is a subtle, but important, distinction between these two terms. The *sharia* is the totality of divine categorizations of human acts as laid out in the Quran and the Hadith, constituting issues of both legality and morality.<sup>1</sup> While there is no dispute regarding its divine origin, *sharia*, in and of itself, does not exist as a ready-made body of law to administer. Or in other words, while *sharia* is God-given, its application and interpretation is man-made and therein appears the principal dilemma taxing Islamic legal history for over fourteen centuries: law is proposed by God, yet disposed by ordinary mortals. Between the original divine proposition and eventual human disposition appears an extensive field of intellectual activity, differences of opinion and

hotly contested decisions. Therefore, the peculiarity inherent in Islamic law is its dual nature as both divine law and jurists' law.

It is important to keep in mind that the sharia *becomes* law through the process of interpretation, codification and legislation.<sup>2</sup> This is the fundamental goal of Muslim jurisprudence: to reach an understanding (*fiqh*) of God's articulations (*sharia*). Consequently, Muslim legal theory is referred to as *usul-al-fiqh* or the sources of understanding.<sup>3</sup> The word *sharia* itself is derived from the Arabic root *shar*, simply meaning straight path.<sup>4</sup> In Islamic tradition, it is under the heading of *fiqh* not *sharia*, where the rules and regulations applied in courts and enforced by the state actually reside. According to British legal scholar Noel Coulson, "Islamic jurisprudence is a speculative essay to comprehend the precise terms of Allah's law."<sup>5</sup> By extension, the *sharia* becomes a sort of Platonic ideal that Muslim jurists endeavor to formulate and codify in the science of *fiqh*, however

imperfectly and infallibly. While there is no contesting the primary sources of fiqh law, the Quran and the *Sunnah* taken together comprise the regulatory framework of a legal system which is *juristically* derived by Muslim scholars (mujtahids) and judges (qazis).<sup>6</sup> Law, in the sense of a body of precisely articulated rules, is thus not readily presented in Islam; it must be unearthed by the jurists who become the necessary mediators of the divine law. This constant tension between God's will and human agency is a natural consequence that emphasizes Islam's premium on human reason and intellect. As Bernard Weiss eloquently stated, in *The Search for God's Law*: "God in his wisdom has chosen to engage human beings—the *mujtahids*—in the toilsome task of ferreting out the law from a plethora of indicators, or articulating what he himself has not precisely articulate."<sup>7</sup>

### The Development of Law in Islam

Islamic law has been evolutionary in its growth phase. The first 150 years of Islam were characterized by an almost untrammelled level of individual freedom in legal reasoning based on divine revelations; when new circumstances posed challenges, the expression of personal opinion, known as *ra'y*, was widely acceptable.<sup>8</sup> Law then occupied two separate spheres of divine ordinance and individual decision which did not combat each other. However this pragmatic attitude soon became victim to the increasing sophistication of theological and philosophical inquiry and the political rifts in Islam.<sup>9</sup>

Among the growing body of scholars rose the conviction that the legal sovereignty of God was all embracing.<sup>10</sup> To allow human reason to formulate a legal rule—whether by continued recognition of a customary law or by juristic speculation on a new issue—was tantamount to heresy.<sup>11</sup> In other words, human interpretation could not "compete with Allah." A compromise solution was to devise a method of reasoning to operate within the parameters of divine will. This appeared in the form of a human legislative authority whose function was harnessed to the implementation and development of the *sharia*

with complete subordination to sacred revelation.<sup>12</sup> However, this process did not occur in a water-tight closet, but rather in an organic cultural, social and political context.

"The person who does not understand the divergence in doctrine has not caught the true scent of jurisprudence"

—*An old Arab proverb*

"Difference of opinion within my community is a sign of the bounty of Allah"

—*Prophet Muhammad (PBUH)*

### Divergence in Jurisprudence

Throughout the development of Islamic legal theory, there has been wide-spread divergence in the interpretations of the Muslim jurists qualified to expound God's *sharia*. This captures the tension between unity and diversity in Islamic legal doctrine which goes to the very core of Muslim jurisprudence. As divine revelation is a fixed and constant element and human reason the variable and fluctuating factor, an inevitable rift occurs between the ideal and the profane state of affairs. This was crystallized in the four different schools or versions of sharia law (Hanafi, Maliki, Shafi and Hanbali).<sup>13</sup> Their stabilizing force was essentially the doctrine of consensus or *ijma*, which addresses the paramount question of legal authority in Islam.<sup>14</sup>

Therefore, the whole process of Muslim jurisprudence, from the definition of the sources of law to the derivation of substantive rules, was an exploratory effort of the human intellect. When an individual jurist reached a judicial conclusion, it was considered more of a conjecture; however, when the ruling was the outcome of a more or less unanimous consensus, it became an incontrovertible statement of the divine law.<sup>15</sup> Hence, *ijma* provided an umbrella authority for the variant doctrines of the different schools. Where Muslim jurists could not agree, they agreed to disagree. It is important to appreciate the significance of *ijma* as a candidly pluralistic

aspect of Islamic law which recognizes that no individual opinion can claim, against other variants, a unique authority. By extrapolation, it is apparent that Islamic law emphasizes collective rather than individual action in the temporal sphere.

### Rethinking Sharia within Islam

The divine nature of law in Islam has posed multiple complexities: is the sharia simply the manifestation of supernatural revelations or is there room for social and contextual grounding? Are the words of God immutable or adaptive? A majority of disagreements among Western and Islamic circles have stemmed from the failure to distinguish the nuances between the *sharia* and *fiqh*. A broader definition of the *sharia* is: “those institutions which Allah has ordained in full or in essence to guide the individual in his relationship to God, his fellow Muslims, his fellow men and the rest of the Universe.”<sup>16</sup> The means by which Muslims attempt to follow the guidance of the Quran and Sunnah is the most comprehensive assessment of *fiqh*, which is essentially Islamic law in practice with its own rules of engagement and protocols for disagreement. Part of the beauty of—as well as a source of frustration in—Islamic law is the plethora of positions and interpretations in jurisprudence. This underlying precept adds to the confusion: while Islamic law attempts to moralize legal actions and formalities by placing them in the context of religion and morality, it tends to discourage the formalization or legislation of the religious and moral precepts.<sup>17</sup> The very fact that the *sharia* law has to be recreated through the *fiqh*-based approach with its various schools of thought testifies to this assertion.

According to some progressive strands of Islamic thought, “all rules in the *sharia* that are based upon customs change when custom changes.”<sup>18</sup> It is also possible to discern that the Quran is not one document but two. The first deals with social and practical questions and may be understood as a flexible gauge which adjusts to the prevailing socio-political situation. It is legalistic and regulatory in content. The second is

concerned with universal, moral and philosophical issues. It is this which embodies the eternal message of Islam. Undue emphasis on the legislative aspect of Islam is to lose sight of its spiritual context, which is precisely what happened in the over zealous application of the Hudood Ordinances in Pakistan.

The modern Islamic judge Muhammad Sa'id al-Ashmawi further argues that Islam is basically a message of compassion and morals with legislation occupying a secondary place.<sup>19</sup> Of the Quran's 6,000 verses, fewer than 700 deal with legislation and only 200 of these are directly concerned with regulation of social matters (the remaining passages are devoted entirely to regulation of worship).<sup>20</sup> If this is the case, the argument can be taken further to advocate the idea of adapting the social precepts of seventh century Islam to the contemporary age.

### Stretching the limits: Sharia in Evolution?

While men and women entail some differences in rights in Islam, they are considered equal in terms of spiritual status. This fundamental equality applies to the level of punishments and certainly to *hudood* or criminal matters, which must be identically enforced towards both sexes, according to the Quran. The problem is when the custodians of *sharia* are in political power, as in the case of General Zia's regime. A conflict emerges between the contradictory aims of the national agenda to establish an authentic “Islamic” state and the staunch preservation of a traditional, patriarchal interpretation of so-called *sharia* prerogatives. The resulting tension between the theory and practice of Islamic law was vividly exemplified in the case of Pakistan.

To corroborate this claim, an Iranian female lawyer, has provided a factual analysis of the gendered basis of codification of Islam's punishments incorporated in the Hudood laws; according to her assertions, “Islam is a collection of *Quranic* verses, the Prophetic *Sunnah* and opinions of the Islamic jurists and we know that jurists differed in their perspectives and opinions. Some refute others and it is exactly here that we

need to urge our policy-makers to re-examine the inequalities that exist in penal laws that are derived from Islam but are fundamentally un-Islamic in practice. It is time to prescribe a fundamental revision in these laws. In other words, it is time for progressive *ijtihad*s.”<sup>21</sup>

Society must possess eternal principles to regulate its collective life, for the eternal gives us a foothold in the world of perpetual change. But eternal principles when they are understood to exclude all possibilities of change, which according to the Quran, is one of the greatest signs of God, tend to immobilize what is essentially mobile in its nature...What then is the principle of movement in the structure of Islam? This is known as *ijtihad*.

—Muhammad Allama Iqbal, *The Reconstruction of Religious Thought in Islam*

### Ijtihad: Open or Closed?

The word *ijtihad* means “a total expenditure of effort in the attempt to achieve something whose realization is burdensome or difficult.”<sup>22</sup> Commonly referred to as independent reasoning, *ijtihad* is a fundamental Islamic concept that is somehow riddled with controversy. Although it is factually true that from the onset of the tenth century in Islam, the process of *ijtihad* was gradually circumscribed, this was merely due to the overwhelming belief at the time that Muslim jurisprudence had been invested with a largely uncontested doctrinal authority that no longer required greater elaboration.<sup>23</sup> Further inquiry would be without purpose or meaning and it was this conclusion as well as a growing rift between Islamic political factions and the ulema that led to the compromise wherein “the doors of *ijtihad* were closed.”<sup>24</sup> As *ijtihad* lost its creative force, future generations of jurists were denied the right of independent reasoning and were bound instead by the principle termed *taqlid* to follow their predecessors (however, this was more the

case in Suni Islam rather than the Shia minority).<sup>25</sup>

While various theories and opinions have flourished to explain this phenomenon of the closing of the door to *ijtihad* and its implications on modern Muslim societies, it is a fanciful assertion that this fundamental process of human reasoning is not allowed in the present day and age. This line of argument falters with the realization that law is by and large a mirror of a given society and ebbs and flows according to the changing social order. Islamic law remained static for an extremely protracted period because Islamic society itself was relatively stable. There was no real impetus to challenge legal authority until the past few decades of the twentieth century, which witnessed great upheavals in the social, political and moral fabric of Islamic nations. This evolution necessitates a critical reexamination of the contemporary validity of some of the medieval precepts of Islamic law; a process which can only occur with a renewed urgency towards *ijtihad*, for which there is no sound intellectual or moral basis for objection.

According to the Muslim jurist, Ibn al-Arabi, the denial of *ijtihad* amounts to nothing less than the denial of Allah’s continuing, living solicitude and the mission of the Prophet as a mercy to the worlds.<sup>26</sup> Indeed, despite talk of its closed gates, it is not an exaggeration to claim that Muslims all over the world exercise *ijtihad* everyday in all matters from the mundane to the sacred. As most of the application of law is clarifying definitions, the contest over *ijtihad* is really about the role of the intellect in determining meanings and rulings. Whether desire for standardization and codification in Islamic law is inborn or state-induced, the fact remains that the resulting complacency in reinvigorating *ijtihad* among some Muslim circles, is antithetical to the perpetual inward/outward receptivity enshrined in God’s sharia, where the onus on understanding the law is routinely placed on the reasoning abilities of the individual.

### Balancing Stability and Change

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No human interpretation of God's law can ever claim to attain the status of eternal wisdom and truth. In a world driven by the need for certainty, Islamic law presents a unique challenge implicit with all its ambiguities and diversity. As theory collides with practice, the question is how to resolve the many disagreements that inevitably result between the judge applying the law, the state reinventing the law and the believer trying to follow it? One of the fundamental challenges confronting Islamic jurisprudence is the ability to adapt and conform to changing times. Since the texts in which the Muslim aspires to discover God's eternal law are also the same texts upon which religious belief is erected, it is difficult to separate traditional Islamic law from the religion itself. Both are part and parcel of the same core foundation which in theory constitutes an enormous range of flexibility and tolerance. Furthermore, since the sharia is the product of human interpretation, there is no reason to believe that alternative conceptions of Islamic law are impossible.

### The Secular/Religious Debate

The problem emerges when attempts are made to separate the world into "secular" and "religious" spheres. As argued by the Sudanese lawyer/scholar Abdullahi An-Na'im, the danger of such a strict dichotomy is that "it can be manipulated either to exclude some people from discussion or to give undue weight to the views of others by virtue of their presumed 'special' qualifications or status in 'religious affairs.'"<sup>27</sup> In his words, "it is conceptually misleading to speak of 'purely' religious or secular discourse about the rights of women because the two interact and overlap so much."<sup>28</sup> Indeed, it is a paradox why the richness of Islamic civilization has been reduced to this futile endeavor to sever the religion from the secular domain.

Contrary to popular opinion, the Islamic context inherently incorporates an integrated world view of the social order. The term "secularism" derives from the Western distinction between church and state. This definition has no resonance in the Islamic milieu where there is no

clerical intervention between the believer and God. In other words, there is no pope in Islam. By extension, it is possible to assert that "secularism" in the Islamic domain contains an altogether different connotation which simply implies a concern with temporal matters. The Quran is a spiritual text but it addresses issues of the everyday world that human beings must live in. As a more specific example, in Zia's Pakistan, religious dogma was made the basis of political authority and/or legal rights and status. It requires little imagination to see that the mantle of religious dogma to legitimize political authority by authoritarian regimes in Muslim countries essentially invalidates the entire secular/religious divide in Islam as a false debate.

### Poetic Justice

As a product of human agency, the sharia should be regarded as a constantly evolving ethical and legal system that each generation of Muslim men and women have the right, indeed the obligation, to undertake in their own historical context. Challenging the sharia to adapt to changing circumstances is simply disputing a historically conditioned human understanding of Islam and not repudiating Islam itself. However, by arresting this discourse and merely reiterating archaic arguments that are no longer valid, law itself becomes a captive of its legislators, instead of a progressive instrument for social equity and justice. The melding of political power with religious oppression in the name of religion, is a lethal combination that opposes criticism and opposition through unevenly maneuvering the law that leave open a vacuum of space where silence, fear and intimidation prevail.

When the Quran is silent about certain issues, it allows room for freedom of thought and choice of appropriate actions for different times. But when the interpreters of Islamic law, be they conservative jurists or power hungry politicians, fill the silence with one-sided patriarchal notions of right and wrong, they begin to anoint themselves as the sole guardians of sacred law. Islam has always encouraged diversity and plurality in approaches. However, the current political struggles in the Muslim world to harness

the legitimacy of the state with a singular, narrow-minded version of Islam severely hijack the flourishing of Islamic thought and practice.

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*The views and opinions expressed in articles are strictly the author's own, and do not necessarily represent those of Al Nakhlah, its Advisory and Editorial Boards, or the Program on Southwest Asia and Islamic Civilization (SWAIC) at The Fletcher School.*

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<sup>1</sup> Weiss, Bernard. *The Search For God's Law: Islamic Jurisprudence In The Writings Of Sayf Al-Din Al-Amidi*. (University of Utah Press, 1992.), 33.

<sup>2</sup> *Ibid*, 36.

<sup>3</sup> Islahi, Amin Ahsan. *Islamic Law: Concept and Codification*. (Lahore, Pakistan: Islamic Publications, Ltd, 1979), 222.

<sup>4</sup> *Ibid*, 225.

<sup>5</sup> Coulson J. Noel. *Conflicts and Tension in Islamic Jurisprudence*. (Chicago: The University of Chicago Press, 1969), 41.

<sup>6</sup> *Ibid*, 55.

<sup>7</sup> Weiss, Bernard. *The Search For God's Law: Islamic Jurisprudence In The Writings Of Sayf Al-Din Al-Amidi*. University of Utah Press, 1992). 16.

<sup>8</sup> Malik A.A. and Malik Maqsood Halima. *A Theoretical and Practical Approach to Islamic Law*. (London: Unique Books, 2001), 123.

<sup>9</sup> *Ibid*, 128.

<sup>10</sup> *Ibid*, 132.

<sup>11</sup> *Ibid*, 143.

<sup>12</sup> *Ibid*, 151.

<sup>13</sup> Winkel, Erik. *Islam and the Living Law: The Ibn al-Arabi Approach*. (Oxford: Oxford University Press, 1997), 33.

<sup>14</sup> Coulson, 41.

<sup>15</sup> Winkel, 37.

<sup>16</sup> Weiss, 88.

<sup>17</sup> *Ibid*, 95.

<sup>18</sup> Chodkiewicz Michel. *An Ocean Without Shore: Ibn Arabi, The Book, and the Law*. (Albany: State University of New York, 1993), 44.

<sup>19</sup> Al-Ashmawi quoted in N. Ayubi. *Political Islam*. (London: Routledge. 1991), 204.

<sup>20</sup> Kazi, Seema. "Muslim Law and Women Living under Muslim Laws," *Muslim women and the Politics of Participation*. Mahnaz Afkhami and Erika Friedl, eds. (Syracuse: Syracuse University Press, 1997), 161.

<sup>21</sup> *Ibid*, 165.

<sup>22</sup> Weiss, 683.

<sup>23</sup> Coulson , 61.

<sup>24</sup> Winkel, Erik, 76.

<sup>25</sup> Coulson, 54.

<sup>26</sup> Winkel, 31.

<sup>27</sup> An-Na'im Abdullahi. "The Dichotomy between Religious and Secular Discourse in Islamic Societies," *Muslim women and the Politics of Participation*. Mahnaz Afkhami and Erika Friedl, eds. (Syracuse: Syracuse University Press, 1997), 53.

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<sup>28</sup> Ibid, 56.