

Shari'ah Law and Islamic Jurisprudence

Shari'ah is much wider in scope than the concept of law as understood in the West. Shari'ah law encompasses aspects of belief and religious practice, including rules relating to prayer, fasting, the making of the *Haj* and giving *zakat*. It also covers aspects of everyday life such as behaviour towards other people, dietary rules, dress, manners and morals. Lastly, it includes laws relating to crime and evidence, international relations, marriage, divorce and inheritance, commercial transactions and many other subjects that would be included under the Western definition of law.

In this scheme of things, the function of Islamic jurisprudence was the formulation of doctrinal principles elaborate enough, and technically sophisticated enough, to draw these disparate strands together in a consistent and logically coherent manner, integrating the social with the religious in a single, unified system of law. This was achieved by the end of the tenth century. Thereafter, the efforts of medieval Muslim jurists went into an increasingly elaborate series of doctrinal commentaries which constitute the textual authority of the Shari'ah. The Shari'ah is, pre-eminently, a law of the book — a jurists' law — and this of course always implies a certain degree of artificiality.

2.1 From the Obligatory to the Forbidden

Every aspect of Islamic society is subject to the lens of Shari'ah scrutiny and can be classified according to five degrees of admissibility ranging from the obligatory to the absolutely forbidden. They are as follows:

- (i) Obligatory (*fard* or *wajib*) — an obligatory duty, the omission of which is punishable.
- (ii) Desirable (*mandub* or *mustahab*) — an action which is rewarded, but the omission of which is not punishable.
- (iii) Indifferent (*jaiz* or *mubah*) — an action which is permitted and to which the law is indifferent.
- (iv) Undesirable (*mukruh*) — an action which is disapproved of, but which is not a punishable offence, though its omission is rewarded.
- (v) Forbidden (*haram*) — an action which is absolutely forbidden and punishable.

Together, these categories define the universe of what is and is not possible in Islamic society and they apply just as much to financial transactions as to any other kind of activity.

2.2 The Quran, the *Sunnah* and the *Hadith*

The key text upon which the Shari'ah is founded is of course the Quran, that is to say, the Revelations of the Prophet Muhammad, which came from God. As Coulson puts it: the Quran is "historically and ideologically the primary expression of the Islamic law".²⁵ In addition to the Quran, there is the *Sunnah*. The word *Sunnah* literally means "a beaten track" and thus an accepted course of conduct. In Islamic thought, it refers to all the acts and sayings of the prophet as well as everything

²⁵Coulson, Noel J., "Islamic law", 1968, p. 55.

he approved. The latter are described as *hadith* (plural *ahadith*), which literally means a “narrative” or “communication” but in this context is understood to refer specifically to an account of the life and conduct of the Prophet Muhammad, who is regarded by all Muslims as their ideal role model. The *hadith* was assembled from the recollections of the Companions of the Prophet, and was only put down in writing after some considerable time had elapsed since Muhammad’s death.²⁶

Only *Sunnah* of a legal nature is held to form part of the Shari’ah and ultimately the Quran takes priority over the *Sunnah* as a source of law; jurists should resort to the *Sunnah* for legal guidance only when no clear directive can be obtained from the Quran.

2.3 The Five Major Schools of Islamic Law

The Quran and the *Sunnah* together constitute the primary sources of Islamic law, after which we have the secondary sources, comprising the various schools of law, or *madhab* (plural *madhabib*), of which there are five. These schools came about as a result of local and historical circumstances in the first two centuries of the Islamic era and they gave rise to the major political and social divisions of the Islamic community today.

After the death of the Prophet in AD 632, his “rightly guided” caliphs became the leaders of the Muslim people or nation (*Ummah*). Unlike the Prophet, they were not the recipients of divine revelation (*wahy*), but they had the full authority to interpret the Shari’ah in their time. Their knowledge, piety and religious authority meant that the people could turn to

²⁶There are differences of scholarly opinion concerning how early the *hadith* commenced to be recorded. The earliest systematic collection which has survived was the *Muwatta* of Iman Malik (d. 179 AH). See Daniel Brown, *Rethinking Tradition in Modern Islamic Thought*, 1996, p. 94.

them for any final decision regarding the Shari'ah and related matters. The caliphs used to consult the many *sahabah* (companions of the Prophet), but whatever the decision they eventually arrived at, their word was final. In this respect, there was only one school of law (*madhab*) during the time of these early caliphs and it was they who were ultimately responsible for maintaining the unity and uniformity of the *Ummah*. For example, we know that when Muslims differed in their reading of the Quran, the Caliph Uthman sent his authorised copy to every corner of the emerging Muslim world and had all other copies of the Quran removed from circulation and burnt. In this way he was able to preserve the unity of the *Ummah*.²⁷

With the emergence of the Umayyad rule (AD 682–754), the situation began to change. The Umayyad caliphs did not have the same religious authority as their predecessors and there was dissension in their ranks. Some of them were regarded as having deviated from the true path of Islam and they were avoided by jurists and scholars, so they left the fold and began to teach independently elsewhere. Many of the companions of the Prophet similarly went to different regions with their followers (*tabiun*) and taught and preached to the local people they found there. There was no central authority that could unite all the opinions at this time, which coincided with the rapid expansion of Islamic state, and this set the stage for the emergence of the different Islamic schools of thought (*madhahib*).

The Umayyad caliphs were followed by the Abbasids (AD 754–1278). They were more supportive of Islamic law and its scholars than their predecessors and during this time scholars were encouraged to write commentaries on Islamic laws. The Abbasid caliphs also patronised the collection of early

²⁷ "The authenticity of the Quran", *The Institute of Islamic Information and Education* (www.iiie.net).

fatwabs, which are legal opinions of jurists and encouraged religious discussion and debate. At the beginning of this period, there were some twenty different schools of Islamic teaching in existence, but by the end of the third century of Hijrah (ninth century, Christian era), the majority of these had been eliminated or else had merged with one another resulting in the five major schools of Islamic law that we know today.

(i) Shia

The Shia school as its followers comprises about 10 per cent of Muslims and came about as a result of early political differences in the Muslim world over whether the leader of the Muslim community should always be a descendent of the family of Ali b. Abu Talib (AD 595–660), the Prophet's nephew and husband of his daughter Fatima. Shias distinguish themselves from other Muslims — who are known as Sunnis — in the following way. The Sunnis are the people of the *Sunnah*. The *Sunnah* of the Prophet is an unerring guide to man in respect to all that is permissible and all that is prohibited in the eyes of God. Without this belief in the Prophet and the *Sunnah*, belief in God would become a mere theoretical proposition. The Sunni profession of faith is simply: "There is no God but God and Muhammad is the Apostle of God". To this the Shias add: "and Ali the companion of Muhammad is the vicar of God". The elevation of Ali to an almost co-equal position with Muhammad himself, may be stated, popularly, as the great distinctive tenet of the Shias. This school has significant numbers of followers in Iraq, India and the Gulf states.

(ii) Hanafi

The Hanafi school of thought was established by Imam Abu Hanifa (80–150 AH) and his famous pupils, Abu Yusuf and Muhammad. They emphasised the use of reason

rather than blind reliance on the *Sunnah*. This is the prevailing school in India and the Middle East.

(iii) Maliki

The Maliki school adheres to the teachings of Imam Malik (96–178 AH) who laid emphasis on the practices of the people of Medina as being the most authentic examples of Islamic practice. The Moors who ruled Spain were followers of the Maliki school, which, today, is found mostly in Africa.

(iv) Hanbali

The Hanbali school was founded by Imam Ahmad Ibn Hanbal (163–240 AH) who had a high reputation as a traditionalist and theologian, and adopted a strict view of the law. The Hanbali school today is predominant in Saudi Arabia.

(v) Shafi'i

The Shafi'i school was founded by Imam As-Shafi'i (149–204 AH) who was a pupil of Imam Malik, and is thought by some to be the most distinguished of all jurists. He was famed for his modernisation and balanced judgement, and although he respected the traditions, he examined them more critically than did Imam Malik. Followers of the Shafi'i school today are found predominantly in South-east Asia and as the focus of this book is on Islamic jurisprudence in that region, it is the Shafi'i school that primarily concerns us here.

2.4 Classical Islamic Jurisprudence and the Processes for Ascertaining the Law

As the emergence of the different Islamic schools reveals, one of the fundamental problems facing the Prophet, and more especially his successors as Islam spread over a wider area,

was the need to find a method to define the relationship between the provisions of the Quran and local circumstances and traditions. In essence, this was actually a need to define the provisions of the Quran *itself* and it was not until the accession to power of the Abbasid Dynasty in AD 750 that a systematic approach began to be developed. From this time onwards it was the jurist (*faqih*) who came to occupy the central place in the development of Islamic jurisprudence, while the judge (*qadi*) was charged simply with the application of formulated doctrine.

The English term "Islamic law" is somewhat ambiguous in that it conflates two Arabic terms, Shari'ah (divine law) and *fiqh* (human comprehension of that law). The distinction is an important one. In the first instance, since God is the true and only law-giver, any legal position must ultimately be rooted in the Quran and the *Sunnah*, which are understood to be the revelation of His divine will. However, when it comes to the practical application of this divine law to individual situations and the circumstances of everyday life, the responsibility lies with those who are skilled in interpreting the revealed sources, namely qualified religious scholars or *ulama'*. The first recourse of the *ulama'* is to turn to the primary sources and derive his rulings directly from the Quran and the *Sunnah*. However, it often happens that no clear answer can be found in the primary sources, in which case the *ulama'* must resort to other methods in order to reach a decision.

These methods are collectively described as *ijtihad*, which literally means effort, signifying the use of intellectual exertion by a jurist to derive an answer to a question. *Ijtihad* observes a particular methodology called "the roots of the law" (*usul al-fiqh*), which includes the following recognised methods of reaching a decision: *ijma*, *qiyas*, *istihsan*, *maslahah mursalah* and *istishab*.

- *Ijma* has been defined as the “consensus of opinion of the Companions of the Prophet (*Sahabah*) and the agreement reached on the decisions taken by the learned Muftis or the Jurists on various Islamic matters”.²⁸
- *Qiyas* literally means making a comparison between two things with the view of evaluating one in the light of the other. In Shari’ah law it refers to the extension of a Shari’ah ruling from an original case to a new case, on the grounds that the latter has the same effective cause as the former.
- *Istihsan* is similar to the principle of equity as it is understood in the West in the sense that they are both inspired by fairness and good conscience and both allow a departure from a rule of positive law when its enforcement will lead to unfair results. The difference is that whereas the notion of equity relies on the concept of natural law as an eternally valid standard apart from the positive law, *istihsan* relies on, and is an integral part of, the Shari’ah and recognises no law superior to it.
- *Maslahah mursalah*, or public interest, is very similar to *istihsan*. If it is evident that a particular course of action will result in public benefit, it may be followed. This is one of the means by which the Shari’ah can be adapted to meet the need to accommodate social change.
- *Istishab* is a legal presumption in Islamic law and is very similar to legal presumptions in English common law.

One further consideration in this scheme of things is the local or customary laws of a particular place (*‘urf*). These may be continued under Islamic law so long as they are not contrary to Islamic belief and practices.

²⁸Doi, Abdur Rahman I., *Shari’ah: The Islamic Law*, 1989, p. 78.

2.5 The Concept of *Fatwah*

In Islamic jurisprudence, *fatwah* means the opinion of a scholar (*mufti*) based on that scholar's understanding and interpretation of the intent of the sources of Islam, combined with that scholar's knowledge of the subject in question and the social context that gave rise to the particular issue or question in hand. The scholar's answer, or *fatwah*, is not a binding rule; rather, it is a recommendation. In this respect, a *fatwah* may be opposed, criticised, accepted or rejected, or may even itself become the subject of debate or questioning.

Fatwahs may be asked for by judges or individuals, and are typically required in cases where an issue of *fiqh* is undecided or uncertain. Lawsuits can be settled on the basis of a *fatwah*, so it is vital that the recommendations of a *fatwah* do not involve any personal interests or agenda of the *mufti* or lawyer; rather he should render it in accordance with fixed precedent.

In an egalitarian system such as Islam, a *fatwah* gains acceptance based on the integrity of the *mufti* who offered the *fatwah* and his perceived knowledge of Islamic sources, as well as his understanding of issue itself and the particular circumstances, social, historical or otherwise, surrounding it. His recommendations may be challenged on any of the above accounts — after all a *fatwah* is, ultimately, only an opinion and that opinion may be incorrect. To consider a *fatwah* issued by anyone as binding on all Muslims is a dangerous contemporary trend that merely stifles Islam's rich history of debate and dissent. Moreover, it theoretically allows individuals to claim authority over others by virtue of their supposed knowledge of God's will. The purpose of a *fatwah* is to offer an opinion, not to silence discourse.²⁹ The Shari'ah is very accommodating here

²⁹Hathout, Maher, "Demystifying the fatwah", *The Institute of Islamic Information and Education* (www.iiie.net), 22 February 2003.

and gives only a principle outline while leaving the matter of details to scholars.³⁰

In this last respect, the pluralist approach of Islam is quite clear. Humankind comes in many colours and is divided into different races, tribes and nations; every race is different from the others in terms of their physical appearance and nature, and speaks a different language (Chapter 49: verse 13, Chapter 30: verse 22). This manifest diversity is a reflection of divine wisdom of Allah. The Prophet Muhammad was sent as a mercy on humankind, not to force people to follow his teachings (Chapter 3: verse 164, Chapter 21: verse 107, Chapter 50: verse 45). The very principle of Islam is persuasion — there is no compulsion in Islam (Chapter 2: verse 256). How then can Muslims be intolerant and deny other religious communities the opportunity to live with them peacefully?

Today, *fatwahs* have limited importance in most Muslim societies and are normally resorted to only in cases of marriage, inheritance and divorce. Ultimately, the importance of a *fatwah* depends entirely on its acceptance by the people, and if people do not respect or adhere to it, then it is in reality powerless.

2.6 From Revelation to Codification: Scholasticism and the Formulation of Doctrine

As we have seen, in time, a number of different schools of law began to emerge, each with the avowed aim of formulating an ideal scheme for Islamic law. However, the doctrine expounded by these schools tended to diverge as local conditions and practices exerted their effect. This divergence primarily had to do with the relation between individual or personal

³⁰Halim, Shah Abdul, "Islam & pluralism: A contemporary approach", www.islamonline.net, 8 May 2003.

reasoning (*ra'y*) and the authority of a given source. In contrast to the Maliki and Hanafi schools, which both permitted a recourse to reason, whether by way of opinion or deduction (*qiyas*), the "supporters of the traditions" (*ahl al-hadith*) maintained the illegitimacy of juristic reasoning. They held that outside the Quran, the only other source of law was the *Sunnah* of the Prophet, which was to be found in the *hadith* books. As in other revealed systems of legal obligations such as Judaism, the key issue is the relation between revelation and reason in law. It is a crucial question, which can admit only one answer: a formal and theoretical limitation on the free use of human reason. The problem, then, was how to organise this limitation so as to turn it into a creative tool that could accommodate the interpretation and application of Islam to the various realities of the Muslim world. This was the achievement of the greatest of all Muslim legal scholars, Shafi'i.

Shafi'i maintained that certain knowledge of the law of Allah could come only from revelation. The material sources of law were thus confined to the Quran and the (divinely inspired) practice (*Sunnah*) of the Prophet. Outside these sources, the need for a disciplined and subsidiary form of reasoning by analogy (*qiyas*) was recognised. In this respect, "the function of jurisprudence was not to make law but simply to discover it from the substance of divine revelation and, where necessary, apply the principles enshrined therein to new problems by analogical reasoning".³¹

The implications of this position for the development of a technical jurisprudence were critical. Muslim scholarship became concerned with the documentation of the *Sunnah* through the classification of *hadith*. Classical jurisprudence was thus largely devoted to the establishment of scholastic canons

³¹Ibid, p. 62.

by means of which the divine law could be ascertained. The concept of *ijma* — the agreement of qualified legal scholars of a given generation — was developed to describe the result of this scholastic endeavour. Once such an agreement had been reached for a particular case, no further development was possible and “the door of *ijtihad* was closed”. From the tenth century onwards all that was possible was an ‘imitation’ (*taqlid*) of established doctrines, which meant detailed commentary and the production of authoritative legal texts for each school of jurisprudence. These texts expounded the divine law for man and his institutions but, because of the multiplicity of *hadith*, variations in doctrine persisted and have long been an accepted feature of the Muslim world. This variation extended not only to doctrine, but also to the science of the principles of law (*usul*) itself, and in this respect, Islamic technical jurisprudence may not unfairly be described as a fragmented scholasticism,³² although an ideal unity was postulated on the formal grounds described above.

2.7 Closing of the Door of *Ijtihad*

After the beginning of the tenth century, no further schools of law were founded, reflecting an end of scholarly discourse relating to the revision of issues and questions not covered by the Quran and the *hadith*. This phenomenon was later referred to as “the closing of the door of *ijtihad*” (the term *ijtihad*, it will be recalled, refers to the intellectual exertions of Islamic jurists when they applied themselves to an interpretation of the available sources in order to reach a legal verdict or decision in cases which are not specifically dealt with in the Quran or the *hadith*). But there have always been some Islamic scholars

³²Burton, John, *The Collection of the Quran*, 1977, pp. 8–45.

who have refused to acknowledge the closing of the door of *ijtihad* and have advocated independent reasoning to find legal solutions. Reformist Muslim theologians of the nineteenth century, for example, attributed the decline of the Islamic world in modern times to the fact that the door of *ijtihad* had been closed since the tenth century and that the majority of Islamic scholars of law considered the most important legal questions resolved. They demanded a “re-opening of the door of *ijtihad*” in order to be able to address the issues of modern life adequately.

After the consolidation of the schools of law and the closing of the door of *ijtihad*, the only method for resolving future legal questions that remained was that of imitation (*taqlid*) — that is the resolution of new legal issues and question by analogy with decisions reached in the past. The secular and spiritual leader of the Sunni Islamic world, the Caliph, who actually was not allowed to formulate laws by himself, unofficially enjoyed the possibility to pass laws by “interpreting” Islamic regulations individually. However, these “interpreted” laws of the ruler had to be in accordance with Islamic jurisprudence.

2.8 Shari'ah and State Law in the Modern Era

The modern era has seen many Islamic countries adopt a codified legal system whereby an existing system of regulations and penalties is set down in writing and fixed as the law of the land. During the colonial era, the authorities were naturally inclined to introduce largely European laws and the only areas where Shari'ah was still applied were in matters of family law, inheritance and religious endowments, as well as cases of retaliatory punishment (*qisas*).³³ Often Shari'ah courts, dealing

³³In Islam, retaliation should be forgone as an act of charity.

with such cases, existed next to secular courts, which dealt with all remaining legal issues.

Today, the application of Islamic jurisprudence in Muslim countries may be divided into three categories:

- (i) Those countries where jurisprudence is subordinate to Shari'ah — they include Iran and Saudi Arabia.
- (ii) Those countries where the legal system is influenced by Shari'ah. In this instance, Shari'ah is in most cases mentioned in the constitution and typically manifests itself mainly in the area of the status of an individual (such as personal property, marriage and inheritance). However, simply mentioning Shari'ah in the constitution does not necessarily indicate the extent of its application. In Algeria, for example, the Shari'ah is not specifically mentioned as a source of jurisprudence, yet mixed marriages are prohibited. Elsewhere, the Shari'ah is sometimes quoted as one of the sources of jurisprudence (Kuwait, Bahrain), the main source (Qatar, Syria) or the only source (Mauritania).³⁴
- (iii) Those countries where the legal system is entirely independent of the Shari'ah. Many Muslim (or predominantly Muslim) countries do not mention the Shari'ah at all in their constitution. They are Algeria, Burkina Faso, Cameroon, Chad, Djibouti, Gambia, Guinea, Guinea-Bissau, Iraq, Mali, Morocco, Niger, Senegal, Tunisia and Turkey.

In general, Shari'ah tends to be at least partly in force wherever Islam is the official state religion of a specific country. However, the extent of its application varies from country to country. Shari'ah has been re-introduced in Afghanistan in

³⁴Schirmacher, Christine, "Islamic jurisprudence and its sources", www.steinigung.org/artikel/islamic_jurisprudence.htm, 1994.

2002 and introduced in some northern states of Nigeria, while more Islamicist elements in Malaysia and Indonesia have agitated for the introduction of Shari'ah in those countries, though without success.

Shari'ah law in modern Muslim-populated (not Islamic, if it is Islamic countries, then Shari'ah law is part of their law) countries such as Malaysia and Indonesia, are mostly concerned in dealing with the individual (e.g. marriage, inheritance and personal property). There is no relation between international law and Shari'ah law as international law does not incorporate the teachings of the Quran. In Islamic banking, Shari'ah law is abided in the sense of following what the Quran prohibits and allows. The Shari'ah supervisory council board ensures that Islamic banking and finance is carried out in the proper or *halah* way, for example, no *riba*, *zakat* is paid, no gambling.