

Islamic Law

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Abstract:

Islamic legal system is one of the major legal systems in the world. It is a time tested system based on over centuries of evolution. But it does not mean that it is a perfect system. Like any other legal system, it has weaknesses, strengths and contentious or difficult areas with plenty of room for further development.

Keywords: Sharia, Quran, Sunnah, Hadith, Ijma, Qiyas, Urf, Ijtihad, Fiqh schools, Human Rights

Islamic law is very often called Sharia. Sharia, however, is a much broader concept than Islamic law. Sharia literally means 'a way to a watering place'. [1] (p. 2) In the Quran (45:18) it is used in contrast to what is whimsical (*hawa*): 'Then we have put you on a certain way (*shari'atan*) of the matter (i.e. the religion); so follow it, and do not follow the desires [*hawa*] of those who do not know'. Technically, Sharia is seen as a code of life covering faith, law, politics, economics etc and, as Islam believes in the hereafter and the Day of Judgement, the life in the hereafter. The code of life is laid down in the primary sources, i.e. the Quran and Sunnah (exemplary behaviour of the Prophet Muhammad (peace be upon him (ca. 570 – 632)) and is further developed by *Ulema* (Muslim religious scholars) deriving rules from these two sources or developing new rules bearing in mind the objectives of Sharia. Thus Islamic law is just one aspect of Sharia. In this entry, we focus on Islamic law only.

Islamic law is also very often called *fiqh* but Sharia has wider meaning than *fiqh*: Sharia is the law itself whereas *fiqh* is the knowledge of that law. [2] (p. 24) *Fiqh* literally means 'understanding' and 'discerning'. In Islamic legal terms, it means 'the knowledge of the rules of conduct that have been derived by the jurist from specific evidence found in the Qur'an and the Sunnah as well as other specific evidence in *ijma* and *qiyas*'. [2] (p. 23) Sharia is the divine body of law whereas *fiqh* is the rational body of law derived from divine sources by human agency. This is why *fiqh* is not considered as infallible.

Nature of Islamic law

Muslim jurists study Islamic law under '*hukm shari*'. Literally '*hukm*' (pl. *ahkam*) means 'command' and '*shari*' means based on or derived from Sharia. Technically, *hukm* means a 'rule'. *Hukm shari* is defined as 'a communication from Allah ... related to the acts of the subjects through a demand or option or through a declaration'. [2] (pp. 45-46) The *hukm*, or rule, is expressed through a

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demand: to do or not to do something. The hukm may also grant an option or a choice (*takhyir*) to do something. Sometimes, a hukm is a simple declaration declaring or determining a relationship of an act or set of facts with the hukm. [2] (pp. 45-46)

Hukm shari is divided into two categories: rule-creating obligations (*hukm taklifi*) and declaratory rules (*hukm wadi*).

Muslim jurists have divided hukm taklifi into five categories. First, hukm may be obligatory (*fard*): something must be done. Second, it may be prohibitory (*haram*), or something must not be done. These two categories of *hukm taklifi* are binding in nature and punishable if not followed but the number of mandatory and prohibitory rules is limited. Third, a hukm may be recommendatory (*mandub*) and following it is commendable. Fourth, a hukm may disapprove something (*makruh*) but not following it does not attract punishment but the action is generally disapproved. Fifth, a hukm may permit (*mubah*) something leaving to individuals to follow it or not. [2] (pp. 54-55) All rules of Islamic law are neither binding nor prohibitory and allow flexibility. Even mandatory or prohibitory rules can be suspended (i.e. not followed) under necessity (i.e. the concept of *darura*). It is a misconception that Islamic law is not flexible.

Declaratory rules (*hukm wadi*) inform the subject that a certain thing is a cause of, condition for or an obstacle to a hukm, explains the relationship between two rules, or provides a criterion for judging whether an act performed is valid or void. An act or event that is affected by hukm taklifi is within the ability of the subject (e.g. not to steal) whereas hukm wadi may or may not be within the ability of the subject (e.g. insanity is a defence against criminal liability, i.e. it is an obstacle for the hukm to take effect and is beyond the power of the subject). [3] (pp. 431-440)

Objectives of Sharia

Sharia, like any other faith or system, aims to achieve a certain goal and objectives. The goal and objectives of Sharia are known as *maqasid al-sharia*. *Maqasid* (sing. *maqsad*) means 'objective or purpose'. Technically the term means the goal and objectives as envisaged especially in the primary sources of Sharia.

The maqasid of Sharia are treated under two categories: objectives related to the hereafter, i.e. preservation of religion and objectives related to this world. The latter include the preservation of life, progeny (family), intellect and wealth. Some scholars add *maslahah* (sing. *masalih*) to the list as well. Maslahah literally means 'benefit' or 'interest' but is roughly translated as 'public welfare' or 'interest'. [4] (p. 195) For Muslim jurists, technically it means 'the seeking of benefit and the repelling of harm' as directed by the lawgiver, i.e. God. The concept of maslahah allows Muslim jurists to develop new rules for new conditions and circumstances but new rules must comport with maqasid al-sharia.

The framework of Sharia is to follow rules in the Quran and Sunnah or the secondary sources of Sharia. New rules can be developed to meet the needs of new conditions and circumstances but the new rules must be compatible with maqasid al-sharia. The same framework applies to law-making as well other rules of governance: every law, rules and policy must comport with the overarching maqasid al-sharia.

Sources of Islamic law

The textbooks of Islamic law list four major sources of Islamic law: the Quran, Sunnah, *ijma* (consensus of opinion) and *qiyas* (analogical deduction) but some scholars list seven as they consider *ijtihad* (independent individual reasoning), *istihsan* (juristic preference of one rule/interpretation over another to meet the requirements of public interests) and *maslahah*. Some include custom as the eighth source. In my view, Islamic law has three main sources: the Quran, Sunnah and *ijtihad* and the rest are techniques or methods of developing Islamic law through *ijtihad*. Therefore, I will discuss these three sources together with some most commonly used techniques of Islamic law.

The Quran and Sunnah are called the divine, revealed or primary sources. Other sources are called rational or secondary sources. The hierarchy of these sources are based on the Quran (4:59): 'O you, who believe, obey Allah and obey the Messenger and those in authority among you. Then, if you quarrel about something, revert it back to Allah and the Messenger'. In verse 4:59, 'obey Allah' refers to the Quran as it is considered a word of God whereas 'obey the Messenger' refers to the Sunnah of the Prophet Muhammad. 'Those in authority among you' is understood in two senses: the most authoritative and knowledgeable ulema and rulers (as authorities) of an Islamic state. Both interpretations are very plausible demonstrating that both ulema (by doing *ijtihad* using techniques such as *ijma*, *qiyas*, *istihsan* etc) and institutions of state, e.g. parliament (i.e. legislation) or superior courts (case law) can make rules.

The Quran

The term 'Quran' literally means 'reading' or 'recitation'. [4] (p. 256) Muslims consider it 'the word of God'. Their view is based on the Quran (26:192): 'verily this is a Revelation from the Lord of the Worlds', and 'this Quran is not such as can be produced by other than Allah' (Quran, 10:37). The words of the Quran (God) (18:27) are eternal which 'none can change' but different interpretations are possible. It is the first source of Sharia, and all other sources of Islamic law are explanatory to the Quran. The Quran (6:38) states: 'We have not missed anything in the Book [Quran]' and deems Islam as a complete religion: "Today, I [Allah] have perfected your religion for you, and have completed my blessing upon you, and chosen Islam as Din (religion and a way of life) for you' (Quran, 5:3).

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The Quran consists of 114 chapters (*surat*, sing. *sura*) and 6,235 verses (*ayat*, sing. *aya*) of unequal length. The contents are not classified subject-wise, but the Prophet Muhammad determined the order of verses and chapters before his death. The Quran was revealed gradually over a period of 23 years through the Angel Gabriel. The Quran (25:32) explains the logic of its gradual revelation (*tanjim*) thus:

'Why has the Qur'an not been revealed to him all at once?' (It has been sent down) in this way (i.e. in parts) so that we make your heart firm, and we revealed it little by little'.

Verses of the Quran are divided into Meccan and Medinan verses on the basis of time and place where they were revealed namely, Mecca and Medina. The Meccan verses (610-622 AD) are mainly related to faith and devotional matters because the revelatory process of the Quran started at Mecca in 610 AD. It was the beginning of founding a new religion. The Medinan verses (622 – 632 AD) deal with the social, economic, political, and legal structures, and Islam's relations with the non-Muslim world. The focus in Medina was to found and organise a community of Muslims, known as an *Ummah*.

The Quran is not a legal document. Only one-tenth of its verses relate to law. [3] (p. 25) The rest are devoted to matters of belief and morality. Instead the Quran calls itself guidance (*huda*). [1] (p. 19) A ruling of the Quran may exist in a clear and specific language or in a language that is susceptible to multiple interpretations. Thus, the legal contents of the Quran are divided into the definitive (*qati*) and speculative (*zani*) categories. A definitive (*qati*) text is one which is clear and specific: it has only one meaning and admits no other interpretations. [3] (pp. 27-28) Examples of clear rules are the punishments of 100 stripes for fornication and adultery (Quran, 24:2) and 80 stripes for false accusation of fornication and adultery (Quran, 24:4). Clear rules are also called *nusus* (sing. *nass*). *Nusus* cannot be changed and must be followed. For example, the number of stripes cannot be changed but its method of administration is not specified in the Quran which *ulema* or the state can devise. For instance, 100 stripes as a punishment for fornication and adultery can be applied individually or 25 stripes tied together and applied four times.

A speculative verse (*zani*), on the other hand, is open to more than one interpretation. For instance, one of the punishments for highway robbery (*harabah*) in the Quran (5:33) is 'to be banished from the earth'. Banishment (*nafy*) can mean exile from where the crime was committed but some jurists argue that it means imprisonment, not exile in the literal sense. They argue that banishment from the earth can be done only by death and banishment is a punishment other than killing as killing as a punishment for *harabah* has been provided separately in the same verse. The specific rules of the Quran are an integral part of the dogma, and anyone who denies its validity automatically renounces Islam. However, denying a particular interpretation is allowed.

The Sunnah

Literally, Sunnah means 'a clear path' or 'a beaten track'. [2] (p. 162) It also means a normative practice or an established course of conduct. A Sunnah may be set by an individual, a sect or community. The opposite of Sunnah is innovation (*bid'ah*) which is characterised by lack of precedent or continuity with the past. The Quran (48:23; 17:77) uses Sunnah in the sense of an established practice or course of conduct. The Sunnah of Prophet Muhammad is not clearly mentioned in the Quran, but the phrase "*uswah hasanah*" (excellent conduct) (33:21) of the Prophet Muhammad is mentioned. This is interpreted as a reference to the Sunnah of the Prophet Muhammad. For Muslim jurists and scholars, the Sunnah refers to all that is narrated from the Prophet Muhammad, his acts and sayings, and anything he has tacitly approved. In its juristic sense, Sunnah for the Islamic scholars is also a divine source of Islamic law. As a source of Islamic law, the Sunnah may also create rules that are obligatory (*wajib*), prohibitory (*haram*), disapproved (*makruh*), and permitted (*mubah*) and its ruling of *haram* (prohibited) and *halal* (allowed) stands on equal footing with that of the Quran. The authority of the Sunnah as a source of law is based on the Quran (4:80):

'Whatever the Messenger gives you, take it, and whatever he forbids you from, abstain (from it)' (59:7); 'O you who believe, obey Allah and obey the Messenger and those in authority among you' (4:59) and 'Whoever obeys the Messenger obeys Allah'.

The Sunnah is divided into legal (*tashriyyah*) and non-legal (*ghar tashriyyah*). The non-legal Sunnah consists of the natural activities such as how the Prophet Muhammad slept, what and how he ate, what was his favourite colour etc. Activities of this nature are not of primary concern to the Prophetic mission and therefore, do not constitute legal norms and are not binding. [3] (p. 67) Sunnah relating to specialised knowledge such as medicine, commerce and agriculture also do not constitute binding norms. Acts and sayings of the Prophet Muhammad related to particular circumstances, such as strategy of war, misleading the enemy forces, timing of attacks, etc. are considered to be situational and do not constitute binding norms. [3] (p. 67)

The legal Sunnah consists of the exemplary conduct of the Prophet Muhammad which incorporates the rules of Sharia. The legal Sunnah is divided into three kinds: the Sunnah of Prophet as a Messenger, as a head of the state (*imam*) and as a judge (*qadi*). In his capacity as a Messenger, the Prophet expounded rules, which on the whole, complement the Quran, but also establish rules for when the Quran is silent. Whatever the Prophet Muhammad has authorised pertaining to principles of religion constitutes general legislation whose validity is not limited by time and circumstances. All commands and prohibitions falling in this category are binding on all Muslims without prior authorisation by an Islamic scholar or government. [3] (pp. 69-73)

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All the rulings which originate from the Prophet Muhammad in his capacity as head of state such as the allocation of public funds, appointment of state officials, signing of treaties etc do not constitute general legislation. Sunnah of this type may not be practised by an individual without prior authorisation of a competent governmental authority. In the following example, the Prophet Muhammad acted as head of the state. The Prophet Muhammad, after winning the battle of Khyber, distributed the land of Khyber among the conquerors as this was considered the best action on that occasion. He did not order the same at the conquest of Mecca, instead leaving the properties of locals untouched to win their hearts and minds. [3] (pp. 69-73)

Sunnah that originates from the Prophet Muhammad in his capacity as a judge in particular disputes consists of two parts: the part which relates to the claim, evidence and factual proof and the judgement. The first part is situational and does not constitute general law. The second part lays down general law, but it does not bind individuals directly and no one shall act upon it without prior authorisation of a competent judge. Anyone who has a claim shall follow the proper procedure as is laid down by an Islamic state to prove the claim and obtain a judicial decision.

Hadith

Very often, the Sunnah and the term '*hadith*' (pl. *ahadith*) are used interchangeably but they are not the same thing. Hadith literally means a 'narrative', 'communication', or 'news consisting of the factual account of an event'. [3] (p. 63) The word occurs frequently in the Quran in that sense but after the death of the Prophet Muhammad, stories relating to his life and activities dominated all other narratives. As a result the word hadith began to be used exclusively for the sayings of the Prophet Muhammad. A hadith is a saying of the Prophet Muhammad whereas the Sunnah is the example of the law that is deduced from ahadith. A hadith in this sense is the carrier of the Sunnah, i.e. the Sunnah is contained in ahadith. Authentic collections of ahadith are *Al-Bukhari*; *Al-Muslim*; *Sunan al-Nasai*; *Sunan Abi Dawud*; *Jami at-Tirmidhi* and *Sunan Ibn Majah*.

A Hadith may be continuous (*muttasil*) or discontinued (*ghayr muttasil*). A continuous hadith is one which has a complete chain of transmitters from the last narrator all the way back to the Prophet Muhammad. A discontinued *hadith* is one whose chain of transmitters is broken and incomplete. The majority of the scholars agree that acting upon a discontinued hadith is not obligatory. A continuous hadith is divided into (1) a *mutawatir* hadith (continuously recurrent), a report by indefinite number of people related in such a way to exclude a lie or doubt; and (2) *ahad* (solitary) hadith, a hadith reported by a single individual or odd individuals from the Prophet Muhammad. According to the majority of scholars, the authority of a continuous hadith is equivalent in authority to the Quran. Other scholars believe that a solitary hadith engenders speculative knowledge and that acting up it is not obligatory.

The scholars of ahadith agree on the fabrication of ahadith on a large scale which is why they have developed a stringent mechanism to distinguish genuine from forged ahadith. A common mistake made by non-expert writers is to cite ahadith of dubious origin without checking their authenticity. This has led to confusion in the academic literature. It is also noteworthy that acting on every hadith, even if regarded as genuine, is not obligatory as the categories of ahadith indicate. Like the interpretation of the rules of the Quran, the rules in the Sunnah are not set in stone and there are different opinions on the precise meanings and how they should be put into practice.

Ijma

Ijma and Qiyas are described as non-revealed, secondary, or rational sources, as compared with the divine sources (the Quran and the Sunnah). Ijma refers to a consensus of juristic opinion, while qiyas refers to analogical deduction.

Ijma has literal as well as technical meanings. Literally, it is used in two senses: to determine or plan something and to agree upon a matter. In the legal sense, ijma is defined as 'the consensus of *mujtahidin* (sing. *mujtahid*) from the Ummah [Muslim community] of the Prophet Muhammad (peace be upon him), after his death, in a determined period upon a rule of law (hukm shari)'. [2] (p. 182) This definition lays down several conditions for ijma to be valid. Ijma must be done by mujtahidin; it must be done by the Ummah; it must be after the death of the Prophet Muhammad and it must be done in a definite period on a rule of law. [3] (p. 230)

Ijma is divided into two types based on the way it is made known: explicit (*sarih*) and tacit (*sukuti*). Sarih is one in which all jurists explicitly indicate their agreement on a legal issue in a given time and society. This type of ijma has binding strength as source of law. Sukuti is one when a mujtahid issues a verdict on a legal issue, but the rest of jurists remain silent on it. It is neither expressly acknowledged nor rejected. The majority of jurists maintain that tacit ijma is a legally binding source of law, (see Quran, 4:59, 4:115) but they differ with respect to its strength. Some argue it is a definitive source like explicit ijma whereas others argue that it is a probable source of law.

Whatever the difference of opinion on the strength of different types of ijma may be, it is a source of Islamic law that plays a crucial role in the development of Sharia. Ijma ensures the correct interpretation of the Quran, the faithful understanding and transmission of the Sunnah, and the legitimate use of ijtehad. The existing body of *fiqh* is the product of a long process of ijtehad and ijma. Ijma, in the early stages, was confined to the jurists Companions of the Prophet Muhammad. Later, when different schools emerged, the forum of ijma shifted to the leading schools. Today, Muslims live

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in nation-states therefore, in addition to ulema; the highest judicial body can also be a forum of ijma leading to national ijma.

Qiyas

'Qiyas' literally means 'measuring' or 'ascertaining' the length, weight, or quality of something. Qiyas also means comparison in order to suggest similarity or equality between two things. [3] (p. 264) Legally, qiyas is the extension of Sharia value from an original (*asl*) case to a new case because the latter has the same effective cause (*illah*) as the former. The original case is regulated by a given text and qiyas seek to extend the same ruling to a new but similar case. The commonality of effective cause between the two cases justifies qiyas. Jurists resort to qiyas only if a solution to the new case is not found in the Quran and Sunnah or a definite ijma. The law may be deduced from any of these three sources through qiyas. Qiyas is different from interpretation as it is concerned with the extension of the rationale of a given text to cases which may not fall within the terms of its language. It is in this sense that qiyas is considered to be discovering and extending the law. For example, the Quran (62:9) forbids the sale and purchase of goods after the last call for Friday prayer. By analogy this prohibition is extended to all kinds of transactions since the effective cause – diversion from prayer – is common to all. Hence, qiyas is the application to a new case (*far*), on which the law is silent, of the ruling (*hukm*) of an original case (*asl*) because of the effective cause (*illah*) which is common to both cases. But only if the new case must not be covered by the Quran, Sunnah, or ijma, the effective cause must be applicable to the new case as it is to the original case and the application of qiyas to the new case must not result in changing the law of the Quran and the Sunnah. (see [5])

Urf: Custom

In Islamic law custom (*urf*) is recognised as a minor source of law. Urf is derived from an Arabic term '*arafa*' which means 'to know'. Urf literally means 'that which is known'. In its primary sense, it is the known as opposed to the unknown, the familiar and customary as opposed to the unfamiliar and strange. [3] (p. 369) Urf is defined as recurring practices that are acceptable to people of sound nature, and for a custom to be considered a basis of law, it must be sound and reasonable. Therefore, corrupt practices or unbeneficial practices (i.e. unacceptable or unreasonable urf or customs) do not constitute valid bases for law. *Maruf*, a derivative of urf, is used in the Quran in the sense of good and its opposite, *munkar* (strange) is equated with evil. Occasionally, Maruf is used in the Quran in the sense of good conduct, kindness and justice. Islamic scholars have used urf as a valid criterion for interpreting the Quran, e.g. the Quran (65:7) states that a husband must provide maintenance for his wife without specifying the amount. The amount of maintenance was determined according to custom in various societies and times. Similarly, maintenance for children was recognised in the Quran (2:223) but its amount was fixed according to custom. [3] (p. 371)

Ijtihad

Ijtihad is a mechanism to derive rules from the primary sources through using techniques such as ijma and qiyas. The literal meaning of ijtihad is the expending of maximum effort in the performance of an act. Technically, it is the effort made by the *mujtahid* (jurist of the highest category carrying out ijtihad) in seeking knowledge of the rules of Sharia through interpretation. [2] (p. 263) The primary task of mujtahid is to discover the rules of Sharia from the texts in primary sources in three ways. First, to discover the law that is either stated explicitly or implied in the primary sources, i.e. discover it through literal interpretation. Second, to extend the law to new cases that are similar to cases mentioned in the primary sources but cannot be covered through literal methods. Third, to extend the law to new cases those are not covered by the previous two methods. The mujtahid thus performs a legislative function and is regarded as the jurist of highest category. [2] (p. 264) The effort expended by a non-mujtahid is of no consequence as he/she is not qualified to carry out ijtihad. A mujtahid should have the following qualifications: he must be a Muslim; have knowledge of the Quran and the Sunnah; well-versed in Arabic language; sound knowledge of ijma, qiyas and objectives of Sharia and must be an upright (*adil*) person whose judgement the people can trust. [3] (p. 476)

The role of a *faqih* (expert in fiqh) is different from that of a mujtahid. A *faqih* is not an independent jurist like a mujtahid but one who works within the principles settled by a mujtahid. The function of a *faqih* is to extend the law to new unsettled cases: the extension of the law by reasoning from principles. This methodology used by a *faqih* is called *takhrij*: discovering the law through the general principles and extending it to new cases with the help of reasoning from principles. [2] (p. 337) The superior courts, lawyers, eminent academics can exercise *takhrij*.

Ijtihad and *fatwa* (pl. *fatawa*) are often used interchangeably but they are not the same thing. Ijtihad has a greater juridical substance as it explains its own evidential bases. Fatwa literally means 'response' but technically it means an opinion or verdict given by a *mufti* (a qualified jurist but of a lower standing compared to a *faqih* or a mujtahid) as a response to a question. (For classification of jurists, see [2] pp. 234 – 236.) It is defined as 'a response given by a qualified person (i.e. a mufti) who expounds the ruling of Sharia on a particular issue that is put to him by a person or a group of persons'. [1] (p. 174) This response may be very brief or detailed one as a mufti is not required to give his evidential basis. Fatwa is usually sought by individuals seeking an advice on legal or public issue. The fatwa does not bind the person to whom it is addressed. An individual can seek another fatwa from a different mufti if he/she is not satisfied with it. [1] (p. 162) Historically, fatwa was a private activity but the practice diminished gradually. Now-a-days a state appointed mufti issue *fatawa* according to a specified procedure. A fatwa issued by someone who does not qualify as mufti has no value like a legal opinion offered by someone who is not qualified to offer a legal opinion.

Fiqh schools

Muslims are broadly divided into two main groups: Sunni and Shia and so is Islamic law, i.e. Sunni law and Shia law. The Sunni-Shia division occurred for political reasons: the Shia regarded Ali, the cousin and son-in-law of the Prophet Muhammad, to be his lawful heir to become a Caliph (ruler) after the death of Prophet Muhammad whereas the Sunni wanted to elect a Caliph. The Sunni group was dominant and elected Abu Bakr as the first Caliph after the death of the Prophet Muhammad. Ali eventually became the fourth Caliph. The term 'Shia' literally means 'followers' as they were the followers of Ali; hence they were called the 'Party' of Ali.

Theological and juristic controversies which arose in the early period of Islam led to the emergence of various groupings within the Sunni community. In the early eighth century two geographic centres of juristic activities emerged: Hijaz (in Saudi Arabia) and Iraq. Hijaz had two main centres, Mecca and Medina, the cities where the Prophet Muhammad spent his life. Iraq has also two main centres, Basra and Kufa. Of these four geographic centres, Medina and Kufa were the most prominent. The two geographic centres adopted different approaches to jurisprudence. The jurists of Mecca and Medina placed greater emphasis on tradition (*hadith*) of the Prophet Muhammad because Hijaz was the birth place of Islam and where all the early Islamic developments took place. The Iraqi jurists resorted to personal opinion (*ra'y*). In the latter half of the eighth century, these geographical centres gave birth to personal schools named after an eminent jurist followed by their pupils and others. There are four main existing Sunni schools: the Hanafi School, the Maliki School, the Shafi School, and the Hanbali School.

Abu Hanifa Nu'man ibn Thabit (d.767) was born in Kufa and was the founder of Hanafi School. His works were compiled by his two disciples, Abu Yusuf (d. 798) and Al-Shaybani (d. 804), but it was the latter who compiled the body of law of the Hanafi School. His six works were compiled into a single volume called *Al-Kafi (The Self-Contained)* by Al-Marwazi also known as Al-Hakim Al-Shahid (d. 965). Shams al-Din al-Sarakhsi (d.1095) further commented and annotated *Al-Kafi* in thirty volumes called *Al-Mabsut (The Extended)*. Hanafi school is considered most flexible compared to other schools and is the most widely followed school in the Muslim world. The Hanafi school is now predominant in Turkey, Syria, Jordan, Lebanon, Pakistan, and Afghanistan and among the Muslims of India.

The Maliki School was founded by Malik ibn Anas al-Asbahi (d. 795), who spent his life in Medina. Imam Malik was keen on closely following the Medinan practices but his school is identified with the doctrine of *istislah* (consideration of public interest or *maslahah*) as a source of law. This has opened the scope for *ijtihad* more widely than other schools. The Maliki School is currently predominant in Morocco, Algeria, Tunisia, the Sudan, Bahrain, and Kuwait.

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The Shafi School is named after its founder Muhammad ibn Idris al-Shafi (d. 820) who was a pupil of Imam Malik. He formulated the legal theory of Sharia which is retained until today. According to this theory, Islamic law is based on four main principles or roots: the Quran, the Sunnah of the Prophet Muhammad, *ijma* and *qiyas*. Shafi wrote many books of which *Kitab al-Umm* is very popular. The Shafi School is predominant in East Africa, Indonesia, Malaysia, and Brunei, and also has many followers in Palestine, Jordan, and Syria.

The Hanbali School was founded by Ahmed ibn Hanbal (d. 855). His emphasis on the hadith as authority won him and his followers the title of "traditionists" (followers of traditions or ahadith) rather than jurists. His main work, *Al-Musnad (The Verified)*, is a collection of some forty thousand ahadith. The Wahabi puritanical movement of eighteenth century in the Arab peninsula derived its inspiration from Hanbali School, especially from the celebrated jurist Ibn Taymiyyah (d. 1328). The Hanbali School is currently predominant in Saudi Arabia and has followers in Oman, Qatar, Bahrain, and Kuwait (see [6]).

Shia law has several schools but the three main existing ones are Ithna Ashariyah (Twelvers), Zadi, and Ismailis. They differ mainly over the line of succession after the fourth imam. The Twelvers believe in twelve imams whereas the Ismailis believe in seven, this is how they got their respective names. Shi'ism remained political in character until the eighth century when it became a school of juristic thoughts after the works of two imams, Muhammad al-Baqir (d. 735) and Jafar al-Sadiq (d. 765). The Shia schools recognise the Quran, the Sunnah, and the authority of an imam as sources of law. Twelvers' doctrine was officially adopted in Iran and has followers in Iraq, Lebanon, and Syria (see [7] pp. 121-130).

Islamic law in Muslim states

Islamic law applies to Muslims in Muslim states. It does not apply to non-Muslims. In Muslim states Islamic law takes two forms: Islamic law as is contained in juristic treatises and manuals and Islamic law in the form of statutes. The former is generally called *fiqh* and the latter is called statutory Islamic law. Both types of laws are derived from the two primary sources: the Quran and the Sunnah. Courts rely on Islamic statutory laws, *fiqh* and the two primary sources. Some Muslim states, e.g. former colonies have a mixed system. They follow the laws inherited from colonial period with piecemeal incorporation of Islamic law through the so-called process of 'Islamisation'. Pakistan is a good example as it is still using the penal, civil and criminal procedure codes inherited from British colonial era but has incorporated Islamic legislation in the areas of personal status, law related to sexual offences, evidence, theft, homicide etc. Most of the inherited procedural laws are considered to be compatible with Sharia (for example, see [8]). Traditionally, it is in the area of criminal law where changes have been made. Most Muslim states will have criminal law dealing with *hadd* offences (offences for which

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punishment is fixed by the primary sources) and *tazir* law, i.e. offences for which no fixed punishment is provided in the primary sources allowing discretion to state authorities to set minimum and maximum punishment.

All Muslim states have written constitutions, e.g. Afghanistan, Pakistan or Saudi Arabia. Most Muslim states have given Islam the status of official religion and have recognised Sharia as the supreme source of law. (These countries include Afghanistan, Algeria, Bahrain, Bangladesh, Brunei, Egypt, Iran, Iraq, Jordan, Kuwait, Libya, Malaysia, Maldives, Mauritania, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Tunisia, UAE and Yemen.) Given the supremacy of Sharia, any existing or new law must conform to Sharia standards. In some states the superior courts may invalidate existing laws which are found incompatible with Islamic standards. The Federal Shariat Court of Pakistan is empowered to determine the Islamic standing of any legislation. In 2008, the Federal Shariat Court invalidated s 10 of the Pakistan Citizenship Act 1951 as it was discriminatory towards women and thus against Sharia [9]. Similarly, in *Shaikh* 2009, the Federal Shariat Court invalidated para 4 of art 51 of the Qanun-e-Shahadat [Evidence] Order 1984 – supposedly based on Sharia - as its language was found to be disparaging and discriminatory towards female witnesses. [10] In 1985, the Federal Shariat Court validated the UN Security Council Act 1948 as it was found not to be against Sharia to accord immunity and privileges to officials of the United Nations. [11] Given the supremacy of Sharia in the constitutions of Muslim states, all laws, policies in Muslim states must pass the 'compatibility with Sharia' test. All policies must comport with the sources and objectives of Sharia. Otherwise, they will face criticism, legal challenges and eventually invalidation.

Governance in Sharia is discussed under *Siyasah shariyyah*. *Siyasah shariyyah* means government in accordance with the goals and objectives of Sharia. Although some commentators have attempted to confine it to administrative measures only while others have singled out criminal procedures and punishments as the main areas of its application but in its widest sense, it applies to all government policies: be it in areas where Sharia provides explicit guidelines or otherwise. [3] (pp. 225-226) The measures that are taken in the name of *siyasah shariyyah* must be Sharia compliant as the purpose is to facilitate rather than circumvent the implementation of Sharia. Rules of procedure, policy decisions, legislative and administrative measures that are laid down and taken for the implementation of Sharia would thus fall within the ambit of *siyasah shariyyah*. [3] (p. 225) *Siyasah shariyyah* is generally seen as an instrument of flexibility and pragmatism because Sharia is designed to serve the purpose of justice and good governance. Ibn Qayyim divided *siyasah* into types: oppressive policy which the Sharia forbids and just policy which serves the cause of justice even if it may at times depart from the letter of an injunction in favour of its spirit. Since justice and good governance are the principal goals of just policy, measures that are taken in pursuit of it are bound to be in harmony with Sharia ([3], citing Ibn Qayyim 225)

Debatable areas

Certain areas of Islamic law are intensely debated within Islamic scholarly circles. These areas have been subjected to criticism by non-Muslim scholars, the less informed scholars on the subject and criticism driven by hatred for religion-based laws especially Islamic laws. It is inappropriate to engage with the less informed and those who hate faith-based laws here. Contentious areas include human rights especially rights of women, minorities, freedom of religion and recently Jihad (the use of force) and targeting civilians in armed conflict. I will briefly comment on Jihad, targeting civilians in armed conflict and human rights.

Jihad (the use of force)

Literature on Jihad indicates towards many theories of Jihad but the two theories – offensive and defensive – are the most plausible and prominent. I believe that the offensive theory is untenable (see [12]) and the Quran allows the use of force self-defence only: 'Permission (to fight) is given to those against whom fighting is launched, because they have been wronged'. [12] This was the first time, immediately after the Prophet Muhammad migrated from Mecca to Medina [13] (p. 832) in 622 AD that the Quran gave permission to use force in self-defence. [14] (p. 603) Verse 22:39 is in the passive 'against whom war is made' [13] (p. 832) and therefore, indicates that the permission given is when Muslims are 'wronged', i.e. attacked. Verse 2:190 reinforces this position: 'Fight in the way of Allah against those who fight you, and do not transgress. Verily, Allah does not like the transgressors'. This verse was revealed one year after the Prophet Muhammad migrated from Mecca to Medina. [15] (p. 512) 'Fight in the way of Allah against those who fight you' has two plausible interpretations. First, it allows Muslims to fight those who fight them, a reflection of the permission given in verse 22:39. The phrase 'those who fight you' shows that Muslims cannot be aggressors (see [14], p. 58; see also [16] and [17]). This verse prohibits aggression but allows the use of force in self-defence as an exception. Second, it means to fight only combatants during actual combat (*qital*). Civilians are immune from attack. 'And do not transgress' means not to violate the limits set by Allah: fight those who fight you or use force in self-defence. The only verse in the Quran allowing the use of force is 22:39. One of the interpretations of verse 2:190 also support the use of force in self-defence but its preferred interpretation is for fighting combatants only and non-combatant immunity. There are several other verses in the Quran - very often misquoted - exhorting Muslims to join Jihad, benefits of Jihad etc and they must not be confused with verse 22:39 which is the only verse providing basis for the use of force (i.e. triggering armed Jihad). We will revert to the point why Muslim armed groups target civilians in armed conflicts around the world.

Muslim states tend to follow the defensive theory of Jihad as all Muslim states are members of the United Nations and accept the Charter (art 2(4)) prohibition on the threat or use of force by one state against other state/s unless it is in self-defence (art 51). The UN Security Council (art 42) may also

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authorise the use of force, as a last resort, for restoring or maintaining international peace and security. Muslim states also contributed to the development of international humanitarian law, e.g. their demand for using the emblem of crescent instead of the cross was legally recognised. Muslim states view international humanitarian law compatible with Sharia as not a single Muslim state has entered reservations to the four Geneva Conventions 1949. In contrast, Muslim states have entered many Sharia-based reservations to human rights law as they view some human rights principles may conflict with Sharia.

Human Rights

Sharia believes in human dignity and other rights and when compared closely with international human rights law, many commonalities between the legal systems become obvious. (Bear in mind that Muslim states are members of the UN and only international human rights treaties which they had acceded to are applicable to them. They are not parties to the European human rights convention (except Turkey) and the European convention does not apply to them.) Muslim states enter reservations to areas of potential conflict with Sharia, e.g. Pakistan has entered reservation to art 16 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984. Article 16 requires preventing but does not define cruel, inhuman or degrading treatment or punishment. Muslim states try to insulate themselves from criticism as they see potential conflict between some Sharia-based punishments for certain offences, e.g. cutting of hands for theft and stoning to death for adultery. Muslim states have also entered reservations to art 16 of the UN Convention on the Elimination of All Forms of Discrimination against Women 1979. Article 16 deals with family rights but as Islamic law allows polygamy, Muslim states have entered reservations indicating they will interpret art 16 in line with Sharia.

Foundational compatibility

Let me give two examples indicating towards foundational compatibility between Sharia and human rights law. 'Foundational compatibility' means that the foundation of both systems is based on human dignity and equality. We are not concerned with the origin of the rules as that will take us into the debate about secular versus faith-based rules and which set of rules should trump the other set.

Human dignity and equality

Human rights law is based on the concept of human dignity and equality. Article 1 of the Universal Declaration of Human Rights 1948 states that 'all human beings are born free and equal in dignity'. Sharia also believes in human dignity and equality. The Quran (17:70) states: 'We have honoured the sons of Adam'. Verse 17:70 lays down the foundation of human dignity and equality. The words used are the 'sons of Adam', not Muslims. In another place the Quran (95:4) states: 'We have indeed created man in the best of moulds'. Here again the word used is 'man', not Muslims. These two

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verses show that human beings are honoured and created in the best mould, a sign of dignity and honour, for their humanity rather than for their faith in Islam. Muslim states did not see conflict between Sharia and human dignity and equality expressed in the Universal Declaration and supported it. (Saudi Arabia abstained from voting but it was mainly for their objection to the freedom of religion provision.)

Sharia also forbids discrimination:

We created you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other (not that ye may despise each other) (Quran, 49:13).

In *Mirza*, the Federal Shariat Court of Pakistan relying on verse 49:13 held: 'All humanity belongs to one human family, without any inherent superiority of one over the other and all racial, national or tribal prejudices stood condemned by Islam'. [18] The concept of equality also includes gender equality. Islamic law is not inherently gender discriminatory, but many Muslim states have legislation, which are discriminatory towards women, e.g. s 10 of the Citizenship Act of Pakistan which the Federal Shariat Court invalidated in 2008.

Justice and the rule of law, both of which encompass obligations to uphold human rights law, are among the major themes of the Quran. Verse 4:135 of the Quran captures the spirit of the rule of law:

O you who believe, be upholders of justice ... even though against (the interest of) your selves or the parents, and the kinsmen. One may be rich or poor; Allah is better caretaker of both. So do not follow desires ... If you twist or avoid (the evidence), then, Allah is all-aware of what you do.

This verse can be the basis for developing a full-fledged justice system where the right to a fair trial for everyone, for instance, can be guaranteed.

Misperceptions

Many misperceptions about Islamic law exist in the Muslim world as well as non-Muslim states. When suicide bombing is shown on media again and again, it creates the impression, on the less informed, that somehow Islamic law allows the killing of civilians especially non-Muslims. This impression is misplaced for two reasons. First, Islamic law does not allow the killing of civilians irrespective of their religion or other background. In addition, Muslim armed groups have killed more Muslims in Afghanistan, Pakistan and Iraq compared to non-Muslims in countries such as in the USA or Israel. Second, every action of Muslims does not reflect Islamic law. Laws are always violated in all

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countries, e.g. American or British or French laws are violated regularly by Americans, British and French people. International law is also violated on regular basis by states. The jurisprudence of the International Court of Justice provides good evidence in this regard. Therefore, it is sensible to distinguish Islamic law from the actions of Muslims as their actions may not comply with Islamic law. A good evidence for compliance or otherwise can be found in the case law of Sharia courts in Muslim states. So far I have not come across judicial evidence validating the terrorist activities, e.g. suicide missions killing civilians Muslims or non-Muslims.

Another misperception is generated by Muslim states' official interpretation of Islamic law. Official interpretation of law is not always the correct interpretation in any country. Governments and public authorities lose cases in courts almost on daily basis. This is the case in the UK, USA, Saudi Arabia, Pakistan etc. Again national case law in these countries provides evidence that the state interpretation is not always the legally correct interpretation. A good example is Pakistan where the Federal Shariat Court invalidated several laws to be incompatible with Sharia. The Qanun-e-Shahadat Order 1984 was supposed to be based on Sharia but part of art 5 of it was declared to be against Sharia. If Saudi Arabia does not allow women to drive, it does not represent the correct Islamic legal position. It only reflects the Saudi government position. In other Muslim states women are allowed to drive and can even become Prime Minister, e.g. in Pakistan a woman was elected twice as Prime Minister of Pakistan.

Conclusion

Islamic law is an established and mature legal system. There are contentious and difficult areas demanding intense scholarly debate by scholars of Islamic law. Islamic law has always been debated by scholars and difference of opinion is tolerated and reflected by the formation and acceptance of various schools. Scholars of Islamic law need to ask bold questions such as whether stoning to death or cutting of hands can be replaced with more humane punishments by reinterpreting evidence in the primary sources of Islamic law, e.g. in *Bakhsh*, the Federal Shariat Court of Pakistan 1981 held that stoning to death is against Sharia and 100 stripes is the only punishment. [19] The decision was overturned by the Shariat Appellate Bench of the Supreme Court of Pakistan holding that the Prophet Muhammad had awarded stoning as tazir (discretionary) punishment; see [20].)

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