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Understanding Islamic Law in Theory and Practice

Abstract: Professor Mashood Baderin of the School of Oriental and African Studies explains the basic concepts of Islamic law. He discusses its sources, including the distinction between Sharī^{c}ah and Fiqh and its methods and principles. He concludes with a discussion of the various Schools of Islamic jurisprudence.
Keyword: Islamic law

I. Introduction

Islamic law is one of the major legal systems in the world today, yet it is probably the most misunderstood legal system, especially in the West. Traditionally, it is usually presented as having four general sources, namely: (i) The Qur'an (Holy book of Islam), (ii) The *Sunnah* (Traditions of the Prophet Muhammad), (iii) *Ijmā*^{c}, (Consensus) and (iv) *Qiyās* (Analogy). However, that traditional approach often tends to depict Islamic law as a completely divine system, without clearly distinguishing between its two principal component parts, namely, the immutable divine revelation termed '*Sharī*^{c}*ah*' and the non-immutable human understanding/interpretation of the '*Sharī*^{c}*ah*' termed '*Fiqh*'. This distinction is essential for a proper understanding of Islamic law in theory and practice. Abd Al-Ati has noted in that regard that "confusion arises when the term *sharī*^{c}*ah* is used uncritically to designate not only the divine law in its pure principal form, but also its human subsidiary sciences including *fiqh*".[1]

II. Distinction between *"Sharī*^{c}*ah"* and *"Fiqh"*

The two concepts, *Sharī*^{c}*ah* and *Fiqh*, are often synonymously interpreted as Islamic law, but they are not technically the same. Literally the term *Sharī*^{c}*ah* means 'path to water' or 'right path' and it can be used in three different contexts in relation to Islamic law as follows:

1. Sharī^{c}ah in a generic religious context

The term *Sharī*^{c}*ah* can be used in a generic religious sense to refer to the Muslims' way of life generally. In that context the term covers both issues of "non-law" and issues of strict "law", i.e., Islamic ethical, moral, religious, spiritual and legal stipulations as a whole. In that context, not all *Sharī*^{c}*ah* stipulations are enforceable juridically. This can be illustrated with the following three Qur'anic provisions:

> (a) Q4:86 provides that: "When you are greeted with a greeting, greet in return with what is better than it, or (at least) return it equally. Certainly, God is a Careful Account Taker of all things."

This Qur'anic obligation to return a greeting in a better or at least in a similar way is a moral and ethical obligation enjoined on Muslims, which is not juridically enforceable. Thus, one Muslim cannot bring legal action in a *Sharī*^{c}*ah* court against another Muslim who refuses to return a greeting despite being enjoined to do so under the *Sharī*^{c}*ah*.

> (b) Q3:97 provides that: "Pilgrimage (Hajj) to The House (Ka'bah) is a duty owed to God by everyone who is able to undertake it; but if any denies faith, God stands not in need of any of His creatures."

Similarly, the Qur'anic obligation to perform the pilgrimage (hajj) is a religious and spiritual obligation enjoined on Muslims who can afford it, but which is not juridically enforceable. Thus, no legal action can be brought in a *Sharī*^{c}*ah* court against a Muslim who fails to perform the hajj pilgrimage, even though he has a religious obligation under the *Sharī*^{c}*ah* to do so.

> (c) Q4:7 provides that: "There is a share for men and a share for women from what is left by parents and near relations, whether the property be small or large, a legal share."

Unlike the previous two provisions, the Qur'anic stipulation on the right to inheritance is not merely

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ethical but is also juridically enforceable. Thus, I can bring legal action to enforce it in the *Sharīᶜah* courts if, for example, there is an attempt by my siblings to exclude me from my rightful share in the estate of our late parents.

Thus, while all the three Qur'anic verses cited above are *Sharīᶜah* stipulations, the first relates to the moral and ethical ("non-law"), the second to the religious and spiritual, ("non-law") and the third to the strictly legal ("law"). In relation to administration of justice only the third type of *Sharīᶜah* stipulations are subject to juridical enforcement in a strict legal sense. However, while moral and religious stipulations of the *Sharīᶜah* may not be juridically enforceable herenow, Muslims believe that there may be adverse religious consequences in the hereafter against violators of such divine stipulations.

2. Sharīᶜah in a general legal context

The term *Sharīᶜah* can also be used in a general legal sense in reference to the Islamic legal system as a distinct legal system with its own sources, methods, principles and procedures, separate from other legal systems such as the common law and civil law. Used in that context there is often the tendency to perceive the whole Islamic legal system as completely divine and thereby to (mis) represent the whole system as inflexible and unchangeable. There is therefore always the need to distinguish between what is divine and immutable and what is human and variable within the Islamic legal system, which brings us to the third context of the term *Sharīᶜah* in contrast to the term *Fiqh*.

3. Sharīᶜah in a specific context distinct from Fiqh (Jurisprudence)

In its specific context the term *Sharīᶜah* can be used restrictively in reference to only the divine sources of Islamic law, namely the Qur'an and the *Sunnah* of the Prophet Muhammad. In that context it is distinguished from *Fiqh*, which is the human jurisprudential aspect of Islamic law. While the *Sharīᶜah* is in this sense immutable, the legal rulings derived from the *Sharīᶜah (Ahkām al-Sharīᶜah)* through *Fiqh* are not immutable but variable, especially in respect of inter-human relations (*Muᶜāmalāt)* as distinguished from acts of religious worship (*Ibādāt*).

Thus, in its strict juridical sense the term *Sharīᶜah* refers to the corpus of the divine law as contained in the Qur'an and the *Sunnah* of the Prophet. It differs in that context from *Fiqh* which refers to the understanding derived from the *Sharīᶜah* by the Muslim jurists. Thus, *Fiqh*, which technically means jurisprudence, is non-divine and may change according to time and circumstances.

Against that background, Islamic law is better understood as consisting of three main elements, namely, sources, methods and principles as is briefly analysed below.

III. Sources, methods and principles

1. Sources of Islamic law

Effectively, Islamic law has two divine sources, namely, the Qur'an and the *Sunnah* of the Prophet, both of which are, to Muslims, literally immutable.

The Qur'an is the first and principal divine source of Islamic law, believed by Muslims to be the exact words of God revealed, piecemeal, to Prophet Muhammad over a period of approximately 23 years.[2] It contains more than 6,000 verses of varied lengths covering spiritual, moral and secular matters of life. Some of the verses cover matters of religious worship such as praying and fasting,[3] some cover issues of ethics and morality such as respect for parents,[4] while some are legal-specific regulating temporal matters such as trade and crimes.[5] While Muslim jurists identify between 350 and 500 verses of the Qur'an as being legal-specific, "Western" scholars estimate very much less. This difference in perception on the legal-specific verses contained in the Qur'an is due to the fact that some verses that may be considered, from a "Western" positivist legal perspective, as mere moral rules are often considered by Muslim jurists as also constituting the basis for legal rulings in Islamic law and thus considered not only as moral rules, but also relating to the legal. The legal-specific verses in the Qur'an relate to different aspects of private, public, domestic and international law.[6]

The Qur'an was originally revealed in Arabic language but has been translated into different languages of the world today, making it more generally accessible. While some of the Qur'anic stipulations are definitive (*Qatᶜī*), most of it are speculative (*Żannī*), thus often requiring interpretation and supplementary elaboration, especially of the legal-specific provisions. Prophet Muhammad, being the receiver of its revelation, was obviously in the best position to interpret the Qur'an and also provide relevant supplementary elaboration during his lifetime, and indeed did so in his dual role as a Prophet and a judge. His interpretations, elaborations and other relevant guidance on the Qur'an formed the initial basis of what materialised as the Prophet's *Sunnah*, which eventually became, and continues to be, the second fundamental source of Islamic law. As there is universal unanimity amongst Muslims that the Qur'an is the first and immutable divine source of Islamic law, the search for Islamic legal provisions normally starts with it.

The *Sunnah*, as the second fundamental source of Islamic law consists of Prophet Muhammad's lifetime sayings, deeds and tacit approvals on different aspects of life. It plays corroborative, elaborative and supplementary roles to the Qur'an.

Apparently, the role of the *Sunnah* as a source of law is supported in the Qur'an itself. One oft-quoted authority in that regard is Q4:59, which says: "Oh you who

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believe, Obey God and Obey the Messenger…" The Qur'an and the *Sunnah* operated as the two main sources of Islamic law from the Prophet's lifetime, as noted by Ramadan that "the structure of Islamic law - the *Sharī*^{c}*ah* - was completed during the lifetime of the Prophet, in the Qur'an and the *Sunnah*".[7] The Prophet is reported to have asked one of his companions named Mu'ādh ibn Jabal, whom he had deployed as a judge to Yemen, what would be his source of law in deciding cases. Mu'ādh was reported to have replied: "I will judge with what is in the book of God (the Qur'an)". The Prophet then asked: "And if you do not find a clue in the book of God?" Mu'ādh answered: "Then with the *Sunnah* of the Messenger of God." The Prophet asked again: "And if you do not find a clue in that?" To which Mu'ādh replied: "I will exercise my own reasoning (*Ijtihād*)."[8] The Prophet was reported to have been satisfied with these answers by Mu'ādh, which signified his approval of that process.

While Muslims believe generally that the *Sunnah* also enjoys divine inspiration, they appreciate that not every reported Tradition is authentic. Political dissension, and other social factors that emerged after the Prophet's death, led to divisions amongst the Muslims and to the emergence of fabricated Traditions attributed to the Prophet. This subsequently necessitated the early Muslim jurists to develop a conscientious and critical technique of authenticating the *Sunnah*, through the science of *Hadīth*, which eventually culminated in the emergence of six recognised *Sunnī* books of authentic Traditions in the third century of Islam. The six *Sunni* books containing what are considered to be the authentic *Sunnah* of the Prophet are: *Sahīh al-Bukhārī*, *Sahīh Muslim*, *Sunan Abū Dāwūd*, *Sunan al-Tirmidhī*, *Sunan al-Nasā'ī* and *Sunan Ibn Mājah*. These six *Sunni* books of *Hadīth* have also been translated into different languages today for easy accessibility. The *Shī'ah* also have their own different collections of Prophetic Traditions such as *Kitāb al-Kāfī* by Abū Ja'far al-Kulaynī al-Rāzī, *Tahdhīb al-Ahkām* and *al-Istibsār* by Abū Ja'far al-Tūsī.

The terms *Sunnah* and *Hadīth* are sometimes used interchangeably, but they differ in the sense that *Hadīth* is the oral or written narration of the *Sunnah* while the *Sunnah* is the actual practice or message conveyed by the narration in a *Hadīth*. Thus *Hadīth* has been correctly described as the vehicle or carrier of the *Sunnah*.

2. Methods of Islamic law

During Prophet Muhammad's lifetime, the application of Islamic law was relatively straightforward, as matters were normally referred to him and his decisions were accepted as conclusive. However, the passage of time and the expansion of Islam after the Prophet's death, brought many new cases that were not specifically covered by the Qur'an or the *Sunnah*. Relying, *inter alia*, on the Tradition of Mu'ādh ibn Jabal quoted earlier, the concept of *Ijtihād* (legal reasoning) was utilised to devise two main methods, namely *Ijmā*^{c} (consensus) and *Qiyās* (analogy) for moving Islamic law forward. These two methods of Islamic law are not divine but were products of human reasoning developed by the early Muslim jurists as a means of addressing new situations that needed to be regulated, but not expressly covered by the Qur'an or the *Sunnah*. These methods facilitated the extension of the two divine sources to answer new legal questions that arose after the Prophet. The jurists have justified each of these two methods by reference back to relevant provisions of the Qur'an or the *Sunnah*. Thus, while the revealed sources of Islamic law ended with the demise of the Prophet, the evolved methods of Islamic law are the vehicle by which the Muslim jurists transport the *Sharī*^{c}*ah* into the future.

Ijmā^{c} consists of the unanimous consensus of qualified Muslim jurists on a particular issue that is not specifically covered in the Qur'an or the *Sunnah*. When any new issue arises and qualified Muslim jurists unanimously agree on a ruling based on their understanding of the Qur'an and the *Sunnah*, such juristic consensus becomes binding and authoritative on that particular issue. While an *Ijmā*^{c} is considered to be as binding as a provision of the Qur'an or the *Sunnah*, it can, unlike the Qur'an and the *Sunnah*, be modified or changed by another *Ijmā*^{c} validly agreed upon again by consensus. This method of Islamic law has been justified by reference to Qur'anic provisions such as Q4:59, Q4:83 and Q4:115, which enjoin Muslims to hold together as a community and also to obey those in authority. Reference is also often made to a Tradition in which the Prophet is reported to have said: "My community shall never agree (i.e. reach a consensus) on an error".[9] However, due to the fact that differences of opinion (*Ikhtilāf*) is also very much accommodated in Islamic law, *Ijmā*^{c} in the sense of unanimous juristic consensus is often quite difficult to determine. There is therefore some tension between the theoretical connotation and practical feasibility of *Ijmā*^{c}, as a method of Islamic law, which has been variously debated by the classical Muslim scholars.[10]

Qiyās consists of extending an original provision from the Qur'an or *the Sunnah* to cover, by analogy, a new case that has a similar effective cause as the original case provided for in the Qur'an or *Sunnah*. This is usually illustrated by reference to the prohibition of narcotic drugs under Islamic law today even though narcotic drugs are not specifically mentioned in the Qur'an or the *Sunnah*. The prohibition of narcotic drugs is by analogy to the specific prohibition of wine (*Khamr*) contained in Q5:90 on grounds that narcotic drugs have a similar effect on the intellect as wine does. The process of *Qiyās* must fulfil four conditions. First, there must be an original case *(Asl)* covered either by the Qur'an or the *Sunnah* on which the analogy would be based. Second, there must be a new case *(Far*^{c}*)* on which a ruling is needed but not specifically covered in either the Qur'an or the *Sunnah*. Third, there must be an effective cause *(*^{c}*Illah)* between the original case *(Asl)* and the new case *(Far*^{c}*)*. Where these three conditions are satisfied, the ruling *(Hukm)* on

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the original case can be applied to the new case by analogy. Thus, in the example of narcotic drugs given above, the original case (*Asl*) is wine, which is covered by Q5:90; the new case *(Far^{c})* is narcotic drugs, which is not specifically covered in either the Qur'an or the *Sunnah*; and the effective cause is the intoxicating effect of both substances and thus the original ruling prohibiting wine would be applicable to narcotic drugs analogically and also prohibited under Islamic law.

Both *Qiyās* and *Ijmā^{c}* are reasonable human methods through which Muslim jurists carry Islamic law forward to cover new situations in human life, but with varying degrees of approval and application amongst the classical jurists and their different schools of jurisprudence.

The practical application of both the sources and methods of Islamic law are guided by relevant principles as discussed below with some very brief examples.

3. Principles of Islamic law

Legal principles serve to ensure consistency between the theory and practice of law. In Islamic law, there are different established principles of jurisprudence (*Usūl al-Fiqh*) to ensure a logical application of the legal provisions. Some of the principles relate to the interpretation of the sources, while some relate to the application of the methods. This helps to ensure consistency in the relationship between the sources and the methods leading to a logical application of the law. Some examples of the principles of Islamic law are *Darūrah* (principle of necessity), which enables proportionate deviation from the letter of the law in cases of necessity; *Maslahah* (principle of welfare), which allows for the consideration of human welfare in the application of the law; *Istihsān* (principle of juristic preference), which enables judges to do what is fair and equitable based on the facts before them; *Urf* (custom), which validates the recognition of prevailing custom within the context of the sources and methods of Islamic law; *Takhayyur* (principle of eclectic choice) which allows movement between the opinions of the different schools of Islamic jurisprudence to avoid hardship, where necessary. There are many more of these principles, most of which have been formulated into maxims to formalise their scope and application in Islamic law.[11] Differences exist in respect of the degree to which some of the principles are applicable under the different schools of Islamic jurisprudence.

IV. Schools of Islamic Jurisprudence

With the expansion of Islam outside Arabia, about 500 schools of Islamic jurisprudence *(Madhāhib)* developed in the early years, but most of them disappeared and others merged by the 10th century. Today, there are four main *Sunnī* Schools of Islamic jurisprudence (also called "Colleges" or "Schools of Law") applicable in different parts of the Muslim world, namely, the *Māliki* School (North Africa, West Africa and Kuwait), the *Hanafī* School (Turkey, Syria, Lebanon, Jordan, India, Pakistan, Afghanistan, Iraq, and Libya), the *Shāfi'ī* School (Southern Egypt, Southern Arabia, East Africa, Indonesia and Malaysia) and the *Hanbalī* School (Saudi Arabia and Qatar). There are also different *Shī'ah* schools of jurisprudence, the major ones being the *Ithnā 'Asharī* School(Iran and Southern Iraq), the *Zaydī* School (Yemen), the *Ismā'ilī* School (India) and the *Ibādī* School (Oman and parts of North Africa).

Based on their understandings of the provisions of the *Sharī'ah* through careful and prolonged study, the classical jurists of the different Schools of Islamic jurisprudence compiled books of *Fiqh* containing *Ahkām al-Sharī'ah* as derived through *Ijtihād* within the different Schools. All the schools generally recognise the Qur'an and *Sunnah* as the principal sources of Islamic law. Their differences of opinion on particular matters result from their different interpretations of relevant provisions of the Qur'an and the *Sunnah* and also influenced by the different circumstances in the different provinces where the Schools developed and flourished. The books of *Fiqh* containing the jurisprudential rulings of the classical Islamic jurists, unlike the *Sharī'ah* itself, are neither divine nor immutable, but have become accepted by Muslims as established legal treatises of Islamic law in different parts of the world today. Ramadan has rightly noted that "the invariable basic rules of Islamic law are only those prescribed in the *Sharī'ah* (Qur'an and the *Sunnah*), which are few and limited. Whereas all juridical works during more than thirteen centuries are very rich and indispensable, they must always be subordinated to the *Sharī'ah* and open to reconsideration…"[12]

1. Closing the gate of *Ijtihād*?

By the 10th century, it was thought that the established Schools of Islamic jurisprudence had fully exhausted all possible questions of law and that the necessary interpretative materials of Islamic law were fully formed. Consequently, the practice of *Ijtihād* diminished substantially, which led, around the 13th century, to what was termed as "closing of the gate of *Ijtihād*". This ushered in the concept of legal conformism *(Taqlīd)* whereby Muslims were restricted to conforming to or following the jurisprudential rulings in the *Fiqh* books of any one of the Schools of jurisprudence. This slowed down the dynamism that had been injected into Islamic law from its inception, and thus, according to Iqbal, "reduced the law of Islam practically to a state of immobility".[13] Although many contemporary scholars have challenged the notion of the closing of the gate of *Ijtihād*, the practice of *Taqlīd* still prevails amongst lay judges of the lower *Shari'ah* courts in Muslim countries.

While *Taqlīd* remains a necessary methodology of Islamic law for ensuring that those who are not fully

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qualified in the science of Islamic jurisprudence are able to base their decisions on relevant precedents laid down by the classical jurists, it must be distinguished from blind conservatism that does not allow for a reflective and contextual application of classical precedents. It is imperative to state that the concept of *Taqlīd* should neither place unnecessary restrictions on the development of new theories and principles of Islamic law by qualified scholars and jurists, nor prevent qualified Islamic law judges from exercising their own legal reasoning in cases before them, within the context of the sources, methods and principles of Islamic law. Actually, Muslim jurists are agreed on the fact that a qualified jurist or judge must exercise his own juristic opinion in accordance with the *Sharī'ah*, in every case before him, subject to a clear elaboration of the relevant methodologies of the law utilised in reaching his decision so that the validity of his judgment can be properly evaluated within the relevant rules of Islamic law.

Endnotes

[1]H. Abd Al-Ati, *The Family Structure in Islam* (Indianapolis: ATP, 1977) p.14.

[2]Q26:192 says: *'Verily this is a Revelation from the Lord of the Worlds*'. The revelation of the Qur'an to the Prophet commenced in Mecca in 609CE when the Prophet was 40 years old and ended with the Prophet's death in Medina at the age of 63 years in 632CE.

[3]See e.g. Q2:238 and Q2:183.

[4]See e.g. Q4:86 and Q17:23.

[5]See e.g. Q2:275 and Q5:38-39.

[6]See e.g. T. Mahmood, "Law in the Qur'an: A Draft Code" (1987) 7 *Islamic Comparative Law Quarterly*, 1.

[7]S. Ramadan, *Islamic Law: Its Scope and Equity* (London: Macmillan, 1970) p. 36.

[8]See e.g. A. Hasan (Trans), *Sunan Abū Dāwūd* (1984), Vol. III, p.1019, Hadîth No.3585.

[9]Reported in *Sunan Ibn Majah*.

[10]See e.g. G.F. Hourani, "The Basis of Authority of Consensus in Sunnite Islam" (1964) 21 *Studia Islamica*, pp. 13-60.

[11]See e.g. M.H. Kamali, "Qawa'id al-Fiqh: The Legal Maxims of Islamic Law" (1998) 3 *The Muslim Lawyer Journal*, Issue 2, October.

[12]S. Ramadan, *supra*, p.36.

[13]Iqbal, M., *The Reconstruction of Religious Thought in Islam* (1951) p.148.

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