

UNDERSTANDING SHARI'A THE SACRED LAW OF ISLAM

Muhammad. About the year 613 AD, a successful and respected merchant began to preach in the streets of Mecca. He spoke as God's messenger delivering revelations he had received from the Angel Gabriel and exhorted his listeners to abandon their polytheistic and animistic ways and submit to the one true God, Allah. His name was Muhammad and his message was not well received by the local establishment which feared that it would discourage pilgrimage to the local pagan shrines. Informed of a plot to murder him, Muhammad and a small band of followers fled to Medina where they were welcomed. The year was 622 and their flight across the desert (higra) marked the beginning of the Muslim era and remains the signature event in the history of Islam.

In Medina Muhammad served as arbitrator resolving conflicts among warring tribes. He led a military campaign to ward off the hostile Qur'ash tribe of Mecca, ultimately defeating them. And importantly he served both as judge adjudicating disputes among his followers and other inhabitants of the Arabian desert, and as leader guiding the creation of a community of believers (umma). He became known as the Prophet who brought the revelations of the Qur'an to his people..

The Qur'an. The Qur'an (that which should be recited and read) is the compendium of the revelations received by Muhammad and preached by him, as recorded by his Companions. It is the comprehensive spiritual, ethical and practical guide and moral code for Muslims and the wellspring of Islamic culture. It explicates the basic belief of Muslims in an all powerful God who created everything and on whom all human beings are equally dependent. It contains exhortations regarding right and wrong and revelations of historical events bearing on moral lessons. Muslims believe the Qur'an to have solutions to all the problems of humanity.

Unlike legal systems in the West, the Qur'an functions in two spheres: it governs human affairs and it determines man's obligations to God. It contains descriptions and prescriptions concerning the way men should worship God and how they should act towards each other, but it provides few specific rules of law. Thus it urges traders to deal fairly with each other and not to demand usurious interest but it supplies no details of the required course of conduct.

The Qur'an's revelations are held to be divine, each word having come from Allah. They are immutable and demand complete submission (Islam). Their translation (in theory) is forbidden; Muslims recite them whether they know arabic or not.

The final version of the Qur'an was published (in three duplicate originals) about 650 AD by Caliph Uthman, not long after Muhammad's death in 632. Its publication was guided by the principle that God's words, being sacred, must not be disturbed by organization of the material in chronological or thematic order. It is approximately the length of the New Testament, containing some 6,000 verses in 114 chapters (surahs). Many deal with religious duties and rituals. About eighty surahs cover areas of law.

The Qur'an is the ultimate legal authority for Muslims. But for a code of law, it is relatively sparse. It was evident that a slim volume was not an adequate source for a complete system of law. The community therefore faced the problem of providing legal rulings acceptable to all on points that the Qur'an did not cover or left ambiguous. They realized that during his lifetime Muhammad made many decisions to implement the Qur'an—known as the interpretations and practices of the Prophet--and they determined to record and preserve them as sunna. (This is the origin of sunni, the people who followed the Prophet's practices and way) Sunna is reported in compilations known as hadith which served to augment the Qur'an as a source of law. Numerous volumes of hadith reports--the most authentic having 7,000 to 12,000 entries--contain the often diverse recollections of jurists and scholars of the words and actions of Muhammad.

Islamic Law Developing. From the earliest days there was general agreement on the essential acts of worship imposing basic obligations on Muslims: the singularity of God and the Prophet, ritual prayer, giving of alms, fasting, ramadan and the hajj (pilgrimage). But with the rapid expansion of the Empire under the first four caliphs and the subsequent Umayyad dynasty, the Caliphate was called on to dispense justice and decide disputes of ever increasing diversity of subject matter and volume. The resulting demand for Islamic law made it necessary for the Caliphate to appoint Islamic judges (quadi) throughout the territory. The judges, lacking a body of law to work with, made their decisions on a case by case basis, using their own judicial discretion and sense of equity. Also diverse legal traditions had sprung up in major cities--Mecca, Medina, Kufa and Basra-not always consistent with the Qur'an and sunna. Finally Muslim jurists and scholars were struggling to arrive at the meaning of the Qur'an. Some—Shia and Sufi—believed that the Qur'an was not limited to its literal words but had esoteric meaning. Others—Salafi and Zahiri—believed that the Qur'an could only be taken at its face. They engaged in extensive exegesis (the extraction of law from text) to arrive at critical explanations and interpretations, exposing conflicts between fundamentalists and moderates. It became clear that a system was needed for the orderly implementation of the principles of Islamic law.

Working independent of the Caliphate, scholars were engaged in the formulation and systemization of Islamic law. From their ranks emerged four major schools of law named after their founding scholars: Hanafi'i, Maliki'i, Shaf'i'i and Hanbali'i in the sunni world and Ja'afari' for shia. They sought to make contemporary legal practice conform to the Qur'an and sunna and hadith. Their deliberations, rather than producing objective, impersonal statute law as in the West, generated methodological principles for lawmaking reflecting the opinions of the school's scholars. Though they

differed on particular points of law and principles of reasoning, they shared a common vision of the law.

The Emergence of Shari'a. During the first two and a half centuries of Islam, scholars and jurists had thus been left to find their own solutions to legal problems, relying on what they took to be Islamic law. But with the advent of the Abbasid dynasty in 750 C.E., the Caliphate evolved into a centralized, bureaucratic state. Because Islam was the foundation of that state, it became necessary that there be general agreement on the principles of Islam: on the Qur'an's meaning, on sunna as embodied in hadith reports, on the practices of communities, and on the scholars' reasoning and their consensus.

Responding to that need there appeared a legal scholar, al Shafi'i (767-820), to become known as the father of Muslim jurisprudence, who “unravelling the tangled threads of multiple controversies and propounded a solution to create order out of existing chaos.” Shafi'i identified four major sources of Islamic law: first, the Qur'an which not only provided binding substantive rules but also the means for their interpretation by establishing the precedents of Muhammad—the Prophet—as a source of law second only to God. Because the Qur'an commanded obedience to God and to the Prophet, Shafi'i insisted that the Prophet's legal decisions and actions were necessarily divinely inspired, complementing the Qur'an.

These legal decisions and actions of the Prophet— sunna—therefore became the second source of Islamic law known as the Traditions. Shafi'i maintained that there could be only one genuine Islamic Tradition, displacing local variations and instilling doctrinal uniformity. It followed that the Traditions were binding authority and could not be rejected unless the authenticity of a report could be denied.

The third source of law was consensus (ijma). Shafi'i rejected the previous practice of accepting the authority of scholars in any particular locality. He argued that the only

valid consensus was that of the entire Muslim community but since that was unlikely to be obtained, the effect of the doctrine was to reject local consensus and the resulting diversity in the law.

The fourth source of law was reasoning by analogy (ijtihad). Where points were covered by explicit decisions of God, the Prophet or sunna, no disagreement was allowed. On other points not specifically addressed, scholars could use their reasoning ability to search for guidance in one of the other three sources so long as it did not contravene the plain spirit and meaning of the shari'a.

Once these principles had been accepted, they were applied to the entire body of laws and precepts by a process called fiqh (jurisprudence), and the product of fiqh came to be called shari'a.

Shari'a reached its definitive literary form with the publication in the tenth century of the *hidaya* (guide) and of anthologies by al-Bukhari and Muslim. They created a vast reservoir of case materials and precedents which, though no longer offering a set of rigid rules, could be used as a basis for judicial decisions, thereby providing opportunities for individual interpretation and flexibility in practice. And they contributed to the creation of a homogenous religious life based on the Sacred Law of shari'a.

The essence of Shari'a. Shari'a---literally the path to the water---is the Sacred Law of Islam. It is grounded on the Qur'an and sunna by way of hadith reports. The term itself is not defined and is rarely seen in the Qur'an or in other religious writings. Believers hold shari'a to be the unchanging expression of God's will, a collection of divine revelations that came to an end with Muhammad's death, and a metaphor for the right path to a way of life ordained by God, in worshipping, interacting with other human beings, and conducting one's personal life.

Shari'a divides human acts into two broad categories. The first comprises ritual acts of worship such as pilgrimage, prayer and other conduct which an individual is expected to follow knowing that he will be judged by God after death. The second category embraces five categories of human acts (subcategories). Two of those subcategories—namely acts that are obligatory and acts that are forbidden-- entail punishment for violation and thus are in the nature of positive law. The other categories comprise acts that are recommended, disapproved, or neutral. Though these acts may be grounded on religious principles, because they provide no punishment they are not considered law.

Shari'a law, therefore, comprises those rules that are subject to enforcement mechanisms. It is a subset of Shari'a which in its entirety is as much concerned with recommending and disapproving as with forbidding and prescribing.

Shari'a in action. One must next consider some of the more important precepts (rules) illustrative of shari'a's scope although any of them may in fact be subject to disagreement among schools. A complete statement of the Sacred Law can be found, for example, in *Reliance of the Traveller*, 1200 pages (of small type) in length, comprising some 400 surahs with a subject index of 81 pages.

Litigation. The Sacred Law deals with judicial proceedings extensively and with considerable sophistication. By way of illustration, one who is competent is obliged to accept a judgeship and may not take a salary for it; he must have comprehensive knowledge of the Sacred Law and its processes, be “stern without harshness” and “flexible without weakness,” and should not decide cases when angry.

Shari'a courts principally heard complaints arising out of private disputes between individuals. Typical cases were disputes between property owners about their

respective rights, heirs arguing about distribution of estates, and couples arguing about marriage, divorce and child support. Cases were presented by oral testimony under oath from two men (two women were equivalent to one man), usually without the assistance of lawyers. Documents could also be received but were considered inferior to oral evidence. A losing party who failed to comply with a judgment could be jailed until he did. Routine criminal offenses and other public law disputes were usually handled by the police or government officials. The courts also heard cases arising under customary or government law where shari'a was silent or inadequate (for example tax law).

Marriage. Marriage is considered at great length, beginning with who should marry and what characteristics they should look for. It is unlawful for a man to look at a woman not his wife except when necessary for commercial dealings, for testimony in court or if he wants to marry her. No woman may marry another woman. When a woman asks to marry a suitable man, her guardian must arrange the marriage. The wedding feast should be of sheep or goat whenever available. A woman is obligated to let her husband have sex with her immediately when he asks. One should make love to one's wife every four nights. Husband and wife should treat each other kindly and graciously but if a wife does not obey her husband he may punish her. The Qur'an permits a man to take up to four wives but cautions "if you cannot do justice (between wives) then (marry) only one."

Divorce. A husband may divorce his wife by unilateral repudiation of the marriage, but he must then return the dowry to the wife.

Paternity. The husband of a woman who bears a child is the father no matter whether the marriage is valid if it is physically possible for the child to be his.

Women's Status. A majority of scholars held that it is unlawful for a woman to leave the house unveiled. Women may own property in their own right and inherit

from family members. Until the 20th century, Islam law granted women legal rights that Western systems did not grant, such as a married woman's property right.

Crimes. The Sacred Law defines only a small number of crimes. These are serious offenses (hadd) for which punishment is specified because they are held to offend God Himself and to undermine the integrity of the community. The offenses are illegal sexual relations (fornication), theft, armed robbery, apostasy, and wine drinking. For fornication, the penalty is stoning to death or being scourged one hundred stripes under carefully specified conditions, and banishment for a year, but ignorance may be an excuse, and one who makes such an accusation without four eye witnesses is also subject to scourging. For theft, a person's right hand is amputated, for a second offense, the left foot and so on, unless the place of the theft did not meet normal security requirements. For highway robbery, execution or crucifixion if a homicide results but the penalty is cancelled if the robber repents. If a person voluntarily apostatizes—say, reviles Allah or his messenger or denies Allah's existence—he must be asked to repent and if he refuses he must be killed. For drinking an intoxicating beverage the penalty is to be scourged forty stripes but if the offender dies an indemnity is due from the scourger. One who commits any of these offenses more than once is punished only once for each type of offense.

Jihad is a complex word carrying many meanings depending on the speaker and his purpose. As defined in the Sacred Law, the lesser jihad is the struggle against the enemies of Islam. The greater jihad is the struggle in God's cause against the lower self. Jihad is a communal obligation, but when non-Muslims invade a Muslim country, it is also a personal obligation upon the inhabitants of that country who must repel the non-Muslims with whatever they can, and on all those present in the battle line. Jihad is also

personally obligatory on everyone, male or female, when surrounded by the enemy. A woman is obliged to fight if she is not certain that she will not be subjected to an indecent act if captured. Muslims may fight Christians and Jews provided they have been invited to enter and pay the non-Muslim poll tax but refused.

The primary aim of jihad is not the conversion of non-Muslims to Islam by force, but rather the expansion and defense of the Islamic state: “There is no compulsion in religions.” The Qur'an allows jihad as a means of encouraging potential converts and fighting only defensively against aggressors. Some Muslim writers have claimed that the Qur'an allowed only for self-defense and defense of freedom; later writers argued that jihad was the Islamic equivalent of a “just war.”

The Qur'an also urges a non-violent response against those who might be perceived as enemies and to forgive those who disagree with them. But there may be times when Muslims must stand up and confront the forces against them and the rules governing armed warfare are covered at great length. Thus the text legitimates violent behavior including war while elsewhere it speaks of peace and harmony.

In recent years jihad has been invoked as holy war, a political, propaganda and terrorism weapon. Fundamentalists have argued that in the final years of Muhammad's life, jihad meant a struggle to bring the whole world under Islamic rule although historically, jihad did not sanction military action to convert non-Muslims to Islam by force but served only the expansion and defense of the Muslim state. Jihadists also find intellectual and philosophical support in the pronouncements of an early line of Muslim scholars and jurists. The first was Ibn Taymiyya (1263-1328) who called for rebellion against nominally Muslim rulers, at the time the Mongols, who were not ruling in strict compliance with shari'a. He was the first to legitimate the killing of Muslims by Muslims. His teaching was carried forward by Ibn Abd al-Wahab (1703-1792), who led his followers, the Wahabis, in brutal attacks. on the Muslims of Mecca and Ta'if whose

observance of shari'a they considered insufficiently pure. The founder of modern Islamic fundamentalism was Sayed Qutb (1906-1966), one of the organizers of the Muslim Brotherhood, who called for all-out jihad to destroy secularism and capitalism and establish through shari'a God's rule on earth. Among his disciples was Osama bin Laden (1957-2011), neither scholar nor jurist, who declared jihad against the United States for its "unjust" and criminal acts.

Abrogation. The Sacred Law specifically recognizes that the Qur'an presents a variety of rules, including some which supersede previously revealed verses and others which are superseded by later verses. According to the theory of abrogation, rules designed for the early stages of the community (umma) sometimes are rendered obsolete by later developments and had to be replaced by more progressive rules. Application of this theory introduced considerable uncertainty into the interpretation of hadith.

Shari'a evolving. The verses of the Qur'an retain a powerful influence on the lives and thought of the 1.6 billion Muslims around the world. A recent survey by the Pew Research Center found that most Muslims are deeply committed to their faith and want its teachings to shape not only their personal lives but also their societies and politics. Most favor using shari'a in domestic matters such as family and property disputes, though there is little support for severe punishments.

But Muslim attitudes and perceptions of shari'a vary widely. Reformists would remodel it to conform to modern Western culture and values, using the Qur'an as the sole source of law and quarrying it for passages that support their views while ignoring or suppressing those not in accord. Much of their reinterpretation had to do with women, sex and the family. Fundamentalists regard shari'a as eternally valid and unchanging. They seek to live by it to the letter while transforming it from a legal system to a

political force.

Moreover the Qur'an, shari'a's primary source, no longer holds a monopoly as the source of religious law; beginning in the nineteenth century, most Islamic states enacted secular legislation to address the current needs of their societies: new commercial and criminal codes limiting the scope of the shari'a were adopted and new courts were established. Indeed as early as the time of the Ottoman Empire, Sultans found it necessary to promulgate various kinds of codes, to regulate tax matters, define criminal offenses, administer the court, and bring the laws of conquered territories into conformity, all within the general ambit of sharia. Suleyman the Magnificent (1495-1566), for his efforts, became known to his subjects as the "Lawgiver."

Shari'a abroad. Some fifty countries are Muslim-majority states. Each maintains a unique relationship to shari'a. The following are examples.

Of all the Muslim countries, Saudi Arabia maintains the most fundamental Islamic legal system in the world. Traditionally trained judges apply Islamic law exclusively and carry out the principles of Wahabism literally. (The New York Times reported that the editor of a liberal website who angered authorities by urging Saudis to share opinions about the role of religion was sentenced to seven years in prison and 600 lashes.) Salafism, the dominant sect, mandates strict adherence to the Qur'an and the actions and practices of the first four caliphs. The severe restrictions on the public conduct of women, for example, are well known.

Pakistan's legal system is based on the English common law but its constitution states that all laws shall be in conformity with the injunctions of Islam. Shari'a is declared the law of the land although the harsh hadd penalties are rarely imposed except in the tribal areas beyond the central government's control.

In Nigeria shari'a has been in force in 12 northern states. Ten people have been

sentenced to death there by shari'a courts since the year 2000, many more have suffered retaliatory amputation, and floggings are said to be a regular occurrence.

Egypt's judicial system is a mix of British, French and shari'a law. Shari'a courts have been integrated into the national courts and access to them appears to be at the litigants' option. The Muslim Brotherhood, founded in 1928, has been pressing for Egypt to become an Islamic state but the outcome of the present struggle between fundamentalists and secularists remains in doubt.

Turkey abolished shari'a and its supporting institutions in 1926 and advocating shari'a became an offense under Turkish law.

Shari'a is a presence to some degree even in non-Muslim countries:

Great Britain. An estimated 3 million Muslims reside in the United Kingdom. Numerous shari'a councils operate throughout the country. They have no official status and their orders are not enforceable in the English courts. But a couple who contracted marriage under Islamic law would be subject to the jurisdiction of a shari'a council so long as the proceedings did not violate fundamental English law. Muslim parties may also agree to proceed before a shari'a council as under the Arbitration Act and be bound by the resulting award.

United States. Legislation has been proposed but none has been passed barring state and federal courts from considering foreign or religious laws. The U.S. Constitution's free exercise and establishment clauses protect against conflicts with religious laws. Islamic law may, however, appropriately come before a court where a marriage or business arrangement was contracted subject to Islamic law or where Islamic law may be critical to proper understanding of a document or relationship. And the free exercise clause necessarily protects Muslim observance of the rules and practices of their

religion.

A passing thought: some may not remember that in this country, not so long ago, women could not inherit or own property as they could under shari'a, and they may forget that in some places justice was administered with the hangman's knot and the whip with tacit official approval.

Conclusion. Shari'a is the Muslim people's commitment to their faith. It guides, serves, inspires, directs and teaches its people in ever changing ways, at times as a beacon of hope and progress, but at others as agent of violence and destruction. Shari'a is also the polestar of islamists seeking to establish government under Shari'a. To confront that challenge understanding Shari'a is critical.

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