
CONCEPTIONS OF ISLAMIC AND WESTERN LAW

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Introduction

Law (a loan word from Danish-Norwegian law) in politics and jurisprudence is a set of rules or norms of conduct which mandate, proscribe or permit specified relationships among people and organisations, as well as punishments for those who do not follow the established rules of conduct.¹

Law and rules are concerned with obligation rather than coercion. Thus, it is necessary to analyse the characteristic features of legal rules. In some way, legal rules resemble the rules of games, clubs and societies. These rules are typically of a formal nature and open to amendment by bodies authorised for this purpose. When difficulties arise as to the meaning or application of such rules, some sort of adjudication process is typically to be found. These characteristics which legal rules share with those of games and clubs differentiate them from the rules and principles of morality. While rules are concerned not with what happens but with what ought to be done; they are imperative or prescriptive rather than indicative or descriptive.

Fitzgerald in his book entitled "Salmond on Jurisprudence" distinguishes between "moral rules" and "law." He says that the former are not amenable to legislative alteration and moral disputes are not resolvable by adjudication.² There is one characteristic however, which legal and moral rules have in common, and which distinguishes them from other type of rules. As both legal and moral rules are *invitum*; obedience to them is non-optional. Furthermore, law consists of rules which can be created by legislature and applied and developed by a court. In this perspective, religious laws are characterised by religious sanctions. Religious laws are recognised as of Divine origin or the result of revelation. Moreover, this recognition may be seen as examples of the unrevealed laws of nature, denoted as natural laws, more meaningfully natural law are describable to be the laws manifested to man by the light of nature or reason.

This paper will define the meaning of Islamic law and Western law and highlight some of the main differences that exist between these two systems of law.

Islamic Law as Religious Law

Islamic law, which is religious law is recognised as of Divine origin or the result of revelation. Moreover, Islamic law is considered to be natural law.

In discussing Islamic law, it is important to distinguish between moral or

religious obligations on the one hand and legal obligations on the other. Thus, a distinction must be made between *Sharia'h* and *Fiqh*. *Sharia'h* means the canon law of Islam, it embraces the totality of Allah's Commandments and subsequent developments of the common law. It is not law in the modern sense. It is fundamentally a doctrine of duties which contain a guide to ethics. While *Fiqh* is also based on the canon law of Islam, it is confined to that part of the canon law which is used to describe the law as a science or as a jurisprudence and which a citizen is legally bound to obey. Thus, it appears that *Sharia'h* is a much wider concept.³ The term *Sharia'h* literally means the "pathway leading to the watering place." It may roughly be translated as "the path in which God wishes men to walk." E.J. Brill's First Encyclopaedia of Islam describes *Sharia'h* as "road to the watering place, the clear path to be followed, the path which the believer has to tread, the religion of Islam in technical terms is the canon law of Islam, the totality of Allah's commandments.⁴ In religion, the term means "the highway of the righteous leading to God" or the sum total of divine commands to men. It comprehensively includes law, moral principles and the creed to which every Muslim must subscribe.⁵

Sharia'h is the standard of right and wrong in human affairs, and it provides an all inclusive scale of religious valuation for conduct. Every human deed falls under the perspective of the law without exception. Actions are classified as obligatory, meritorious, recommended, indifferent, i.e. not punishable but disapproved and forbidden.

The sources of Islamic law are divided into two main categories: basic

material sources and subsidiary sources. The basic material sources are the *Qur'an* (the Holy Book of Islam), the *Sunnah* (the way of the Prophet as recorded in the tradition or *Hadiths*), *Ijmah* (consensus of the community) and *Al-Qiyas* (analogical reasoning). The law has been studied, analysed and commented upon for many centuries and most Islamic countries have their own appropriate and authoritative texts. In most Islamic countries, the law has been codified and in modern times slight changes have been made to the process of codification to suit modern life and conditions. Another important source of Islamic law in modern times is judicial decisions.⁶

The broad outline of *Sharia'h* is drawn from the *Qur'an*, but for details and the newer issues which arose from time to time, in differing circumstances recourse had to be made to sources other than the *Qur'an* such as the Prophetic traditions or practice (*Sunnah*), and consensus (*Ijmah*).

Islamic law is among the world's oldest and most widely practised systems of law. The population of the world stands at about 5.7 billion. As many as 1.7 billion are Muslims, one-fifth of mankind. There are 44 countries with a majority Muslim population. They form a continuum from the Atlantic coast of Africa south of the Sahara to the shores of the Mediterranean, through the Middle East, Iran, and Afghanistan to Pakistan's border with India, then north to Kazakhstan, the northern most Muslim country,⁷

Islamic law unlike Western law begins with a rather different premise.

Islamic faith proclaims God's intimate concern for justice between human beings.

Western Law

Law consists of rules which are of broad application and non-optional character but which are at the same time amenable to formalisation, legislation and adjudication.

Most laws and legal systems in the Western world are quite similar in their essential themes as they arise from similar values and similar social, economic and political conditions. One of the fundamental similarities across different legal systems is that, to be generally approved and obeyed, law has to be made available to the citizens.

Western law is a set of legislation and case law. It is formal codification of customs which have achieved acceptance and become the enforced norm. The process of acceptance is accelerated by the existence of legislative bodies which seek to impose laws. This also involves legislation and regulation of statutes as well as the resolution of disputes. These laws are enacted through the process of constitutional charter, constitutional amendments and executive orders and the common law jurisdictions; the ruling of judges are an important additional source of legal rules.

In the West, there are several distinct laws and legal traditions, and each jurisdiction has its own set of laws and its own system. Individually codified laws

are known as statutes, and the collective body of laws relating to one subject emanating from one source are usually identified by specific reference e.g. Roman Law, English Law and so on.

Major Differences between Islamic and Western law

Sharia'h differs fundamentally from Western law in that it is not, in theory, man-made but rather grounded in divine revelation.

Western law as we know is essentially secular, whereas Islamic law is essentially religious. and regarded fundamentally as a divine law as it is basically immutable.

Islamic law is much wider in scope than Western law. To the Western mind, law in the lawyer's sense may be defined for our immediate purpose as what is, or at least might be enforced by courts. Islamic law on the contrary, takes the whole of human conduct into account in arriving at a decision. It is a guidance and direction in living successfully in a complex and fragile world. This is fundamentally different from a view of law that accepts the will of the majority as the ultimate source of sovereignty and therefore introduces an element of arbitrariness, that is something new to most concepts of religious law.

Islamic law regulates man's relationship not only with his neighbours and

the state, which is the limit of most other legal systems, but also with God and his own conscience. Ritual practices such as the daily prayers, almsgiving, fasting and pilgrimage to Mecca at least once in one's lifetime are an integral part of *Sharia'h*. The *Sharia'h* is also concerned with ethical standards as well as legal rules, indicating not only what man is entitled or bound to do in law, but also what he ought in conscience, to do or refrain from doing.

Islamic law not only deals with matters of religious ritual, but it also regulates every aspect of political, social and private life. An interesting example would be the Islamic law of marriage. A person could be subject to Islamic law by conversion as it is applicable immediately on conversion to Islam. In *Reid vs. Attorney General*,⁸ a case decided in Sri Lanka, where a man had contracted a marriage according to Muslim rites. He had as a Roman Catholic contracted an earlier marriage and his first wife was alive. He was charged with the offence of bigamy. In the subsequent case of *Katchi Mohamed vs. Benedict*,⁹ the accused was a Muslim married to a Muslim woman according to the Muslim rites. Subsequently, he became a Catholic and married a Catholic woman while his first marriage was still subsisting. It was held that he was guilty of bigamy. The effect of a change of religion after marriage according to Mulla,¹⁰ is that "It is an open question whether conversion to Mohammedanism made honestly after marriage with the assent of both spouses and without any intent to commit a fraud on the law has the effect of altering rights incidental to marriage." Islamic law permits a man to contract a second marriage only with the consent of his first wife and provided that he could treat and maintain both equally. If he violated the Islamic law, he would be charged for bigamy.

Religious belief is part of *Sharia'h* in the broadest sense, though theological literature became a specialised science in its own right. At the other extreme, *Sharia'h* prescribes permissible and forbidden types of food, the manner of a Muslim's dress, and acceptable manners. Traditionally, Muslims divide the *Sharia'h* into two parts - the *Ibadat*, religious obligation which refers to the duties that are owed to God by way of worship and so on, and interpersonal acts which are duties of a particular kind towards men and society. These include family law, marriage, divorce, inheritance, testament, bequests, mercantile law, laws relating to agency, land ownership, compensation for injury, killing and the usurpation of goods and penalties.

Another distinction between *Sharia'h* and Western legal systems is the result of the Islamic concept of law as the expression of the divine will. With the death of Prophet Muhammed, communication of the divine will to man ceased, so the terms of the divine revelation were fixed and immutable. Therefore, the process of interpretation and expansion of this source material was held to be incomplete and *Sharia'h* remained a rigid and static system. Unlike secular legal systems that grow out of society and change with changing circumstances of society, *Sharia'h* was imposed upon society from above. Thus, in an Islamic society it is not society that moulds and fashions the law, but the law that precedes and controls society.

Another difference between Islamic law and the modern concept of law is that law is normally associated with the state, enforced by the police power and applied to all within the territorial boundaries of the state. None of these facts

hold true of Islamic law. It is binding primarily upon individuals, who stand face to face with God, and is not enforced by the state. *Sharia'h*, in fact, gives scant attention to the sphere of public law. Most of its provisions apply to Muslims alone, though there are some rules for non-Muslims living in Islamic territory. Similarly, some of the precepts that Muslims must observe in an Islamic territory become inoperative in regions controlled by non-Muslims.

As already discussed, in several important ways the Islamic concept *Sharia'h* is different from contemporary Western concept of law, most significantly on the question of arbitrariness of the contemporary Western law.

In Western jurisprudence, there are concepts of natural justice or equity, both are often used as judicial and legislative principles. For example, various Western nations and states within the United States differ on the legitimacy of the death penalty. Another example would be in the area of family law, where the legal age of marriage differs across the different states in the United States. The ultimate authority and sovereign power to enact such legislation is the will of the people.

Western law also deals with cases of multiple jurisdiction. For example, in the United States, questions arise about the jurisdiction of a particular case – federal or the state and which jurisdiction applied in certain cases. The particular case is based on either where the parties reside, the area where the crime was committed or the nature of the crime. But Islamic law can be applied

in any geographical area in any *Sharia'h* court, which one is applied depends on the personal adherence of the person being tried or of the parties in dispute. The Islamic concept of equality before the law is based on the principle that it is the right of every citizen to be tried according to the conscience of his or her own religious community.

Conclusion

Islamic law is one of the major non-western legal systems in the world today and its importance can be measured by the fact that it actually applies to order the lives and social conditions in limited or general form, to many hundred millions of Muslims. It is just like common law in that, although there exists a set of common historical sources and methods, the modern expression of Islamic law vary immensely from country to country.

The distinction between Islamic law and Western law is very clear. Western law is essentially human law which responds to the patterns of social and economic life, whereas Islamic law is a divine or religious law emanating from the Almighty Allah and which is essentially immutable and provides guidance in all walks of life - individual and social, material and moral, economic and political, legal and cultural, national and international. In other words, Islamic law comprehends the requirements of life - past and future until the end of human existence on the earth.

The Islamic legal system or Islamic law is demonstrably comparable to major

systems of law in the world, and with its additional juridical merits, it retains the potential of acquiring an ascendant position.

Notes

1. Law: definition of law in Encyclopaedia,
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3. Fyzee, A.A.. *Outlines of Muhammedan Law*, Oxford University Press, 1964.
4. Brills E.J. *First Encyclopaedia of Islam*, 1913-1936, Vol. VII, 1987.
5. The New Encyclopaedia Britannia, Vol. 9, 1980).
6. Cooray, L.J.M., *An Introduction to the Legal System of Ceylon*, Lake House Investments Limited, Colombo, Sri Lanka, 1972
7. Paul Lunde, *ISLAM*, D.K. Publishing Inc. New York, 2002.
8. (1964) 67 New Law Reports 25
9. (1961) 63 New Law Reports 505
10. Mulla, D.F., *Principles of Mohammedan Law*, 20th edition, Mansoor Book House, Lahore, Pakistan, 1995.