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Islamic law: the sources

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## Islamic law

### The sources

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While the classical jurisprudence (*fiqh*) of Islamic law speaks of ‘four sources’ to the Sharī‘a, there are actually only two that refer directly to divine revelation: the Qur’ān which was revealed to the prophet Muḥammad, and the Prophet’s statements and acts, his *sunna*, collected and transmitted in a body of normative stories and anecdotes called the *hadīth*, or ‘Prophetic traditions’ (Kamali, 1991: 14–228; Vikør, 2005: 31–88). The Prophet had no supernatural attributes according to standard theology (the Sufī mystics would disagree), so there is an issue why his statements beyond those that transmit the Qur’ān also represent a divine revelation. One explanation is to claim that the Prophet, being the exemplary human, is infallible: he cannot say anything that is not correct. However, most views of the Prophet would restrict his attribute to being free of sin (*ma‘ṣūm*), which preserves him from a conscious lie but not from being honestly mistaken. Many *hadīth* stress his human side, providing statements of the type, ‘when I speak as a Prophet, you must follow my example, but I have my own likes and dislikes as a man, and you need not follow me in that’ (Muslim, ‘Ṣaid’, 7). Clearly, such stories are responses to claims that everything the Prophet said and did was indeed normative and represented divine will. A more pragmatic explanation is that divine revelation was continuous throughout the Prophet’s life. So, if the Prophet had inadvertently made a mistake, God would correct him in a later revelation. In the absence of such a correction, the Prophet’s statement must thus reflect God’s will.

However, neither the Qur’ān nor the *hadīth* are limpid sources but in contrasting ways. The text of the Qur’ān is not disputed by Muslims but is not always directly understandable, and only a small fraction of its verses refer to what may be

considered legal matters, perhaps around 350 of the 6,200 verses (Kamali, 1991: 19–20). Thus, human intellectual intervention is required to bring out the legal content or actual rules in many of the Qur’ānic verses. Some, however, like some rules of marriage, or the ‘Qur’ānic shares’ of inheritance, are direct and practical.

The *ḥadīth* are generally more directly applicable: a story will tell of an issue or a problem being presented to the Prophet, and he will answer: This is the rule. The problem here is that, unlike the Qur’ān, the *ḥadīth* literature has no clear boundary (Brown, 2009: 1–123). The *ḥadīth* can represent divine revelation if it is true, that is if it represents an actual statement or act of the Prophet, but clearly not if it is untrue and a later falsification. The *ḥadīth* were narrated orally from the individual who observed the Prophet’s action to one or many listeners, who then repeated the story to their audiences, and so on in a chain of at least three or four links before the story was written down from the late eighth century onwards, that is at least 150 or 200 years after the events they related. Over this time, the number of claimed *ḥadīth* had grown to an impossible mass of hundreds of thousands of quite contradictory stories. So, the *ḥadīth* collectors had to devise means to sift this body of texts to discover the authentic example of the Prophet. Various methods were used, mostly focusing on the transmitters rather than the content of the stories. In this way, the collectors could structure their works according to probable level of authenticity from ‘sound’ (*ṣaḥīḥ*) through several levels of ‘probable’ to ‘weak’. However, as the collectors themselves were individual scholars without any corporate authority to back them, many alternative collections appeared, differing in which *ḥadīth* they included as ‘sound’. Later on, a selection of six to nine works were granted the stamp of ‘orthodoxy’, but in particular two, the ‘two sounds’ of al-Bukhārī (d. 870) and Muslim ibn al-Ḥajjāj (d. 875), were given special status, and it was difficult to argue against a *ḥadīth* that was included in both of these. Beyond them, however, legal discussion would to a large degree consist of debates about which *ḥadīth* outranked the others in authenticity.

The collectors included *ḥadīth* in principle solely on the basis of authenticity, and they were therefore cumulative in content. Thus, several variants of the same story could be included in the same collection if they were all given credit as ‘sound’ in transmission. In particular, a *ḥadīth* could relate an event of the Prophet’s life and his rule with the context in which he stated it, juxtaposed to a version that gave just the

statement of the rule without the context. This could clearly be the basis of later legal debates about whether the rule depended on the context or was meant to be universally applied. The **hadīth** collectors left those decisions to the legal specialists, as their object was not to formulate the law but just to collect what the Prophet and his companions had said or done.

## Formulation of the law from the sources

The two other ‘sources’ (**usūl**) in the classical theory of law were called **ijmā** and **qiyās**. The former, ‘consensus’, is often legitimized by a **hadīth** from the Prophet: ‘My community will not agree on error’ (Ibn Māja, ‘Fitan’, 8 and al-Tirmidhī, ‘Fitan’, 7 in Vikør, 2005: 76–77), meaning that if there was full consensus on an issue in the Muslim community, divine will had to be at work (Rahman, 1962; Hasan, 1992). Therefore, a view reaching this level of concurrence must in itself be a third form of divine revelation and did not need further basis in the Qur’ān or Sunna. However, this **hadīth** was considered weak, and the argument contained some logical problems. For example, what was meant by ‘my community’ or by ‘consensus’: was it the acceptance by the totality of Muslims in the world, learned as well as unschooled? Or only those who had competence in law, the scholars? How many Muslims would have to disagree for a consensus not to be reached; was a single dissenting voice enough? If so, would a sinful Muslim count as the voice that broke the consensus? And further, how could one know that a consensus was reached, was a positive statement of agreement required, or only the absence of stated disagreement? If the latter, how could it be known that there was no such dissenting voice anywhere? How long had the community to wait to make sure a dissenter did not appear? Some said one generation without dissent after an opinion was made public was sufficient, but in that case, why was this generation more important and decisive than the following one?

In short, the principle of consensus, while generally accepted, could not be very productive in legal formulation. The theoretician al-Shāfi‘ī summed up that consensus as an independent principle was only valid as a way to give a legal basis for self-evident truths, such that it was necessary to breathe or that the Muslims had to pray (Calder, 1983). Otherwise, consensus was only formed around statements and acts reported from the Prophet’s early community, and these then already had legitimacy in **hadīth**, which for al-Shāfi‘ī was the most important source alongside the Qur’ān.

In practical reality, consensus came to play a completely different role, not as a ‘source’ for the law alongside and independent from Qur’ān and Sunna, but as a way to select which legal rule among several alternatives was to become a ‘positive’ rule, that is, the one to be applied. Thus, it came after the procedure of formulating rules based on the two recognized sources. This process of rule formulation was called *ijtihād*, ‘effort’. It became known as a ‘fourth source’ of Islamic law under the name of its most widespread process, *qiyās*, or analogical reasoning (Kamali, 1991: 197–228; Hasan, 1994; Vikør, 2005: 54–74). It involved taking a specific statement or act from the Qur’ān or Sunna and expanding it into a general rule by discovering the ‘effective cause’ (*illa*) of the original rule.

The classical example of this process is a Qur’ānic verse that a particular beverage, *khamr*, is the ‘devil’s work’ (Qur’ān, 5:90–1). From this Qur’ānic statement, the act of drinking *khamr* was classified in the category ‘forbidden’. *Khamr* was a common type of wine, but not the only type. So were other similar beverages like *nabīdh* also forbidden? In order to avoid saying vaguely that ‘the one is similar to the other’, the jurists developed a methodology to discover, not *why* God had forbidden *khamr*, as that may be unknowable, but what it was about *khamr* that *caused* God to forbid it. In this case, the context of the Qur’ānic verse was telling: the verse followed statements on other dissolute behaviour like gambling, from which it must be deduced that the cause must be the intoxicating nature of *khamr* which made men act irresponsibly. This could then be transferred to other items that had the same effect, and from the original statement that *khamr* is of the devil, we get a general rule that it is forbidden to consume any substance that causes intoxication, *nabīdh* included.

Not all jurists approved of these procedures, which clearly brought a strong element of human intellect into the fashioning of the divine law. The key to the process was determining the *illa* of the source rule, and that was seldom expressed directly in the verse or *hadīth*. Many jurists considered that going too far in basing the *illa*, and thus the generalized rule on scholarly deductions weakened its basis on the divine will. To accommodate such reservations, limits were placed on the *qiyās* methodologies. Thus, one could for example not build one analogy on another; any analogy must be based directly on a text of revelation. Still, many scholars who preferred a stricter and more direct connection to the revelation would if possible

discard *qiyās* and similar human methodologies altogether. Instead, they lowered the level of probability for accepting *hadīth*. Thus, in the case of wine, there was a Prophetic saying that stated simply, *kull muskir khamr*, ‘everything that intoxicates is wine’ (Muslim, ‘Ashriba’, 73; Vikør, 2000). Even if that *hadīth* was considered weak, less likely to be the Prophet’s expression, a weak *hadīth* was preferable to human *qiyās*. It should be noticed that most often there was agreement on the actual rule: drinking all kinds of alcohol was forbidden. The disagreement was about how to establish this rule in law.

Analogy and the discovery of *illa* was the most productive form of *ijtihād*. There were however others, sometimes known as the ‘subsidiary sources of law’. The most important of these were *istihsān* and *istiṣlāḥ*, both of which meant to avoid a general rule in circumstances where it would lead to unjust and unacceptable hardship for the believers, under the general Qur’ānic statement, ‘God wants ease for you and not hardship’ (Qur’ān, 2:185). Evidently, these rules of exception were also specified and delimited in strict methodologies, so as not to give general access to dispense with any legal rule one wanted. Other concepts are *istiḥsāb*, the principle that in case of indeterminacy from other rules, the preferred result is not to change an existing situation, and *urf*, ‘custom’, a term used in different ways (Kamali, 1991: 283–309). Here it generally means that the rule should be specified by local circumstances, the law could, e.g. require ‘fair rent’, but local custom would decide what ‘fair rent’ was in any particular place and time. Such leeway was of course necessary if the law was to be practicable in a civilization that spanned centuries and in so widely diverse societies as the Muslim empire soon came to be. In fact, while some rules are very detailed (such as those of inheritance), others, including much of the penal law, were quite vague as to sanctions and left that to the judge’s discretion (*ta zīr*), which again allowed for easy adaptation to changing social conditions.

Another process which clearly introduced an element of human reason in determining the content of the divine revelation, was the concept of ‘abrogation’ (*naskh*). The issue here was cases where the sources of revelation appear to contradict each other. Wine, *khamr*, is not only mentioned in the verse about it being ‘the devil’s work’ but also as a ‘delight’ (Qur’ān, 47:15). Many similar conflicts occur, and the scholars had to try to resolve them. One method was to consider each verse to refer to

a different context, or other ways to ‘unify’ their legal import. But a common solution was to say that a later revelation abrogates an earlier one: God revealed His intention in steps suitable to the ability of the early believers to follow it. The latest rule is His final will. Unfortunately, the Qur’ān is not organized chronologically, so it was up to the scholars to determine the order of revelation and thus of priority in such internal contradictions. A complex set of concepts of abrogation was established, and there were cases where the ‘rule is abrogated, but not the text’ (that is, we can still see the earlier, invalid, text in the Qur’ān) and cases where the ‘text is abrogated, but not the rule’ (God has effaced from our memory the text of His latest, valid rule, and only the earlier, invalid one remains visible). The latter, which seems fairly counter-intuitive, was used to explain why the *hudūd* rule of stoning an adulterer is not mentioned in the Qur’ān, while the arguably far milder – but legally invalid – punishment of temporary house arrest is expressly stated (Qur’ān, 4:15–16). As, according to al-Shāfi‘ī, only the Qur’ān can abrogate the Qur’ān, there must have been a later Qur’ānic verse that abrogates 4:15, and when we cannot find any such now, then it is because God for reasons of His own has removed this verse from our memory (Burton, 1990: 122–164).

In all, these methodologies of developing a law from the sources of revelation was known as the science of *uṣūl al-fiqh*, the ‘roots of jurisprudence’ as opposed to the work on the actual rules, the *furū*, ‘branches’. However, as this process was unmistakably a human scholarly endeavour and evidently contested by rival scholars every step of the way, it could not become actual law (or even non-legal rules of behaviour) without a further step of sifting all the various interpretations, analogical deductions and claims of *hadīth* authenticity. As the scholars had been successful in denying the caliph and state any say in matters of religious science, including that of *fiqh*, they could not look for a caliphal deciding voice; neither did Sunnī Islam establish any formal internal religious authority of the type of pope or patriarch. Some Shī‘ī variants did have such an authority in a living *imām* (thus most of the Ismā‘īlī and Zaydī branches), but even the majority Shī‘ī groups, the Imāmīs of Iran, Iraq and Lebanon, actually dispensed with that as they believe that last *imām* went into seclusion in the year 874. For the Sunnīs, this is a matter of theology; all humans whatever their religious station stand on the same level in relation to God after the disappearance of the Prophet. So, no Muslim however schooled can speak in the name

of God, except by citing His revelation – but not for the interpretation of it when contested by other similarly schooled scholars.

Thus, with no external and no internal fixed authority, the scholars had to settle for the principle of consensus – not here the universal *ijmā* consensus that was a divine gift, but the more limited pragmatic consensus of ‘the majority opinion’. They were not able to achieve such a full uniformity even within Sunnism, but arrived a part of the way towards it in forming four *madhhabs*, schools of law, each of which was supposed to form a consensus within them. To anchor the consensual opinions of the schools, they were as far as possible attributed to the eponymous early founders of each school: Abū Ḥanifa, Mālik, al-Shāfi‘ī and Ibn Ḥanbal: ‘This is what Mālik said is the most correct’ (see Chapter 3, this volume). But clearly Mālik did not pronounce on every issue that was to be settled, so further concepts such as *ma‘rūf*, the ‘known’ or the *arjah*, ‘the most prevalent, best’ solution came to be ways to define the opinion that scholars within the school were supposed to follow.

## The legal literature

Which opinions and rules were to be applied in this way, was a matter for the recognized scholars of law, the *fuqahā*, to decide. Initially an open field where aspiring students flocked around a locally renowned scholar, the transmission of knowledge and its authorization came to be focused in colleges, *madrasas*, where students could live off benevolent donations (the same that most scholars depended on) and memorize the words of the teacher (Makdisi, 1981; Chamberlain, 1997).

Such transmission from teacher to student was in the first centuries only oral; the student made notes of what the teacher said and memorized it. Thus, the works of these early scholars tend to exist in different recensions, *riwāyāt*, stemming from the original notes of different students who varied in what they had written down (Muranyi, 1997; Melchert, 1997). From the middle of the tenth century, we begin to see greater homogeneity in the transmitted texts, which indicates that teachers now began to hand over written texts to their students, leaving less room for individual variations in transmission (Schoeler, 2006). The legal discourse was however still open; legal works would normally introduce an issue and then present all the different views of different scholars on it, maybe with a note of which was preferred by such and such authoritative scholar (indicating it was the author’s view). Once these



conclusions began to be framed in recognized words like ‘the preferred view’, it was clear that they constituted what the practitioners of the school were supposed to follow. But it was still open to opposing scholars within the school to challenge these views if they felt that the discussion in the school provided them with arguments.

The assumption in the early literature was that those who put the laws into practice, the judges, as well as the muftis who framed legal opinions for individual cases, were themselves scholars and could navigate the discursive literature to find what was the correct conclusion within their *madhhab*: they were *mujtahids*, qualified to define the law within the methodologies of the schools and the sources of revelation. From the thirteenth and fourteenth centuries onwards, it appears to have been recognized that this expectation of scholarly competence was not realistic. Thus, we begin to see a different type of legal literature in the schools, ‘abbreviations’ (*mukhtaṣar*) that summed up the school’s view (Fadel, 1996). In these works, a topic was raised and the solution given without any argumentation or discussion of variant opinions: in such and such a situation, the opinion of our school is that the rule is so and so. Some see these *mukhtaṣars* as the beginning of codification, in the sense of establishing one simple and authorized set of rules to be applied. They may indeed be a step on that way, but it should be noted that no-one had authorized these scholars to write a *mukhtaṣar*, there could be different such works in circulation for each school, and the judge who considered himself competent could freely ignore it for a different opinion in the school – and often did so (Fadel, 1996: 233). Nevertheless, the development of the *mukhtaṣar* literature did certainly lead to greater uniformity and homogeneity of the law within each of the four schools.

These simplified works were supplemented by other *genres*, which could also lead to authorization and homogenization. The muftis had, within the limits of their scholarly competence, the task to provide legal opinions on disputed questions. Originally relevant only for the individual case for which it was issued – *fiqh* does not recognize precedence as a principle – the written opinions (*fatwās*) of famous muftis would be collected and the contextual specificities removed to focus on the legal discussion involved (Hallaq, 1996). After two or three rounds of increasing abstraction, these *fatwā* collections would then take the shape of a legal commentary of a general nature, which later muftis or other scholars could use in legal arguments.



Still, the authority of these works resided only in the competence and scholarly quality of the mufti who had originally written it, and how that was appreciated by the later scholars.

## Natural law, human law and divine law in the Sharī'a

The scholars of Islamic law clearly recognized that the formulation of the practiced law had a human as well as a divine element. There has however been a discussion about how to conceptualize that, in particular what exactly is meant by the terms Sharī'a and *fiqh*. Briefly, two views can be seen: on the one hand, that the Sharī'a is the divine law that resides with God and only He can truly know: it is God's rules and opinions, which he has for every issue. He has made as much as He wants of His Sharī'a clear to the humans through the revelation. But for humans to understand the revelation and practise the divine Sharī'a, we must use our intellect. That human effort, as well as its result, is *fiqh*. Thus, the Sharī'a is strictly speaking a body of rules that only God can know, and what we have in the mundane world is only *fiqh*, merely an imperfect reflection of the divine Sharī'a.

Most often, however, the term Sharī'a is used for the body of rules that we can see and which are practised in this world, while the term *fiqh* refers to the efforts to develop and discuss the law, a science of law, divided into the two fields of legal theory, *usūl*, and elaboration of the various branches of the law, *furū'* (Vikør, 2005: 2). It would seem that the former view, which reserves the term Sharī'a for the divine element of the law, ultimately ungraspable by humans in its totality, is a way to protect the term Sharī'a from the imperfections of the law as hammered out through fallible human scholarship, but is also a way to justify an opening for change and modernization of the law: what we then change is not the actual divine Sharī'a but merely the human *fiqh*, which could represent or not represent God's authentically intended rules, since God is silent after the death of His last Prophet Muḥammad and has not sanctioned any interpretation over another. So, contesting *fiqh* is less dangerous than contesting the Sharī'a would be.

A variant of this view, however, is to delimit the Sharī'a in another way: There are some elements of the law where we do have absolute certainty about the divine will: those that directly apply the rules of the Qur'ān. In addition to some elements of inheritance rules (the *farā'id*, or 'Qur'ānic shares') and similar, they are specifically

the **hudūd** laws against theft, marital infidelity, intoxication and robbery or rebellion. These then constitute the core of the actually divine Sharī'a, or even **are** the Sharī'a. This view has been promoted by some **jihādī** groups as arguments for focusing on the **hudud** in their campaigns to 'reintroduce' the Sharī'a. However, this view is clearly blind to the fact that even those rules were developed through **fiqh**, and are not at all stated unequivocally in the Qur'ān. It was only the **fuqahā** who, after logical discussions, established that these penalties must be thus extrapolated from the Qur'ānic text. They are not incontestable; in fact there is not even a full agreement about which rules are included among the **hudūd** (some scholars would, e.g. add **radd**, apostasy, while others would exclude intoxication from the **hudūd**).

In the legal development, the focus was thus on the texts of the revelation, which grounded the law in the divine will. An issue of some discussion in the **uṣūl al-fiqh** literature of legal theory, was how to combine this with the human intellectual endeavours to formulate a law. In particular, whether human reason could provide a separate source or a legal authority beyond direct references to the revelation and God's expressed or indirectly discovered will. That is, whether there is an element of natural law in Islamic law.

Many historians of Islamic law reject this possibility, at least as far as the established legal schools are concerned, and state that there is no component of natural law in the Sharī'a. God was the only authority for any legal rule and the only one who could determine what was right or wrong, permitted or forbidden. Without revelation, there would be no morality or law (Crone, 2005: 264).

However, more recent studies have challenged this view and believe that there can be found elements that may be linked to natural law, giving reason a role as an authority independent of revelation when thinking about the law (Emon, 2005, 2010). They link this to the discussion in Islamic theology and legal theory around God's intention with the Sharī'a (His **maqāsid**) and the connected answer that this purpose is clearly stated to be the welfare (**maṣlahah**) of the individual or society (Opwis, 2010). The issue is what this welfare is grounded in. In simplified terms: everyone agrees that what God ordains is good. But is it good because God has ordained it – and if he had ordained the opposite, then that would also have been good – or is it good because God is good and just, and always does what is best for mankind? In other

words, does the concept ‘good’ have a meaning outside of (or ‘before’) revelation, a logical meaning that can be comprehended by man?

One element of this discussion is the more theological issue of whether God, in the latter case, does good because of His nature, that He as a just god is compelled to do the good. This position, promoted by the early current known as the Mu‘tazila, was rejected by what later became the standard Sunni theology, as it put a restriction on God’s omnipotence (Watt, 1998: 180–250). God is indeed good, the later critics said, but only because He chose to be so, He could have chosen to be otherwise. This line of discussion is of lesser importance to the legal debate, as revelation is what it is (and is uniformly good). However, the issue of the *maqāṣid* of the law was very relevant in the field of theory of law, *uṣūl al-fiqh*.

The issue can be raised in two contexts. One is *inside* the legal methodologies to discover the legal consequence of a source text, that is within the process of *qiyās*, ‘analogy’. There are myriad ways to establish the ‘effective cause’ (*illa*, or *ratio legis*) of a rule expressed in the Qur’ān or *hadīth*, some more speculative than others. Could an evaluation of the common good, *maṣlaḥa*, be used here to establish what the *illa* might be? One example given by al-Juwaynī (d. 1085) is a marriage contract, details of which may or may not be regulated in analogy with commercial contracts (Opwis, 2010: 47). However, he says, since a marriage is different from a commercial relation, the jurist should instead of direct correspondence with commercial contracts, look at the *maṣlaḥa* result of his answer, which promotes the intention of marriage. In other words, social welfare could be a factor in formulating the legal rules within the *qiyās* system.

Another question is whether *maṣlaḥa* can be the source for a legal rule when there is no text of revelation at all on which to base it, that is in a totally unprecedented case outside the *qiyās* process. That is known as *maṣlaḥa mursala*, an independent *maṣlaḥa*. This was more controversial. A fairly restrictive use of it was that of Abū Ḥamīd al-Ghazālī (d. 1111), who was an important scholar in what became a standard theology in Sunnism. He recognized *maṣlaḥa* as an independent principle, if the result without doubt promoted God’s purposes with the Sharī‘a, which he defined as five: the protection of religion, life, intellect, family and property (Opwis, 2010: 67). However, he also structured these into four levels: necessity (*darūra*), need (*hāja*),

improvements and preference. Independent **maṣlaḥa** may only be used in the first of these cases. For example, it is the duty of a father or guardian to provide his children with appropriate marriage partners. That is thus a need, but it is not a necessity like the duty to provide food and clothing for them. Only the latter is a **darūra**, necessity that qualifies for **maṣlaḥa mursala**.

Ghazālī added further restrictions which made this concept less important for him. Another theoretician that expanded more on **maṣlaḥa** was Ibrāhīm al-Shāṭibī (d. 1388). For him, **maṣlaḥa** is not restricted to one aspect of legal development alone; it is the overall underlying principle of the Sharīʿa, its meaning, **ma`nā** (Masud, 1995; Opwis, 2010: 251). Thus, we must understand that particular rules that may not be relevant in each case are still valid because they serve a universal principle of welfare: a Muslim may shorten his obligatory prayer when he is on travel. This is so even if the travel does not cause any particular hardship for him, because the universal rule of shortening the prayer does provide ease for travellers in general (Opwis, 2010: 254). Further, al-Shāṭibī accepts that legal rules can be based directly on **maṣlaḥa mursala**, under certain conditions (e.g. that it is necessary to have a rule) and that the **mujtahid** in that case has to consider the outcome of the rule (Opwis, 2010: 315).

This connects to the question of rights and obligations, which in the **uṣūl al-fiqh** are conceived in two forms: the **huqūq al-`ibād**, the rights of man (the worshipper) and the **huqūq Allāh**, the rights of God. Read literally, this seems to be a distinction between ‘human rights’ and obligations towards God, but here the language can obfuscate the real meaning. There were of course no concepts of individual ‘human rights’ in the pre-modern or medieval thinking of Islamic law. All humans belonged to categories, and their rights and duties depended on these categories, primarily those of Muslim versus unbeliever, man versus woman, and free versus slave. All these had rights (the heathen unbeliever possibly excepted), but different rights. More to the point, God did not have ‘rights’, because as the creator He had no need of them – God does not enter into any contractual relation with His own creation.

Instead, the concept of God’s rights, **huqūq Allāh**, must be understood as the obligation to fulfil God’s intentions, which was **maṣlaḥa**, welfare. Thus, God here represents God’s will, and **huqūq Allāh** must be understood as a legal obligation to promote public welfare. An interesting aspect of this is that the sultan or other ruler is

also subservient to this God's intention, and the idea of *huqūq Allāh* could be used against a sultan who transgressed against the interests of public welfare. The *huqūq al-ʿibād*, on the other hand, represents the individual rights of each person. It was a matter of contention which of these rights, those of God, the society at large, or those of the individual, would prevail if they came into conflict, but one view was that since God has no personal interest in his 'rights', He can forgo them, and the rights of the individual for redress should therefore trump the public interest if the two were opposed (Emon, 2005: 379–390).

### Opening the gates of *ijtihād*

One effect of grounding the authority of the *madhhab* rules in the opinions of the four founders, 'this is what Abū Ḥanīfa said' (whether or not he actually said it), was a basic conservatism in the law. As indicated, legal development never stopped in reality, but it was made to appear as if it had stopped with the founders, and that any further changes merely filled in gaps left open, in a way they would have originally been settled had the founders pronounced on them. This was formulated in the expression that the 'gates to *ijtihād* are closed'. While this term is often quoted as an incontestable fact by modern historians of Islamic law, it was in fact disputed, and many later scholars claimed both that legal development could never stop ('no age can be without a *mujtahid*', a scholar capable of performing *ijtihād*) and that they themselves had the ability to perform *ijtihād* (Hallaq, 1984). However, there were several levels of *ijtihād*. Most Muslim scholars agreed that no new schools of law beyond the four Sunni ones could be created in this later age. That is what is meant by 'completely free *ijtihād*', and those gates were closed. But it was possible in later times to perform various levels of rule formulation *within* the *madhhab*, using the established methodology of the *madhhab* on new situations to create a new rule (a high level of *ijtihād*) or a new modification of an existing rule (Calder, 1996).

In spite of this opening, and also because many *madhhab* scholars would try to restrict even such limited legal development as much as possible, voices began to be heard from the eighteenth century onward for a wider opening, the 'gates to *ijtihād* can never be closed'. Interestingly, such voices for legal reform often came from the peripheries of the Islamic world, starting perhaps with Shah Walī Allāh of India (d. 1762), followed by Muḥammad ibn 'Alī al-Shawkānī of Yemen (d. 1839), Aḥmad ibn

Idrīs (d. 1837) and his student Muḥammad ibn ‘Alī al-Sanūsī (d. 1859) of Morocco, Yemen and Libya, and others (Peters, 1980). The main argument of these scholars was that the Sharī‘a must be based on the sources of revelation and not on the views of the school founders or later scholars.

As the most productive sources for legal discussions were the *hadīth*, they thus promoted *hadīth* studies and insisted that a new critical evaluation of *hadīth* could bring forth knowledge that had either been lost or was unavailable to the earlier scholars. At that time, many orthodox scholars abstained from addressing the *hadīth* critically and insisted that only the established *fiqh* of the early authorities was now a fit object of study. Thus, the reformers argued for a return to the original sources of revelation. They also tended to be critical of the subsidiary methods of *qiyās*, human analogical reasoning, the importance of which they would reduce to the benefit of studies directly on the sources of revelation (Vikør, 2000).

The term *ijtihād* has in our time become a mantra for ‘modernizing’ the Sharī‘a. The pre-modern scholars who argued for an ‘opening of the gates’ certainly implied reform but not in the sense of freely adapting the revealed law to contemporary conditions in a free-for-all fashion. On the contrary, they strongly rejected *ra’y*, personal opinion, and indeed considered any legal opinion not properly based on a source of revelation as ‘whims’, be that the whims of the early founders or of contemporary scholars. Their object was to work on the sources in the same classical manner as the early scholars had. What they claimed was that the early scholars, including the founding authorities, could not have any precedence over studies done later on the same type of sources with the same methodology. The early scholars could be wrong, or they could have been unaware of sound *hadīth* that had come to light later. Thus, they repeated hagiographical stories for each of the four school founders saying, in essence: ‘If you find a *hadīth* that is in opposition to what I have said, then leave my opinion and follow the *hadīth*’.

Thus, these nineteenth-century reformers have been termed *la-madhhabī*, ‘non-school’. Indeed some, like Ibn Idrīs mentioned earlier, did express views that would indicate that anyone who follows one of the schools is performing *shirk*, idolatry, since he is putting the (human) jurists of the school above God (that is, above any *hadīth* that might oppose their school’s view) (Ibn Idrīs, 2000: 47–130). However, in

most cases, these reformers did generally identify with a school but insisted that a scholar must have the right to look above the fences between the schools and see if a scholar in another school had found and used a **ḥadīth** that was more sound than one's own. Thus, what they opposed was **ta'asṣub al-madhhab**, '**madhhab**-fanaticism', the total rejection of any opinion presented by schools other than their own.

## Modernity and the sources of revelation

The idea of combining views from different schools, **tafīq**, was not totally unheard of earlier either, but did become an important tool for the next generation of reformist scholars, who unlike the eighteenth- and early nineteenth-century reformists, worked under the challenge of new legal ideas from Europe. New laws were enacted, some codifying rules based on the Sharī'a, but without its methodology, others borrowed more or less wholesale from European laws (see Chapter 3, this volume). In the nineteenth century, the former was most common, but the education of new generations of legal experts in the ways of European law led to western-inspired legal thinking becoming dominant, even when they worked on those areas of the law that were retained as a 'reservation' for Sharī'a rule, such as family and personal status law.

While lawyers in the Muslim world would still receive some training in **fiqh**, the methodology of how to refer to the sources, how to evaluate various views of **fiqh** against each other, and so on, remained generally foreign to the training and thinking of twentieth-century lawyers. Thus, modern law makers and lawyers would most often refer to the Qur'ān and Sunna either by mimicking traditional texts, or eclectically quote bits from the Qur'ān and Sunna in support of whichever legal view they had developed by their own methodology. The development of the law was thus removed from the traditional muftis to state legislative bodies. Egypt did introduce the office of state mufti in 1895 (the first being the famous modernist Muḥammad 'Abduh), but it soon lost any influence over the legal developments (Skovgaard-Petersen, 1997). Thus shorn of their legal competence, the muftis instead became private councillors for individual Muslims in matters of ritual or everyday adaptation to the rapidly changing technical and social circumstances of the country.

The new legislators tended to see the gates of **ijtihād** as wide open, without the strict methodology of **ḥadīth** criticism that had prevailed a century earlier, but



primarily as a way to adapt the law to the current times. Indeed, the plural, *ijtihādāt*, has come to mean ‘legal development’ in general, while the two terms for legislation, *tashrī‘* (from the same root as Sharī‘a) and *taqnīn* (from Kanun, the Ottoman state law) has come to be used more or less interchangeably, although the latter more specifically means codification.

With the rise of Islamism and political Islam, in particular from the 1970s, such modernity was challenged by political forces that called for the ‘restoration of the Sharī‘a’. They, like the modernists, favoured a renewed *ijtihād*, but here in the meaning of discarding the impurities that later tradition had falsely introduced and returning to the pure Sharī‘a of the Prophet’s own time, either as an ethic found in God’s intentions of *maṣlahā*, or, alternatively by adopting literally any practice of the Prophet, in large or small matters, that they believed to be attested in the Sunna (the latter trend was known as ‘Salafism’). However, for many, this call for *ijtihād* was more a slogan that should free them from the authority of the traditional scholars, than a project of actual legal reform. In most cases, the Islamists focused more on either resisting the moral liberalism of modern society, or for the more radical, to reinstate the *hudūd* laws as a symbol of ‘pure Sharī‘a’. In neither case did these Islamists tend to go deeply into a scholarly discussion of an internal development of the Sharī‘a and most often sought scholarly legitimation in citing traditional *fiqh*, if they at all referred to scholarly debates.

An exemplary case of how these references to Sharī‘a and the sources of revelation could be played out in practice, is the story of the Egyptian constitution after 1970. Until that time, the law only said that ‘Islam is the religion of the state’ (§3, from 1956). In 1971, under president Sadat, the phrase ‘and the principles of the Islamic Sharī‘a is a main source for legislation’ was added (now §2). In 1980, this was strengthened to say that the Sharī‘a was *the* main source, but still only its ‘principles’. This caused considerable controversy, but the decision of what these ‘principles’ were and how they were to be applied, was given to the new Constitutional Court, manned by professional lawyers with a secular training (Lombardi, 2006). They did test a number of new laws against §2 but decided that these principles of the Sharī‘a could be either some fixed and undisputed rules, or the *maqāṣid*, the goals of the Sharī‘a. The former, they decided, were quite few, while the latter was the *maṣlahā*, public

welfare. So, any law that promoted the general welfare of the Egyptian people without expressly contravening the few rules they found to be fixed would be acceptable under §2, and in the years of its existence, the court only overturned one minor law on this ground.

After the Arab Spring revolution in 2011, a new constitution was again to be made, and a constitutional assembly was established with a strong element of Islamists, the majority from the ruling Muslim Brotherhood, and a smaller but vocal group by the emerging and more conservative Salafi parties (Vikør, 2016). The liberal and secular currents successively withdrew from the assembly, leaving it to the Islamists. The Salafi groups first attacked §2, which clearly had not worked to strengthen the Sharīʿa in actual legal practice. They suggested replacing the word ‘principles’ of the Sharīʿa with the ‘rules’ of the Sharīʿa. This was however rejected by the Brotherhood, which did not disagree strongly with the prevailing opinion that §2 referred to the *maṣlaḥa* general welfare of Egypt. They did not want to rock this particular boat, so §2 remained unchanged.

Instead, the assembly introduced two new paragraphs, both of which were fairly ambivalent. One was §4, saying that the religious authorities of al-Azhar, the central seat of Islamic learning in Egypt, should ‘be consulted’ in matters of the Sharīʿa. It was not clear what this was to mean or whether the intention was to move the authority of interpretation from the judiciary to the religious scholars. Even more impenetrable was §219, which described how the interpretation was to be done. The published English translation did not provide much insight: ‘The principles of Islamic Sharia include general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community’. Some deconstruction of the Arabic text may however indicate how a new law was to be tested against the Sharīʿa. First, the law should be seen against the undisputed text of the Qurʾān and *ḥadīth* (general rule texts). Then, against the ‘methodologies and basics’ of Islamic jurisprudence (*uṣūl al-fiqh*), and finally against the established rules of the four schools of law. It was still not clear how this process was intended to work, but it seems to indicate that a fair amount of *ijtihād* was to be allowed, and that new laws of Egypt should be tested directly against the Qurʾān and Sunna, not just against the rules of the established schools.

This was never put to the test, as the military deposed the Islamist government soon afterwards and abolished the constitution. The new constitution they promulgated soon after retained §2 and allowed al-Azhar a smaller role in questions of religion, but not particularly of law. The complicated §219 was removed. Thus, Egypt returned to the situation it had been before the revolution in 2011. In all its complexity, the exercise indicated one manner in which an attempt was made to integrate a traditional religious authority (al-Azhar), new Islamist sensibilities and a codified constitution into one text.

The example from the revolutionary process of Egypt shows how the sources of revelation remain relevant, not just as a remote historical text but as a living basis for potential legal development. However, since the meaning of these texts has always been, and remains, contested, the issue of authority over the sources and over what methods of inquiry could be used on them, became central. After the early attempts by the caliphs to arrogate this authority to themselves were defeated, the religious scholars could dominate the field as the *wuratha al-aniyā*, the heirs to the prophets. But today they are challenged both by would-be scholars without classical training from the independent Islamist circles, and by modernizing state authorities who rely as much on western-trained legal experts as on the traditional religious scholars, who nevertheless still persist in their promotions of the classical sciences of theology and Sharī'a.

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