

Islamic law and its sources

Federal Agent David MacGregor is undertaking a Masters in International Law at the University of Melbourne and has recently completed an essay about the fundamentals of Islamic law. An excerpt of that essay follows.

In many ways, the laws and religion of Islam are inextricably linked and an understanding of Islamic law, the shari'ah, is fundamental to the understanding of Islam. In light of the increasing scope of the AFP's International Deployment Group missions overseas, which already include Sudan and Jordan, and the ongoing cooperative efforts between the AFP and Indonesian authorities to counter transnational criminal groups and terrorist organisations, the effectiveness of policing will be greatly enhanced through a greater understanding of Islam and its system of law.



Federal Agent David MacGregor

The Muslim ideal

Muslim law is inherently religious. Its principle source is the Qur'an which is considered the final revelation of God to humankind and the ultimate guide to which all practising Muslims must adhere. Muslims believe the Qur'an was first revealed to God's Prophet Muhammad in the year 610 CE in a region populated largely by tribal Bedouin peoples whose livelihood relied on the busy trade routes of the area.

While both Christianity and Judaism were practised widely in this region, many tribes were polytheistic and practised their own pagan rituals. As Islam spread rapidly, the conscripted Bedouins of the Muslim armies were unified by the shared custom of

attending Friday prayer, during which their military commanders recited passages from the Qur'an and imbued them with a single Muslim identity. In this way, rules and sanctions of the Qur'an became normative among otherwise unrelated tribes.

The Qur'an as a legal document

Even in the early years of Islam, it was apparent that many facets of social and economic life were not mentioned in the Qur'an. As an example, the Qur'an attributes an explicit punishment for the crime of adultery (Qur'an 24:2), but says nothing specific on the legality or otherwise of rape. As Pakistani scholar Fazlur Rahman states, '... there is little in [the Qur'an] that is, properly speaking, legislative'. To overcome instances of

ambiguity, individuals charged with the legal and religious direction of Muslim communities, the qadis, looked to other sources of authority upon which to base rulings and offer advice. In the earliest years much of this authority was derived from customary or tribal law. By the end of the first century of Islam, many qadis based their judgments on a hierarchy of authorities and the primary source of law within this hierarchy remained the Qur'an.

The Prophet Mohammad

The Prophet Mohammad is revered among Muslims as the consummate personification of the Qur'an and the paragon of Muslim behaviour. As such, the exemplary conduct of Mohammad, represented by his every word, deed and approval — and known as the Sunnah



Legal and religious terms

Faqih: An expert practitioner of the shari'ah.

Fatwa: A legal statement in response to a specific question.

Hadith: Written collections of the words, actions, works and deeds of Muhammad.

Haram: An act or thing prohibited by the shari'ah.

Ijma': Consensus, usually between a group of Muslim scholars,

Ijtihad: The exertion of mental effort in the pursuit of knowledge to the absolute limit of a person's cognitive energies.

Imam: A person with special qualities relevant to Islam.

Islam: The religion practised by Muslims, literally meaning "submission" (to submit under the will and guidance of God).

Makruh: An act or thing disapproved of by the shari'ah.

Mandub: An act of thing recommended by the shari'ah.

Mubah: An act or thing neither allowed nor disallowed by the shari'ah.

Mufti: A religious leader who deals with judicial questions and issuer of statements on aspects of the shari'ah (fatwas).

— is regarded as the second principle authority of the shari'ah — the system of law inspired by the Qur'an. While not the word of God itself, the Sunnah is regarded as the best example of how to live by God's decree on earth. The Qur'an (4:80) reveals 'Whoever obeys the Messenger obeys God' and so the Sunnah is widely considered divine in nature.

In early years, there was little vigour attributed to determining the validity of reported Sunnah, meaning it ranged in reliability and authenticity depending upon its source. However, by the beginning of the third century of Islam, numerous collections of respected written hadith (a document recording the Prophet's life, customs and consequently, his Sunnah) provided greater consistency and validity upon which to base legal determinations.

While Prophetic Sunnah was revered by qadis before the establishment of authoritative hadith, its somewhat inconsistent nature and sometimes dubious authenticity allowed for a greater scope of abstract reasoning on the part of the qadi. Ra'y is a collective term that describes any process of reasoning used by the qadi to argue or resolve a point of law that is otherwise unclear by reference to the Qur'an or the Sunnah. Ra'y includes both legalistic methods of analogy as well as less logical and more discretionary approaches to problem solving. However, as the acceptance of authentic hadith became widespread, the use of discretionary reasoning

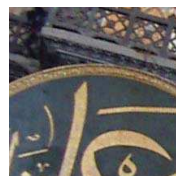
became regarded by traditionalists as inferior and too arbitrary as compared with the wisdom of a 'single Prophetic voice' (Hallaq, 2004). In a system of law that is fundamentally religious, the divine must outweigh the human.

The trend toward traditionalism increased the role of dedicated specialists with expert knowledge of the Qur'an and the Sunnah. People with these qualifications, the faqihs, were increasingly consulted by qadis to ensure their rulings were consistent with religious authority. Interpretation was still required when literal evidence from the Qur'an and the Sunnah remained inconclusive or caused shari'ah scholars to argue over points of law.

The tradition of ijthihad refers to an exertion of mental effort in the pursuit of knowledge to the absolute limit of a person's cognitive energies. Unlike ra'y, with its semantic affiliation to the arbitrary decisions of qadis, ijthihad is widely accepted as a necessary process in the development of legal consensus. As a result, schools of thought were established based on agreement of legal scholarship. When such consensus, or ijma', on a ruling is reached, a third source of shari'ah, subordinate in the hierarchy of authority to the Qur'an and the Sunnah, is established. Ijma' is described by the modern Muslim scholar S. Mahmassani as the 'agreement by all Muslim jurisconsults in any particular age on a ruling'.

The rapid growth of Islam from the Hejaz into societies of central Asia, northern Africa and southern Europe introduced circumstances and problems that were unfamiliar to the system of shari'ah as had developed in the Arab lands. Similarly, as the passage of time brought new technologies and social conditions, literal reference to the principal authorities of shari'ah could not provide legal answers to every problem. In such circumstances, some legal scholars developed a form of ijtihad whereby rules applicable to an established problem could be applied to a new problem where the objectives

those elements of behaviour that are obligatory or strictly forbidden and which attract a consequential punishment when violated (as is the case with the majority of Western legal paradigms), but also those actions that determine a person's moral character before God. Thus, for Muslims, observance of shari'ah is both a legal and religious duty. Under this system, all human behaviour can be categorised into one of five normative classifications: forbidden (haram), obligatory (wajib), disapproved (makruh), recommended (mandub) and permissible or discretionary (mubah).



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of the rules were analogous. Decisions reached through this process ensured the shari'ah remained within the boundaries of the Muslim tradition while allowing for major societal changes. This use of analogy, or qiyas, provides shari'ah with a significant element of flexibility because, through qiyas, legal rulings can be extended to similar cases while maintaining conformity with the texts of the Qur'an and the Sunnah.

Crime and punishment

Joseph Schacht, a pre-eminent Western scholar of Islam, describes Islamic law as 'a system of religious duties, blended with non-legal elements.' As such, the shari'ah regulates not only

If an act that is haram is committed, shari'ah prescribes a punishment. The Qur'an states that theft is haram and commands Muslims to '[c]ut off the hands of thieves, whether they are man or woman, as punishment for what they have done...' (Qur'an 5:38). Similarly, acts of wajib that are ignored will have consequences for the errant Muslim, but it should be noted that not all punishments are physical — or 'earthly' — in nature. It is obligatory to believe in God, his revelation and have faith in life after death (Qur'an 2:4). For those who disbelieve, the Qur'an promises that 'agonising torment awaits them' (Qur'an 2:10) in the afterlife. In this way, Shari'ah depends on the belief by all Muslims in God and their fear that

Muslim: A person belonging to Islam, a person who believes in God and submits to his will as it is described in the Qur'an.

Qadi: A judge or public official authorised to make judgments before a court of law.

Qiyas: Analogical reasoning, based on the Qur'an and the Sunnah, enabling the defining of a new injunction from a known injunction.

Qur'an (Koran): The holy book of Islam, containing the revelations from God to Muhammad in the period 610–632.

Ra'y: Individual reasoning used when there is an unresolved matter for which no firm or indirect regulations can be found, representing the most unrestrained form of intellectual reasoning in Islam and thus not accepted by many Muslim scholars.

Shari'ah: The system of law inspired by the Qur'an, the Sunnah, older Arabic law systems, parallel traditions, and work of Muslim scholars.

Sunnah: The examples, deeds, sayings and unspoken approvals of Muhammad.

Sura: A chapter in the Qur'an.

Wajib: An act or thing made compulsory by the shari'ah.

Zina: Adultery, fornication, having sexual intercourse outside marriage.

The notation CE (Common Era) is the period of measured time beginning with the year 1 on the Gregorian calendar and aligns with AD (Anno Domini)

indiscretions escaping punishment in life will be rebuked by God in death. Irrespective of whether punishment is physical or spiritual, both haram and wajib establish positive rules where an action or omission will elicit a punitive consequence.

From a Western legal perspective, it is more difficult to conceive of the remaining three categories as positive sources of law. For example, the Qur'an says, 'marry off the single among you and those of your male and female slaves who are fit (for marriage)' (24:32). While 'marry off' is posed in the infinitive, no immediate punishment is proscribed for someone who does not marry. Rather, this rule is a recommendation that attracts

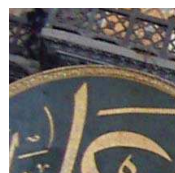
Methods of legal reasoning, interpretation and fatwa

The Qur'an and the Sunnah as sources of definitive and speculative rulings

The authority of the Qur'an and the Sunnah is undisputed in Islamic legal thought. But shari'ah originates from human reason as well as divine revelation, and the method of combining and interpreting these elements to derive meaningful law remains a source of tension in the Muslim world. It is important to recognise that, with the exception of the key tenets of Islam and those definitive rulings from the Qur'an or the Sunnah that are specific to the degree that there is no cause for human interpretation, such as 'You

necklines and not reveal their charms except to their husbands..." (24:31).

Such ambiguous wording leaves much to individual interpretation. What is acceptable and to whom? What are a woman's charms and how should she conceal them? Which parts of a woman's body are private? An ultra-conservative regime, such as the former Taliban government in Afghanistan, could read such text as wajib and use it, particularly when read in conjunction with verse, or sura, 33:59, 'Prophet, tell your wives, your daughters, and women believers to make their outer garments hang low over them so as to be recognised and not insulted...', to justify the covering of all women from head to toe. But if the same text is read as mandub in a more liberal context, local laws may leave the question of 'what is acceptable' to the discretion of each individual. Any derived ruling will depend greatly on the context in which that ruling was made.



Shari'ah depends on the belief by all Muslims in God and their fear that indiscretions escaping punishment in life will be rebuked by God in death.

God's approval and is likely to benefit individuals through His provisions.

While not positive sources of law in the traditional legal sense, these categories of action should not be considered any less important in the scheme of the shari'ah simply because they elicit no direct consequence. A practising Muslim must follow the word of God and the example of the Prophet as closely as possible to achieve success in both life and the afterlife.

are forbidden to eat carrion; blood; pig's meat...' (Qur'an 5:3), considerable variations in the law can and do exist. Such variations will often reflect the geopolitical circumstances of a society and its lawmakers. For example, the Qur'an says to Muslim women that:

"... they should lower their glances, guard their private parts, and not display their charms beyond what (it is acceptable) to reveal; they should let their headscarves fall to cover their

As discussed briefly above, a number of legal schools have developed throughout the history of Islam. Each has its own methods of finding the law and, even at the most fundamental levels, each may disagree with the principles of the others. While it is universally accepted that the Qur'an is the supreme source of legal authority, some scholars have argued that the Sunnah, being a form of revelation, can supersede the Qur'an in instances where the Sunnah differs in favour of the good of society. Other scholars vehemently reject this theory, standing

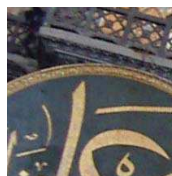
firmly by their belief that the Qur'an is the only true word of God. It is, therefore, important to understand both the geopolitical and scholastic backgrounds of any decision or ruling within the shari'ah. If this is understood, it is possible to appreciate how two scholars can resolve the same legal problem and arrive at different legal opinions.

Legal Methodology and Fatwa

To find the shari'ah, a basic process of consultation should be undertaken. First, a clear decree should be sought from the Qur'an. If such a ruling is evident, it is unnecessary to look further for the law. However, as has been discussed, the Qur'an is rarely specific on matters of a technical legal nature. Early legal specialists developed the theory of abrogation based on the logic, described by Hallaq (2005), that 'nothing can repeal the word of God except another word from the same source'. If contradictions appear to exist within the Qur'an, a careful analysis of the chronology of conflicting suras is made so that the later decree is determined to have annulled the earlier one. As an example, the Qur'an says, '[t]he (Muslim) believers, the Jews, the Christians, and the Sabians — all those who believe in God and the Last Day and do good — will have their rewards with their Lord. No fear for them, nor will they grieve' (Qur'an 2:62). However, a later revelation stating, '[i]f anyone seeks a religion other than (Islam) complete devotion to God, it will not be accepted from him: he will be one of the

losers in the Hereafter' (Qur'an 3:85), appears to abrogate the earlier verse. Such matters must be closely examined by Muslim scholars to determine the true meaning of the Qur'an.

Second, if earnest consultation of the Qur'an has failed to enlighten a legal scholar on an aspect of law, reference to the Sunnah should be made. Given the Prophet's every word, deed and



Given the Prophet's every word, deed and approval is considered the basis of a legal ruling, the Sunnah adds considerable depth and detail to the shari'ah.

approval is considered the basis of a legal ruling, the Sunnah adds considerable depth and detail to the shari'ah. Issues of contradiction within the Sunnah and even, as mentioned briefly above, between the Sunnah and the Qur'an, have forced Muslim jurists to further argue the respective merits and appropriate weight attributable to each authority. At verse 24:3, the Qur'an tells us that the crime of zina (illicit sexual relations) is punishable by one hundred lashes. There is no apparent distinction between sexual acts between two unmarried people, and adultery, where it is implied that at least one of the fornicators is married to a third party. However, the hadith of al-Bukhari (Volume 8, Book 82, Number 815) states the Prophet prescribed 100 lashes as punishment for a fornicator, but death by stoning as punishment for an adulterer. Given the shari'ah appears widely to regard the crime of adultery

as a capital offence, it can be argued the Sunnah abrogates the Qur'an in this instance. Nevertheless, as a general rule of Islamic legal methodology, the Sunnah should be consulted as a supplementary source to the Qur'an.

Some Muslim scholars will go no further than this secondary stage in search of legal guidance, claiming all divine law is contained within these two sources.

However, many legal practitioners believe that ijma' is a legitimate third source of law, whether such consensus relates to agreement on a legal aspect that was not otherwise addressed in the Qur'an or the Sunnah or agreement on how to interpret a ruling within the primary sources. The fourth, and final, source of law is qiyas derived from ijihad. When no definitive ruling can be deduced from the Qur'an, the Sunnah or ijma', a legal practitioner must combine their knowledge of these sources with their ability to reason and intellectualise the problem until a solution has been derived.

Court Judgments and Fatwas

A judge, or qadi, is responsible for ensuring human affairs are regulated in court, with sufficient reference to sources of the shari'ah and its rules of evidence and procedure and their judgments are binding on those

before the court, but only as far as the specific circumstances and facts of that case determine. The role of a mufti differs considerably in that he or she provides advice or an opinion on specific matters of shari'ah, again based upon the abovementioned sources, in response to a specific question (where, as distinct from the factual disagreements common to court proceedings, the factual basis of a question is assumed to be self-evident). The advice, or fatwa, of a mufti is non-binding and traditionally based on that person's detailed knowledge and understanding of the shari'ah texts as they relate to the question. As a result of these distinctions, a mufti's scope broadens beyond purely legal issues to

questions of law. As such, the incorporation of authoritative fatwas into this reference provided a source that was both 'the oldest and most recent material relevant to the needs of society and responsive to the changes it had undergone over time' (Hallaq, 1995). The influence of fatwa on the development of the shari'ah has been significant.

Development of the shari'ah

Alcohol and drugs in the shari'ah: a practical example of analogy and the law.

With regard to determining the status of alcohol as haram, it is unnecessary

acts — Satan's doing — shun them so that you may prosper. With intoxicants and gambling, Satan seeks only to incite enmity and hatred among you, and to stop you remembering God and prayer.

However, neither the Qur'an nor the Sunnah says anything about the use of cocaine or ecstasy, given that it is widely agreed that the term 'intoxicants' refers specifically to alcohol and its effect on Muslims of the 7th century. Does this mean the shari'ah allows the use by Muslims of these drugs? As previously discussed, the Qur'an was first revealed to Mohammad in 610 CE. The Prophet died and his Sunnah ended in the year 632 CE, but it was not for another thousand years that the international trade in recreational narcotics began.

Hence, an obvious problem exists for practitioners of the shari'ah in the 21st century when faced with determining the law regarding the use, sale and trafficking of these narcotics. Given it is impossible for substances such as cocaine and ecstasy to have borne any relevance to early generations of Muslims, their standing before God and the law was never determined by either the Qur'an or the Sunnah. Nevertheless, it is important that shari'ah jurists develop a stance on the act of trading in and consuming drugs so Muslims can be confident their behaviour remains consistent with their religion.

Through ijma' and the use of qiyas, legal scholars have been able to expand the laws pertinent to the consumption and trade of alcohol to make them equally applicable to the consumption



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encompass the full range of moral and spiritual questions that involve Muslim life.

While a fatwa is technically non-binding, the implied legal expertise required of the mufti gives their opinion some weight in the law. Unlike the decision of a judge, a fatwa can be applied widely to influence cases of similar circumstances. Fatwas were, especially in Ottoman times, incorporated into works of positive law that were widely regarded by legal practitioners as standardised authoritative references. Ideally, reference to these texts would provide clarity on all imaginable

to look further than the Qur'an. Verse 2:219 reveals, '[t]hey ask you (Prophet) about intoxicants and gambling: say "There is great sin in both, and some benefit for people: the sin is greater than the benefit".' Verse 4:43 commands, '[y]ou who believe, do not come anywhere near the prayer if you are intoxicated, not until you know what you are saying; nor if you are in a state of major ritual impurity...' and at verses 5:90 and 5:91, it is stated:

You who believe, intoxicants and gambling, idolatrous practices, and (divining with) arrows are repugnant

and trade of narcotic drugs. It must be recalled that the analogy sought by shari'ah scholars is that which pertains to the effect or outcome of an action to which a law expects to cause or negate. Alcohol is haram because of its intoxicating effects which '... incite enmity and hatred... and (prevent Muslims from) remembering God and prayer' (Qur'an, 5:91) and lead to the commission of further sins. The mufti Sheikh Yusuf Al-Quradawi summarises the symptoms of the 'destructive social disease' of intoxicants as wasting time and money, creating poor physical health and distracting Muslims from prayer and other important social duties. If these consequences are realised as a result of consuming a similarly intoxicating substance, which in the cases of heroin, cocaine and ecstasy they are, it is accepted that this substance is also haram and any subsequent fatwa delivered on this subject will indicate as such.

Conclusion

There is no singular or all-encompassing version of the shari'ah. Certainly, there are fundamental elements, or key tenets, of the shari'ah that exist in an incontestable vacuum and are accepted by all Muslims across all schools of thought. However, outside the parameters of these key tenets, the shari'ah diverges at various points of secularism, intellectualism, cultural relativism and nationality. Islamic legal jurisprudence has developed sophisticated methods of reason and

process that have allowed it to apply ancient but divine law to problems and circumstances unique in fact to the modern world. Muslim jurists are able to employ these methods to arrive at all manner of solutions to contemporary problems. Thus, the shari'ah is not necessarily an antiquated or irrelevant system of law and should not be universally criticised as such. Rather, if practised with appropriate intellectual vigour, it has the potential to be as dynamic as any other system of law while remaining true to its religious foundations.

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1 Throughout this essay it can be assumed unless otherwise specified that passages from the Qur'an have been taken from the English translation of this text by M.A.S Abdel Haleem (2005).

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