KHALED ABOU EL-FADL: REASONING WITH GOD

WHAT IS SHARIA?

In the legal context, Shari‘a is God’s eternal and immutable law—the way of truth, virtue, and justice. In essence, Shari‘a is the ideal law in an objective and noncontingent sense, as it ought to be in the divine’s realm. As such, Shari‘a is often used to refer to the universal, innate, and natural laws of goodness. Islamic law, or what is called al-ahkam al-shar‘iyya or ahkam al-Shari‘a (= fiqh), refers to the cumulative body of legal determinations and system of jurisprudential thought of numerous interpretive communities and schools of thought, all of which search the divine will and its relation to the public good. The stated objective of Islamic law is to achieve human well-being (tahqiq masalih al-‘ibad). Islamic law is thus the fallible and imperfect attempt by Muslims over centuries to understand andimplement the divine norms, to explore right and wrong, and to achieve human welfare.

WHAT IS ISLAMIC LAW?

The Islamic legal system consists of legal institutions, determinations, and practices that span a period of over fourteen hundred years, arising from a wide variety of cultural and geographic contexts. Whether espoused by Muslim or non-Muslim scholars, highly simplified assumptions about Islamic law, such as the belief that Islamic legal doctrine stopped developing in the fourth/tenth century, the purported sacredness and immutability of the legal system, or the phenomenon of so-called qadi justice (essentially, a type of law that is individualistic, unpredictable, and irrational),1 are to a large extent products of turbulent political histories that contested and transformed Islamic law (or what is commonly referred to as Shari‘a) into a cultural and ideological symbol.

THE SOURCES OF ISLAMIC LAW

It is important to distinguish the formal sources of law in the Islamic legal tradition from what is often called the practical sources of law. Formal sources of law are an ideological construct—they are the ultimate foundations invoked by jurists and judges as the basis of legal legitimacy and authority. The practical sources, however, are the actual premises and processes utilized in legal practice in the process of producing positive rules and commandments. In theory, the foundations of all law in Islamic jurisprudence are the following: the Qur’an, the Sunna (the tradition of the Prophet Muhammad and his companions), qiyas (analogical or deductive reasoning), and ijma‘ (consensus or the overall

agreement of Muslim jurists). In contrast to mainstream Sunni Islam, Shi‘i jurisprudence as well as a minority of Sunni jurists in the particular classical orientations recognize reason (instead of qiyas) as a foundational source of law. These four are legitimating sources, but the practical sources of law include an array of conceptual tools that greatly expand the venues of the legal determination. For instance, practical sources include presumptions of continuity (istishab) and the imperative of following precedents (taqlid), legal rationalizations for breaking with precedent and de novo determinations (ijtihad), application of customary practices (‘urf and ‘ada), judgments in equity, equitable relief, and necessity (istislah, haja, darura, etc.), and in some cases the pursuit or the protection of public interests or public policies (masalih mursala and sadd al-dhara’i‘ wa almafasid). These and other practical jurisprudential sources were not employed as legal tropes in a lawless application of so-called qadi justice. In fact, sophisticated conceptual frameworks were developed to regulate the application of the various jurisprudential tools employed in the process of legal determination. Not only were these conceptual frameworks intended to distinguish legitimate and authoritative uses of legal tools, but collectively, they were designed to bolster accountability, predictability, and the principle of rule of law.

It would be erroneous to assume, as many fundamentalists tend to do, that Islamic law is a literalist explication or enunciation of the text of the Qur’an and Sunna. Only very limited portionsof the Qur’an can be said to contain specific positive legal commandments or prohibitions. Much of the Qur’anic discourse, however, does have compelling normative connotations that were extensively explored and debated in the classical juristic tradition. Muslim scholars developed an extensive literature on Qur’anic exegesis and legal hermeneutics as well as a body of work (known as ahkam al-Qur’an) exploring the ethical and legal implications of the Qur’anic discourse. Moreover, there is a classical tradition of disputations and debates on what is known as the “occasions of revelation” (asbab alnuzul), which deal with the context or circumstances that surrounded the revelation of particular Qur’anic verses or chapters and on the critical issue of abrogation (naskh), or which Qur’anic prescriptions and commandments, if any, were nullified or voided during the time of the Prophet.

Muslim jurists did not just focus on whether a particular report was authentic or a fabrication but on the extent or degree of reliability and the attendant legal consequences. Importantly, Muslim jurists distinguished between the reliability and normativity of traditions. Even if a tradition proved to be authentic, this did not necessarily mean that it is normatively binding,

because most jurists differentiated between the Prophet's sacred and temporal roles. The Prophet was understood as having performed a variety of roles in his lifetime. The Prophet did not always act as a lawmaker or legislator, and part of the challenge for Muslim jurists was to ascertain when his statements and actions were intended to create a legal obligation or duty (taklif) and when they were not meant to have any normative weight. In some cases, Muslims are affirmatively prohibited from imitating the Prophet's conduct because it is believed that in certain situations the Prophet acted in his capacity as God's messenger.

The utilization of the concepts of qiyas (or 'aql) and ijma', not just as instrumentalities of law but as legitimating and foundational origins of law, was a necessary legal fiction. These concepts were intended to steer a middle course between unfettered and unrestrained borrowing of local customary laws and practices into Islamic law and, on the other extreme, the tendency toward literalism and overreliance on textualism as the basis of legitimacy in the process of legal development. Confronted by an unprecedented or novel case, often for which there is no law on point, the jurist would extend the ruling in a previous case (asl) to the new case (far'), but only if both cases shared the same operative cause. The derivation of the operative cause of a ruling (istikhraj 'illat al-hukm) was important. If the operative cause changes or no longer exists, the law, in turn, must change. It meant that cases involving substantially the same issues were decided similarly. This practice, in turn, led to the development of the presumption that precedent ought to be followed unless there is sufficient cause for exception or change (istishab), which could be for changed circumstances, equity, or a number of other legal justifications.

The concept of ijma' (consensus) was utilized to create a more systematic and accountable legal system. The agreement of jurists on a particular point of law or that well-established legal doctrine ought to be binding.

There are a number of other legal instrumentalities that allowed Muslim jurists a degree of flexibility in reaching determinations consistent with equity, avoidance of hardship, or granting special relief. Among such instrumentalities was the method of istislah, by which a jurist would follow a certain precedent that was not directly on point, instead of another precedent that was directly on point, for purposes of achieving equity. Another was istihsan, by which a jurist would break with the established precedents on a legal matter in the interest of reaching a more just or fairer result.

THE NATURE AND PURPOSE OF ISLAMIC LAW

Shari‘ah is to serve the well-being or achieve the welfare of people (tahqiq masalih al-‘ibad). The objective of Shari‘ah is not necessarily the compliance with the commands of God for their own sake. Such compliance is a means to an end—the serving of the physical and spiritual welfare and well-being of people. in Islamic legal theory, God communicates God’s way (the Shari‘ah) through what is known as the dalil (pl. adilla). The dalil means the indicator, mark, guide, or evidence, and in Islamic legal theory, it is a fundamental building block of the search for the divine will and guidance. As a sign of God’s mercy and compassion, God created or enunciated numerous indicators serving as guidance to human goodness, well-being (al-hasan wa al-ma‘ruf), and ultimately, the divine will. God ordained badhl al-juhd fi talab aldalil, so that the objectives of Shari‘ah may be fulfilled. The most obvious type of indicator is an authoritative text (sing. nass Shar‘i or pl. al-nusus al-Shar‘iyya), such as the Qur’an, but Muslim jurists also recognized that God’s wisdom is manifested through a vast matrix of indicators found in God’s physical and metaphysical creation. Hence, other than texts, God’s signs or indicators could manifest themselves through reason and rationality (‘aql and ra’y), intuitions (fitra), and human custom and practice (‘urf and ‘ada). Rational proofs (dalil ‘aqli) and textual proofs (dalil nassi). As to rational proofs, jurisprudential theory further differentiated between pure reason and practical or applied reason. Foundational legal principles and legal presumptions, such as the presumption of innocence or the presumption of permissibility (al-bara’a al-asliyya) and the presumption of continuity (istishab al-hal), are derived from pure reason. Interpretive tools, such as qiyas and istihsan, and hermeneutic categories are all instances of applied or practical reason.

The centrality of the text from the very inception of Islamic legal history. It is true that in the first two centuries of Islam, one clearly observes a much greater reliance on custom, practice, and unsystematic reasoning and that both the juristic schools of Medina and Kufa incorporated what they perceived to be the established practice of local Muslims. The struggle was over the methodologies. The diversity and complexity of the divine indicators are considered part of the functionality and suitability of Islamic law for all times and places. The fact that the indicators are not typically precise, deterministic, or unidimensional allows jurists to read the indicators in light of the demands of time and place. “It may not be denied that laws will change with the change of circumstances” (la yunkar taghayyur alahkam bi taghayyur al-zaman wa al-ahwal).

One of the most important aspects of the epistemological paradigm on which Islamic jurisprudence was built was the presumption that on most matters the divine will is unattainable, and even if attainable, no person or institution has the authority to claim certitude in realizing this Will. This is why the classical jurists rarely spoke in terms of legal certainties (yaqin and qat‘). Rather, as is apparent in the linguistic practices of the classical juristic culture, Muslim jurists for the most part spoke in terms of probabilities or in terms of the preponderance of evidence and belief (ghalabat al-zann). As the influential classical jurist al-Juwayni (d. 478/1085) stated: “The most a mujtahid would claim was a preponderance of belief (ghalabat al-zann) and the balancing of the evidence. However, certainty was never claimed by any of them (the early jurists). . . . If we were charged with finding [the truth] we would not have been forgiven for failing to find it.”11 Muslim jurists emphasized that only God possesses perfect knowledge—human knowledge in legal matters is tentative or even speculative; it must rely on the weighing of competing factors and the assertion of judgment based on an assessment of the balance of evidence on any given matter. So, for example, Muslim jurists developed a rigorous field of analytical jurisprudence known as tarjih, which dealt with the methodological principles according to which jurists would investigate, assign relative weight, and balance conflicting evidence in order to reach a preponderance of belief about potentially correct determinations.

Contemporary fundamentalist and essentialistic orientations imagine Islamic law to be highly deterministic and casuistic, but this is in sharp contrast to the epistemology and institutions of the Islamic legal tradition that supported the existence of multiple equally orthodox and authoritative legal schools of thought, all of which are valid representations of the divine will. Indeed, the Islamic legal tradition was founded on a markedly pluralistic, discursive, and exploratory ethos that came to be at the very heart of its distinctive character. Abu Hanifa (d. 150/767) and al-Shafi‘i (d. 204/820) asserted: “We believe that our opinions are correct but we are always cognizant of the fact that our opinions may be wrong. We also believe that the opinions of our opponents are wrong but we are always cognizant of the fact that they may be correct.”

Malik bin Anas (d. 179/795) resisted the efforts of the Abbasid Caliph al-Mansur (d. 158/775) to impose the legal rulings of Malik as the uniform law of the land, arguing that no one, including the state, has the authority to sanctify one school of thought as the true law of God while all others are denounced as corruptions or heresies. Similar efforts by the Abbasid Caliph Harun al-Rashid (d. 193/809) and other rulers to have the state become the sole

representative of God's Will were defeated as well. According to classical legal reasoning, no one jurist, institution, or juristic tradition may have an exclusive claim over the divine truth, and hence, the state does not have the authority to recognize the orthodoxy of one school of thought to the exclusion of all others. Shari'ah is the unchangeable and objectively perfect divine truth. Human understanding of Shari'ah is subjective, partial, and subject to error and change. It is the distinction between Shari'ah and fiqh that fueled and legitimated the practice of legal pluralism in Islamic history.

The Prophet: "Every mujtahid is correct" or "Every mujtahid will be [justly] rewarded." All positions held sincerely and reached after due diligence are in God's eyes correct. God rewards people in direct proportion to the exhaustiveness, diligence, and sincerity of their search for the divine will—sincerity of conviction, the search, and the process are in themselves the ultimate moral values. It is not that there is no objective truth—rather, according to this view, the truth adheres to the search.

Shari'ah contains the foundational or constitutional principles and norms of the legal system. So, for instance, Shari'ah imposes a duty (taklif) on Muslims to enjoin goodness and resist wrongfulness. This duty is a part of Shari'ah, but what it actually means and how or who should implement it is part of fiqh. The exact boundaries between Shari'ah and fiqh were often contested and negotiable. The notion that the divine will cannot be represented by a single system of fiqh, and the celebration of diversity are among the foundational grundnorms. Shari'ah is the unwritten constitutional law of the Islamic common-law system. It is firmly established in the Islamic legal tradition that Shari'ah seeks to protect and promote five fundamental values: (1) life; (2) intellect; (3) reputation or dignity; (4) lineage or family; and (5) property. there are three basic levels of attainment or fulfillment of such values: the necessities, needs, and luxuries. The legal duty to secure a person's survival is a priori to the obligation of guaranteeing human beings any basic needs that are above and beyond what is necessary for survival.

As early as the eighth century, alongside the state courts run by appointed judges and administrators, already there emerged the widespread phenomenon of privately funded and endowed centers of legal learning and schools of fiqh, usually organized around the persona of a gifted law teacher. There is a long-established tradition in Islamic history of the state trying to entice or coerce particularly wellrespected and reputable jurists into serving in the state-run judiciary. However, while every founder of a personal school of thought was a faqih (jurist), not every faqih agreed to serve as a judge (qadi), and not every qadi was a reputable

faqih. Four Sunni schools, three Shii schools. Even in a single school, such as that of Abu Hanifa, there could be several distinctive trends or orientations. By the end of the tenth century, no fewer than one hundred schools of fiqh had emerged in the highly competitive legal market, but for a wide variety of reasons most of these schools ultimately failed to survive. Remarkable diversity in the first three centuries in every issue. Close association with the state discredited jurists. Initially, what differentiated one school of law (madhhab) from another were methodological disagreements and not necessarily the actual determinations.

Legal scholars from the different schools of thought were often far more interested in hypotheticals that illustrated their analytical models and methodologies than in passing judgments on actual disputes. This is why fiqh studies did not speak in terms of positive legal duties or prohibitions but analyzed legal issues in terms of five values: (1) neutral or permissible (mubah/halal); (2) obligatory (fard/wajib); (3) forbidden (muharram); (4) recommended (mandub/mustahab); and (5) reprehensible or disfavored (makruh). Frequently, jurists spoke in probabilistic terms, such as saying "what is more correct in our opinion," referring to the prevailing view within the jurist's school of thought (almurajja' a 'indana). The critical point is that the masters of fiqh understood that they were not making binding law but issuing opinions of persuasive authority. The difference between fiqh and positive law was akin to the distinction between fatwa and hukm. A hukm is a binding and enforceable legal determination, but a fatwa (responsa) is a legal opinion on a particular dispute, problem, or novel issue, which, by definition, enjoys only persuasive authority. Both fiqh and fatawa (sing. fatwa) become binding law only if adopted as such by a person as a matter of conscience or if adopted as enforceable law by a legitimate authority such as a judge.

In theory, judges were willing to obey regulatory or administrative laws as long as they did not conflict with Shari'ah principles, but even then the most prominent jurists often resisted judicial appointments because of the fear that they would have to enforce unlawful executive orders. Unless the case involved a pure administrative or regulatory law problem, which tended to come under the separate jurisdiction of executive diwans (diwan al-mulk, diwan al-hukm, or diwan al-mu'amalat, all of which connoted different administrative councils or ministries), typically judges would decide cases on the basis of the precedents of what can be called the regional or local madhhab or the regionally established practices and precedents of each madhhab. By the end of the tenth century, as more schools of fiqh became extinct, thriving schools became increasingly institutionalized and organized as legal guilds with complex processes of training and certification. In turn, only properly trained and certified

members of the established legal guilds would be appointed to the judiciary, but there is ample evidence to suggest that after the tenth century, instead of localized or region-specific variations on the madhhab, legal schools of thought developed recognized majority and minority positions—majority positions reflected the formal stand of the madhhab on recognized legal problems (al-mu‘tamad fi al-madhhab), and minority positions represented the dissenting opinions that emerged within the schools. Junior judges, in particular, were expected to implement the positions representative of the school, but justices of higher rank, such as the chief justice (qadi al-quda’), and respected senior professors had considerably more freedom in adopting minority views or advocating for a change in the law.

The legal myth of closing of the doors of the ijtihad. Instead of the uphill battle of founding a new madhhab, it was much more feasible for even the most talented jurists to join an already established school of law and rise in the ranks through regular channels. Taqlid was not the instrument of legal stagnation; it was an important functional instrument of the rule of law. In general, taqlid stabilized the law by requiring continuity in legal application and by creating a legal presumption in favor of precedents unless a heightened burden of evidence was met in justifying legal change. In principle, judges of the first instance were expected to follow the same rule of law from case to case, and students and junior scholars of the law were required to first apply the existing methodology and determination of the madhhab to which they belonged. Higher-ranked judges and scholars enjoying greater qualifications and stature were able to initiate de novo legal determinations (ijtihad).

Juristic method and the linguistic practices of cumulative communities of legal interpretation became not only the mechanism for legitimacy and authority but also the actual source of law. The juristic method became Islamic law itself; it became the mechanism for negotiating not just the relationship between Shari‘ah and fiqh, but the relationship between the realm of God and that of humans and, ultimately, between the sacred and the profane.

THE SACRED AND PROFANE IN ISLAMIC LAW

Among these categories was the conceptual differentiation between ‘ibadat (laws dealing with matters of ritual) and mu‘amalat (laws pertaining to human dealings and intercourses).24 In theory, all Islamic laws are divided into one of these two categories: ‘ibadat are laws that regulate the relationship between God and humans, and mu‘amalat are laws that regulate the relationship of humans with one another. As to issues falling under the category of ‘ibadat, there is a legal presumption in favor of literalism and for the rejection of any innovations or

novel practices. However, in the case of mu‘amalat, the opposite presumption applies; innovations or creative determinations are favored (al-asl fi al-’ibadat al-‘ittiba’ wa al-asl fi al-mu‘amalat al-‘ibtida’). The rationale behind this categorical division is that when it comes to space occupied exclusively by how people worship the divine, there is a presumption against deference to human reason, material interests, and discretion. Conversely, in space occupied by what the jurists used to describe as the pragmatics of social interaction, there is a presumption in favor of the rational faculties and practical experiences of human beings. Underscoring the difference between ‘ibadat and mu‘amalat was the fact that not only were the two identified as distinct and separate fields and specialties of law, but it was also quite possible to specialize and become an authority in one field but not the other (fiqh al-’ibadat or fiqh al-mu‘amalat).

Beyond this clean categorical division, negotiating the extent to which a particular human act or conduct, whether it be public or private, primarily involved ‘ibadat or mu‘amalat was not a simple and unequivocal issue. For instance, there were lengthy debates as to whether the prohibition of zina (fornication or adultery) or consumption of alcoholic substances falls under the category of ‘ibadat or mu‘amalat or alternatively some mixture of both categories. Nevertheless, as in the case of the debates regarding the parameters of Shari‘ah and fiqh, although in principle there was a philosophical recognition that the spaces occupied by the sacred and profane require different treatments, in reality, it is the juristic method that played the defining role in determining the function of text, precedent, and rational innovation in the treatment of legal questions. Ultimately, it was not the legal presumptions attaching to either category but the institutional and methodological processes of each legal school of thought that most influenced the way issues were analyzed and determined.

It is in the historical practice of schools of thought, and especially on questions of procedure, jurisdiction, conflict of laws, and the compulsory powers of courts, that one finds the most pronounced negotiations of the space and balance between the sacred and profane. For instance, throughout Islamic history, courts rarely took jurisdiction of matters involving ‘ibadat such as performance of prayers. In a rather large genre of literature dealing with the laws of adjudication (ahkam al-qada’), administrative and executive laws (ahkam al-hisba and al-siyasa al-Shar‘iyya), and the functions of the muhtasib, who in classical practice were usually market inspectors, Muslim jurists differentiated between judicial and executive functions. Related and overlapping discussions are also found in treatises dealing with the private and public normative obligation to enjoin the good and resist what is wrong (al-amr bi

al-ma‘ruf wa al-nahy ‘an al-munkar). In this literature and in the actual historical practice, courts did not take jurisdiction of a matter unless there was an actual or real conflict. Courts had the duty to issue ahkam (judgments) and not fatawa (responses). At the same time, the authority and discretion of the executive to dispense summary justice or deal out summary penalties was restricted. Among other limitations, in any particular case, if either the law or the facts were disputed, the matter had to be referred to the judiciary. Only the judiciary had the legitimate power to interpret the law and establish the facts in any dispute. Interestingly, although varying according to time and place, it was not unusual for litigants to appoint a wakil (agent or lawyer) to argue on their behalf in civil cases, and it was common for litigants to solicit and obtain a fatwa in support from respected jurists, and judges considered such conflicting responsa as advisory or persuasive authority.

Furthermore, contrary to the unfounded generalizations that plague the field, again depending on time and place, very often there was an appellate process and sophisticated procedural rules regulating the circumstances under which a higher court may overrule a lower court within the same jurisdiction or fail to recognize the judgment of another Islamic court from a different jurisdiction. Perhaps as a practical result of the epistemology of plural orthodoxy, in Islamic jurisprudence, a court’s judgment or finding was not equated with or considered the same as God’s judgment. At a normative level, a court’s An Introduction to Shari‘ah judgment could not right a wrong or wrong a right, and it could not negate or replace the duties and responsibilities imposed by an individual’s conscience. Jurists argued that individuals do have an obligation to obey court decisions as a matter of law and order, but judicial determinations do not reflect or mirror God’s judgment. A classic example would be of a litigant who, for instance, follows the Hanafi school of thought and is forced to submit to the jurisdiction of a Shafi‘i court. The Hanafi litigant would have to obey the judgment of the court not because it is correct, but because a duly constituted court possesses legitimate positive authority (sultat al-ilzam). Not surprisingly, the proper balance between the duty of obedience to the public order and the duty to follow one’s conscience, or school of thought, has been the subject of considerable jurisprudential debates. It was argued that at times it becomes incumbent to disobey a lawful judgment or command even if this might mean having to suffer negative repercussions. Typically, this involved situations where a person conscientiously believes that harm or injury would be done to innocent parties or scenarios implicating personal virtue or honor, such as marital status. In the classical juristic tradition, there are situations where the state, acting through a judge, could rightfully punish

disobedience to its commands, and yet an individual would have an obligation to disobey the state's commands. In the Hereafter, God would reward such an individual for his sincerity and at the same time possibly reward the judge for his effort. Because of the reality of pluralist legal orthodoxy, in Islamic jurisprudence it is entirely conceivable even where Shari'ah is the law of the land that an individual legitimately would feel torn between his duties toward the public order and God. The legitimacy of the state and even the law were not absolute—both state and law performed a functional but necessary role. Beyond the fact that the state could not act as a proxy for God, legal determinations could not void the necessary role of personal beliefs or individual conscience because they did not replace the sovereignty of divine judgments. A product of the institutions of legal pluralism was the rather fascinating but little understood practice of multiple territorially overlapping legal jurisdictions. There were many historical examples of governments establishing as many as four court judicial jurisdictions, each following a different madhhab, with a challengingly complex set of conflict-of-laws rules regulating subject matter and in personam jurisdiction. Normally, however, the predominant madhhab affiliation of the population of a region would play a determinative role on the madhhab followed by a court. Furthermore, frequently there was a senior or chief judge settling issues of adjudicatory law within each madhhab. In addition, a common practice was to appoint a supreme chief judge who enjoyed ultimate appellate authority, as far as the positive law was concerned, over all the judicial jurisdictions. Although the research in this field is poorly developed, there is considerable evidence that the supreme chief judge, although personally belonging to a particular madhhab, in his official function sought to resolve conflict among the jurisdictions through synchronistic or conciliatory methodology known as al-tawfiq bayn al-madhahib (resolving and balancing between the differences among the schools of legal thought), which was a well-developed jurisprudential field and specialty.