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The Place of Shariah Among the Legal Systems of the World*

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Abstract

Islamic law has been classified during the International Congress on Comparative Law held in Paris in 1900 as a great original legal system. The basic foundation of Islamic law rests on a moral concept of right and wrong as found in the Koran, the Holy Book of Islam and the traditions of the Prophet Mohammed. Muslim scholars formulated the legal rules and organized into a number of schools of Islamic legal thought. The plurality of opinion among and within these schools attest to the flexibility built into the structure of Islamic law. Later generations of Muslim scholars and intellectual leaders often failed to reach the spirit of the law and to build upon its accomplishments.

Keywords: Ijtihad, harmonise, Al-husn wal qubh, Islamic law, Hadith.

A. Classification of Legal Systems into Families

The interest in comparing the laws of various localities and jurisdictions goes back to ancient times. Aristotle, the great Greek philosopher, refers in Chapter X of his treatise on Government to the constitution of Lacedaemon as having been formed in imitation of that of Crete, adding that "in general most new things are an improvement upon the old."[1]

This comparison is probably the process by which legal systems have affected and influenced one another.

In a treatise on International Commercial Law published in 1863, Leone Levi wrote, in identifying the sources of Commercial law in Britain:

> The codes, laws, and ordinances of other states, ancient or modern, are received with great respect by the courts, not as containing any authority in themselves in this country, but as evidence of the general law merchant.

* All views expressed in this article are strictly personal and do not reflect the position of the United States Government or any of its representatives, branches or agencies.

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1 <www.gutenberg.org/files/6762/6762-h/6762-h.htm#2H_INTR>.

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Levi continues by stating that

> [o]n points which have not been decided they, [meaning foreign codes, laws and ordinances] are worthy of great consideration.[2]

For most of the time the comparison had been between and among individual laws and legislations of different countries. But in the late nineteenth century, some jurists started to propose groupings of various legal systems of the world into a cluster of legal families based on certain commonalities shared by the legal systems of each cluster.

The purpose of such groupings was to facilitate the study of foreign laws, how they compare with domestic law, what are the basic differences and similarities among the various groupings and how best to harmonise their legal rules.[3]

While the roots of this classification may go back to ancient times, as we mentioned, it is probably accurate to suggest that its official sponsor was the International Congress on Comparative Law held in Paris in 1900.

In his report to this 1900 Congress, Professor Esmell of the Paris University School of Law proposed to classify the laws of various peoples into a small number of families or groups each of which represents an original legal system.

> Pour cela, il faut classer les législations (ou coutumes) des différents peuples, en les ramenant à un petit nombre de familles ou de groupes, dont chacun représente un système de droit original; et, faire connaître la formation historique, la structure générale et les traits distinctifs de chacun de ces systèmes nous parait être une première partie, générale et essentielle, dans tout enseignement scientifique du droit comparé.[4]

He then proposed the classification of the laws of the European continent into four families or groups. In addition, he proposed to add Islamic law as a fifth group, describing it as a great original legal system that is of interest to the European nations owing to the Muslim population in their colonies.

> Mais peut-être faudrait-il ajouter, comme cinquième groupe, le droit musulman, qui constitue aussi un grand système original, et qui intéresse si sérieusement un certain nombre de nations européennes, à cause des populations musulmanes de leurs colonies.[5]

2 L. Levi, *International Commercial Law*, p. 2. <http:// archive .org/ stream/ internationalco00 levigoog#page/n8/mode/2up>.

3 For a good overview of the history of legal family taxonomies, *see* M. Pargendler, 'The Rise and Decline of Legal Families', *American Journal of Comparative Law*, Vol. 60, No. 4, 2012, pp. 1043-1074.

4 Congres international de droit comoare tenu a Paris, 1905, Tome premier, p. 451, <www.archive .org/stream/congrsinternati00compgoog/congrsinternati00compgoog_djvu.txt p451>.

5 *Id.,* pp. 451-452.

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B. Characteristics of Islamic Law

Islamic law is indeed an original legal system set apart from other legal systems on the basis of its sources, methodology and the multiplicity of its rules.

The legal theory behind Islamic law rests on a basic moral concept of right and wrong or good and bad (*al-husn wal qubh*). Under this theory, the legal rules must compel the performance of human acts that are intrinsically good and prohibit the performance of human acts that are intrinsically bad. In other words, the validity and legitimacy of the legal rules depend on whether they prescribe the good and proscribe the bad. No legal rules under Islamic law could be morally neutral. The Muslim believer must always do what is good and abstain from doing what is bad.

The late Associate Justice of the US Supreme Court, Robert Houghwout Jackson, captured the essence of this basic foundation of Islamic law by distinguishing it from American law, pointing out that under American law – by contrast to Islamic law,

> One may at the same time be a law-abiding citizen and a thoroughly shabby character.[6]

C. Sources

The legislative process of Islamic law is therefore a process aiming at differentiating between the good and the bad of human acts. Muslim scholars who devoted themselves to the discovery of the legal rules of Islamic law later organised into a number of schools of Islamic legal thought or *mazaheb*.

During the classical period, these schools faced a basic question of whether human reason could make the differentiation between good and bad and therefore be a source of legal rules.

The minority view championed by al-Mutazila answered this question positively.

The majority view, however, was of the opinion that human reason is capable of differentiating between good and bad only in a relative and subjective manner and would change with changing circumstances.

Imam Abu Hamed al-Ghazali, the renowned eleventh century Muslim scholar, illustrates this point by giving the example of the act of killing a king. He says that this act would, if viewed through the prism of human reason, be good when judged by the king's enemies and bad when judged by the king's loyalists.[7]

In other words, the resort to human reason would leave unanswered the question of whether the act of killing a king is intrinsically good or intrinsically bad.

6 R.H. Jackson, 'Foreword', *in* M. Khadduri & H.J. Liebesny (Eds.), *Law in the Middle East, Vol. I: Origin and Development of Islamic Law*, The Middle East Institute, Washington D.C., 1955.

7 A.H. al-Ghazali, *Almustafa Min Ilm al-Usul*, <www.waqfeya.com/book.php?bid=1140>.

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The majority view was that this determination has to be made on the basis of the religious prescriptions that God revealed to his prophets and messengers and not on the basis what human reason dictates.

Muslims believe that the Prophet Mohammed is the last messenger sent by God and that his message is the most perfect and complete and is the source of all rules relating to human conduct, including the legal rules.

The Prophet Mohammed received the divine message directly from God in the form of more than 6,000 verses recited to him in the Arabic language by the angel Gabriel over a period of 23 years. These verses were collected and inscribed in the Koran, the Holy Book of Islam. God also transmitted his message indirectly through the explicit and implicit actions and sayings of the Prophet Mohammed himself. The totality of these actions and sayings, known as the Prophet's *Sunnah,* were later collected by Muslim scholars in reports known as *Hadith.* Both the Koran and the *Hadith* are therefore the sources of the legal rules of Islamic law.

D. Methodology

After deciding on the sources of the law, Muslim scholars faced the problem of how to extract the legal rules from these sources.

Neither the Koran nor the Sunnah contains codes of law or legal rules per se. Even the limited number of divine revelations with legal import do not indicate how exactly their legal rules ought to be elaborated. For example, Verse 5:90 prohibits both gambling and consuming wine but leaves unanswered the particular legal questions: does the prohibition entail criminal or civil responsibility, should the act of consuming alcohol be judged exactly the same as the act of gambling, and what punishments and remedies should be imposed for violating these prohibitions?

To deal with these and other similar questions, the schools of Islamic legal thought adopted the methodology of *ijtihad,* consisting of three tools by which to formulate or extract the legal rules from their sources.

These tools or methods are *tafsir* or interpretation, *qias* or analogy, and *ijmaa* or consensus. The last two methods are generally discussed and considered to be a part of the sources of Islamic law rather than a part of the methodology to formulate its rules.

What is interesting, however, is the acknowledgment by Muslim scholars of the role that human reason plays in the process of this methodology. After denying its capacity to differentiate between good and bad, Muslim scholars found no alternative to using human reason as the vehicle to elaborate the legal rules.

In describing the various types of knowledge, Imam al-Ghazali refers to the legal science or *ilm al-fiqh* as the most noble because it is the science where human reason is coupled with the divine revelation to produce the legal rules and guide the believers on the right path.[8]

8 *Id.*

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> وأشرف العلوم ما ازدوج فيه العقل والسمع واصطحب فيه الرأي والشرع وعلم الفقه وأصوله من هذا القبيل فإنه يأخذ من صفو الشرع والعقل سواء السبيل فلا هو تصرف بمحض العقول بحيث لا يتلقاه الشرع بالقبول ولا هو مبني على محض التقليد الذي لا يشهد له العقل بالتأييد والتسديد ولأجل شرف علم الفقه وسببه وفر الله دواعي الخلق على طلبه وكان العلماء به أرفع العلماء مكانا وأجلهم شأنا وأكثرهم أتباعا وأعوان

E. Plurality of Islamic Legal Rules

The human reason element in the elaboration of Islamic law was bound to and did produce multiple and sometimes contradictory legal rules on the same subject matters. In fact, if it was not for this multiplicity of rules we would not have had several schools of Islamic legal thought. The difference among these schools and sometimes within the same school is well known and documented and has been an integral part of the Islamic legal tradition known as *ikhtilaf al-fuqaha*.

Some Muslim scholars argue that the multiplicity and variations in God's creation of man and the universe are divine signs attested to by the Holy Koran such as in Verse 30:22, which proclaims:

> And among His Signs is the creation of the heavens and the earth, and the variations in your languages and your colours: verily in that are Signs for those who know.

In his book *Al-Ihkam fi Tmyiz al-Fatawa aan al-Ahkam wa Tasarrufat al-Qadi wal-Imam* [The Precision in Distinguishing Interpretation from Judgment and Actions of Judge and Ruler], the thirteenth century Muslim scholar Imam Shihab al-Din al-Qirafi gave the following example of disagreement among Muslim scholars on the elaboration of the legal rules.

A *Hadith* reports that the Prophet said to Hind bint Utbah, who complained to him that her husband was not providing sufficiently for her and her son's maintenance: "Take whatever is customarily equitable to sustain yourself and your son."

Some scholars relied on this *Hadith* to conclude that a creditor who seized the property of a non-consenting debtor is entitled to satisfy his debt from that property without recourse to the court; they interpreted the Prophet's saying as a statement of the legal rule. Other scholars concluded that no creditor is entitled to satisfy his debt against a non-consenting debtor without first obtaining a judicial decision; they interpreted the Prophet's action as a judicial decision made by him in his capacity as a judge.

Another example of differing rules is the question related to the part of the estate that a female descendant is entitled to inherit from a deceased parent in the absence of a male sibling. The rule formulated by all Sunni Schools, *Hanafi, Maliki, Shafi'i* and *Hanbali,* makes female descendants ineligible to inherit the whole estate of a deceased parent regardless of whether she has male siblings or not. Conversely, the legal rule adopted by the Jaafari School gives female

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descendants the right to inherit the whole estate of a deceased parent in the absence of male siblings.

F. Harmonisation of Islamic Legal Rules

The plurality of the legal rules on the same subject matter raises the question of whether there have been any attempts among the various schools of Islamic legal thought to harmonise these rules internally within the framework of a unified Islamic law, or externally with the rules of other legal systems, especially the rules of the emerging globalised international human rights law.

As is generally known, the harmonisation may be accomplished through total unification, complete integration or partial accommodation. A total unification occurs when an existing law or a newly crafted model law is chosen to replace all divergent rules; a complete integration occurs when the existing laws are modified through additions and eliminations to conform to one another, and partial accommodation is when a clear set of conflict of law rules is adopted by all jurisdictions involved.

The first attempt to unify Islamic law was made during the second century of the Islamic era.

In a letter to the Abbasid caliph al-Mansour, who ruled from 754 to 775 CE, his secretary, Ibn al-Muqaffa, explained how disparate the legal and judicial rulings in the provinces of the caliphate had become and suggested that the caliph may want to take remedial actions to bring uniformity to the legal practice in the various regions of the state. He elaborated:

> […] the Prince of the believers might want to consider the grave level of contradiction entailed in the rulings related to marriage, property, and criminal matters. Matters of marriage and criminal law that are permitted in Hira are prohibited in Kufa and the same pattern is happening within Kufa; what is permitted in one of its districts is prohibited in another […]
>
> If so pleases the Prince of the believers he might order these rulings be submitted to him along with what their proponents claim to be their evidence from Sunna or analogy so the Prince of the believers might express in each case the opinion that God will inspire him to express, prohibit the issuance of contradictory rulings, and reduce the disparate rulings into a unified code […][9]

It has been reported that when the caliph al-Mansour attempted to unify the legal rules by adopting the compendium, al Muwatta, composed by Imam Malik ibn Anas as the law binding on the people and the courts of the caliphate, Imam Malik himself dissuaded him from doing so.

9 A. Ibn al-Muqaffa, *Risala fil Sahaba*, pp. 316-317, available in Arabic at <www.waqfeya.com/book.php?bid=3858>.

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> O prince of the believers! Do not do that. The people have already received reports, heard statements, and transmitted accounts. Each community is acting upon the information they have received. They are practicing and dealing with others in their mutual differences accordingly. Dissuading the people from what they are practicing would put them to hardship. Leave the people alone with their practices. Let the people in each city choose for themselves what they prefer.[10]

While subsequent rulers were able to impose compliance with the legal rules of one school to the exclusion of the others, such as when the teachings of the Hanafi School became the unified applicable code for Muslims during the rule of the Ottoman Empire, multiplicity and pluralism remained an essential feature of Islamic law.

The importance of plurality in Islamic law is illustrated in the following *Hadith,* in which the Prophet says:

> *Ikhtilaf ummatti rahma* (the difference within my community is a mercy).[11]

To deal with the multiplicity of legal rules, Muslim scholars of the various schools reached a unique solution that may have no precedent in the annals of the history of competing intellectual activities. They agreed that rules formulated by qualified *mujtahids* are all equally true, valid and enforceable no matter how different or contradictory they are one with the other. On this point, Joseph Schacht, a Western expert on Islamic law, explains:

> The four schools [...] all deemed to translate into individual legal rules the will of Allah as expressed in the Koran and in the Sunna of the Prophet; their alternative interpretations are all equally valid, their methods of reasoning equally legitimate; in short they are equally orthodox.[12]

This solution could probably not have been possible without two other basic features of Islamic law, the personality of the legal rules and the freedom of the believers to judge for themselves which among the competing rules are most reflective of the divine will.

The personality of the legal rules means that Islamic law applies only to Muslims. Islamic legal doctrine has recognised from the beginning the right of members of other religious communities to be subject to and governed by their own laws even when the behaviour allowed by such laws is repugnant to Islamic law.

10 <www .faithinallah .org/ imam -malik -rejects -caliph -al -mansurs -request -to -force -muslims -to -follow-the-maliki-school/>.

11 Al-Nawawi, *Sahih Muslim SharhNawawi*, Vol. 11, p. 91, available at <https://archive.org/details/SahihMuslimSharhNawawi>.

12 J. Schacht, *An Introduction to Islamic Law*, Oxford University Press, New York, p. 67.

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The *Hanbalite* jurist, *Ibn Qayyim al-Jawziyah*, addressed this issue approvingly with respect to marriage among non-Muslims.[13]

As for the freedom of Muslim individuals to decide on what rules are more compatible with the divine, Joseph Schacht explains as follows:

> The individual Muslim may join the school of his choice or change his allegiance without any formality; he may even, for the sake of convenience or for any reason of his own, with regard to any individual act or transaction adopt the doctrine of a school other than that which he habitually follows.[14]

G. Closing of the Door of Interpretation

For reasons not fully explainable, Islamic law gradually started to lose its flexibility by restricting the right and freedom of jurists to elaborate new legal rules on the basis of original sources.

This restriction, known as *sad bab all-ijtihad,* or closing of the door of interpretation, seems to have made the harmonisation of Islamic law especially with the norms of the emerging international law on human rights more difficult and problematic.

This is despite the fact that Muslim jurists of the formative period were innovative in trying to help society accept real change consistent with the values of Islam.

This spirit of innovation should have been, in my opinion, a continuum of progress towards the full implementation of the great principles of the Islamic religion.

For example, Muslim jurists' understanding of the Islamic principle of equality between men and women compelled them, in a world environment very hostile to women, to be creative in trying to establish this equality principle between wives and husbands, taking into consideration the enormous resistance that the social norms would display against such a principle.

What they did was again very elegant, in my opinion. They all recognised the right of women to negotiate the conditions of their marriage contracts and rectify, if they wish, the equality deficit in the marital relationship.

Under the rules on marriage formulated more than 1,000 years ago, women were given the tools to obtain, through negotiating the conditions of the marriage contract, the right, for example, to unilaterally repudiate their husband, prohibit him from being polygamous and prevent him from interfering in their free movement after marriage.

13 I. Q. al-Jawziyah, *Ahkam Ahl Al-Dhimmah* [in Arabic], Damascus University Press, Damascus, 1961, pp. 391-397.

14 *Id.*, p. 68.

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H. Conclusion

I would like to conclude by expressing my belief that Islamic law, which occupies a notable place within the legal families of the world, has the flexibility, if understood in the same spirit by which it was formulated during the classical period, to influence and be influenced by other legal systems and to be harmonised with emerging international law on human rights while always being truthful to the great principles and values of the Islamic religion.