

SHARI'A OR SHARI'A LAW?

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Summary. Shari'a is not a legal system. It is the overall way of life of Islam, as people understand it according to traditional, early interpretations. These early interpretations date from 700 to 900 CE, not long after the Prophet Muhammad died in 632 CE. Shari'a can evolve with Islamic societies to address their needs today. Shari'a is the code of conduct or religious law of Islam. Most Muslims believe Sharia is derived from two primary sources of Islamic law: the precepts set forth in the Qur'an, and the example set by the Islamic Prophet Muhammad in the Sunnah. Fiqh jurisprudence interprets and extends the application of Sharia to questions not directly addressed in the primary sources by including secondary sources. These secondary sources usually include the consensus of the religious scholars embodied in ijma, and analogy from the Qur'an and Sunnah through qiyas. Shia jurists prefer to apply reasoning ('aql) rather than analogy in order to address difficult questions. Muslims believe Sharia is God's law, but they differ as to what exactly it entails. Modernists, traditionalists and fundamentalists all hold different views of Sharia, as do adherents to different schools of Islamic thought and scholarship. Different countries and cultures have varying interpretations of Sharia as well.

Key words: Islamic law, Islamic Arab region, value system, law

“a well-trodden path to water”

INTRODUCTION

In Arabic, “Sharia” literally means “path,” and is understood to be the path to salvation. It is pronounced SHA-ree-ah. Shari'a is not a legal system. It is the overall way of life of Islam, as people understand it according to traditional, early interpretations. These early interpretations date from 700 to 900 CE,

not long after the Prophet Muhammad (PBUH) died in 632 CE. Shari'a can evolve with Islamic societies to address their needs today¹.

It is the sum total of the things that you must do (and refrain from doing) if you are going to heaven. This includes things that states enforce (laws against theft) and also some things that states never try to enforce – how to greet your neighbors, what to eat, how to brush your teeth etc². You answer to God for everything in the Sharia, and you only answer to the state for a few of them³.

Sharia deals with many topics addressed by secular law, including crime, politics and economics, as well as personal matters such as sexuality, hygiene, diet, prayer, and fasting. Where it enjoys official status, Sharia is applied by Islamic judges, or qadis⁴. The imam has varying responsibilities depending on the interpretation of Sharia; while the term is commonly used to refer to the leader of communal prayers, the imam may also be a scholar, religious leader, or political leader. The reintroduction of Sharia is a longstanding goal for Islamist movements in Muslim countries. Some Muslim minorities in Asia (e.g. in India) have maintained institutional recognition of Sharia to adjudicate their personal and community affairs. In western countries, where Muslim immigration is more recent, Muslim minorities have introduced Sharia family law, for use in their own disputes, with varying degrees of success. Attempts to impose Sharia have been accompanied by controversy, violence, and even warfare⁵.

Naturally, different countries will interpret God's law differently. Even in areas where Muslim countries seem to at first glance to agree, pretty serious differences appear. For example, not all Muslim countries interpret the Sharia to permit Muslim men to take more than one wife. Of those that permit polygamy, some say that it only permits polygamy when the wife agrees. Others say that it permits polygamy unless the wife has made the husband promise at the time of marriage that he will remain monogamous⁶.

To understand how Shari'a came about, it's important to understand a little bit about history. The Prophet Muhammad (PBUH) is believed to have been born in 570 CE. The Qur'an was revealed to Muhammad (PBUH) starting around 610 CE. Early Muslims followed the guidance of the Qur'an and the

¹ J. Harnischfeger, *Democratization and Islamic law: the Sharia conflict in Nigeria*, Campus Verlag, Berlin 2008, p. 16.

² B.G. Weiss, *The Spirit of Islamic Law*, Alta Mira Press, Lanham 1998, p. 17.

³ M. Hodgson, *The Venture of Islam Conscience and History in a World Civilization*, "The University of Chicago" 3 (1958), pp. 105–108.

⁴ Library of Congress Country Studies, *Library of Congress Country Studies: Sudan*, in: <http://www.countrystudies.us/sudan/63.html> [accessed: 10.10.2017].

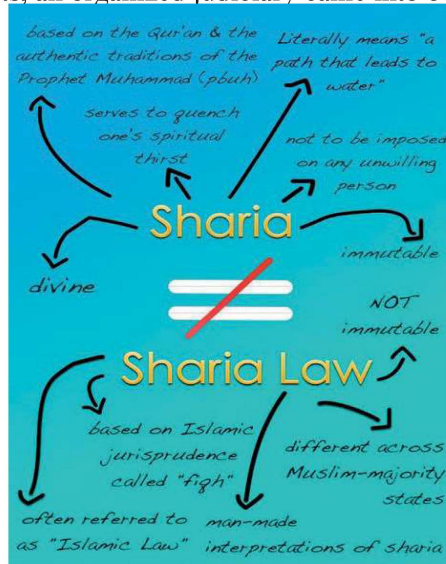
⁵ J. Harnischfeger, *Democratization and Islamic law*, p. 16.

⁶ Independent, *Fight for sharia leaves dozens dead in Nigeria*, in: <http://www.independent.co.uk/news/world/africa/fight-for-sharia-leaves-dozens-dead-in-nigeria-1763253.html> [accessed: 02.10.2017].

example of the Prophet Muhammad (PBUH). If they had a question, they could just ask him. After he died, people would ask their questions to the Prophet's family and friends – people who had a good idea of what he might have answered. The Prophet's friends and family would often tell stories about things the Prophet said or did, to help explain their answers. These stories came to be called Hadith⁷.

For the first Muslim community established under the leadership of the Prophet Muhammad at Medina in 622, the Qur'ānic revelations laid down basic standards of conduct. But the Qur'ān is in no sense a comprehensive legal code. No more than 80 verses deal with strictly legal matters; while these verses cover a wide variety of topics and introduce many novel rules, their general effect is simply to modify the existing Arabian customary law in certain important particulars⁸.

During his lifetime Muhammad, as the supreme judge of the community, resolved legal problems as they arose by interpreting and expanding the general provisions of the Qur'ān, and the same ad hoc activity was carried on after his death by the caliphs (temporal and spiritual rulers) of Medina⁹. But the foundation of the Umayyad dynasty in 661, governing from its centre of Damascus a vast military empire, produced a legal development of much broader dimensions. With the appointment of judges, or qāḍīs, to the various provinces and districts, an organized judiciary came into being¹⁰.



Shari'a and Shari'a law Source: <http://www.mpvusa.org/sharia-law/> [accessed: 23.10.2017].

⁷ J. Harnischfeger, *Democratization and Islamic law*, p. 16.

⁸ Library of Congress Country Studies, *Library of Congress Country Studies: Sudan*.

⁹ B.G. Weiss, *The Spirit of Islamic Law*, p. 17.

¹⁰ Library of Congress Country Studies, *Library of Congress Country Studies: Sudan*.

The qāḍīs were responsible for giving effect to a growing corpus of Umayyad administrative and fiscal law; and since they regarded themselves essentially as the spokesmen of the local law, elements and institutions of Roman-Byzantine and Persian-Sāsānian law were absorbed into Islamic legal practice in the conquered territories. Depending upon the discretion of the individual qāḍī, decisions would be based upon the rules of the Qurʾān where these were relevant; but the sharp focus in which the Qurʾānic laws were held in the Medinian period had become lost with the expanding horizons of activity¹¹.

Early Islamic societies were ruled by caliphs (from Arabic “khalifa”) – such as Al-Khulafā al-Rashidun (the “Rightly-Guided Caliphs”) – and later by kings and emperors. These rulers mixed Islamic ideas with secular rules that were already in place or that had been the common practice¹². These early Muslim empires did not have what we now call “law”, with the government making laws that apply to all people and enforcing the laws everywhere in the same way. Communities of Muslims applied Shariʿa in their own informal ways. Over time, laws changed. Some new rulers tried to bring the law closer to Islamic Law – as they understood it at the time, which might have been different from how previous rulers understood it. Others introduced new secular laws based on culture or their personal goals¹³.

Shariʿa isn’t a legal system. It includes Islamic principles to help guide people to new answers, and it includes common cultural practices that had to do with a specific time and place in history. Muslim rulers wanted a way to make Shariʿa into law. To do that, they decided which rules needed to be laws, first. Then they used interpretations of Shariʿa to show people that the new laws were Islamic. The result was what we call Islamic Law¹⁴.

Sharia has been defined as:

- Muslim or Islamic law, both civil and criminal justice as well as regulating individual conduct both personal and moral. The custom-based body of law based on the Quran and the religion of Islam. Because, by definition, Muslim states are theocracies, religious texts are law, the latter distinguished by Islam and Muslims in their application, as Sharia or Sharia law¹⁵;

¹¹ J. Harnischfeger, *Democratization and Islamic law*, p. 16.

¹² Omar A. Mannan, *Dictionary of the Holy Qurʾan*, NOOR Foundation International Inc. Berlin 2003, p. 287.

¹³ J. Harnischfeger, *Democratization and Islamic law*, p. 16.

¹⁴ I. Abdal-Haqq, *Understanding Islamic Law: From Classical to Contemporary*, Alta Mira Press, Lanham 2006, p. 4.

¹⁵ *The Sharia and the nation state: Who can codify the divine law?*, in: <http://www.hf.uib.no/smi/pao/vikor.html>, p. 2 [accessed: 5.10.2017].

- “a discussion on the duties of Muslims” – Hamilton Alexander Rosskeen Gibb¹⁶;
- “a long, diverse, complicated intellectual tradition”, rather than a “well-defined set of specific rules and regulations that can be easily applied to life situations” – Hunt Janin and Andre Kahlmeyer¹⁷;
- “a shared opinion of the [Islamic] community, based on a literature that is extensive, but not necessarily coherent or authorized by any single body” – Knut S. Viko¹⁸.

Islamic Law is always based on someone's interpretation of the Shari'a (which is an interpretation of the Qur'an and Hadith)¹⁹. Because it is a human interpretation, Islamic Law can mean different things in different places and at different times in history. Today, interpretations of Shari'a are usually still limited to rules of interpretation (called *usul al-fiqh*) that were established by early scholars before 900 CE. More recently scholars have called for new *ijtihad* to meet the changing needs of modern Islamic societies²⁰.

Sharia law can be organized in different ways. Sharia can be divided into five main branches:

- *ibadah* (ritual worship);
- *mu'amalat* (transactions and contracts);
- *adab* (morals and manners);
- *i'tiqadat* (beliefs);
- *'uqubat* (punishments).

Ahmad ibn Naqib al-Misri, organizes Sharia law into the following topics:

- Purification;
- Prayer;
- The Funeral Prayer;
- The Poor Tax;
- Fasting;
- The Pilgrimage;
- Trade;
- Inheritance;
- Marriage;
- Divorce.

Justice in some areas, there are substantial differences in the law between different schools of *fiqh*, countries, cultures and schools of thought.

¹⁶ S. Gibb, H.A. Rosskeen, *Mohammedanism: an Historical Survey*, Oxford University Press, London 1970, p. 68.

¹⁷ J. Hunt, A. Kahlmeyer, *The Sharia from Muhammad's Time to the Present*, McFarland and Co. Publishers, London 2007, p. 3.

¹⁸ I. Abdal-Haqq, *Understanding Islamic Law*, p. 4.

¹⁹ B. Musallam, *The Cambridge Illustrated History of the Islamic World*, Cambridge University Press, Cambridge 1996, p. 176.

²⁰ M. Hodgson, *The Venture of Islam Conscience*, pp. 105–108.

THE SUBSTANCE OF TRADITIONAL SHARĪ'AH LAW

Sharī'ah duties are broadly divided into those that an individual owes to Allah (the ritual practices or 'ibādāt) and those that he owes to other human beings (mu'āmalāt). It is the latter category of duties alone, constituting law in the Western sense, that is described here.

Offenses against another person, from homicide to assault, are punishable by retaliation (qiṣās), the offender being subject to precisely the same treatment as his victim. But this type of offense is regarded as a civil injury rather than a crime in the technical sense, since it is not the state but only the victim or his family who have the right to prosecute and to opt for compensation or blood money (dīyah) in place of retaliation²¹.

For six specific crimes the punishment is fixed (ḥadd): death for apostasy and for highway robbery; amputation of the hand for theft; death by stoning for extramarital sex relations (zinā) where the offender is a married person and 100 lashes for unmarried offenders; 80 lashes for an unproved accusation of unchastity (qadhf) and for the drinking of any intoxicant. Outside the ḥadd crimes, both the determination of offenses and the punishment therefore lies with the discretion of the executive or the courts²².

Traditional perspectives the majority of Muslims regard themselves as belonging to either the Sunni or Shi'a sect of Islam. Within these sects, there are different schools of religious study and scholarship. The schools within each sect have common characteristics, although each differs in its details²³.

Sunni in addition to the "Basic Code" of the Qur'an and Sunnah, traditional Sunni Muslims also add the consensus (ijma) of Muhammad's companions (sahaba) and Islamic jurists (ulema) on certain issues. In situations where no concrete rule exists in the sources, law scholars use qiyas – various forms of reasoning, including analogy, to derive law from the essence of divine principles and preceding rulings. The consensus of the community, public interest, and other sources are used as an adjunct to Sharia where the primary and secondary sources allow²⁴. This description can be applied to the major schools of Sunni fiqh, which include the Hanafi, Shafi'i, Maliki and Hanbali.

Salafi. The Salafi movement looks to the actions and sayings of the first three generations of Muslims for guidance, in addition to the Qur'an and Sunnah. Salafis take these exemplary early Muslims as the source of their fiqh. The Salafi movement has attracted followers from many Muslim cultures

²¹ Omar A. Mannan, *Dictionary of the Holy Qur'an*, p. 287.

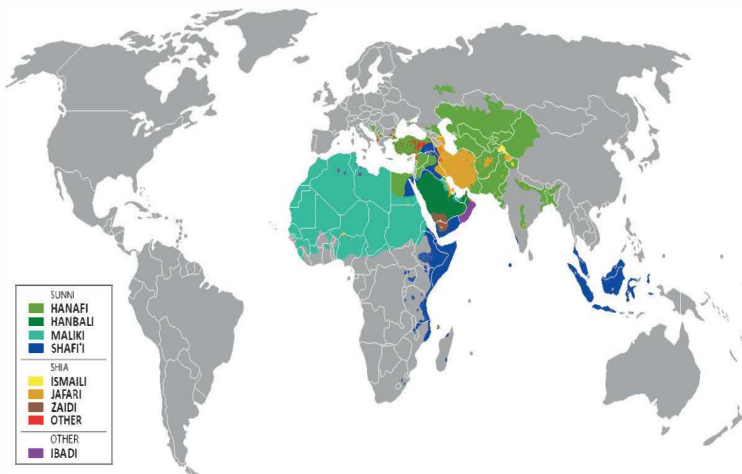
²² M. Hodgson, *The Venture of Islam Conscience*, pp. 105–108.

²³ S. Ansari, *The Cambridge Illustrated History of the Islamic World*, Cambridge University Press, Cambridge 1996, pp. 103–111.

²⁴ H.P. Glenn, *Legal Traditions of the World*, Oxford University Press, London 2007, p. 201.

and schools of fiqh²⁵. Muslims who subscribe to the teachings of scholar Muhammad ibn Abd-al-Wahhab are considered part of the Salafi movement²⁶.

Shi'a. Shi'a Muslims also extend the "Basic Code" with fiqh, and in some aspects reject analogy. At the same time, they believe Islam was long designed to meet today's innovations and culture. During the period after Prophet's death, Sunni scholars developed, at the same time the Shi'a Imams were alive teaching and spreading the original message of Islam. Since the 12 Imams are descendent of the Prophet's family Shi'a believe they have a greater right on leadership and spreading the message of Islam, as a result Shi'a view them as an extension of the original Sunnah taught by the Prophet himself. A recurring theme in Shi'a jurisprudence is logic (mantiq)²⁷, something most Shi'a believe they mention, employ and value to a higher degree than most Sunnis do. They do not view logic as a third source for laws, rather a way to see if the derived work is compatible with the Qur'an and Sunnah. In Imami-Shi'i law, the sources of law (usul al-fiqh) are the Qur'an, anecdotes of Muhammad's practices and those of The Twelve Imams, and the intellect ('aql). The practices called Sharia today, however, also have roots in comparative law²⁸ and local customs (urf)²⁹. Most Shia Muslims follow the Ja'fari school of thought.



Map of the Muslim world with the main schools of Islamic law (madhhab)
Source: https://en.wikipedia.org/w/index.php?title=Codification_%28law%29
 [accessed: 23.10.2017].

²⁵ J.L. Esposito, *The Future of Islam*, Oxford University Press, London 2010, pp. 74–77.

²⁶ *Sharia Law*, in: <http://www.duhaime.org/LegalDictionary/S/ShariaLaw.aspx> [accessed: 23.09.2017].

²⁷ K. Abou El Fadl, R. Boase, *Islam and Global Dialogue: Religious Pluralism and the Pursuit of Peace*, Ashgate Publishing, New York 2005, p. 184.

²⁸ H.P. Glenn, *Legal Traditions of the World*, p. 201.

²⁹ K. Abou El Fadl, R. Boase, *Islam and Global Dialogue*, p. 184.

MUSLIM LEGAL SYSTEMS

The legal systems in 21st century Muslim majority states can be classified as follows: Sharia in the secular Muslim states: Muslim countries such as Mali, Kazakhstan and Turkey have declared themselves to be secular. Here, religious interference in state affairs, law and politics is prohibited³⁰. In these Muslim countries, as well as the secular West, the role of Sharia is limited to personal and family matters. The Nigerian legal system is based on English Common Law and the constitution guarantees freedom of religion and separation of church and state. However eleven northern states have adopted Sharia law for those who practice the Muslim religion³¹.

Muslim states with blended sources of law: “Muslim countries including Pakistan, Indonesia, Afghanistan, Egypt, Sudan, Morocco and Malaysia have legal systems strongly influenced by Sharia, but also cede ultimate authority to their constitutions and the rule of law”³². These countries conduct democratic elections, although some are also under the influence of authoritarian leaders. In these countries, politicians and jurists make law, rather than religious scholars. Most of these countries have modernized their laws and now have legal systems with significant differences when compared to classical Sharia³³. Muslim states using classical Sharia: Saudi Arabia and some of the Gulf states do not have constitutions or legislatures³⁴. Their rulers have limited authority to change laws, since they are based on Sharia as it is interpreted by their religious scholars. Iran shares some of these characteristics, but also has a parliament that legislates in a manner consistent with Sharia³⁵.

The Muslim community became divided into groups reacting differently to the change. This division persists until the present day³⁶:

- Secularists believe that the law of the state should be based on secular principles, not on Islamic legal doctrines.
- Traditionalists believe that the law of the state should be based on the traditional legal schools. However, traditional legal views are considered unacceptable by some modern Muslims, especially in areas like women’s rights or slavery³⁷.

³⁰ J.L. Esposito, *The Future of Islam*, pp. 74–77.

³¹ H.P. Glenn, *Legal Traditions of the World*, p. 201.

³² J.L. Esposito, *The Future of Islam*, pp. 74–77.

³³ S. Otto, J. Michiel, *Sharia and National Law in Muslim Countries: Tensions and Opportunities for Dutch and EU Foreign Policy*, Amsterdam University Press, Amsterdam 2008, pp. 8–9.

³⁴ B. Tibi, *Political Islam*, World Politics and Europe, Routledge 2008, p. 33.

³⁵ S. Otto, J. Michiel, *Sharia and National Law in Muslim Countries*, pp. 8–9.

³⁶ A. Bayt, *Hawza – Advanced Islamic Studies*, in: <http://al-islam.org/index.php?t=258&cat=258> [accessed: 10.09.2017].

³⁷ Averroes Foundation, *Islamic Law: An Ever-Evolving Science under Revelation and Rea-*

– Reformers believe that new Islamic legal theories can produce modernized Islamic law and lead to acceptable opinions in areas such as women's rights³⁸.

However, traditionalists believe that any departure from the legal teachings of the Qur'an as explained by the Prophet Muhammad and put into practice by him is an alien concept that cannot properly be attributed to "Islam".

CONCLUSIONS

Many Islamic countries believe they are following Shari'a in family law matters, but Shari'a is not a legal system. These countries actually use some kind of Islamic Law in family matters, and in all other matters apply European-style law left over from colonization. Iran, Saudi Arabia and a few other countries claim that most of their laws are based on Shari'a, but, in fact, most of those laws are secular. Even those laws which come from Islamic Law are different from place to place because they are interpreted by people – and those people are influenced by their culture. Still, Islamic Law is followed by many Muslims as a way of life, not as law. In that case, it is a personal choice, based on the person's own understanding and beliefs³⁹.

Today, many Islamic countries use some version of Islamic Family Law (also called "IFL") even if they use secular laws for all other kinds of laws⁴⁰. IFL is a type of law that covers topics like marriage, divorce, custody of children and the status of women. It also may be called Muslim Personal Status Law. The idea of IFL was introduced by European colonial powers. Colonial governments separated the field of family law from the rest of Shari'a, then enforced IFL as national law, according to European models of government. All other fields of law came under secular European-style laws⁴¹.

Current Islamic Law can not be called Shari'a. Applying Shari'a as law changes it, and applying only certain parts of Shari'a causes social problems, such as human rights issues. Family law in Islamic countries today should be guided by fair social policies, as well as Islamic principles that do not distort the Qur'an.

According to Jan Michiel Otto, Professor of Law and Governance in Developing Countries at Leiden University, "Anthropological research shows that people in local communities often do not distinguish clearly whether and to what extent their norms and practices are based on local tradition, tribal custom, or religion. Those who adhere to a confrontational view of sharia

son, in: http://www.averroes-foundation.org/articles/islamic_law_evolution.html [accessed: 30.09.2017].

³⁸ Ibidem.

³⁹ M. Hodgson, *The Venture of Islam Conscience*, pp. 105–108.

⁴⁰ B. Tibi, *Political Islam*, p. 33.

⁴¹ B. Musallam, *The Cambridge Illustrated History*, p. 176.

tend to ascribe many undesirable practices to sharia and religion overlooking custom and culture, even if high ranking religious authorities have stated the opposite". Professor Otto's analysis appears in a paper commissioned by the Netherlands Foreign Ministry⁴².

In my opinion Islamic countries couldn't today apply Shari'a across the board as law. First of all Shari'a is a set of guidelines for living a responsible moral life. It covers how a person can relate to God and to others ethically. It is open-ended and flexible, while law is not. Making Shari'a law changes it. The principles of Shari'a do not provide everything needed for a complete legal system. For sure, Islamic countries today are part of a world system, which is based on a European model of nation-state. This affects political, economic and social relationships within and among Islamic nations.

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⁴² Averroes Foundation, *Islamic Law*.

- Mannan Omar Abdul. 2003. *Dictionary of the Holy Qur'an*. Berlin: NOOR Foundation International Inc.
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SZARIAT CZY PRAWO SZARIATU?

Streszczenie. Próba przybliżenia czytelnikowi, który nie jest wyznawcą islamu prawa muzułmańskiego napotyka na szereg trudności. Praktycznie każdy nowy tekst w tej materii należałoby poprzedzać przypomnieniem, że prawo muzułmańskie charakteryzuje się dwiema współzależnymi cechami. Po pierwsze: religijnym pochodzeniem („boskim charakterem”) i po drugie: ścisłą więzią przepisów prawa z muzułmańską teologią, moralnością, przepisami kultu i obyczajami, zatem brakiem rozdziału pomiędzy *sacrum* a *profanum*.

Islam, ostatnia z trzech wielkich religii monoteistycznych wyrosłych w semickim kręgu cywilizacyjnym, zarówno w jej średniowiecznym rozumieniu, jak i dzisiaj, wyznacza granice działalności człowieka w jego życiu indywidualnym i wspólnotowym. W związku ze zwiększoną liczbą muzułmanów napływających do krajów członkowskich Unii Europejskiej coraz częściej sądy państw członkowskich stykają się z rodzimym prawem muzułmanów, z prawem Szari'a.

Shari'a nie jest systemem prawnym. Oznacza on ogólny styl życia islamu, ponieważ ludzie rozumieją to według tradycyjnych, wczesnych form jego interpretacji. Tezą niniejszego artykułu jest stwierdzenie, iż Shari'a może ewoluować z islamskimi społeczeństwami, aby zaspokoić ich obecne potrzeby. Shari'a jest kodeksem postępowania lub prawem religijnym islamu.

Słowa kluczowe: prawo koraniczne, obszar arabsko-muzułmański, system wartości, prawo

