Islamic Law and Society

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Shari'ah (Islamic law) has been the dominant moral and legal code of Muslim societies for the greater part of their history. During the early centuries of Islam, Shari'ah facilitated the social growth and development of the Muslims, growth that culminated in the establishment of a vast empire and an outstanding civilization. By the close of the fifth century of Islam, however, Shari'ah began to lose its role as the guiding force that inspired Muslim creativity and ingenuity and that nurtured the growing spirit of the Muslim community (Ummah). Consequently, the Ummah entered a period of stagnation that gradually gave way to intellectual decline and social decadence. Regrettably, this painful trend continues to be more or less part of the individual consciousness and collective experience of Muslims.

This paper attempts to trace the development of the principles of Islamic jurisprudence, and to assess the impact of Shari'ah on society. It argues that the law ceased to grow by the sixth century of Islam as a result of the development of classical legal theory; more specifically, law was put on hold, as it were, after the doctrine of the infallibility of ijma' (juristic consensus) was articulated. The rigid principles of classical theory, it is contended, have been primarily induced by the faulty epistemology employed by sixth-century jurists.

Shari'ah, or Islamic law, is a comprehensive system encompassing the whole field of human experience. It is not simply a legal system, but rather a composite system of law and morality. That is, Islamic law aspires to regulate all aspects of human activities, not only those that may entail legal consequences. Hence, all actions and relationships are evaluated in accordance with a scale of five moral standards.

According to Shari'ah, an act may be classified as obligatory (*wājib*), recommended (*mandūb*), permissible (*mubāḥ*), reprehensible (*makrūh*), or prohibited (*ḥarām*).[1] These five categories reflect the varying levels of moral

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[1]Abd al-Wahab Khalaf, *'Ilm Usul al-Fiqh*, 8th ed. (Dar al-Kuwaitiyah, 1388/1978); Fazlur Rahman, *Islam*, 2nd ed. (Chicago: University of Chicago Press, 1979), p. 84.

demand placed on human acts by Divine Will. Acts that fall in the categories on the two opposite extremes are strictly demanded, whereas acts falling in the two categories around the neutral center of the scale are not as solemnly demanded, and hence their violation, though discouraged, is not condemned. To put it differently, while the individual is morally obliged to follow the commands of the first and last categories—i.e., the obligatory and prohibited—he is only encouraged to observe the commands of the second and fourth—i.e., the recommended and reprehensible.

It should be emphasized, however, that even the absolute commands of the law have essential moral, or more accurately religious, implications, and thus are not necessarily under state sanction. For instance, the pilgrimage to Makkah once in a lifetime is obligatory (*wājib*) for every Muslim who is physically and financially capable of performing this duty. Yet the state, according to Shari'ah, may not compel the individual to fulfill this personal obligation.

Notwithstanding the inextricable association between law and morality in Shari'ah, Muslim jurists conveniently differentiate between private and public morality—or, using Islamic-law vocabulary, *ḥaqq Allah* (rights of God) and *ḥuqūq al 'Ibād* (rights of humans)—and hold that only the latter may be subject to legal sanctions. Private morality includes purely religious activities pertaining directly to the spiritual relationship between a human being and God, labeled as *'ibādāt* (services). Since *'ibādāt*, or services, do not have, for the most part, any social consequences, the individual, it is argued, is answerable to God for fulfilling them, not to society. Public morality, on the other hand, encompasses those patterns of behavior that have social consequences, appropriately labeled *mu'āmalāt* (transactions). Because of the direct implications *mu'āmalāt* activities have on society's ability to maintain public peace and order, their regulation may be legally enforced by the state. The division of individual obligations and duties into categories of public and private is, nonetheless, more apparent than real; for, according to Islamic theory, all human activities, regardless of whether they are public or private, are subject to ethical judgment, because all human beings are ultimately accountable to God for their actions.

Law and morality, though interrelated, are perceived by most Western lawyers to be two distinct and separate spheres. Positive law theories predominant in Western society insist that law is only one of a number of social mechanisms—including religion, morality, education, etc.—employed in society to ensure individual conformity to social norms. This means that the ability of Western law to regulate social behavior is limited by, and contingent on, the performance of other social institutions. Only when the ideals and values promoted by other social institutions are compatible with those of the legal system can the law function effectively. Addressing the

question of the impact of law on individual and social development, Iredell Jenkins argues that

> law is not an effective instrument for the formation of human character or the development of human potentialities. It has a very limited power to make men into acceptable social members or to help them become accomplished individuals. Furthermore, law can set minimum standards and define broad guidelines to assure that institutions do in fact provide the services and promote the purposes for which they acknowledge obligation and claim credit. Though law cannot secure the essential similarities that are necessary to a sound society, it can eliminate gross dissimilarity among individuals and groups, and it can prevent serious nonfeasance or misfeasance on the part of other institutions.[2]

In contrast, the impact of Islamic law on society is pervasive and far-reaching, for Shari'ah is an all-inclusive system combining both the legal and moral realms. Shari'ah has guided the development and performance of not only legal institutions, but also those of other institutions and agencies of society, including governmental, business, and educational institutions. This aspect of Islamic law can partially explain to us the success the law had in transforming heterogeneous and incongruent societies into one relatively homogeneous political community during the early centuries of Islam.

The Purpose of Shari'ah

According to Islamic theory, Shari'ah was revealed to provide a set of criteria so that right (*ḥaqq*) may be distinguished from wrong (*bāṭil*). By adhering to the rules of law, the Muslims would develop a society superior in its moral as well as material quality to societies which fail to observe the revealed will of God. Shari'ah, as a comprehensive moral and legal system, aspires to regulate all aspects of human behavior to produce conformity with Divine Law. According to the *fuqahā'* (Islamic jurists), adhering to the rules and principles of Shari'ah not only causes the individual to draw closer to God, but also facilitates the development of a just society in which the individual may be able to realize his or her potential, and whereby prosperity is ensured to all. In other words, while religion, as a set of values and beliefs, establishes the goals and ideals which society must strive to attain, Islamic

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[2]Iredell Jenkins, *Social Order and Limits of Law: A Theoretical Essay* (Princeton, N.J.: Princeton University Press, 1980), p. 35.

With the establishment of the first Islamic state in Madinah, the Qur'anic verses began to include injunctions and statements concerning the characteristics of the just society, along with sporadic legal enunciations. In addition to his principal mission as the bearer and verbalizer of revelation, the Prophet (ṢAAS) served as the head of the community and the interpreter of the Qur'an; he was always available both to clarify the intent of the Qur'anic verses and to respond to inquiries on issues and questions of which the Qur'an was either silent or ambiguous. The personal judgments made by the Prophet were later referred to as the Sunnah or Hadith, to distinguish them from the Qur'an.[4]

Initially the term Sunnah was used in reference to the practice of the Prophet (ṢAAS) and early Muslim Ummah as they attempted to apply the injunctions of the Qur'an to daily life. As such the Sunnah was the living tradition of the community. The term Hadith, on the other hand, was used in connection with the utterances of the Prophet as they were circulated within the community and narrated by the Prophet's companions to relate his practices and directives to other Muslims. Gradually, however, the whole of the Sunnah, the living tradition, was reflected in the Hadith, and the two terms became completely consubstantial by the fifth/eleventh century.[5]

With the death of the Prophet (ṢAAS) and the emergence of new circumstances and issues never before addressed by the Qur'an or the Sunnah, the question arose as to how the Shari'ah would subsequently be known. The answer was in the exercise of juristic speculation (ijtihad), a practice that had already been approved by the Prophet (ṢAAS). However, a juristic opinion (*ra'y*) arrived at by the exercise of ijtihad could lead only to tentative conclusions or conjunctures (*ẓann*). Such judgments were thus considered by jurists as subject to abrogation and refutation. But when juristic opinions arrived at through ijtihad were subjects of general agreement by the jurists (*fuqahā'*), they were considered incontrovertible, and hence binding for the entire community. The juristic speculation of individual jurists (ijtihad) and their consensus (ijma') became, after the death of the Prophet (ṢAAS), additional sources of Shari'ah, and new methods to define Divine Law.

Al-Shafi'i, an eminent classical jurist and the founder of one of the four major schools of law in the history of Islam,[6] presented in the second/seventh

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[4]Fazlur Rahman, pp. 37-38.

[5]Muḥammad ibn Aḥmad al-Sarkhasī, *Uṣūl al-Sarkhasī*, Vol. 1 (Beirut: Dār al-Ma'rifah, 1393/1973), pp. 114-15; 'Abdul Karīm Zaydān, *Madkhal li-Dirāsāt al-Sharī'ah al-Islāmīyah*, 5th ed. (Mu'assasat al-Risālah, 1397/1976), pp. 108-18; and 'Abd al-Majīd Maḥmūd, *Al-Madrasah al-Fiqhīyah li-al-Muḥadithīn* (Cairo, Egypt: Dār al-Shabāb, 1972), pp. 4-5. See also Fazlur Rahman, pp. 56-61.

[6]There are four major schools of law in the Sunni branch of Islam: Hanafi, Maliki, Shafi'i, and Hanbali.

century the first discourse on the principles of Islamic jurisprudence *(uṣūl al-fiqh)*, which was later compiled by his students in a book entitled *Al-Risālah* (The Discourse). Following in the footsteps of his predecessors, al-Shafi'i recognized the four major principles of *uṣūl al-fiqh*: the Qur'an, the Sunnah (tradition of the Prophet), ijma' (consensus), and ijtihad (juristic speculation). He, however, redefined the last three principles.

Before al-Shafi'i presented his thesis in *Al-Risālah*, Muslim jurists by and large regarded the Sunnah, whether in the form of the living tradition of the community or the circulated narratives of the Hadith, as the practical application of the Qur'anic injunctions as they were understood by the Prophet and his companions. As such, the Sunnah was used by jurists to gain insight into the meanings and practical application of Qur'anic principles. Furthermore, early jurists accepted a Hadith only when it was supported by the Islamic principles established by the Qur'an, and they did not hesitate to reject it when it conflicted with generally accepted rules.[7] However, al-Shafi'i insisted that the Hadith, being divinely inspired, could not be abrogated by the Qur'an, and thus the community was obliged to abide by its injunctions.[8]

As a result of al-Shafi'i's insistence on the intrinsic and independent authority of the Hadith, the Sunnah and Hadith were vested with superseding authority; for although the Qur'an continued, in theory, to be regarded as the primary source of law, the Hadith for all practical purposes was given predominance in formulating legal rulings. The Hadith was used not only to interpret the Qur'an, but also to limit its application and occasionally abrogate its injunctions.[9]

The third source of law in al-Shafi'i's legal theory was consensus (ijma'). To him, ijma' was not the consensus of the jurists but that of the community at large. Al-Shafi'i perceived two interrelated problems in the identification of ijma' with the consensus of the jurists. First, consensus of the jurists was used to perpetuate the living tradition of the various schools of law, preventing thereby the unification of Islamic law. Second, and probably the most crucial problem from the Shafi'i perspective, the consensus of jurists was used to

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[7]See Ibrāhīm ibn Mūsa al-Shāṭibī, *Al-Muwāfaqāt fī Uṣūl al-Sharī'ah*, Vol. 4 (Cairo: Al-Maktabah al-Tijārīyah, n.d.), pp. 6-7; Taqī al-Dīn ibn Taymīyah, *Raf' al-Malām 'an al-A'immah al-A'lām* (Damascus: Al-Maktab al-Islāmī, 1382), pp. 49-52; and Al-Sarkhasi, pp. 340-42.

[8]Muḥammad ibn Idrīs al-Shāfi'ī, *Al-Risālah*, 2nd ed. (Cairo: Dār al-Turāth, 1399/1979), pp. 88-92.

[9]See al-Shāṭibī, *Al-Muwāfaqāt*, Vol. 4, pp. 8-9. Al-Shafi'i does not permit the abrogation of the Qur'an by the Hadith, nor the Hadith by the Qur'an; see *Al-Risalah*, pp. 110-13. And for a discussion of the rules of *nadikh* (abrogation) see Ṣalaḥ ibn 'Abd al-'Azīz al-Manṣūr, *Uṣūl al-Fiqh wa Ibn Taymīyah*, 1400 (1980).

reject the Hadith whenever the latter contradicted the prevailing doctrines of a particular school of law.[10]

Indeed, al-Shafi'i was quite successful in making the Hadith an incontrovertible source of law, the second principal source after the Qur'an. Yet the triumph of al-Shafi'i's thesis did not come without opposition. It was strongly resisted even by eminent jurists and supporters of the Hadith. Ibn Qutayba, for instance, continued to hold that the Hadith could be rejected by the consensus of the jurists, thereby giving ijma' priority over the Hadith:

> We hold that ijma' is a surer vehicle of truth (or right) than the Hadith, for the latter is subject to forgetfulness, neglect, doubts, interpretations, and abrogation. . . . But ijma' is free from these contingencies.[11]

The final recognized source of law, according to al-Shafi'i, was ijtihad. Before al-Shafi'i, ijtihad was a comprehensive concept involving any method that employed reasoning for defining the Divine Law. Al-Shafi'i, however, confined juristic speculation (ijtihad) to the process of extending the application of established rules to new questions by analogy (*qiyās*).[12] Analogical reasoning, in classical theory, required that the efficient cause (*'ila*) of the divine command be determined so that the application of the command may be extended to other objects sharing the same effect. For example, the jurists determined that the *'ila* for prohibiting the consumption of wine was its intoxicating effect. By analogy, the jurists decided, therefore, that any substance that possessed the same effect must also be prohibited, even though it may not have been explicitly forbidden by the letter of the Qur'an or Sunnah.

By limiting juristic speculation (ijtihad) to analogical reasoning (*qiyās*), al-Shafi'i hoped that he could render the former more systematic and, consequently, ensure the unity of law, while opposing the efforts of those who would be tempted to usurp the law for their own personal ends. Analogy (*qiyās*), nonetheless, continued to be considered by a significant number of jurists as only one of several methods through which the principle of ijtihad could be practiced. The followers of the Hanafi and Maliki schools of law, for instance, employed the principles of juristic preference (*istiḥsān*) and public good (*istiṣlāḥ*) respectively, regarding them as appropriate methods to derive the rules of Shari'ah. Apparently, the former method was employed by the

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[10]See Al-Shafi'i's *Al-Risalah*, pp. 401-403, 471-72, 531-35; N. J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), p. 59; and Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford, 1950), p. 64.

[11]Quoted in Fazlur Rahman, p. 14; Al-Shāṭibī, vol. 3, pp. 19-21; and 'Abd al-Malik ibn 'Abdullah al-Juwayni, *Al-Burhān fi Uṣūl al Fiqh* (Cairo: Dar al-Anṣār, 1400), pp. 624-25, 599-611.

[12]Al-Shafi'i, *Al-Risalah*, p. 505.

Hanafi jurists to counteract the Shafi'i jurists' attempts to limit the concept of juristic speculation to the method of reasoning by analogy. *Istiḥsān* (juristic preference) was an attempt to return to the freedom of juristic opinion (*ra'y*) that permitted jurists to make legal rulings without relying solely on analogy. For the more systematic jurists, however, rulings rendered through the application of *istihsān* were nothing more than arbitrary rulings or, as al-Shafi'i put it, *"innama al-istiḥsān talādhudh"* (*istiḥsān* is ruling by caprice).[13]

Istiṣlāḥ (consideration of public good) was another approach employed by Maliki, and to a lesser extent by Hanafi, jurists to escape the rigid form into which the Shari'ah was gradually cast by more conservative jurists (primarily the Shafi'i and Hanbali). The jurists who advocated the use of the *istiṣlāḥ* method argued that the principles of Shari'ah aimed at promoting the general interests of the community; therefore "public good" should guide legal decisions wherever revelation was silent with regard to the question under consideration.[14]

Classical Legal Theory

Despite the restrictions placed by al-Shafi'i and other scholars, Shari'ah continued to grow in terms of both its methodology and the body of new rules formulated in response to the concerns of a growing society. By the close of the fifth/eleventh century, however, the science of law began to decline, while the law itself was firmly cast into a rigid mold. It was during this advanced period of the history of Islamic legal thinking that the classical legal theory was formulated. But although the theory itself was the culmination of a long process of accumulation and growth, stretching over five centuries, its historical development was not reflected in the theory itself and was completely ignored by subsequent classical jurists.

Among the prime factors that contributed to the rigidity of law was the doctrine of the infallibility of ijma'. The principle of ijma' was defined first as the agreement of the early community, and was employed to substantiate the fundamental doctrines of the faith. With the establishment of the schools of law during the first two centuries, ijma' was redefined as the consensus of jurists on rulings originally established through juristic speculation (ijtihad).

The principle of the consensus of jurists was first designed as a means to substantiate the speculative judgments of individual jurists, and hence confer

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[13]Ibid., p. 507; see also Malcolm Kerr, *Islamic Reform: The Political and Legal Theories of Muhammad 'Abduh and Rashid Rida* (Berkeley, CA: University of California Press, 1966), p. 90; Coulson, p. 40.

[14]Al-Shāṭibī, *Al-Muwāfaqāt*, Vol. 2, pp. 8-22.

on them a higher degree of certainty and authority. Gradually, however, the theory of the infallibility of ijma' was advanced, thereby turning the early pragmatic authority of the legal rulings which enjoyed consensus of the jurists into theoretical absoluteness.

According to the theory of the infallibility of ijma', a juristic consensus on an issue should be considered as the final step toward understanding the "truth" of that issue. The doctrine of the infallibility of ijma' was supported by a Hadith in which the Prophet (ṢAAS) was reported to have said: "My community shall never agree on an error."[15] As a result of this new definition of ijma', jurists were discouraged from reexamining decisions or judgments on which consensus had been reached, for such reexamination was, according to classical theory, pointless and unnecessary. Thus, it was only a matter of time before jurists came to the conclusion that "all essential questions had been thoroughly discussed and finally settled, and a consensus gradually established itself that from then on no one could have the necessary qualifications for independent reasoning in law."[16]

Henceforth, ijtihad ceased to be one of the functions of the jurist, let alone a source of law. For one thing, ijtihad was perceived to be senseless after Shari'ah was completed and the essential questions answered. But in addition, "the qualifications for ijtihad were made so immaculate and rigorous and were set so high that they were humanly impossible."[17] Gradually the principle of ijtihad was replaced by that of *taqlīd* (imitation), whereby the jurist was supposed to master the official doctrine of his school and apply it to new situations. This meant that "the doctrine had to be derived not independently from the Qur'an, the Sunnah, and the consensus, but from the authoritative handbooks of the several schools."[18]

Clearly, the theory of the infallibility of ijma' was decisive in casting Islamic law into a rigid mold, for it mystified the relationship between the ideal and historical elements of law, that is, it confused law as a volatile and abstract ideal with the concrete rules derived from it and captured in the historical experience of a specific social organization.

The question arises here as to what extent can Shari'ah be regarded, as the classical theory insists, as the manifestation of the Divine Will? To answer this question we need first to distinguish the levels of meaning that separate the ideal from the existential in Islamic legal thought. In this connection the term Shari'ah or law may refer to either of the following four meanings:

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[15]Fazlur Rahman, p. 78.

[16]Schacht, p. 73.

[17]Fazlur Rahman, pp. 78-79.

[18]Schacht, p. 73.

First, law may be perceived as the eternal set of principles which reflect the Divine Will as it is related to the human situation; that is, those principles that relate to the purpose of human existence and the universal rules that must be observed by men to achieve that purpose.

Second, law could be regarded as the revelationary verbalization of the eternal principles in the form of a revealed word or message that discloses Divine Will to mankind. The Qur'an, the manifestation of Divine Will, consists of two categories of rules: universal rules (*aḥkām kullīyah*) embodied in general Qur'anic statements, and particular rules (*aḥkām far'īyah*) revealed in connection with specific instances, which hence may be considered as concrete applications of the universal rules.

Third, law may be viewed as the understanding of revelation as reflected in jurists' oral and written statements. The Qur'an was revealed over a 23-year period in piecemeal fashion in response to the various questions and problems facing the evolving Muslim community. In order to define Divine Will on new situations never before addressed by revelation, Muslim jurists had to develop a legal theory that spelled out the Shari'ah, and establish the methods of deriving and applying its rules. The jurists had to define the overall objectives of Shari'ah, and, using inductive reasoning, rediscover the fundamental principles underlying the formulation of the rules of Shari'ah. Classical jurists had also to develop the appropriate method that could be used to define the fundamental principles of Shari'ah and expand their application to new situations.

Finally, law could be seen as the positive rules derived from the theoretical principles of Shari'ah and used to regulate social and individual behavior. These rules are collected in major encyclopedic works, as well as in numerous handbooks used by the several schools of law. It is this very specific and concrete meaning of law which usually comes to mind when the term Shari'ah is pronounced.

Evidently, the classical legal theory failed to distinguish the general and abstract ideals of Shari'ah from the specific and concrete body of doctrine. That is, it confused the ideals embodied in the Qur'an and the practice of the early Muslim community with the ideologies developed later by jurists. In fact, this confusion did not occur at the early stages of the development of Shari'ah, but only at a later stage, after the four schools of law began to take shape during the third and fourth centuries, and finally with the formulation of the classical theory of law.

Earlier jurists, including the founders of the major schools of law, recognized the difference between the ideal and doctrinal elements of law, for they did not hesitate to reject previous legal theories and doctrines, replacing them with others. It was this distinction that ensured the dynamism of Shari'ah and its growth during the early centuries of Islam. By constructing new theories,

and modifying the old legal theories, the connection between the ideal and existential was maintained and Shari'ah was thus flexible enough to respond to the concerns of a developing society. However, when the prevailing doctrine of the fifth century was idealized, Shari'ah lost its flexibility, and the relationship between law and society was gradually severed. Henceforth, the efforts of the jurists were directed towards resisting any developments that would render social practices incompatible with the existing legal code, instead of modifying legal doctrines so that new social developments could be guided by Islamic ideals.

The four levels of meanings that separate the ideal from the existential elements of law enable us to see the fatal epistemological error that the proponents of the classical legal theory commit when they insist on the infallibility of the principle of ijma'. The classical legal theory mistakenly asserts that the ideals which the law aspires to realize have been captured, once and for all, in the legal doctrines expounded by early jurists, and that classical legal doctrines, substantiated by ijma', have attained absolute universality. Implicit in this assertion is the assumption that as legal decisions move from the domain of the individual to that of the community, they give up their subjectivity and specificity. When they finally become the subject of juristic consensus, legal decisions acquire complete objectivity and universality.

Such a perception is manifestly faulty, for it could be true only if we ignore the historical evolution of the human experience. As long as the future state of society, be it in the material conditions or social organization, is concealed and uncertain, law must keep the way open for new possibilities and change. It should be emphasized here that the relationship between the third and fourth meanings of Shari'ah (i.e., law as interpretation and as positive rules) is dialectical, and must be kept that way if law is to be able to function more effectively. Because in order for the ideal to have positive effect, its universality and objectivity must become embodied in a specific and concrete doctrine. Only when the universal ideal is reduced into particular and local rules and institutions can it begin to transform the human world. However, the embodiment of the ideal in a concrete rule or institution should always be regarded as tentative, and the possibility for future reevaluation or modification should likewise be kept open.[19]

The positive rules of Shari'ah as well as the legal doctrines that have been formulated by Muslim jurists are therefore tentative, because they have been formulated by fallible human beings situated in specific historical moments. The consensus (ijma') cannot confer universality or absoluteness on rules or decisions agreed upon by any particular generation. All that ijma'

[19]For further discussion on this point see Jenkins, pp. 333-35.

can do is to make the rules more objective for a specific community situated in a specific time and space. The claim that the positive rules of Shari'ah (or more accurately the rules of fiqh) and Divine Will are identical is erroneous and ill-founded, for it ignores the historical significance of the legal doctrine and the human agency that has been responsible for its development.

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The development of the classical legal theory by the fifth/eleventh century marked the beginning of a long process in which law was gradually detached from society. Up to that point, the divergence between rules of law and social practices was confined to the political arena, as the development of political institutions, namely the establishment of hereditary rule, ceased, after the fourth successor (Caliph) to the Prophet (ṢAAS), to correspond to the principles laid down by constitutional theory. Despite the fact that the Islamic political system (caliphate) had become a hereditary system after the establishment of the Umayyad dynasty, it was never sanctioned or recognized by Muslim jurists (*fuqahā'*) as such. They maintained that the ruler (Imam) could be either elected (*ikhtiyār*) or designated (*'ahd*) and that the selected head of the community should meet certain physical, moral, and intellectual requirements. Al-Mawardi (d. 450/1058), for instance, predicated these two modes of selection on the practice of the Muslim community during the rightly guided caliphate. He based the election (*ikhtiyār*) of the Imam on "the precedent of the choice of Abu Bakr (the first caliph) by election and that of 'Umar (the second caliph) by nomination."[20] Al-Mawardi also required that the Imam should receive confirmation (*bay'ah*) of the community (Ummah) or their representatives as it was practiced during the early caliphate, a practice that was modeled after the *bay'ah* of al-'Aqaba, in which people expressed their allegiance to the Prophet (ṢAAS) and acknowledged his commission and leadership.[21]

To resolve the contradiction between the de jure requirements of involving the community (Ummah) or their representatives in the selection of the Imam and de facto hereditary rule, classical jurists (*fuqahā'*) divided the selection process into two stages: nomination (*ikhtiyār*) and confirmation (*bay'ah*). While most leading jurists and schools of law agreed that the ruler (Imam) may be nominated by one or two competent individuals, they differed as to what constitutes confirmation; though the widely accepted proposition was that

[20] Haroon Khan Sherwani, *Studies in Muslim Political Thought and Administration* (Philadelphia: Porcupine Press, 1977), pp. 102-3.

[21] Ibid.

it was the right of the community, through their local leaders *(ahl al-ḥal wal-ʿaqd)* and scholars ('Ulama), to confirm the ruler.

The jurists' failure to have any impact on the actual procedure through which the ruler was selected is reflected in the idealistic nature of the classical constitutional theory; the theory is primarily concerned with defining substantive rights and duties, while failing to address the procedures needed for securing these rights and duties.

> The doctrine of the caliphate did not offer any adequate means of identifying the persons empowered to choose and install the Caliph, or, if necessary, depose him, nor did it indicate the process by which they should come to decisions. A wrongdoing ruler should be deposed if this will not invite anarchy, but the doctrine is silent on who is to decide this, or how.[22]

After the fifth century, however, law began to lose touch with reality, not only in the political realm, but also in the social and economic, or, using Islamic vocabulary, in the sphere of *muʿāmalāt*. Furthermore. with the idealization of the fifth-century legal code, the law became increasingly rigid, unable to respond to the growing needs of society. To mitigate the rigidity of law in subsequent centuries, many jurists employed legal devices *(ḥiyal sharʿīyah)* through which "an act may seemingly be lawful in accordance with the literal meaning of the law, but could hardly be in conformity with the spirit or the general purposes of the law."[23] Indeed, by the eighth century, law became primarily concerned with procedural and technical matters, while ignoring substantive questions. This meant that classical jurists in later centuries had virtually subordinated substantive justice to procedural justice.

Despite the efforts to make Shari'ah flexible through the use of legal devices, Shari'ah's ability to respond to social concerns continued to diminish, while the gap between the rules of law and social practices broadened.

This trend continued until the collapse of the traditional sociopolitical order by this century, which was the result of the European colonization of the Muslim world. The European invasion of Muslim lands was the blow that shook Muslim civilization. As a result, Muslim jurists and scholars were faced with the challenge of explaining how, in the scheme of things, the Western world, which after all did not have the privilege of being ruled by Shari'ah, was able to attain military and scientific superiority over the Muslim community. One of the early responses was advanced by Jamāl al Dīn al Afghānī, who attributed Muslim decline to the deficient outlook promoted

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[22]Kerr, p. 10.

[23]Khadduri, p. 151; see also Coulson, p. 140.

by classical legal theory and its proponents. It is not revelation, al Afghānī proclaimed, that should be held responsible for Muslim decadence, but the faulty interpretations of classical jurists. Al-Afghani was alarmed by the jurists' obsession with procedural and technical matters to the neglect of substantive questions. He thus accused classical jurists of wasting time and energy on trivial matters, occupying their minds with minutiae and subtleties, instead of addressing important problems facing the Muslim community.[24] Like al-Afghani, Muhammad Abduh, a leading modern jurist, asserted that Shari'ah would effect prosperity only when its objectives were properly understood, and its principles correctly interpreted and implemented.

> The Shari'ah is designed by God to bring worldly as well as spiritual success to man. Its social prescriptions are assumed to assure the best and most prosperous of earthly communities, provided that they are properly observed.[25]

Conclusion

Islamic legal theory asserts that law can only be established by an impartial legislator who has full knowledge of the purpose of human existence. By necessity, therefore, God must be the ultimate lawgiver of society. According to Islamic legal theory, Shari'ah is revealed to provide a set of criteria so that right may be distinguished from wrong. By adhering to the rules of law, Muslims are assured to develop a society superior in its moral as well as material quality to other societies that fail to observe revelation.

Because revelation ceased upon the death of the Prophet (ṢAAS), the community lost its direct access to Divine Will. Hence the question arose as to how Divine Law was to be known. The answer was in the practice of juristic speculation (ijtihad), whereby jurists resorted to the use of independent reasoning (*ra'y*) to discover the principles embodied in revelation and then extend their application to new situations never before addressed by revelation. Because of the speculative nature of independent reasoning, jurists introduced the principle of juristic consensus (ijma') to confer a higher degree of certainty and authority on their judgments.

In the fifth century, the doctrine of the infallibility of ijma' was introduced,

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[24]Jamal al-Din al-Afghani, "The Benefit of Philosophy," in *An Islamic Response to Imperialism*, ed. Nikki R. Keddie (Berkeley, CA: University of California Press, 1988), pp. 120-21.

[25]Quoted in Kerr, p. 114.

whereby rulings that were subject to juristic consensus were considered to be incontrovertible. Jurists concluded that essential questions had been thoroughly discussed, and were therefore settled once and for all. Henceforth, law (rules of fiqh) lost its earlier flexibility and was cast into a rigid mold from which it has not emerged. Jurists could no longer consult the original sources of law, but had to derive new rules from the fifth-century legal code, which was idealized and codified in the handbooks of the several schools of law.

Clearly, the rigidity of law has been the result of the faulty epistemology of the classical legal theory, and more specifically the doctrine of the infallibility of juristic consensus. For the theory fails to distinguish between the various levels of meaning of the law, namely, the difference between the abstract ideals of law, and the concrete body of rules and doctrines. In other words, the classical theory mistakenly asserts that the ideals which the law aspires to realize have been permanently captured in the legal doctrines expounded by early jurists. As such, the classical theory has certainly been instrumental in hindering the development of Muslim societies and bringing Islamic civilization to ruin. After the theory assumed prominence in legal circles, the efforts of the jurists were directed toward resisting any development that would render social practices incompatible with the existing legal code, instead of modifying legal doctrines so that new social development could be guided by Islamic ideals.

After the fifth century, classical legal theory became the dominant paradigm around which Islamic law evolved. The theory was handed down unchallenged from one generation to another until the turn of this century, when Muslims underwent a devastating defeat at the hands of European powers. The defeat was overwhelming, indeed, for it exposed Muslims—who were still convinced that they were on the top of the world—to a superior mode of civilization, thereby compelling them to reevaluate their assumptions. The Muslims' humiliating defeat by outside forces was the anomaly that violated the central premise of the classical theory, for it became quite apparent that Shari'ah had ceased to produce the superior society it once created and sustained.