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Deciphering the Divine: An Unmasking of Islamic Law

Hamid Khan*

Good afternoon. I want to first of all thank the *Journal* for the kind invitation. And obviously trying to do justice for a legal system that has spanned fourteen centuries and affects the lives of a billion and a half people cannot easily be accomplished in twenty minutes, so I'll give it a try. As we have already discussed so far, terms like the word *shari'a* have become dirty words in America. And so hopefully in the few minutes I have, we'll parse out some of the distinctions and what it *is* and what it *is not*.

First and foremost, even the term *shari'a* is a controversial one. The word, by the way, is only mentioned once in the holy text of Islam, the Qur'an.¹ And literally it means "a path to the source," specifically, a source of water.² Now for those of us who have studied Islamic law, who have studied the language of the Qur'an, it is clear to us that the word *shari'a* is not the same as what is often used to describe Islamic law.³ Why? Because everyone assumes the word *shari'a* is immutable, unchangeable and it is something very much clear and evident. All of these things are not true. The word *shari'a*, which as I said only appears once in the Qur'an, refers to a "straight path."⁴ But what that path really is, is really a path *within* religion.⁵ It is *the* Divine Law.⁶ But any examination of the history of the

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1. See, e.g., Mohammad Hashim Kamali, *SHARI'AH LAW: AN INTRODUCTION* 2 (2008); See also Hamid Khan, *Practitioner's Guide: Islamic Law*, INTERNATIONAL NETWORK TO PROMOTE THE RULE OF LAW 16 (2013) [hereinafter *Islamic Law Guide*], available at <http://www.inprol.org/publications/islamic-law-guide>.

2. See *id.* at 16.

3. See *id.* (contrasting *shari'a* as a straight path commanded by God to an uncertain path of lawlessness).

4. See *id.* at 2.

5. See, e.g., Asifa Quraishi, *Who Says Shari'a Demands the Stoning of Women? A Description of Islamic Law and Constitutionalism*, 163 BERKELEY J. OF MIDDLE E. & ISLAMIC L. 163–177 (2008) (detailing various philosophies within Islam, including *shari'a* as a textually based guideline versus a theoretical approach based on Mohammed's action).

Qur'an itself reveals that there are very few things that are outwardly evident, and that even upon an inspection of time, manner, and place reveal the Qur'an to be less than abundantly clear.⁷ So when we talk about the term *shari'a*, in reality we are really talking about our understanding of God's law—or *an* Islamic law.⁸ Today, when I speak of Islamic law—I will be speak in two periods: (i) the period from the time of the Prophet [Muhammad] to the classical era and (ii) the modern era.

To begin, we have to go where it all began. We have to go to Arabia - and to the middle of Arabia in the sixth century within and among nomads and particularly center on the biography of one man, Muhammad. We also have to cement within our minds the idea that God has intervened into the world, and that intervention took the form of revelation—the revelation we know as the Qur'an. This “recitation” is about the size of the New Testament.⁹ And what's interesting about any discussion about the Qur'an is to note that it did not come about all at once, but through course of a generation—specifically about twenty-two years.¹⁰ To Muslims today, it is regarded as the very word of God.¹¹ And we'll speak about that issue as the word of God as one of the central issues about how Islamic law has unfolded through history. But what is important to consider is that Muhammad was a man, who in a generation, would lead one of the greatest movements in modern humanity and one that still affects us today.

Now, if one looks at the content of the Qur'an, less than four percent of its verses are actually dedicated to legal matters outside of personal ritual practices.¹² In other words, most of Islamic law is actually dedicated to the concept of prayer, giving of alms, the pilgrimage to Mecca. Or, in other words, laws that are not the mechanisms of routine state enforcement—at least not until recently, except by groups like the Taliban. But what remains

6. See Hamid Khan, *Nothing is Written, Reformism, Revivalism and the Fate of Islamic Law*, 273 MICH. J. INT'L L. 277 (2003) (contrasting *shari'a*, which is textually based, to less enumerated principles of Islam) [hereinafter *Nothing is Written*].

7. See *Islamic Law Guide*, *supra* note 1, at 18–20 (explaining that even though the Qur'an is regarded as having one source, God, as his word was dictated to Mohammed, there is considerable debate over interpretation of even straightforward commands).

8. See *Islamic Law Guide*, *supra* note 1, at 16 (describing text-based *shari'ah* and discussing differences in approaches to practicing Islam).

9. See *Nothing is Written*, *supra* note 6, at 286 n.70 (contrasting Christian, Hebrew, and Islamic texts).

10. *Id.*

11. See, e.g., THE QUR'AN: A NEW TRANSLATION ix (A.S. Abdel Haleem, trans., 2008) (discussing approaches to interpreting the Qur'an).

12. See Kamali, *supra* note 1, at 19–22.

of the Qur'an are enduring messages about the judgment of God, about His nature, particularly His compassion and mercy. People often do not realize, that for example, the most often mentioned figure within the Qur'an is Moses.¹³ The second most often figure is Jesus. And the Virgin Mary is actually mentioned more in the Qur'an than in the New Testament. So when one looks at the Qur'an, and when one closely examines its contents—again assuming those contents yield themselves to being clear and evident—they will find that there are many familiar topics. And when it comes to areas such as law or what we consider legal injunctions, most of them are very general in nature; for example, that contracts should be upheld, that consent should be derived, that people should uphold their obligations truthfully and freely, that people should attest to matters, that wills be written, and that evidence be used to convict individuals, all of which appear to be basic principles, but principles which are enshrined in the sixth century and among a nomadic people in Arabia.¹⁴

Without going into too much detail, when the Prophet Muhammad died, his followers were confronted with the question, “what do we do now?” and “how do we organize ourselves?” At the time, the collective Muslim population, which first included a few close relatives, had grown to include entire communities and at the Prophet's death, the entirety of the Arabian Peninsula.¹⁵ Moreover, this community would not even be confined to Arabia, but in another generation, rival the size of the classical Roman Empire.¹⁶ The early leadership, tasked with answering the questions

13. See Reza Aslan, *NO GOD BUT GOD: THE ORIGINS, EVOLUTION, AND FUTURE OF ISLAM* 102 (2006).

14. See *Islamic Law Guide*, *supra* note 1, at 46 (describing the development of different schools of thought interpreting Islamic law).

15. See Aslan, *supra* note 13, at 108 (2006) (discussing the history and origins of Islam in comparison to Judaism and Christianity).

16. See *Islamic Law Guide*, *supra* note 1, at 23 (“Within a decade of the Prophet's death, Islam expanded beyond the reaches of Arabia, and within a quarter century, Islam's reach would rival that of the Roman Empire.”). In one hundred short years, Islam had built a magnificent but deeply divided empire. By the time of the Prophet's death in 632, all of Arabia was under the control of Islam. In 637, Muslims took over the Persian capital of Ctesiphon; in 638, they entered Palestine after parts of Byzantium collapsed following the Battle of Yarmouk. After conquering Syria, Lebanon, and Iraq in 641, Muslims advanced into Egypt. The Catholic Archbishop's invitation to help free Egypt from Roman oppressors exemplified the alliances formed between Muslims, Christians, and Jews. Egypt, Persia, and the Fertile Crescent were ruled by the four Rightly Guided Caliphs until 662; later these regions were ruled by the Umayyad dynasty. By 651, the entire Persian realm came under the rule of Islam as it continued its westward expansion. At the same time, the Muslim conquest reached Morocco in North Africa. By 711, Muslims had begun the conquest of Sindh in Afghanistan; by 718, almost the entire Iberian Peninsula was under Islamic control.

above, in essence asserted, while we have the Qur'an, we still have to figure out how we live according to the laws and dictates of the sacred text and without the Prophet's guidance.¹⁷ Thus, for the first century of Islam's existence there was a recurring debate that dealt with questions like, "Is this book the word of God eternal or is it a created document?" "Is [the Qur'an] responsive to the situation in Arabia, to the customs that existed?"¹⁸ Because if it was eternal, then questions about its immutability becomes even more important.¹⁹ And if it is merely responsive, then how do we create laws, which are equally responsive, both to the people, and to the plight of the individual?

As time went on, the sources of Islam's legal system became crystallized.²⁰ And while there was a decided nod toward the idea that God's word was uncreated, still left to be decided was what to make of the matters not included within the Qur'an.²¹ And perhaps more importantly, came the question "who do we look to guide us?"²² Early legal scholars naturally turned to the legacy of the Prophet Muhammad pondering the historical record about how he decided matters and asking why did he decide the way he did.²³ A century after the Prophet's death the Islamic legal system possessed its two major sources: the Qur'an as the revealed word of God and the tradition of the Prophet Muhammad—a body of tradition that would look to him, his actions, provide context to the Qur'an

In 732, at the Battle of Poitiers, Islamic expansion was halted in France, but it continued into parts of Asia and Africa. *See* MILTON VIROST, *IN THE SHADOW OF THE PROPHET: THE STRUGGLE FOR THE SOUL OF ISLAM* 162–67 (1998); *see also* THE OXFORD ENCYCLOPEDIA OF THE ISLAMIC WORLD 3:67–70 (John L. Esposito ed., rev. ed. 2009); *see generally*, JOHN L. ESPOSITO, *THE OXFORD HISTORY OF ISLAM* (1990).

17. *See Islamic Law Guide, supra* note 1, at 28–29 (describing the attempts to govern and guide the growing Muslim community following the death of the Prophet).

18. *See* Aslan, *supra* note 13, at 140 ("The inquisition begins with a simple question: 'Is the Quran created by God, or is it uncreated and coeternal with God?'").

19. *See Islamic Law Guide, supra* note 1, at 33 (discussing issues of equity and applicability to today's society that arise under a Traditionalist interpretation).

20. *See Islamic Law Guide, supra* note 1, at 29 (indicating that by the ninth century the Quran was universally accepted as a primary source of law and many Muslims also considered the Prophetic Sunnah to also be a primary source of law).

21. *See* Aslan, *supra* note 13, at 158–62 (demonstrating the tensions between the two schools of thought and highlighting some issues that arise with the understanding that the Quran is static).

22. *See* WAEL B. HALLAQ, *A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNI USUL AL-FIQH* 5 (1997) (noting that the Quran did not provide "an all-encompassing or developed system of law").

23. *See id.*

itself, not to mention help to provide reasons for the rules within the Qur'an on subjects as varied as polygamy and the law of retaliation.²⁴ This body of narratives would become part of the message of the law and aimed to directly address questions like how to govern, how to best judge one another in this growing society, that is no longer predominantly Arab.²⁵

With the Qur'an as the word of God and a prophet endowed with the message of the word of God, legal theorists and scholars began to articulate a theory, a theory that directs followers to look to these sources first and foremost and from them, derive answers to questions about law and governance.²⁶ But should one fail to find answers within those sources, they are next instructed to look to the rules within the sources to guide us and analogize from there.²⁷ In other words, from the Qur'an, which laid down a few set of rules, the scope of law then expanded to include the Prophet's example.²⁸ But from there, a whole body of law began to be established but as a result, no one could simply take a verse from the Qur'an and say, "Aha I know what the law is."²⁹ Within a century, institutions had developed and requirements were established.³⁰ Including a requirement those who expounded upon the law had to possess between four and fourteen years of training and education.³¹ The key to that training was an examination of language, an examination of context, an examination of the precedents of other legal scholars in order for them to even approach the right to interpret the law.³² So in another words, it was a set of requirements not entirely unfamiliar to law schools in the United States, nor entirely unfamiliar to the

24. See *Islamic Law Guide*, *supra* note 1, at 18–23 (“Islamic legal scholars have always had to resort to another source to obtain fuller meaning from the Qur'an, which has led them back to the Qur'an's transmitter, expounder, judge, and human exemplar: the Prophet Muhammad.”).

25. *Islamic Law Guide*, *supra* note 1, at 18–23 (describing the creation of these narratives).

26. See *Islamic Law Guide*, *supra* note 1, at 29–30 (articulating the process by which Muslims are supposed to investigate legal inquiries).

27. *Islamic Law Guide*, *supra* note 1, at 29–30 (“Barring a clear answer from either a revealed source or a rational consensus of opinions as to how to address the query, one is permitted to analogize based on the revealed sources or *qiyas* to reach a result.”).

28. See *Islamic Law Guide*, *supra* note 1, at 29 (“Prophetic Sunnah would help to explain and clarify the ambiguous language of the Qur'an.”).

29. See *Islamic Law Guide*, *supra* note 1, at 30 (noting that this process required extensive knowledge of the sources and doctrines of Islamic law).

30. See *Islamic Law Guide*, *supra* note 1, at 30–31 (describing the process by which one became qualified to interpret the law).

31. *Islamic Law Guide*, *supra* note 1, at 30–31.

32. *Islamic Law Guide*, *supra* note 1, at 30–31.

sentiment that we approach any person on the street and say, “what is your interpretation of the law?”³³ and make such an interpretation authoritative. This criteria for the authority to interpret becomes critically important when we speak of Islamic law today.

For centuries, this paradigm for authority revolved around a juristic class—a group of individuals who were regarded as scholars—academics, if you will.³⁴ And more importantly, these academics intentionally sat outside the institution of politics, because their loyalty to the law was not the kind of loyalty given to a politician who occupied the seat of power—whether that power be in Baghdad or Damascus.³⁵ Their loyalty was to God and part of the content of their oath was to ensure that any interpretation of the divine law was to be apolitical.³⁶ Moreover, because of the rules of the law, and for as much education as scholars possessed and the decades of time spent studying the language, their views were simply theirs.³⁷ In other words, under Islamic law, one’s interpretation, no matter how scholarly, was but an interpretation or simply their “understanding” of law or *fiqh*.³⁸ In other words, and to summarize, through the filter of education came an understanding, but that understanding was simply one jurist’s understanding.³⁹ A believer could accept that particular interpretation if one wished, but unless a believer was in a court or obliged by the order of a judge, they remained generally free to choose which opinion of the divine law was acceptable to them.⁴⁰ And it was within this broad penumbra of diversity where even while the jurist was considered the most learned, that Muslims for centuries took their guidance asking should they do something and how should they act.⁴¹

33. See *Islamic Law Guide*, *supra* note 1, at 30–31 (explaining that jurists are expected to possess an “intimate understanding of the sources” and “doctrines of law”).

34. See *Islamic Law Guide*, *supra* note 1, at 30–31.

35. *Islamic Law Guide*, *supra* note 1, at 37–42 (discussing the different responsibilities and roles reserved to the religious scholar class and political officials).

36. *Islamic Law Guide*, *supra* note 1, at 37–42.

37. *Islamic Law Guide*, *supra* note 1, at 31 (discussing the nature of the scholar’s role as interpretive and based upon their unique qualifications).

38. *Islamic Law Guide*, *supra* note 1, at 31.

39. *Islamic Law Guide*, *supra* note 1, at 31.

40. *Islamic Law Guide*, *supra* note 1, at 26 (discussing the value of difference of opinion and ability of individuals to choose on interpretation of religious law that best fits his circumstances)

41. *Islamic Law Guide*, *supra* note 1, at 26.

At the same time, politics was the province of the caliphate, the political successor to the Prophet Muhammad.⁴² He too possessed authority to articulate law, but one which was created to fill the areas of Islamic law not conferred to jurists who were primarily focused on laws within the sources.⁴³ Consequently, while the caliphate possessed his own reservoir of legal authority, it was limited in its scope because it concerned those areas not within the direct view of the jurists.⁴⁴ And it must be remembered that even the authority of jurists was also limited—there being no one universal interpretation of any particular area of the law, and most importantly, Muslims as believers were often encouraged to give freedom to a variety of interpretations.⁴⁵

Over time, after several centuries, the Islamic world came under different threats and under the weight of its own internal decay.⁴⁶ So too did its legal system. And thus, a system that based upon scholarship, freely choosing and internal reforms meant looking outside the Islamic world, particularly to Europe.⁴⁷ The European model, however, included legal codes of clear, decipherable language and remained singular, one-dimensional but also reduced the freedom to interpret to a mere recitation of the law.⁴⁸ And rather than embrace a diverse group of opinions which one could freely choose from, it was simply there to accept.⁴⁹ So the Ottomans, along with future Muslim majority states codified their laws along European lines and the scholarly class was reduced.⁵⁰ From 1924 on, Muslims had to contend with a law that was singular and one dimensional, simply stating what God's law was. In many ways, the process of codification turned the breadth, scholarship and frankly, even the humility of Islamic law into a *shari'a*, because Islamic law no longer appeared to have the kind discretion it once possessed nor a believer's ability to choose

42. *Islamic Law Guide*, *supra* note 1, at 37–42 (discussing the differing role of the politician and jurist).

43. *Islamic Law Guide*, *supra* note 1, at 37–42.

44. *Islamic Law Guide*, *supra* note 1, at 37–42.

45. *Islamic Law Guide*, *supra* note 1, at 31 (discussing how jurist articulated Islamic law resisted both “definitive settlement and the inertia of change”).

46. *See generally* NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* 59102 (Princeton Univ. Press 2010).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

among varying opinions about the precise meaning of either Qur'an and the precedents of the Prophet Muhammad.⁵¹

It was once thought that the democracy envisioned by Greeks had faded into history and would be no more. But by the eighteenth century that we see that idea has become ascendant. And by a twist of history, the same has occurred with Islamic governance and Islamic law. Many regarded Islamic law as belonging to the dustbin of history. Except that in the past sixty years, Islamic law has made a resurgence.⁵² It has become the articulated law of a number of different states, and in a number of different forms. Most commonly, it takes the form of family law or within personal status laws, which includes states that have Muslim majorities but also to states that have non-Muslim majorities such as Israel and India, both of which have codified articulations of Islamic law.⁵³ Today, however, we also live within an era where the scholarship of Islamic law no longer belongs in the hands of apolitical academics or a few non-political elites.⁵⁴ Now the institutions which once shaped Islamic law are in the control of politicians. Therefore, what we understand Islamic law to be is the province of politicians. Today, state institutions have failed in many parts of the Muslim world, and often the demand for Islamic law is really demand for the rule of law, accountability and even authoritarianism.⁵⁵ If one looks at the situation of Mali, Afghanistan, or Nigeria, one will notice repeated demands for the establishment of Islamic law, particularly of its criminal aspects.⁵⁶ But what isn't mentioned, for example, are the procedural hurdles, evidentiary requirements, institutional independence and an outright reluctance within the sources to punish altogether.⁵⁷ Or, in other words, all of the things that accompanied implementation of classical Islamic law. Instead Islamic law has become a contemporary political football, used particularly by militants, politicians and states as a means to

51. *Id.*

52. *See, e.g.*, JOHN L. ESPOSITO, WHAT EVERYONE NEEDS TO KNOW ABOUT ISLAM 162 (Oxford Univ. Press 2d. ed. 2011).

53. *See Islamic Law Guide, supra* note 1, at 6267.

54. *See* FELDMAN, *supra* note 46, at 105121.

55. *See, e.g.*, M. Hakan Yavuz, *Ethical, Not Shari'a Islam: Islamic Debates in Turkey*, 10(4) REV. OF FAITH & INT. AFFAIRS 32–33 (2012).

56. *See, e.g.*, RUDOLPH PETERS, CRIMES AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY (Cambridge Univ. Press 2005).

57. *See id.* at 3536.

establish authority and to confer dose legitimacy usually in self-interested fashion.

So when you look at the totality of Islamic law, one must remember that it sits at the end of centuries of thought and construction. But when one hears of its revitalization, it is being done in a far different world from whence it emerged. So keep this contextualization both in terms of language as well as institutions in mind not only when looking at the laws of the Qur'an or even the Bible, but also when one looks to the laws of any text, (which you are all going to confront as lawyers or up and coming lawyers). Language is generally oblique no matter the situation, but to draw meaning from language often requires inspecting context, gaining understanding beyond the limits of mere words, which naturally means embracing different interpretations even to the clearest words. That was one of the foremost principles of Islamic law and hopefully that will give you some sense about how Islamic law has been understood and how it is likely to be understood in the future.