

Shari'ah Law

Unlike the principles underpinning most western democratic societies, which call for a fundamental separation between the mechanisms of government and the mechanisms of religion and the church (although there may often be shared principles and influences between them), there is no similar principle of separation in Islamic society.

Thus, under Islam, the religion is the government and the Law.

A fundamental tenet of Islam is that the faith requires a "total and unqualified submission to the will of Allah (God)". Islamic law is the expression of God's command for Muslim society, and constitutes a system of duties and obligations that are incumbent upon every Muslim by virtue of his or her religious belief.

Known as the "Shari'ah", (literally, "the path leading to the watering place"), Islamic law constitutes a divinely-ordained code of conduct that seeks to guide the faithful Muslim toward a practical expression of his religious conviction in the earthly world, and toward his goal of divine favor in the world after death.

Although based on the "will of Allah" revealed to Muhammad during his life, and considered fixed and immutable at the time of Muhammad's death, the process of Muslim jurisprudence, or the science of ascertaining the precise terms of the Shari'ah, was not regarded as complete until the end of the 9th century, when the law had achieved a definitive formulation in a number of legal manuals written by various respected Muslim scholars and jurists prior to that time.

Shari'ah differs from Western systems of law in two principle ways.

First, the scope of the Shari'ah is much wider, regulating not only man's relationship with his neighbors and with the state, which are the limits of most other legal systems, but also with his God and his own conscience. The Shari'ah is as concerned with ethical standards as with legal rules, dictating not only what man is bound to do in law, but also what he ought to do or refrain from doing in conscience.

Thus, the Shari'ah is not merely a system of law, but a comprehensive code of behavior that embraces both public and private activities.

The second major distinction between Shari'ah and Western legal systems is the result of the Islamic principle of law as the expression of divine will.

With the death of Muhammad in 632 A.D., communication of the divine will to man were decreed (by Abu Bakr, his claimed successor), to have ceased, so that the terms of the divine revelation to Muhammad were henceforth "fixed and immutable".

When the process of interpretation and expansion of the source material was held to be complete with the canonization of the doctrine in the medieval legal manuals at the end of the 9th century, Shari'ah law effectively became a rigid and static system.

Unlike most secular legal systems that are held open to re-examination and change, and which are able to grow and adapt to meet the changing landscape of society and technology, Shari'ah law is considered to have been imposed upon society from above.

Thus, in Islamic jurisprudence, it is not society that shapes and fashions the law, but the law that preceeds, shapes, and controls society, and the individual.

Historical Development

For the first Muslim community established under Muhammad from 612 A.D. to 632 A.D., the revelations of Muhammad himself laid out the basic standards of conduct.

This however was not a comprehensive legal code. No more than 80 recorded verses (of the Qur'an) deal with strictly legal matters, and these verses covered a wide variety of topics. While often introducing some novel rules for the day, their general effect was often to merely modify the existing Arabian custom or traditions in certain particulars.

During his lifetime, Muhammad, as the supreme arbiter and judge of Medina and of the Muslim community, resolved legal problems himself as they came up, either by interpreting and expanding the general provisions of his earlier revelations, or by receiving new ones.

After Muhammad's death, this ad hoc interpretation continued under the various caliphs of Medina, until approximately

661 A.D., when the foundation of the Umayyad dynasty in Damascus led to the development of a legal network of provincial and district judges, often in regions conquered by the advancing Muslim armies.

This often had the result of elements of Roman-Byzantine and Persian -Sasanian law being merged with existing Qur'anic principles, to the effect that local decisions would be based on the rules of the Qur'an where relevant, but otherwise local tradition might prevail.

Reaction to this state of affairs arose in the early 8th century, when pious Muslim scholars began to debate whether or not Umayyad legal practice was properly implementing the religious ethic of Islam.

Actively sponsored by the Abbasid rulers, who came to power in the mid-8th century, and who pledged to build a truly Islamic state and society, the activities of the jurists in these early Islamic schools of law marked the beginning of any real Islamic jurisprudence.

Their aim was to Islamize the law by reviewing the current legal practice in the light of Qur'anic principles, and then adopt, modify, or reject them as part of building an ideal scheme of law.

During this time two opposing schools of legal thought developed - one which maintained that outside the terms of the Qur'an scholars were free to use their reason to ascertain the law, and another which insisted that the only valid source of law outside the Qur'an were in the precedents set by Muhammad himself during his lifetime.

One influential Muslim jurist sought to eliminate this division and to produce a greater uniformity in the law, by expounding a firm theory that knowledge of the Shari'ah could only come from divine revelations found either in the Qur'an, or in the divinely-inspired traditions and commentary of Muhammad, which were recorded in the Hadith.

Human reason in law was to be confined to solving problems not specifically solved by divine revelation, by applying principles from closely parallel cases in the Qur'an or Hadith.

This insistence upon the legal importance of the Hadiths produced a great deal of activity in the collection and classification of the Hadiths. Muslim scholarship maintained that these classical compilations of this era constituted the authentic record of Muhammad's precedents and commentary. The general view of many Western scholars, however, is that a considerable part of the Hadith represents the views of jurists after the time of Muhammad, who ascribed them to Muhammad in order to give the doctrine a greater authority.

The final seal of rigidity was placed on the legal doctrine in the 10th century, and from that time onward, Islamic jurists were bound by the doctrine of "unquestioned acceptance", to follow the law as it was recorded in the authoritative legal manuals previously written.

In spite of this, various regions and sects of Islam have developed somewhat disparate schools of legal thought and practice. In addition to the four Sunni, or orthodox schools of Islam, there are the minority sects of the Shi'ah, the Ibadis, the Hanafi, Maliki, Shafii, Hanbali, and Shii.

Traditional Shari'ah

Shari'ah is broadly divided into categories delineated between the individual's relationship to Allah (God), and the individual's relationship to his fellow man. It is that second category, which is what is considered law in the Western sense, that is outlined below.

Criminal Law

Offenses against a person, from homicide to assault, are punishable by retaliation. In other words, the offender is subject to precisely the same treatment as his victim. Under Shari'ah, it is not the state but only the victim or their family who have the right to prosecute, and to opt for compensation or blood money in place of retaliation.

The punishment is fixed and established for six specific crimes; for highway robbery or for leaving the Muslim faith (apostasy) - death; for theft - amputation of the hand; for extramarital sex relations - death by stoning if the offender is married, or 100 lashes for unmarried offenders; for an unproved accusation of unchastity - 80 lashes; for the drinking of any intoxicant - 80 lashes.

Beyond these six crimes, both the determination of offenses and the punishment lies at the discretion of the executive or the court.

Business Law

The legal capacity to transact belongs to any person "of prudent judgement", normally deemed to have arrived with

physical puberty. The irrefutable presumption of law is that boys below the age of 12 and girls below the age of 9 have not attained puberty, and that puberty has been attained no later than age 15 for both sexes.

Persons who are not competent, on account of minority, mental deficiency, simplicity, or prodigality, are placed under the care of a guardian, and they are prohibited from transacting without their guardian's consent.

The basic principles of the law are laid down in the four root transaction types of (1) sale - transfer of the ownership of property for a consideration, (2) hire (rent) - transfer of the right to use of property for a consideration, (3) gift - gratuitous transfer of the ownership of a property, and (4) loan - gratuitous transfer of the use of a property.

These four types then applied to the various specific transactions of (for example): pledge, deposit, guarantee, agency, assignment, land tenancy, partnership, and waaf foundations.

Waaf is a peculiarly Islamic institution whereby the founder relinquishes his ownership of real property, which then belongs henceforth to Allah, and dedicates the income or use of the property in perpetuity to some pious or charitable purpose, which may include settlements or payments in favor of the founder's own family.

The Islamic law of transactions as a whole is dominated by the doctrine of "riba". Essentially, this is the prohibition of usury, but the concept has been rigorously extended to cover and preclude any form of interest on a capital loan or investment.

This doctrine is also linked with a general prohibition on gambling. Islamic law does not in general permit any kind of speculative transaction the results of which cannot be precisely determined or forecast.

Family Law

Islamic society is strictly patriarchal. Fathers have the right to contract their daughters, whether minor or adult, into compulsory marriage.

Only when a woman has been married before is her consent to her marriage necessary. But even then her father, or other marriage guardian, must conclude the marriage contract on her behalf.

In Hanafi and Shii law, however, only minor girls may be contracted in compulsory marriage, and adult women may conclude their own marriage contracts, except that the guardian (or father) may have the marriage annulled if his ward has married beneath her social status.

Husbands have the right of polygamy and may be validly married at the same time to a maximum of four wives. Upon marriage a husband is obliged to pay to his wife her dower, the amount of which may be fixed by agreement or by custom. During the marriage he is bound to maintain and support her provided that she is obedient to him, not only in domestic matters, but also in her general social activities and conduct.

A wife who rejects her husband's dominion by leaving the family home without just cause forfeits her right to maintenance.

A divorce may be effected simply by the mutual agreement of the spouses, known as a "khul" when the wife pays some financial consideration to the husband for her release. According to all legal schools except the Hanafis, a wife may obtain a judicial decree of divorce on the grounds of some matrimonial offense, e.g. cruelty, desertion, failure to maintain. The husband alone has the power to unilaterally terminate the marriage by repudiation of his wife.

The legal status of children within the family group depends on their legitimacy, and a child is legitimate only if conceived during the lawful wedlock of its parents.

In Sunni law no legal relationship exists between a father and his illegitimate child. There is a legal tie, for all purposes, between a mother and her illegitimate child.

Guardianship of the person and the property of a minor child belongs to the father or other close relative male, but the bare right of custody of young children, whose parents are divorced or separated, belongs to the mother, or to the female, maternal relatives.

To be continued ...