

**“Sociological, Philosophical, and Legal Considerations
of Shariah as the Rule of Law in Islam”**

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ABSTRACT

I explore the compatibility of the idea of Shariah with the classical liberal conception of liberty by considering sociological, philosophical, and legal aspects of both concepts. Some contemporary Muslims depart from the historical norm by equating the Shariah with a fixed set of regulations handed down from the past. I contend that the Shariah is an idealized notion of Islamic law to which Muslims appealed to solve problems after they occurred, and solved those problems through a practical application of a strong 'rule of law' ethos, logically related to the higher purposes of the law (*maqâsid-ash-sharî'a*), and methodologically grounded in an evolved legal procedure. Traditionally, appeal to Shariah was functional, a way to deal with practical questions as they arise or to resolve differences of opinion over seemingly contradictory fatwas. Thus, both the Western notion of natural rights and the Islamic notion of the *maqâsid-ash-sharî'a* aim at an intuitive ideal of justice. I conclude that notwithstanding specific disparities between Muslim fiqh and Western jurisprudence, Shariah is fully compatible with liberty.

0. Introduction

The rule of law as an institution must be distinguished from any particular set of laws that may be applied in a particular society. Every society has always had *laws*, but the rule of law itself, the notion of nomocracy as popularized by Friedrich Hayek is a necessary ingredient for a free society.¹ It is best understood in opposition to rule by *men*, which to some degree or another has always existed in human affairs. In a free society the rule by men is minimized by the rule of law. It is my contention that this concept was first practically implemented in human society under Islam, that the notion was introduced to the West by Crusaders returning during the high medieval period and refined by political philosophers such as John Locke (influenced by Ibn Tufayl) and sociologists like Toynbee (who acknowledged his debt to Ibn Khaldun). I believe that modern political “Islamists” who understand Sharia as a particular set of laws to be imposed by government are more influenced by post-Westphalian nation-statism than by the Islamic tradition.

I contend that the Sharia is an idealized notion of Islamic law to which Muslims appealed to solve problems after they occurred, and solved those problems through a practical application of a strong “rule of law” ethos, logically related to the higher purposes of the law (*maqâsid-ash-sharî`a*), and methodologically grounded in an evolved legal procedure. Thus, both the Western notion of natural rights and the Islamic notion of the *maqâsid-ash-sharî`a* aim at an intuitive ideal of justice.

1. Shariah as the social science analog of natural law in the physical sciences

The notion called *Tawhîd* (Unity) that there is no god but God is not only the first half of the declaration of faith of a Muslim, it is the basis of everything in Islam. *Tawhid* is the declaration that the set of things worthy of worship is a set with a single member. The Arabic word *Islam* means submission and the corollary of *tawhîd* is that one submits only to the One God, the Creator of all things. In the political realm, the state is among the things unworthy of worship. The state can be useful and positive, but like any other human institution, it can be negative and destructive. It must be kept in its proper place.

This corollary of *tawhîd* is repeatedly articulated in the Islam’s sacred scripture, the Qur’an. Its divine origin is acknowledged in the second part of the declaration of the faith, that Muhammad is the Messenger of God; that is, that the text revealed to him is truly, as it

¹ I. Ahmad 1993, "Islam and Hayek," *Economic Affairs* 13 #3 (Apr.), 16.

professes to be, literally God's word to mankind. In the Qur'an we are told, repeatedly, how rulers have transgressed the limits of righteousness and their civilizations were destroyed for their hubris. The story of Moses speaking truth to Pharaoh is one with which Jews and Christians should be familiar from the Bible, and appears numerous places in the Qur'an as well.

The Qur'anic narrative of Abraham's confrontation with a powerful king, however, is very different from the one in the Bible. In the Qur'anic version, when the king demands to know who is this God to whom Abraham has submitted, Abraham answers, "My Lord is He Who gives Life and Death." The king responds arrogantly, "I give life and death!" Unintimidated, Abraham retorts, "But it is God Who causes the sun to rise from the East; do you then cause it to rise in the West." Of this confrontation the Qur'an comments, "Thus was he confounded who (in arrogance) rejected Faith. Nor does God give guidance to a people unjust." (2:258).

This parallel between the God-given laws of nature and the God-given laws of justice is not mere rhetoric. The laws that govern human interactions are just as much decreed by God as the laws that govern the motions of the celestial bodies. In this context we can understand the otherwise surprising use of the word Shariah, which means "path" or "way" and literally means "the path to the water," as a synonym for Islamic law. The word occurs only once in the Qur'an: "And, finally, [O Muhammad,] We have set thee on a way [Shariah] by which the purpose [of justice] may be fulfilled: so follow thou this [way], and follow not the whims of those who do not know [the truth]." (45:18) The importance of the path to the water to a desert-dwelling people is self-evident, but there is more to it than that. The path of justice, like the laws of nature, is what it is. The human struggle to understand that path, which is the science of jurisprudence (*fiqh* in Arabic) is analogous to the human struggle to understand the laws of nature, which we call science (*'ilm* in Arabic). The jurist (*faqih*) in Islam is considered a kind of scientist (*'alim*). The role of the jurist is not to invent laws, but to discover them, as the role of the physical scientist is to discover the laws of the natural world.

The relationship of the jurisprudence to the justice, then, is, like the relationship of scientific theory to natural reality, the relationship of a map to natural terrain. The Shariah is the path to the well and the *fiqh* is the **map** the jurists have made of that **path**. This distinction between the map and the terrain is very important because an error in the map is not a mistake in the terrain. The mapmaker is not God. Aristotle's understanding of gravity was mistaken, but gravity was and remains real. Newton's understanding of gravity was improved upon by Einstein, but gravity did not change. Perhaps our conception of gravity will be improved by the emerging understanding of the Higgs boson, but gravity will still remain whatever God made it to be. Only our understanding is changing. Gravity is something which we should understand and must obey, not something we impose. In the same way Shariah is something we should

understand and must obey but not something we impose. Anyone who speaks of imposing Shariah has failed to understand it.

The analogy between physical laws and Shariah was understood by the Islamic scholars during the classical, or “Golden” era of Islam. This can be seen in Ibn Nafis’s “Story of Perfect” about a perfect reasoning being who begins life as a natural scientist studying physics and astronomy, later turns to biology, then to the difficult subject of the process of revelation, and finally to the most difficult subject of all, the laws of human behavior which are the substance of the revelation.² It is also depicted by Ibn Tufayl, whose later version of the story *Alive the Son of Awake*, translated into Latin as the *Philosophicus Autodidactus*, influenced John Locke to abandon his early pragmatism for natural rights theory.

It is significant that the scholars of Islam in the early centuries were not officials of the state. Their status was not that of a coequal branch of government like that modern legislators, but what Goiten called “an independent republic” of scholars, more akin to modern law professors, but with greater influence. They were the ones who discovered the law which the people then expected the ruler not only to enforce, but to be governed by.

When Abu Bakr was elected to succeed the Prophet Muhammad as the secular leader of the Muslim community said in his inaugural address, “I have been elected your *amir* (Commander), although I am not the best of you. If I give you a command in accordance with the Qur’an and the practice of the Prophet, obey me; but if I give you a command that departs from the Qur’an and the practice of the Prophet, then correct me. Truth is righteousness and falsehood is treason.” Six centuries later, the British nobles who had just returned from the crusades where they saw Saladin rule *under* the law, not from above it, imposed the Magna Carta on King John. Although they were seeking to constrain their ruler by an English common law rather than Islamic law, this idealized notion of a rule of discoverable law came out of the Muslim tradition. In her book *The Discovery of Freedom*, Rose Wilder Lane pointed out that later, during the Christian reconquista of Spain, the people there also demanded “little magna cartas” from their new rulers in order to retain the superiority of law over the rulers to which they had become accustomed under Muslim rule.³

²Muhasin Mahdi, “Remarks on the Theologus Autodidactus of Ibn Nafis,” *Studia Islamica* #31 (1970), pp. 197-209.

³ R.W. Lane and I. Ahmad, *Islam and the Discovery of Freedom* (Beltsville: amana, 1997) pp. 70-71.

2. The centrality of contract in the Islamic legal system

Despite the Qur'an's place of primacy in Islamic thought, it is a book of guidance rather than a book of law. That is, it provides general principles, examples, and much inspiration, but, save for a handful of legal limits (called *hudûd*), almost no legal code. Thus, jurists have had to look to additional sources in order to develop the Islamic legal system. The classical sources, apart from the Qur'an, have been the example of the early Muslim community (called the *sunnah*) as related in a body of reports ("hadith") collected a century or two after the Prophet, the consensus of the community or the scholars (called *ijmâ*) and in the original critical thinking by individual scholars (called *ijtihâd*). This process of *ijtihâd* employed a variety of tools including deductive and analogical reasoning, considerations of public interest, juristic preference, equity, etc. The consequent articulations of that legal system, in which acts are classified as *halal* (permissible) or *haram* (prohibited) have caused some to think of Islamic law as a mere set of inflexible dos and don'ts, but such an oversimplification misses the big picture.

To begin with, the *halal* actions are subdivided into gradations of mandatory, encouraged, optional, or discouraged. Further, the vast majority of possible human actions fall in the "optional" category, and the classifications of actions may differ from one school of thought to another. Some of the actions concern ritual worship, but most deal with daily living.

Of special importance among the mandates that deal with daily life, is that one must keep one's valid contracts. Thus Islamic law is a framework within which just contracts may be made and enforced. Most important of all, however, for the question of the relationship of Islam to liberty, is the prohibition of coercion. When we ask what principles of political behavior are articulated in the Qur'an, the one that jumps out at me is "(Let there be) no coercion in religion." (2:256) This is a statement of the non-aggression principle, which is the foundational principle of all libertarian politics. Do not be confused by the qualifying phrase "in religion" into thinking that this only means no one can be forced to become a Muslim. That is certainly one of the corollaries of this principle, but the word used here for "religion" is *dîn* which is a synonym for justice, not *millat*, which means religious community. For a Muslim, the *dîn* is a way of life, and thus aggression, in the sense of initiation of force, is here precluded from the Muslim way of life.

Also important among the prohibitions is the prohibition of fraud. No contract is valid if it is based on fraud. There is also a prohibition on exploitation which is problematical for liberty if one misinterprets exploitation. If we correctly understand exploitation to mean the imposition a contract in a situation in which the imbalance of power between the contracting parties makes the contract meaningless, for example, in loan-sharking, the problem for liberty vanishes.

An important corollary of the centrality of contract in Islamic law is that it allows for a plurality of sub-legal systems within its framework. This has been realized for example in the four competing legal systems known as Sunni schools of Islam. These schools are not denominations in the Christian sense of the term, but rather competing understandings of the Shariah, and Sunni Muslims may subscribe to any of them. In making contracts, the contracting parties may specify which of the schools may be applied in the interpretation and enforcement of the contract much as in the U.S. people specify which of the competing state laws shall apply.

This tolerance of variations in the understanding of the law goes beyond the differences among Muslim interpretations of Islam to accommodate religious minorities being allowed to be governed in their internal affairs by their own laws. This was historically known as the dhimmi system. Even before the dhimmi system was invoked, however, in the compact for the governance of Medina, the Prophet allowed that although the Jews were numbered as full citizens of Medina with the same duties of defending the city as the Muslims, that they nonetheless were allowed to be governed by their own religious law in all internal matters.⁴

3. Islamic sociology: Keeping the state in its place

Sociology is about human behavior. The sociologist tries to understand Sharia as that which helps to achieve a better society. Individuals need to behave appropriately rather than inappropriately. The Islamic view is that people behave appropriately not because government demands it, but because God demands it.

In successfully functioning societies a spontaneous order emerges in a matrix of social expectations and decentralized institutions of civil society that reduce deviance and increase good behavior. The perception of legitimacy of these expectations and institutions by the general public, including a free market to manage the economic challenges of society, frees the institutions of government to focus on containing threats to the peace posed by occasional criminal activity, violations of contract, or torts. Dysfunctional societies tend to resort to state coercion to impose order. Shariah, when properly understood and followed, leads to a successful society with minimal state coercion. It includes proper parenting, proper education, and proper religious training among the institutions to facilitate the self-regulation of society.

Proper parenting involves many factors. The children of successful parents have internalized the value that the rule of law is both for good of the individual and the collectivity. Liberal

⁴ I. Ahmad, "Muhammad on the US Constitution (as Inferred from the Qur'an and the Medina Covenant)," ch. VI in Joshua B. Stein, *Considering the Constitution: Commentary on the Constitution of the United States from Plato to Rousseau* (Boston: Pearson Custom, 2006) pp. 57-68.

education teaches students both to think critically about the truth and how to employ it in a practical manner to achieve virtue. Proper religious training should inculcate in the congregation that God wants us both to love and follow the rule of law. One gets closer to God when one obeys the rule of law and goes astray when one ignores the rule of law. The believer never entertains any cost/benefit analysis over whether the human enforcers of the law may fail to catch criminal or anti-social activity since God is all-seeing and all-knowing and is sufficient for its enforcement.

Socially, rule of law succeeds through both positive mechanisms like recognition, promotion, and fame, and through negative mechanisms like shunning, isolation, and banishment. Physical punishment and imprisonment cannot be effective unless they are needed only in rare aberrant cases in which society needs to defend itself against those whose violent or fraudulent actions impinge on the rights of its members.

Islam promotes a society of voluntary agreements. Just as in essence Islam is the voluntary submission to the will of God, the Shariah is mainly a system of voluntary submission to the rule of law. Muslim society promotes and sustains voluntary submission to Shariah through a multiplicity of legal systems and tolerance of diverse ideas, no matter how controversial in public discussion. Reasonable people may even question the Qur'an. Muslims, of course, by definition, have accepted the divine origin of the Qur'an, yet they remain free to dispute its meaning. Non-Muslims are free to question even its divine origin or preservation. The Prophetic tradition is also subject to questioning, even as to its authenticity, and the idea that challenges to the authenticity of particular hadith should be denied to masses is a perversion of Islam. While knowledgeable people have every right to dismiss challenges to a hadith by the ignorant, they have no right to impose a tradition on the masses against their will, for each individual is responsible for his own acts. Instead they should take the advice of the Qur'an and "hurl truth against falsehood and it knocks its brains out, and behold falsehood perishes!" (21:18)

Most people are decent because of their faith and their upbringing rather than because of threats of external human power. Devout Muslims behave decently because of their concern that bad behavior will cause them to lose the good pleasure of Allah. They follow the rule of law because it has been reinforced by their families, their educators, and their religious leaders. There are various civil society remedies available for those who transgress the law, and one only goes to the *qâdi* (judge) as a last resort.

Weber advocated the notion that as societies become more civilized they become more rationalized. Muslim society can become more rationalized through a critical examination of the history of the Prophet's companions that does not presume them to be infallible or ahistorical, but rather as well-intentioned actors whose actions must be viewed contextually. That is to say that even when their actions were right in their time and place, they may not be

right in *our* time and place. It is for this reason that the great scholars of the classical period opposed giving fatwas (legal opinions) in response to hypothetical questions. Every question had to be grounded in a context that might affect the appropriateness of the response.

For those wishing to follow up on the relationship of the absolute laws underlying the success or failure of civilization, I can think of no better starting point than the work of the man Arnold Toynbee calls the father of sociology,⁵ Ibn Khaldun, whose famous Muqaddamah, *The Introduction to History*, written in the 14th century, details in a scientific manner the moral point of the Qur'an that the rise and fall of civilizations is a consequence of a society's ability to follow sound policies. Ibn Khaldun goes beyond the abstract notion that good succeeds and evil fails to identify the particular policies that succeed or fail and anticipates much libertarian thought of later eras.

4. Deliverance from error

Having said all this, we must address the question of why the above is not self-evident to all thinking Muslims. I propose that the numerous departures from the model of Shariah here espoused are rooted in the abandonment of the correct methodology for its mapping into jurisprudence. For centuries, the Muslims abandoned the use of critical thinking (*ijtihad*) in the development of jurisprudence. I am but one of many who have attributed to this factor the ossification of Islamic law and the decline of Muslim society. The current Islamic revival has sought to reassert the role of *ijtihad*, but some of its practitioners have adopted an erroneous methodology which has overlooked or minimized the points emphasized in this paper.

For example, the Saudi state has created a "religious police" for which there is no precedent among the first generation of Muslims. The Saudis, who consider themselves salafis, side-step this violation of precedent by naming the religious police the "Committee for the Promotion of Virtue and the Prevention of Vice" after a verse of the Qur'an advising, "Let there arise out of you a band of people inviting to all that is good, enjoining what is right, and forbidding what is wrong...." (3:104) They have failed to distinguish the act of inviting (*yad`ûna*) people to the good, here encouraged, from the act of coercion (*ikrâha*), categorically prohibited in the Qur'anic verse quoted previously. (2:256)

Another example of this flawed methodology is seen in those who consider music prohibited unless one can find a specific salafi precedent to justify it. These people say drums are permissible (since the Prophet's companions used them), but stringed instruments are not. Yet,

⁵ A. Toynbee, *A Study of History* (Vol. 3): *The Growths of Civilizations* (New York: Oxford University Press, 1962), pp. 321-328.

it is a well-established rule of Islamic law that everything is permitted except what is explicitly prohibited. The burden of proof is on those who deny a right, not on those who assert it. In contrast, the Muslims of al-Andalus enjoyed a flourishing musical tradition for hundreds of years. It was they who introduced both the lute and the guitar to Europe.⁶

Historically, Muslims introduced activities of neighboring civilizations into their own culture and then to others. Intellectuals and people of faith would seek to encourage good activities and discourage bad ones without coercion or invasion of privacy. Thus, public use of intoxicants by musicians would be condemned without condemning the act of singing. This was the general rule, although there were certainly some scholars who departed from this standard and some periods of oppression that departed from this norm.⁷

A particular stumbling block for many Muslims has been the notion that the *hudûd*, or limits of the law enumerated in the Qur'an, are legal punishments rather than limits on legal punishments. This peculiar grammatical inversion has been executed by interpreting *hudûd*, which unambiguously means limits, as limits on the crimes being punished rather than limits on the means the state may use to punish a crime. The main obsession of political Islam has been the desire to impose not Shariah, but these punishments, calling them *hudûd*, and equating them with Shariah.⁸

Fortunately, this error is being rectified by the emergence of a movement to replace the imposition of punishment-to-the-limit with the well-established, but until recently neglected, concept of *maqâsid ash-Shariah*, the "higher objectives of the law."⁹ The Classical scholars agreed on five higher objectives that Shariah aims to sustain: life, religion, intellect, family (or heritage or lineage), and property. These are rather astonishingly similar to notions that we today number as human rights. The classical scholars did not call them human rights (*huqûq al-insân*), but rather, rights of worship (*huqûq al-ibâdah*), as opposed to the rights of God (*huqûq Allah*). This may seem counter-intuitive unless viewed in the context that man cannot serve God (Who, after all, needs nothing from us) except by serving mankind. In this context, revisit Locke's explanation of the rights of man:

⁶ See, e.g., "Music," *Cities of Light: The Rise and Fall of Islamic Spain*, <http://www.islamicspain.tv/Arts-and-Science/The-Culture-of-Al-Andalus/Music.htm> (9/30/2010). Accessed 3/16/13.

⁷ For an in-depth discussion of the art of sound in Islam, see I.R. al-Faruqi and L.L. al-Faruqi, "*Handasah al Sawt* or the Art of Sound," *The Cultural Atlas of Islam* (New York: MacMillan, 1986), pp. 441-479.

⁸ See, e.g., I. Ahmad's summary of D. Warren, "The Civil State and a New Fiqh of Citizenship," NOTES FROM THE IIIT CONFERENCE ON GOOD GOVERNANCE IN ISLAM: CLASSICAL AND CONTEMPORARY APPROACHES #3. <http://blog.minaret.org/?p=8465> (1/22/2013). Accessed 3/16/13.

⁹ See, e.g., J. Auda, *Maqasid Al Shariah As Philosophy Of Islamic Law: A Systems Approach* (Herndon, VA: IIIT, 2008).

The state of Nature has a law of Nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions; for men being all the workmanship of one omnipotent and infinitely wise Maker; all the servants of one sovereign Master, sent into the world by His order and about His business; they are His property, whose workmanship they are made to last during His, not one another's pleasure.¹⁰

Locke's expansive term liberty could be understood to include freedom of religion, intellect, and heritage, among other things. The echo of the Islamic analysis, not only in the similarity of Locke's list of rights to the *maqâsid*, but also the defining Muslim notion that these rights or objectives are a consequence of our common servitude to the Divine Master is striking.

5. Conclusions

Islam is unique among the Abrahamic religions in that its founder was also a head of state. While this fact has confused some Muslims into thinking that this fact sanctifies the state, the injunctions of the Qur'an and the practice of the Prophet suggests a different lesson. The Qur'an makes it clear that Muhammad's role was judge of last appeal among Muslims and not a guardian or keeper of their affairs:

But no, by the Lord, they can have no (real) Faith, until they make thee judge in all disputes between them, and find in their souls no resistance against Thy decisions, but accept them with the fullest conviction. (4:65)

But if they are averse, We have not sent thee as a warder over them. Thine is only to convey (the message).... (42:48)

and that governance requires political participation, promising success to those "who (conduct) their affairs by mutual consultation ... and those who, when an oppressive wrong is inflicted on them, (are not cowed but) help and defend themselves." (42:38)

I conclude that sociological, philosophical and legal considerations support these injunctions of the Qur'an and the practice of the Prophet that put the role of the state in its place as the court of last appeal for internal disputes and as the central command for the defense of the community from external aggression. The pre-eminent role of the internal regulation of Islamic society is left to the institutions of civil society such as family, markets, and the religious and other institutions of a free civil society governed by the rule of law. For Muslims, the name for

¹⁰ J. Locke, *The Second Treatise of Civil Government* (1690) ch. II, s. 6. <http://www.constitution.org/jl/2ndtr02.htm>. Accessed 3/18/13.

this idealized concept of rule of law is Sharia, defined by the Qur'an as the "way by which the purpose [of justice] may be fulfilled."

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