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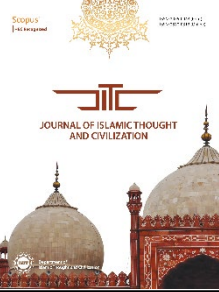
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The Concept of Shari'a Revisited

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Abstract

Shari'a is considered as a central concept in Islam. The wide range of Islamic aspects covered by this term has led some scholars to argue that Shari'a and Islam have become synonymous terms. The terminological obscurity is further increased by the dual nature of Shari'a, where divine and mundane dimensions are both present. Moreover, the implications of this obscurity are observable in the ongoing debates about the changeability of Shari'a. Therefore, the current study attempted to demystify how a central concept in Islam, such as Shari'a, is so vaguely defined. It also examined different factors that contributed to this vagueness, for instance, terminology, history, and politics. However, the focus of the study remained most importantly on the dual nature of Shari'a, stemming from a desideratum for divinity and the inevitability of human agency. This obscurity has practical implications, for instance, the classification of banks interest as *riba* (usury). However, a more general implication is the degree of flexibility in Shari'a, since changeability is proportional to the degree of divinity. Muslims need to have a clearer idea of what Shari'a is, to have substantial relevance in modern times.

Keywords: changeability, divine, mundane, Shari'a

Introduction

One of the major problems that Muslims have been wrestling with for centuries is the dual nature of Shari'a, a duality that has contributed and still contributes, to the obscurity of the concept. This duality takes different forms. For one, Shari'a is constituted of sources that Muslims consider as divine. For instance, Qur'an is the word of Allah, *Sunna* refers to the divinely inspired traditions of the Prophet Muhammad (*SAW*), and *Ijma* (consensus) which Muslims consider to be divinely sanctioned. However, the Qur'an and *Sunna*, to be used as religious sources of moral guidance and law, must undergo a process of human interpretation that cannot claim divinity.

Epistemologically, Shari'a is dichotomized into certain and probable (*qat'i* and *zanni*) and this *knowledge* is concerned with two things, that is, authenticity concerning sources and the understanding of the Divine Will. In the domain of rules (*ahkam*), this dichotomy also takes the form of unchangeable and changeable (*thabit* and *mutaghayyir*) to correspond, mostly, to certain/probable, respectively. This multidimensional nature of Shari'a complicates how it is conceived and, most importantly, how it is made to function in a society.

The term 'Shari'a' does not seem to refer to anything concrete, however, it has different shades of meanings that can only be defined by context. It is mostly agreed that Qur'an and *Sunnah* are at least part of Shari'a and this suffices in giving Shari'a some degree of divinity. Introducing the products of *ijtihad*, such as *fiqh*, *usul*, or law, adds interpretation to revelation under the umbrella of Shari'a. Hence, it gives Shari'a a mundane dimension. Considering how Shari'a's role in a society is perceived, this duality becomes problematic. In the context of the modern nation-state, for instance, stipulating Shari'a to be the (or a) source of legislation (*tashri'*) implicitly refers it to the *divine* Shari'a; utilizing all the force and reverence this reference brings to the constitution and the law. The law, thus, becomes the legitimate son of this divine source, carrying, thereby, a degree of sacredness and reverence of its origin. The state law (*qanun*) which has been referred to here, not *fiqh*,

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nevertheless, without taking the analogy too far, Muslims take pride in calling the law by its family name, *Ahkām al-Sharī'a* (Sharī'a ordinances) or *qawānīn al-Sharī'a* (Sharī'a laws).¹ This includes fields of law, such as family law, finance law, and penal law. All these laws are completely reliant on *fiqh* but referred to occasionally as 'Sharī'a' to utilise the power of the word.

The issue of terminology is not trivial. It is unrealistic to argue that the word 'Sharī'a' was deliberately designed to be semantically obscure to make it possible to divinise what is essentially human. Yet, it is not unrealistic, perhaps it is rather likely, that this vagueness, which could be the result of historical development, is used for that purpose. *Riba* is a good example. *Riba* is prohibited in the Qur'ān and *Sunna* and the details of the law are then elaborated in the books of *fiqh*. Equating the charging of interest in modern financial institutions to *riba* is a modern legal opinion, however, it is postulated as a *fiqh* truism, and therefore, considered in today's Islamic discourse as a part of Sharī'a. This association infuses the prohibition of banks interest with all the traits of Sharī'a, namely, the internal tension between indeterminacy and certitude. That is to say, while the arguments of pronouncing interest to be the prohibited *riba* are inconclusive, to say the least, and the debates about it are unceasing at the academic and intellectual levels, we find the matter, in practice, to be treated with inexplicable surety. Moreover, the argument persistently presented as a justification for this surety is that it is the rule of Sharī'a (*hukm al-Sharī'a*, *al-hukm al-shar'i*). *fiqh*, which is the collection of legal opinions, seldom has claims to certainty since its probable/mundane nature is undenied. Only Sharī'a can justify certainty and it is this licence that needs to be examined.

2. The Mundane in Sharī'a

2.1. Sharī'a as Islamic Law, a Problem of Definition

There are certain common approaches to define Sharī'a or to explain what it means among modern writers.² One such approach is defining/explaining Sharī'a by negation, that is, identifying what Sharī'a does NOT mean. This is usually coupled with a distinction approach where Sharī'a is distinguished from other concepts, such as *fiqh* or *tashrī'* (legislation). For instance, Muhammad Sa'īd al-'Ashmawī, an Egyptian lawyer and Judge, rejects that Sharī'a in its linguistic or Qur'ānic meaning refers to legislation or law. He objects to the use of the word Sharī'a to mean all the rulings in Islam, whether they appeared in the Qur'ān, *Sunna*, *Ijma'*, or in the exegeses; a process, he argues, similar to what happened in Judaism.³ Similarly, Hassan al-Turabi, a Sudanese political Islamist and thinker, argues that Sharī'a is not the same as *tashrī'* (legislation), for *tashrī'* is the human interpretation and enacting of the divine Sharī'a, which does not provide detailed rulings.⁴ Similar arguments were made by Kamali who distinguished, hesitantly, between Sharī'a and *fiqh*. He argued that "*fiqh* is legal science and can be used synonymously with Sharī'a, but they are different in that Sharī'a is closely identified with divine revelation, *fiqh* is developed by the jurists. The path of Sharī'a is laid down by God and His messenger; the edifice of *fiqh* is erected by human endeavour".⁵ The same line of argument was taken by Burhan Ghuliyoun, a Syrian/French academic, who stressed that

¹We can overlook the possible redundancy in this phrase.

²It is not possible to conduct a comprehensive survey on the different definitions of Sharī'a in the space available in this work, nor do I think it is necessary for its objective. I chose instead to provide the reader with a sample that represents the main positions across the spectrum: Left/Right; Liberal/Conservative; Islamist/Secular; etc.

³Muhammad Sa'īd Ashmawī, *Usul al-Sharia* (Dar al-Kitab al-Masri and Dar al-Kitab al-Libnani, 1979), 31-34.

⁴Hassan Turabi, *al-Siyāsah wa-al-Hukm : al-Nuzum al-Sultānīyah Bayna al-Usūl wa-Sunan al-Wāqi'* (Dār al-Sāqī, 2003), 219.

⁵Mohammad Hashim Kamali, *Shari'ah Law : an Introduction* (Oxford: Oneworld Publications, 2008), 16.

it is necessary to distinguish between Shari'a as a religion attributed to Allah and Shari'a as a juristic product attributed to the jurist.⁶ The common idea in the examples above is the assertion to distinguish between the divine and the mundane. The nomenclature may differ; where some would consider 'Shari'a' to be an all-encompassing rubric, others may prefer to distinguish between 'Shari'a' and '*fiqh*' or '*tashri'*'. However, the objective is clear; they want to contain what is considered divine, hence immune from human interference in Shari'a as much as possible in the abstract, and distinguish it from the mundane Shari'a which readily deals with life's ever-changing details without trespassing on God's domain. However, the clear and persistent hurdle to this objective is the question of where to draw the line and who can decide on this subtle, yet paramount, distinction.

This problem is manifested in the arguments presented by Qaradawi, who uses the same approach of distinguishing between Shari'a and *fiqh* but to different conclusions. Qaradawi vehemently rejects the notion of the dispensability of *fiqh*, arguing that it would lead to the rejection of Shari'a as a whole. He rejects the distinction between Shari'a as a divine revelation and *fiqh* as a positive law, since *fiqh* is based on divine revelation, and the accepted way to renovate (*tajdeed*) *fiqh* is by juristic effort (*ijtihad*) in the light of the hermetic texts (*nusus muhkama*).⁷ The question of what counts as a hermetic text or how *ijtihad* can use it would, once again, introduce the problem of authority: who decides and why. This renders the negation/distinction approach insufficient to provide concrete meaning or definition to 'Shari'a'.

Another approach to define/explain Shari'a is by explaining its function. According to Ghuliyoun, Shari'a is the constitution that defines the main values and principles for the life of the community.⁸ Kamali expands on Ghuliyoun's idea and says that Shari'a "regulates legal rights and obligations but also non-legal matters and provides moral guidance for human conduct in general. Shari'a provides an individual with a code of reference consisting of moral, legal, and cultural values that can be reassuring and purposeful."⁹ Turabi, on the other hand, focused on *tashri'* rather than Shari'a. For him, Shari'a was a divine providence, and its function was to provide guidance (*hawādi*) to people; any legislative process should fall under the rubric of *tashri'*.¹⁰ Qaradawi once again was keen to maintain the strong bond between Shari'a and *fiqh*, arguing that Shari'a's function, unlike the law, was not only to regulate the matters of society but to create good individuals, a good society, and a good state. Shari'a, according to him was introduced to regulate ethics, unlike the Roman law that came to regulate customs. Qaradawi was unapologetic about his idea of marrying Shari'a and *fiqh* to give Shari'a, henceforth, complete authority over Muslims' lives. Ghuliyoun and Turabi seemed to be conscious of the subtle conflict between the divinity of Shari'a and the unavoidable human involvement in deducing its rulings. Therefore, they attempted in their descriptions of Shari'a's function to limit its divine sphere and raise it. However, this conflict did not seem to trouble Qaradawi and to some extent Kamali, where they acknowledged the need for Muslims to be engaged in renovating Shari'a to respond to the changing issues. Yet, they seemed to maintain divine authority for Shari'a at the same time with no clear demarcation between the two domains.

Finally, some writers attempted to define/explain Shari'a by describing it in some generic terms. Some descriptions were, to some extent, rhetoric in nature. For instance, the description by Ghuliyoun, who explained Shari'a as "obedience to Allah", "brotherly solidarity and cooperation" and "the method from which many and different rulings can be taken."¹¹ Similarly, Ashmawi says that Shari'a

⁶Burhān Ghalyūn, *Naqd al-Siyāsah : al-Dawlah wa-al-Dīn* (Bayrūt : al-Mu'assasah al-'Arabīyah lil-Dirāsāt wa-al-Nashr, 1991), 359.

⁷Yūsuf Qaradāwī, *Madkhal li Dirasat al-Sharia al-Islamiyyah* (Beirut: Muassasat al-Risalah, 1993), 21-23.

⁸Ghalyūn, *Naqd al-Siyāsah : al-Dawlah wa-al-Dīn*, 366.

⁹Kamali, *Shari'ah Law: an Introduction*, 18.

¹⁰Hassan Turabi, *al-Siyāsah wa-al-Hukm : al-Nuzum al-Sultānīyah Bayna al-Uṣūl wa-Sunan al-wāqī'* (Dār al-Sāqī, 2003), 219.

¹¹Ghalyūn, *Naqd al-Siyāsah : al-Dawlah wa-al-Dīn*, 366.

is an "interaction with life...principles for realistic life,"¹² "the method of faith and righteousness"¹³, and that the Shari'a of Muḥammad (*SAW*) was mercy as opposed to Jesus's love and Moses' 'truth.'¹⁴ Hallaq argued that "the Shari'a defined, in good part (and together with Sufism), paradigmatic cultural knowledge. Enmeshed with local customs, moral values, and social practices, it was a way of life."¹⁵ The only attempt, among the writers discussed above, to provide a definition in the juristic method '*al-ḥadd*' for Shari'a was Qaradawi's. He defined it as "ordinances decreed from Allah that are established by [textual] evidence from Holy Qur'ān and *Sunna* and what stems from them of *Ijma*' and *Qiyas*."¹⁶ What is meant by '*al-ḥadd*' is a definition that meets the criteria set by al-Ghazali and other jurists, that is, to describe the concept by all its unique essentials, so that it includes those attributes belonging to it and simultaneously excludes those that do not.¹⁷

Any attempt to define Shari'a in this concise manner would be faced with the problem of drawing clear lines between the divine and the mundane in Shari'a while maintaining some amount of both. This distinction should allow for Shari'a to be timeless and its efficiency not bound by places or people, a task that is, despite Qaradawi's efforts, logically problematic for epistemological reasons.¹⁸ Coulson's definition of Shari'a may be in line with this argument. He states that Shari'a "is a comprehensive scheme of human behaviour which derives from the one ultimate authority of the will of Allah. So, the dividing line between law and morality is by no means clear."¹⁹ Coulson's notion of morality and law can be equated, with little reservation, with peoples' notion of divine and mundane, respectively. If Shari'a is to remain active in a society, it must be through human agency; this would immediately entail a question of authority: who has the authority to decide what Shari'a says? This applies whether the matter in question was a minor one of, for instance, how to pray, or a methodological matter concerning the structure of Shari'a and how it should work. The problem of presumption is soluble only by denying any claim to divinity for one's opinion which would ultimately deprive Shari'a of its divinity as Qaradawi cautioned. In this sense, the only way to attain what the majority of Muslims have now come to expect from Shari'a is to maintain its conceptual obscurity. It does not suggest that this obscurity is necessarily intentional, however, it shows that precision and firm definiteness will cost Shari'a either its divinity or its efficacy.²⁰

Shari'a is usually considered to be a wider concept than law in a strict sense. The law according to the Oxford dictionary is "the whole system of rules that everyone in a country or society must obey". However, Shari'a is considered, almost unanimously, *higher* than just law because it involves, besides regulating one's relation to society (in the view of many), regulating one's relation to God. In the words of Schacht "Islamic law is part of a system of Islamic duties blended with non-legal elements";²¹ 'system of Islamic duties' is what is now commonly known as Shari'a. To understand how Shari'a as a concept has mutated in the imagination of Muslims to become Islamic law, it is useful to examine three different but related factors which are as follows:

¹²Ashmāwī, *Usul al-Sharia*, 70.

¹³Ibid., 84.

¹⁴Ibid., 179.

¹⁵Wael B. Hallaq, *Shari'a : Theory, Practice, Transformations* (Cambridge University Press, 2009), 544.

¹⁶Qaradāwī, *Madkhal li Dirasat al-Sharia a l-Islamiyyah*, 21.

¹⁷Ghazzālī, *al-Mustasfā min 'Ilm al-Uṣūl*, ed. Muḥammad Mustafā Abu al-'Alā (Cairo: Sharikat al-Tībā'ah al-Fannīyah al-Muttahidah, 1970), 21-39.

¹⁸The very decision of what counts as divine is, ultimately, human.

¹⁹Noel J. Coulson, *Conflicts and tensions in Islamic Jurisprudence* (Chicago: University of Chicago Press, 1969), 79.

²⁰More discussion on the divinity of Sharia in the second part of this chapter

²¹Joseph Schacht, *An Introduction to Islamic Law*, Clarendon paperbacks, (Clarendon Press, 1983), 201.

2.1.1. Terminology

Shari'a literally means 'path to water' or just 'the path.'²² The terms that were mostly used pertaining to the rulings and injunctions, deduced from revealed sources were, *fiqh* and *ahkām*. Therefore, for Shari'a to become Islamic law, it had to go through *fiqh* first. However, *fiqh* had two elements, that is, it regulated one's relationship to society (*Mu'āmalāt*) and to God (*ibadat*). The term '*fiqh*' was reduced to the domain of the latter, while the term 'Shari'a' was mostly used in a political sense to refer to the former as 'the law.'

Ashmawi contended that *fiqh* which is "mistakenly called Shari'a is, in fact, people's legislation for people."²³ He argued that there is a considerable difference between Shari'a, which one can hypothetically accept to be the decrees in the revealed sources and *fiqh* which is the collection of opinions produced by Muslim jurists, scholars and lawyers.²⁴ Nevertheless, the problem that Ashmawi did not address thoroughly here, is that people who call for the implementation of Shari'a as law, like Qaradawi, while initially accepting the distinction between Shari'a and *fiqh* as presented by Ashmawi, fuse them together. This fusion is made on the grounds that jurists who produce *fiqh* opinions can only do so by referring to the revealed sources, hence, tying the mundane with the divine. Ashmawi rejected this approach without clearly explaining how to distinguish between Shari'a and *fiqh*, particularly in the context of law.

Ashmawi's arguments also comprise an objection to the equating of *fiqh* with law. He sees no problem with *fiqh*, in its *Mu'āmalat* part, being a source of law; the problem for him is that a static and historic *fiqh* cannot produce law for all times.²⁵ This view is shared by all the authors mentioned above and is the subject of an ongoing debate on the reformation of *usul al-fiqh*. However, with regards to the two terms being synonymous, they are not; for *fiqh created* what became known as Islamic law.²⁶ While, there is no serious objection to the principle of associating *fiqh* and law in the form of whole and part, the objection will arise with regards to the details: how can *fiqh* constantly produce law for the betterment of society?

Ghulion describes the mutation of the concept of Shari'a as shifting from simply meaning obedience and submission to Allah, to mean an Islamic communion (*millah*). This shift happened as a result of the increasing aspirations of Muslims to form their independent political self. Moreover, as a result of the emergence of the nation-state, the concept of Shari'a was 'reduced' to simply mean 'the law' that is deduced from Islamic values and decrees.²⁷ Nonetheless, the mutation of Shari'a is not a 'reduction' as Ghulion puts it, it is, rather, a change of form and shape and not a change in essence (an essence that is still not clear but is ever-present). In other words, Shari'a never ceased to be regarded as a religion, *fiqh*, or Islamic law. However, the perception of Shari'a seems to focus on a particular aspect of it depending on the context; and under the pressures of the modern state, the focus on law is prevalent. Authors who attempt to define or explain Shari'a, do not tend to confine it to law, however, usually object to this confinement.

2.1.2. History

²²Muhammad ibn Mukarram Ibn Manzūr, *Lisān al-'Arab* (Dār Sādir, 1882), 421.

²³Muhammad Sa'īd 'Ashmāwī, *al-Islām al-Siyāsī* (Mu'assasat al-Intishār al-'Arabī, 1979), 94.

²⁴*Ibid.*, 323.

²⁵*Ibid.*, 305-333.

²⁶I. Goldziher, J. Schacht, and J. Schacht, "Fikḥ," in *Encyclopaedia of Islam*, ed. Th. Bianquis P. Bearman, C.E. Bosworth, E. van Donzel, W. P. Heinrichs (2012), 886-91.

²⁷Ghalyūn, *Naqḍ al-Siyāsah : al-Dawlah wa-al-Dīn*, 359-60.

In order for Shari'a to go from being conceived as 'the path' or 'religion' to being conceived as 'the law,' it underwent a long historical process. To understand this process, the relationship between Shari'a and *kanūn* needs to be examined. 'Kanūn' is the modern Arabic equivalent to 'law.'²⁸ It was arguably adopted into Arabic with the continuation of the pre-Islamic tax system after the Muslim conquest of Egypt and Syria.²⁹ It then also acquired the notion of state law. Matters that needed to be regulated by the state/ruler, for instance, tax, administrative law, and penal law were considered to be within the framework of Shari'a until Imam Shafi'i wrote a book on the principles of jurisprudence '*al-Risala*.' This book narrowed the framework of Shari'a and new administrative regulations were considered outside of the Shari'a framework; they became the province of a new 'state law.' This created an independent body of law that steadily developed under the authority of the ruler; a law that was increasingly taking charge of matters of public life that Shari'a was thought to be silent on. This development was legitimized earlier by scholars of Shari'a (*fuqahā'*; sing. *faqih*) such as al-Mawardi (d. 463/1072) in his book '*al-Ahkām al-Sultāniyya*' (The Ordinances of Government).³⁰ During the time period of the Ottoman Empire, the tension between Shari'a and state law (now officially called *kanūn*) was exacerbated and the prevalence of one over the other depended sometimes on the Sultan.³¹ The disputations that arose in Muslim societies while entering the path of modernization concentrated on the question of the relationship between Shari'a and *kanūn*. European laws started to find their way into the Ottoman legal system in the form of *kawānīn* (sing. *kanūn*) exacerbating, thus, the tension between Shari'a and *kanūn* further.³² The effect of European laws was made all the more evident during colonial times when a whole or part of English and French law was promulgated throughout the Muslim world.³³ According to Hallaq, "between the early years of the nineteenth century and the second decade of the twentieth century, the Shari'a, which had dominated the legal scene for over a millennium in the central lands of Islam, and for centuries in other regions, was largely reduced in scope of application to the area of personal status, including child custody, inheritance, gifts and, to some extent, *waqf*."³⁴ However, the expansion of *kanūn* into the domains of Shari'a continued. Turkey abandoned Shari'a completely in favour of the Swiss civil code in 1923.³⁵ Tunisia introduced the Law of Personal Status, which prohibited polygamy in 1957,³⁶ notwithstanding its permission in Shari'a. Additionally, the Muslim family laws Ordinance was introduced in Pakistan in 1961 which changed the Shari'a inheritance system.³⁷

It was clear by then, perhaps earlier, that *kanūn* or 'law' has developed into a comprehensive regulating system that does not co-exist with the other systems except with tension and conflict. Therefore, for Shari'a to retain its place in the Muslim society, it had to be merged with law, so that both would become Islamic law. This, naturally, entailed some compromise s. Shari'a lost its social

²⁸Kanūn is not originally Arabic, it is Greek.

²⁹Y. Linant de Bellefonds, Cl. Cahen, Cl., Halil İnalçık, Ed., "Kānūn," in *Encyclopaedia of Islam*, Second Edition, Edited by: P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs. Consulted online on 30 October 2023 <http://dx.doi.org/10.1163/1573-3912_islam_COM_0439> First published online: 2012

³⁰Ibid.

³¹For example, Sultan Selim I rejected the intervention of religious authorities in state affairs, while Sultan Sulayman I favoured Sharia. (Bellefonds) et al., n.d.,560)

³²Ibid.

³³For a detailed analysis of this phenomenon see: Hallaq, *Shari'a : Theory, Practice, Transformations*, 396-442.

³⁴Hallaq, *Shari'a* : Hallaq, *Shari'a : Theory, Practice, Transformations*, 443.

³⁵Coulson, *Conflicts and tensions in Islamic Jurisprudence*, 101.

³⁶Ibid., 102.

³⁷Ibid., 104.

structure, that is, its bottom-up, society-driven method, and resorted to the top-down, state-imposed method; what Hallaq calls the “contaminating influence of the state”.³⁸

2.1.3. Politics

When the Muslim societies gained their independence, they were on a quest to affirm the Islamic identity, that was, to them, distorted by colonialism. The most significant change brought about by the colonial powers to the Muslim world was the nation-state. While, some sought to abolish the nation-state altogether and return to the Caliphate as an emblem of their Islamic identity; the more realistic quest was to *Islamize* the nation-state. The main feature of the modern state that Islam could significantly change was law, where a long history of tension between Shari'a and law had already taken place and law had prevailed, particularly under the colonialists and post-colonial secular governments. In other words, the Islamization of the state could be achieved by gaining back for Shari'a what was thought to have been lost to law.

An example for this is, the argument Qaradawi makes for the case of '*Dawlat al-Islam*' (the state of Islam). He argues that the Islamic state is a civil state like all other civil states, only distinguished by making the Islamic Shari'a its ultimate reference.³⁹ He stresses his point by arguing that an Islamic state is not a theocratic state, it is governed by a civilian who is freely chosen by the people.⁴⁰ Ashmawi, on the other hand, raises the question of what is meant by an 'Islamic government' (in this context it is the same as the state). He argues that it generally means a government that implements Shari'a, which for him, means the implementation of a political and legal system that developed in history; in short, the legalization of *fiqh*.⁴¹ Ghalioun expands slightly on this but to the same conclusion, arguing that an 'Islamic state' could be understood in terms of its populous structure, the orientation and political program of its government, or, and this is the case in point, its paradigm for power. In this latter case, the main characteristic of an Islamic state is the adoption of Shari'a, in its classical *fiqh* sense, as the sole source of civil legislation.⁴²

Thus, the 'implementation of Shari'a became an integral part of the political debate in the Muslim world. Moreover, it became the principal agenda of the Islamists and one thing that sets them apart from their political rivals. However, the implementation of Shari'a as a political program can only be significantly manifested in the form of law, and in particular, the implementation of *hudud* (limits) and the prohibition of *riba*; both of which are among the most controversial issues in Shari'a in modern time.

3. Divinity in Shari'a

3.1. Divinity from Sources, An Epistemological Problem

The divinity of Shari'a was not a matter of dispute among most scholars and thinkers of Islamic jurisprudence; they seemed to agree that there is a domain of Shari'a which is based purely on the divine sources and, thus itself is a divine domain. This domain was beyond change for it is the equivalent of nature for natural law or the sovereign for positive law, only better for this is sanctioned by the will of God. The disagreement, however, was on the nature of this domain, what it provides for people (values, general principles, part of the law, etc.), and how it is provided.

Qaradawi (and Kamali who makes similar arguments) argued that Shari'a can be divided into two parts; a small part that is based on the hermetic verses of the Qur'an and the *Sunna*. The second

³⁸Hallaq, *Shari'a: Theory, Practice, Transformations*, 549.

³⁹Yūsuf Qaradāwī, *al-Dīn wa-al-Siyāsah : Ta'sīl wa-Radd Shubuhāt* (Cairo: Dār al-Shurūq, 2007), 158.

⁴⁰Ibid., 158-170.

⁴¹Muḥammad Sa'īd 'Ashmāwī, *al-Islām al-Siyāsī* (Mu'assasat al-Intishār al-'Arabī, 2004), 155–56.

⁴²Ghalyūn, *Naqd al-Siyāsah : al-Dawlah wa-al-Dīn*, 352-53.

larger part is based on the opinions of the jurists, which are deduced from the revealed sources. He indicates that Shari'a's domain for *ijtihād* is the larger one, which implies its adaptability.⁴³ By this argument, he asserts the flexibility and viability of Shari'a, without losing claim for its divinity. Although, by the token of this argument, Shari'a is only partly divine, divinity becomes the prominent hallmark of Shari'a as a whole. However, this argument lacks the answer to the simple question: who decides what belongs to each part? Qaradawi and others used statements, such as 'what is known of religion by necessity' (*ma'lūm min al-dīn bi al-ḍarūra*) in response to the question of authority.⁴⁴ It is a reference to what is purported to be 'undisputed' religious facts. Nonetheless, one can easily see that these are contentious arguments that would regenerate the original question.

Turabi, likewise, stresses the distinction between Shari'a and *tashrī'*. He describes all the human effort in finding law from the revealed sources as belonging to *tashrī'*, thus, keeping Shari'a out of human meddling. However, he gives no detailed account of what Shari'a is or how to determine what he calls *hawadi* (guidance) of Shari'a.⁴⁵

Many Muslim authors follow the same line of argument in dichotomizing Shari'a into changeable and unchangeable. They distinguish parts of the revealed sources as hermetic; assign them different names and functions, and then raise them beyond human approach. According to Hallaq, who studied the contributions of many of these writers, this idea is "what Rahman calls the import of revelation, what Soroush called the essence of the law, and what Ashmawi dubbed as God's pure Shari'a";⁴⁶ a "familiar thesis that the Shari'a is divisible into essential and accidental attributes, a typology that is distinctly Aristotelian."⁴⁷

This 'typology' is indeed not exclusive to modern thinkers of Islam. The Islamic philosopher Ibn Rushd (Averroes, d. 595/1198), a devout Aristotelian, in his book '*Faṣl al-Maqal*, argues that Shari'a cannot contradict what is established by *burhān*' (evidence, proof) and that if a contradiction is thought to occur, the revealed text can be reinterpreted in accordance with 'truth', limited only by the rules of metaphoric use of language.⁴⁸ He argues that this margin of different interpretations does not include what he called '*Mabadi' al-Shari'a*' (principles of Shari'a), which he explains to be the things that all possible methods of knowledge will lead to, so that this knowledge is possible for everyone. He gives the existence of God, the revealed religions, and the Hereafter as examples for this 'undisputed axiomatic' knowledge.⁴⁹

Ibn Rushd, in his attempt to anchor Shari'a on theology, has effectively mixed them. In negating any contradiction between Shari'a on the one hand, and *ḥikma* (philosophy) and the use of logic on the other, an indication of his conviction that Shari'a can be logically established, he was relying on a long tradition of Islamic philosophy that tried to prove theology by logical inferences.⁵⁰ Regardless of the contentious axiomatic nature of Ibn Rushd's 'principles of Shari'a,' it does not help in the argument for Shari'a's divinity, simply because the fact that there are irreconcilably different ideas of what counts as divine, hermetic, or *a priori* in Shari'a contradicts the very idea of an axiom.⁵¹

⁴³Qaradāwī, *Madkhal li Dirasat al-Sharia a l-Islamiyyah*, 22.

⁴⁴Ibid., 210-221.

⁴⁵Turabi, *al-Siyāsah wa-al-Hukm : al-Nuzūm al-Sultānīyah bayna al-Uṣūl wa-Sunan al-Wāqi'*, 219.

⁴⁶Hallaq, *Shari'a : Theory, Practice, Transformations*, 527.

⁴⁷Ibid., 520.

⁴⁸Averroes, *Faṣl al-maqāl fī mā Bayna al-Ḥikmah wa-al-Shari'ah min al-Ittisāl*, ed. 'Abd al-Karīm al-Marrāq (al-Manshūrāt lil-Intāj wa-al-Tawzī'), 97.

⁴⁹Ibid., 108.

⁵⁰Most notable is the philosophical novel '*Ḥay Ibn Yaqṣan*', by Ibn Sina (Avicenna) and Ibn Tufayl.

⁵¹In addition to the fact that an axiom will not be exclusive to Muslims.



3.2. Divinity from Nature

One way to understand why Muslim jurists were keen to establish the divinity of Shari'a is that they needed an absolute reference for it. The need for absolutism was not unique for Islamic law, it was a need for law in general. This was illustrated by A. P. D'Entreves who, in making his case for natural law, argues that the most constant feature of Natural Law was "The assertion of the possibility of testing the validity of all laws by referring them to an ultimate measure, to an ideal law which can be known and appraised with an even greater measure of certainty than all existing legislation. Natural law is the outcome of mans quest for an absolute standard of justice."⁵²

The quest for an ultimate source of law is part of a continuing debate in the philosophy of law which is beyond the scope of this work; but a distinction must be made in this regard between natural law and divine law, namely Shari'a. Natural law depends on people's understanding of nature and ethics. Therefore, the understanding of the law can change when the understanding of its source changes, despite its perceived absolute nature. People have been and perhaps would always be in quest for some ultimate measure of right and wrong, and law is arguably influenced by this idea.⁵³ In this sense, and since peoples ideas about right and wrong can change over time, the law that is influenced by them will accordingly change. This phenomenon occurs regardless of the perplexity it might cause for people. In the words of D'Entreves, "history had indeed been the stumbling block of all natural law theories. Lawyers, philosophers, and theologians had tried in vain to account for the apparent indifference of historical development to any pattern of right or wrong."⁵⁴ However, the problem with a divine law like Shari'a is that it will stand defiantly in the face of any historical change; divinity is simply immunity from change. This is why modern Muslims face a mountainous challenge when trying to validate Qur'anic verses that permit slavery or command the amputation of the hand of a thief in modern times. This seems like a self-imposed predicament; an ultimate source of law need not be divine, and a divine text need not be an ultimate source of law. Nor could a divine text be the source of a divine law, for divinity cannot be transmitted through human agency.

It must be admitted, however, that the divinity of Shari'a is not perceived in the naïve sense of a jurist looking at the Qur'an and simply producing a legal opinion claiming it to be the will of Allah. One way in which Shari'a is said to be divine is through a sophisticated methodology by which rulings can be deduced from the revealed sources without, the presumption is, being influenced by the jurist's caprice. In other words, the system of deducing rulings from the divine texts is sufficiently sophisticated to rule out any chance of human fallibility having any effect on the understanding of the true divine will.

Furthermore, and in addition to its highly sophisticated methodology of textual hermeneutics; Shari'a also has notions of natural law which are supposedly immune from the fallibilities of human-designed systems. Relying solely on the divine text would not suffice to produce a comprehensive body of law that is viable for all times and places. Filling the lacunae has been dependent on the methodology of Islamic jurisprudence, yet, there seems to be the sense that the rulings produced had diluted divinity. The evidence for this is the use of natural law concepts that assume human/jurist a divine endowment, which enables him to distinguish right from wrong without any reference to revealed sources. This would reinforce the notion of divinity for Shari'a even when some of its rulings are made with hardly any reference to the texts.

⁵²A. P. D'Entreves, *Natural Law : an Introduction to Legal Philosophy* (Hutchinson: Hutchinson University Library, 1970), 95.

⁵³"The content of law is a moral one. Law is not only a measure of action. It is a pronouncement on its value", D'Entreves, *Natural law : an Introduction to Legal Philosophy*, 80.

⁵⁴*Ibid.*, 74.

An example of such natural law concepts can be found in the *Mu'azila's*⁵⁵ idea of nature. The *Mu'azila* says that God cannot do evil and thus nature is good. God has endowed human beings with the ability to distinguish between *husn* and *qubh* (good and evil) by using only human reason. This provides people with an authoritative source of law when there appears to be a lacuna in the law and the texts seem to be silent on the matter in question. People can readily embark on a rational assessment of what is good and what is evil and produce law on this ground with the conviction that it will reflect the will of God.⁵⁶

Another example can be found in the *Ash'arite* School of Theology. According to the *Ash'arites*, God is omnipotent, thus, cannot be constrained by any external notion of good or evil; what God commands is good and what He forbids is evil.⁵⁷ In this sense, people do not have the capacity to rationally deduce God's will from nature and the only source for normative judgments is revelation.⁵⁸ Yet, some notion of an innate human capacity to find the path of God can be found in this school of thought, particularly, the concept of *fitra* (natural disposition).⁵⁹

The word *fitra* appeared in the Qur'an in the verse "So direct your face toward the religion, inclining to truth. [Adhere to] the fitrah of Allah upon which He has created [all] people. No change should there be in the creation of Allah. That is the correct religion, but most of people do not know."⁶⁰ The interpretations of *fitra* have varied, however, a narrower meaning can be seen when taken in the context of the hadith of the Prophet (*SAW*) who says: "Every child is born according to the *fitra*. Only his parents make him a Jew, a Christian, or a Zoroastrian."⁶¹ By using the context of this hadith to understand the meaning of *fitra* in the verse, some scholars put *fitra* to be a natural disposition that, if well preserved, will guide the person to the truth which is Islam.⁶² This is similar to the concept of human beings having the capacity to rationally distinguish between good and evil that is found in natural law. This conception of *fitra* was more popular among modern Islamic thinkers and reformers⁶³, for it provides ample basis for the use of reason in Shari'a, when the need for reason is much greater than ever before in Islam. Under the pressures of modernity and the recurring need to find legal opinions of Shari'a (*fatwa*) about different matters that Muslim communities face, it was increasingly clear that the revealed text does not cover everything. Muslim jurists found that *fatwas* were relying increasingly more on reason and less on revelation. Although, there were always efforts to link any *fatwa* to revelation, this link was becoming weaker as issues became more complex and detached from the traditional *fiqh* of pre-modern Islam.

This connection between reason and divinity can be found in the writings of the Egyptian scholar and theologian, Mohammad Abduh (d. 1905). Abduh argued that intelligent people can establish the principles of justice by using reason; however, the community will not respond to their arguments just because they are sound.⁶⁴ Abduh argued that men are one in "the need to submit to a higher

⁵⁵An Islamic School of theology.

⁵⁶For a detailed analysis of this subject see: Anver M. Emon, *Islamic Natural Law Theories* (Oxford: Oxford University Press, 2010), 25-31.

⁵⁷Abbas Amanat, and Frank Griffel, eds., *Sharia : Islamic Law in the Contemporary Context* (Stanford University Press, 2007), 44. See also Emon, *Islamic Natural Law Theories*, 31-37.

⁵⁸Amanat and Griffel, eds., *Sharia: Islamic Law in the Contemporary Context*, 45.

⁵⁹Ibid., 38-61.

⁶⁰ar-Rūm 30:30.

⁶¹Amanat and Griffel, eds., *Sharia : Islamic Law in the Contemporary Context*, 44.

⁶²Muhammad ibn Ahmad Qurtubī, *Tafsīr al-Qurtubi : Classical Commentary of the Holy Qur'an*, trans. translated by Aisha Bewley (Dar al-Taḳwa, 2003), 30:30.

⁶³Scholars like Mohammad Abdu, Saiyyd Qutb, and al-Mawdudi. See Amanat and Griffel, eds., *Sharia : Islamic Law in the Contemporary Context*, 47-61.

⁶⁴Muhammad 'Abduh, *The theology of Unity = Risālat al-Tauhīd*, trans., Ishāq Masaad and Kenneth Cragg (Islamic Book Trust, 2004), 89-90.

power.”⁶⁵ This seemed like a reference to the need for divinity. In other words, since people will not submit to judgments of reason made by fellow people, then there is a need for people with a divine endowment, that is, Prophets, for whom people will readily respond due to a natural tendency towards the divine. According to Griffel, “the tendency of every community not to submit to rules made by itself makes Shari’a a necessity.”⁶⁶ This reading of Abduh, although disputed by some,⁶⁷ can be sustained by Abduh’s idea on prophecy, where he argues that Prophets who come with divine signs “invest the mind like a citadel that finds no option but to surrender... To submit to them is more like a necessity than a studious option of will.”⁶⁸ This seems to suggest that at least one of the reasons for sending Prophets, was to give divine authority to what could have otherwise been known by mere reason. It then follows logically that when there are no Prophets present, the use of reason can suffice in distinguishing between right and wrong, lacking only in social endorsement.

4. Conclusion

In light of the above discussion, one can understand the eagerness of Muslim scholars and even the public throughout the history of Islam for the attribution of divinity to Shari’a, not only as an affirmation of its divine sources but also as part of a collective zeal for a supreme religious identity. The distinction, in the sense of supremacy, of Islam to other cultures and religions is an essential part of the Muslim conscious; and Shari’a is an essential component of this distinction. Shari’a is not just a legal system or a code of worship and ethics; it is an integral part of Muslims’ sense of identity and culture. The divinity of Shari’a is a matter of pride as well as of legal authority, and while this divinity as a source of authority can, in theory, be critically analysed and rationally discussed, it remains difficult to separate the rational aspect from the Muslims’ collective sentiments. Shari’a recently became an emblem for the *umma* (Muslim community) where Muslims identify themselves as the ‘*umma of Shari’a*’. All this gives Shari’a a high degree of immunity from change in modern times regardless of the aptitude of these changes. This sense of certitude and fixity underpins Shari’a as a whole and is oblivious to its dual nature, particularly when Shari’a is present as a source of Islamic identity. Issues related to the viability of Islamic finance in modern markets and the concerns of human rights regarding hudūd are all examples of the challenges faced by Muslims and related to how they define Shari’a. Therefore, it is important to be aware of the effects caused by the obscurity of the concept of Shari’a while studying the impact of Shari’a on the livelihood of Muslims, and how best to address it.

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⁶⁵Ibid., 91.

⁶⁶Amanat and Griffel, eds., *Sharia : Sharia : Islamic Law in the Contemporary Context* , 49.

⁶⁷Malcom Kerr. See endnote 54 in Amanat and Griffel, eds., *Sharia : Sharia : Islamic Law in the Contemporary Context*, 201.

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