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**Muslims**

*Their Religious Beliefs and Practices*

Volume 1 The Formative Period

Andrew Rippin

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CHAPTER SIX

Legal developments

The idea of sunna

The focal point of the law in Sunni Islam is the sunna, the concept of the practice of Muhammad, as embodied in the hadith and transmitted faithfully by Muhammad’s followers through the succeeding generations down to the present. The sunna presents, for the individual Muslim, the picture of the perfect way of life, in imitation of the precedent of Muhammad who was the perfect embodiment of the will of God. The hadith reports are the raw material of the sunna, and must be sifted through by jurists in order to enunciate the details of rightful practice; the shari’ah is the ‘way of life’ for the Muslim which has been developed by the Muslim jurists on the basis of certain jurisprudential principles, the asil al-fiqh.

The history of Islamic law indicates that the sunna was not always perceived in this fashion, nor indeed was the sunna always considered to be the authoritative body of law for members of the community. Such a position took time and much argument before it emerged. It is to Muhammad ibn Idris al-Shafi’i (d. 820) that most of the credit must go in developing this aspect of the over all legal theory of Islam.

Before that transformation took place, however, it must be remembered that the concept of the law of Islam was a part of the emerging ideology and symbol system which provided a sense of identity to the Muslim community. Much of Islamic law, in substantive terms, can now be seen to reflect a Jewish background and concerns common to Judaism. At the same time, portions of the law appear to have developed in a pragmatic way, with the adoption of laws and practices as they were found in the lands which were conquered; this is especially evident in elements of Roman law which were adopted in the Muslim environment. These two trends – Jewish and Roman – often merged, and they were reshaped as the distinct Muslim law emerged; this process was aided by many of the legal elements being recast by Muslims such that they were seen as emerging from the context of the jahiliyya, as was suggested above in chapter 1.

In the early community, law was employed as a tool by which unity was imposed from above and for which an authority was needed to justify the requirements of that law. In the earliest period after the conquests, it would appear that the caliphs themselves were pictured as the authorities within the community on legal matters and it took some time before a unifying concept of the authority of Muhammad as enunciated in the notion of the prophetic sunna actually emerged.
The emergence of schools of law

From the early stages of developing the law in a pragmatic and authoritative way, various 'schools', madhab, in the singular, emerged, in which people sharing common positions derived from their own personal legal deductions gathered together. The schools formed around the name of a single person, a teacher who had instructed students in the law, although it is doubtful that any of the individuals actually intended to start a 'school' as such. The schools themselves did not (and do not now) demand adherence or conformity, nor did the term madhab imply any particular teaching activity. What a school shared was a common interest in a specific body of legal material which, in one way or another, was connected to the eponymous founder of the school and his followers.

There can be little doubt that these schools emerged through the pious motivation and efforts of those involved in the study of law, combined with the emergence of a class of scholarly elite whose desire it was to wrest authority from the hands of the caliphs. For Muslims to be sure that they were fulfilling the will of God as completely as possible, it was necessary that every detail of the law be expounded; this required that every aspect be discovered. As new situations arose, never before encountered within Muslim society, it was the jurisprudents' responsibility to discover 'the will of God' in such instances. The rules of jurisprudential theory (usul al-fiqh) were eventually established in order to allow individual jurists to make these sorts of decisions in an orderly and 'Muslim' way.

The schools of law first emerged as local centres, reflecting the geographical diversity in the law from the beginning. Basra, Kufa, Medina, and Damascus are to be distinguished as the major regions developing their own traditions and influencing others. In Basra, the only lasting school of importance was that which became the Ibadi madhab, a surviving relation of the Kharijite theological school; in Kufa there emerged the Hanafite, under the eponym of Abu Hanifa (d. 767) but developed by Abu Yusuf (d. 798) and al-Shaybani (d. 805), as well as various Shi'ite groups, including the Imamis, the Zaydis and the Isma'ilians. Al-Awsa' (d. 774) was associated with a school in Syria although it did not last very long. Medina produced Malik ibn Anas (d. 795) and provided the impetus, at the very least, for al-Shafi'i (d. 822). A later group, known as the Hanbalis, developed from Ibn Hanbal (d. 855) with a substantial debt to Medinan practices.

The differences between these groups should not be exaggerated; the main contrast between the groups tends to be schematized best as a difference between the early groups in Iraq (who seem to have close contact with Jewish law) and those in Medina (who have a more 'liberal' attitude than their Iraqi counterparts), with the later schools following the Medinan position. The issues at stake were generally matters dealing with customary practice and local conditions rather than disputes primarily over principles or methods. This sort of differentiation between the schools actually increased over time, as the schools developed what had been the early core of the law according to their own practices. Each school developed its own practice, its own sunna, which as time went on and authority was sought for individual practices, was traced back, first to prominent jurists in the past, then to companions of Muhammad and, finally, to Muhammad himself. This 'backwards growth' in authority is a tendency which has already been mentioned in chapter 3 in terms of the growth of ijmā': this is the same phenomenon but on a larger, more theoretical scale. The final result was the emergence of the sunna of Muhammad. The ultimate motivation behind this development was to create a structure of law which was Islamic through and through, by denying all foreign elements and justifying all the law in terms of the twin sources of Muslim life, the Qur'an and the sunna.

The role of al-Shafi'i

It took al-Shafi'i to make the sunna of Muhammad the authoritative source of law for all Muslims. Stimulating his efforts were claims made by Traditionalists to the effect that it was not sufficient for a jurist to simply assert that such and such an item was the sunna of Muhammad; there was, for these people, a need to prove each and every one of these statements.
This is where the role of the hadith with its isnad came in. The tendency to demand proof did not arise without a great deal of opposition, as evidenced most obviously within the Mu'tazilite movement which championed the use of reason in all matters of religion. For the most part, the schools of law as they had emerged by this point only accepted the arguments and the demands of the Traditionalists as far as the latter's points would support the former's legal traditions. Where traditions from Muhammad could be seen to agree with a legal practice, all fine and good; there was not, at this point, any sense of changing the law in order to agree with the hadith.

Al-Shafi'i systematized what appears to have been chaos by developing a procedure for legal reasoning. While other scholars prior to him and contemporary with him, people such as Abu Hanifa, Abu Yusuf and al-Shaybani, were involved in this process also, modern scholarly research (especially that of Joseph Schacht) has shown al-Shafi'i to be the pivotal person in the emergence of the legal system of Islam as we know it. Al-Shafi'i demanded the use of systematic reasoning without arbitrary or personal deduction in formulating the law and thus he created a system that was far more cohesive on a theoretical level than had previously been the case. He argued for the authoritative sunna being that of Muhammad, a sunna which was to be found only in traditions transmitted from Muhammad himself; the acceptance of traditions from the companions was not to be considered sufficient. As al-Shafi'i states, 'the enactments of the Prophet are accepted as coming from Allah in the same way as the explicit orders of the [Qur'an], because Allah has made obedience to the Prophet obligatory'. Furthermore, the Qur'an could not contradict the sunna; the sunna could only explain the Qur'an — such had to be the hierarchy of the sources of the law. A controlled notion of naskh, 'abrogation', was implemented in order to handle cases of apparent contradiction between and within the sources. The community of Muslims could be said never to be in contradiction of the sunna if they agreed on a certain practice: 'We accept the decision of the public because we follow their authority, knowing that, wherever there are sunnas of the Prophet, their whole body cannot be ignorant of them, although it is possible that some are, and knowing that their whole body cannot agree on something contrary to the sunna of the Prophet and on an error, I trust'. This, in fact, must be the case in order to guarantee the transmission of hadith reports from Muhammad. It is not surprising, then, to note that the books of hadith were all compiled after the time of al-Shafi'i when the need for these sources was crucial.

The development of the schools of law

The major schools of law which have survived down until today had their major development in this period. The process was not one of transforming the local practice into a school as such, but of championing the doctrine of a teacher and the tradition which that teaching represented. In Kufa the Hanafi school including the star pupils al-Shaybani (who attributed his writings to Abu Hanifa and thus created the literary tradition which is the school of law, per se) and Abu Yusuf, became paramount and drew into their system the city of Basra; similarly, in Medina and followed by Egypt and Mecca, Malik ibn Anas, the author of al-Mawadda, one of the first written compilations of legal traditions, became central as the Maliki school, destined to find its major development in North Africa. Malik's book was an attempt to provide what traditions there were concerning a given topic and then to interpret them in light of the prevailing legal system of Medina. This latter element is the controlling factor in the whole book, rather than the traditions themselves.

Al-Shafi'i's school was more personally based. He considered himself a member of the school of Medina but he ended up not following the tradition of that area; his efforts were directed towards combining the pragmatic approach and position of Medina with the demands of the Traditionalists for adherence to the sunna of Muhammad. Cairo proved to be the focal point of the development of his school, an area where al-Shafi'i spent the last portion of his life. The school emerged by the ninth century as one of the three major groupings which continued their efforts in developing the shari'a, or law, of Islam and out of which eventually came the usul al-fiqh, the principles of jurisprudence.

Principles of jurisprudence

The emergence of a fully enunciated theory of jurisprudence was not an instantaneous development of the law schools. The works of the earliest representatives of the law schools display a measure of disorder in their treatments of the law and rarely put forth the full basis of the reasoning in individual cases. It was not until the eleventh century that matters became more precise, so that definition of terms and reformulation of earlier decisions took place in works such as that of al-Sarakhsi (d. 1096) in the Hanafi school. This was not a simple reiteration of, or commentary
upon, the earlier works but a creative reworking of the entire structure of the *fiqh* process.

According to the developed jurisprudential theory in Sunni Islam, there are four sources from which law can be derived: the Qur’an, the *sunna* of Muhammad, consensus (*ijma’*) of the community and/or the scholars, and analogy (*qiyaṣ*). The first two provide the material basis upon which *qiyaṣ* must operate. The vast majority of laws have, in fact, been fashioned by *qiyaṣ* because the Qur’an and the *sunna* provide a fairly limited selection of detailed legal provisions.

An individual jurist first had to scour the works of previous jurists to find a precedent for a case under consideration or a case with similar facts. Should he not find one, he was faced with an unprecedented instance for which he would then employ *qiyaṣ*, using as his starting point legal information found in the Qur’an, *sunna* or rendered absolute law by *ijma’*.

*Qiyaṣ* works on the basis of finding the ‘illa, the common basis between a documented case and a new situation; this process depends upon the powers of deduction of the jurist and the results of his work will depend upon *ijma’*, the consensus of opinion, in whether or not it supports his judgement. Should the decision find general support, it becomes an irrevocable law and thus becomes the basis for further deductions by means of *qiyaṣ*.

**The role of consensus**

The operation of *ijma’*, consensus, was a major issue in the development of the principles of jurisprudence, one which jurists took pains to prove was in fact a legitimate process substantiated by the Qur’an and the *sunna*; only in this way, it was argued, was it possible to distinguish between jurists who delegated to themselves the right to make laws (perhaps an accusation resulting from polemical discussions with Jews and Christians) and those who worked legitimately within the Muslim framework.

*Ijma’* functions to confirm rulings. While in theory this could take place at the time of a given ruling, in practice it occurred in retrospect. If no dissenting voices were heard by the time of the following generation, then it could be taken that *ijma’* had confirmed a ruling. *Ijma’* is often seen to be the most crucial element of the whole legal structure, for it is through its action that all elements are confirmed, especially individual *hadith* reports, but even, one might say, the Qur’an itself, which is only authoritative because all Muslims agree that it is so; this is emphasized by the fact that there is no centralized authority (in Sunni Islam) by which such a matter can be established. Muslim theorists, however, did not view the process in this manner, since they still needed to confirm the validity of *ijma’* as a concept by means of *hadith* and Qur’an. For them, the twin scriptural sources were authenticated by customary usage and their miraculous nature, rather than by consensus itself; thus no circular reasoning was involved.¹²

**Reactions to the development of jurisprudence**

The Traditionalist school which had demanded a complete rejection of personal reasoning was not totally satisfied by al-Shafi’i’s compromise in working out the relationship between the sources of law. Ibn Hanbal, who was the founder of the Hanbalite school, structured his thought on the principle of adherence to *hadith* in preference to personal reasoning. He manifested this attitude in his compendium of traditions, the *Mustad‘al*. The anecdote is related that Ibn Hanbal never ate a watermelon because he could not find a tradition which suggested that Muhammad had done so or that he had approved of such.¹³ Over the centuries, however, even this school, by the time it was accepted within the strictures of Islamic orthodoxy (or, more accurately, orthopraxy), came to the position of accepting the *usul al-fiqh* as enunciated by the other schools and thus embracing reasoning and consensus; watermelons were deemed acceptable.¹⁴

Another school emerged in the ninth century, known as the Zahiri group, founded by Dawud ibn Khalaf (d. 884). Claiming allegiance to the *zahir* or 'literal' sense of both the Qur’an and prophetic *hadith*, they rejected all aspects of systematic reasoning employed in the application of *qiyaṣ*. This led to peculiar combinations of stances on the part of the school, appearing liberal in some instances — because it followed the letter of the law and did not extend it into the many other areas deemed analogous by other schools — and being far more strict in others. Ibn Hazm (d. 1065) remains the intellectual high point of this school which, in fact, lost much of its influence after his time.

**The relations between the schools of law**

By the end of the tenth century, the four schools — Hanafi, Maliki, Shafi’i, and Hanbali — had solidified their position to the extent that no further schools of law emerged from that point on. This did not mean
that no further legal judgements were to be made but rather that the principles for which the schools stood and the legal stances which they had developed were to be the points within which all further discussion was to be conducted.\textsuperscript{15} The extent to which the schools disagree, on points of law is of little concern to Muslims, for there is a tradition ascribed to Muhammad which addresses itself precisely to the situation: ‘Difference of opinion in the community is a token of divine mercy’.\textsuperscript{16} An attitude of mutual recognition among the schools has prevailed, such that orthodoxy in matters of law is defined only by acceptance of the roots of the law; this means that the Zahirite school was excluded due to its rejection of dhijas. Where a difference of opinion exists between the schools, it is to be taken that each opinion is an equally probable expression of God’s will. On a matter seemingly as basic as the food laws, differences may be noted in whether certain animals are declared to be permissible or disapproved. The Hanafite school, for example, allows aquatic animals to be eaten only if they have the form of a fish. The Malikite school, on the other hand, consider all aquatic animals permissible. Both positions are considered equally valid and equally ‘orthodox’ for all Muslims.\textsuperscript{17}

Law and morality

After considering a given legal case, a jurist is able to declare whether the resultant action itself is to be classified as being obligatory (wajib), recommended (mandub), permissible (mubah), disapproved (makruh), or forbidden (haram). Speaking in very broad terms, performance of obligatory actions will bring reward in the hereafter for the person concerned, while omission of the actions will bring punishment; recommended actions bring reward but no punishment for their omission. Forbidden actions will bring punishment for being committed but reward for being avoided, while disapproved actions bring reward for being avoided but no punishment should they be performed. The vast majority of actions fall into the ‘permissible’ category, the ramifications of which will not be felt in the hereafter. There are many subtleties in the application of these categories, but, in principle, they apply whether the concern is ritual, moral or legal; all activities are considered in the same way and all are under the rule of Islam. It is in the nature of this law, however, that even an act which is declared to be disapproved can still bring about a binding result. A marriage, for example, which has been dissolved in a way declared to be ‘disapproved’ is still considered to have been terminated in fact.\textsuperscript{18} There is, thus, a separation between what might be considered law and morality, although it is all a part of one whole in the Muslim system, for all law ultimately has as its purpose gaining entry for the individual into paradise in the hereafter. At the same time, it is a sign of the realistic nature of Islamic law that the five moral categories of actions were adopted rather than a bipolar system of good versus bad (a position championed by the Mu‘tazila at one point in history); the law recognizes that not all Muslims are going to be saints in every aspect of their behaviour and that they will need the urging forth towards perfection that the law can provide.

The role of the judge

The administration of the law in the Muslim community developed institutionally first under the Umayyads but came into its more lasting form under the ‘Abbasids. A judge, known as a qadi, was appointed by the government to administer the shari‘a. A central chief judge was also appointed by the government, to whom all other judges as well as the ruler himself would refer on all legal issues. He became the person who recommended the appointment of all the judges to the caliph and became the major legal counsellor of the ruler. The fact that all the judges (including the chief judge) were appointed by the government often led to conflicts; although in theory once a judge was appointed he was to be independent of the government, in practice such things as implementing decisions against high government officials was extremely difficult.

One of the qualifications for being a judge was, obviously, full knowledge of the Islamic law; other requirements included having sound sight and hearing, and being free (that is, not a slave), honest and a Muslim.\textsuperscript{19} Such scholars were often the most strenuous upholders of Islam and they frequently saw the activities of the government as not being as fully ‘Islamic’ as desirable. Their ability to criticize those who gave them their jobs, however, was tenuous. This led to a great deal of discussion over legitimacy of rule and explains why there was such a lot of debate in Islam\textsuperscript{20} concerning the need to follow an unjust ruler and the right of rebellion. The position of the judge and the legitimacy of the appointment to that post were never held to be affected by the nature of the ruling powers who appointed him (or her, for a woman, according to some lines of thought, could be a judge although she certainly did not have the right to rule in the imposition of the hadd penalties — those penalties specifically prescribed in the Qur’an for crimes such as adultery,
stealing, armed robbery, drinking wine, false accusation of unchastity and apostasy). However, many of the leading jurists found it impossible to accept a position as qadi and made much of their refusal to do so; their principles always dictated that since, in their opinion, the ruler of the time was not fulfilling his responsibility to Islam, accepting a judicial appointment from such a person would be morally reprehensible.

The administration of justice

The judges depended upon the power of the government to put their decisions into action. This was crucial in issues of criminal justice, for example. Although the law had been structured by the jurists such that essentially there were no crimes against the state — a crime is against another person or against God — the imposition of the prescribed penalties, especially the *hadd* penalties from the Qur'an, had to be enforced by some means. Eventually a police force was devised to handle such cases. Judges were further hampered by the terms of Islamic law which only allowed them to receive evidence that was submitted to them rather than being able to search it out or conduct interrogations; the law was founded on the notion that blameless witnesses would always tell the truth and that oaths of innocence would always be forthcoming from all honest persons. The jurists saw themselves 'in the role of spiritual advisors to the conscience of Islam rather than authoritarian directors of its practical affairs'.

The result of this was the inevitable situation of the political powers having to assume some of the responsibilities for direct administration of justice; several additional institutions emerged to deal with a variety of situations as a consequence.

Among the legal officials in the community was the 'investigator of complaints' (*nazar fi-l-mazalim*). This was an office originally designed to hear charges concerning the miscarriage of justice, and was thus to act as a check on judges; additional issues such as matters dealing with unjust taxes and enforcing the decisions of the qadis were also in its purview. Later, the office emerged as a parallel system of justice, especially in matters of lawsuits; this was the result of the *mazalim* courts having powers which the qadis did not enjoy: the right to double-check and investigate evidence, to restrain acts of violence and to refer people to binding arbitration.

An 'inspector of the market' (*muhtasib*, holding the office of the *kituba*) was also appointed, who was responsible for encouraging Islamic morality in general and thus provided the possibility of prosecutions in the general interest. Specific duties of this office included matters relating to defective weights in the marketplace and commercial transactions where fraud or unpaid debts were suspected. Once again, the role of the judge was to a certain extent duplicated.

The nature of Islamic law

Over all, Muslim law is recognized to be an 'ideal' system, one which will be corrupted and will suffer at the hand of corruption in the world. This is even more so because the law is, in the first instance at least, a theoretical development and enunciation by the jurists rather than a body of law emerging from precedents, although this position is tempered to some extent by practical considerations; the theoretical nature of the law may be best described, perhaps, as existing in tension with its practical aspects. To a degree, Islamic law is of a purely religious character, carrying with it only the threat of punishment by God; failure to follow the law of Islam concerning the prayer, for example, will not involve any juridical penalty in this world. An exception would be the case of a person who went so far as to deny the obligatory character of the prayer, which would then be evidence of the rejection of Islam itself. The law is flexible also to the extent that any law may be broken under duress or necessity; in such conditions, a given act previously considered forbidden becomes valid, including such things as eating pork when no other food is available or drinking wine in the absence of all other liquids.

One final implication of the character of Islamic law is to be noted in the treatment of Jewish and Christian communities living within territories controlled by Muslims. These groups were not subject to the specific provisions of Islamic law, precisely because it was for those who were Muslims alone. Rather, these communities were allowed to be self-governing, following their own legal codes and principles, although they were considered citizens at a lower level than their fellow Muslims with certain restrictions on their public rights and a requirement of paying a special poll tax. Security of life, property and religion was guaranteed by the payment of this tax, but no new religious buildings were to be erected nor was the public display of religion to be allowed. In practice, the tolerance shown for these communities fluctuated in the Muslim world according to the political and social pressures of the time but the theory, at the very least, echoed the character of Islamic law and its integrative religious nature.
A READER ON CLASSICAL ISLAM

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