

Islamic Law

The Coffee Debate

We can begin to gain a sense of the logic and workings of Islamic law by fast-forwarding several centuries to sixteenth-century Mecca. For sixteenth-century Meccans, coffee was all the rage. The same was true in Cairo, Istanbul, and Aleppo. Coffee houses punctuated the urban landscape of Middle Eastern cities like oases, as they still do. But in the sixteenth century, unlike the twentyfirst, coffee and coffee shops were something new, an innovation only recently imported from Yemen. Arabic accounts of the earliest uses of coffee agree that the first to drink the brew were late fifteenth-century Yemeni *ṣūfīs*, Muslim mystics, who found the effects of caffeine enlivening to their late-night devotional exercises. Some *ṣūfīs* even seem to have made coffee-drinking part of their ritual practice of *dhikr*, the remembrance of God. Yemenis carried their coffee habit with them to the major cities of the Middle East. It was in this way that coffee was reportedly first introduced to Cairo through the Yemeni quarters of the great Islamic seminary of Al-Azhar during the first decade of the sixteenth century. The habit quickly spread. (On the various theories and debates about the origins of coffee, see Hattox 1988: 12ff.)

By the end of the first decade of the sixteenth century coffee and coffee houses had become popular enough to spark serious controversy. (These controversies are

colorfully described by Ralph Hattox in *Coffee and Coffeeshouses*, and I am indebted to his book for many of the facts recounted here.) In 1511 Khā'ir Beg, the muḥtasib or marketplace inspector in Mecca and a minor official of the Cairo-based Mamlūk sultanate, became alarmed at the spread of coffee and coffee houses and convened an assembly of legal experts to consider the matter. The assembled scholars faced two questions which would continue to be debated for over a century. First, was the consumption of coffee in itself permissible or prohibited? Second, regardless of the permissibility of the drink itself, were the social gatherings and activities that had come to be associated with the drinking of coffee permissible? On the second question the Meccan jurists quickly agreed; given what they knew of coffee-inspired gatherings, such gatherings were unedifying and should be suppressed by the authorities. On the first question, however, the legal experts waffled, arguing, first, that coffee should be considered permissible until proven otherwise, but covering their tracks by suggesting that if coffee could be proven to produce intoxication (or other harmful effects) it might be declared a prohibited substance. On the latter point the legal scholars deferred to expert medical witnesses. These were duly called by the prosecution and, all too predictably, testified to the harmful effects of coffee. Consequent to this expert testimony, the assembled jurists agreed that coffee was proscribed, and Khā'ir Beg banned the sale or consumption of coffee in Mecca, burned stores of coffee, and had those involved in the illicit activity flogged (Hattox 1988: 30–7).

Figure 10.1 A coffee house in Cairo. Coffee was first spread in the Middle East by sixteenth-century Yemeni ṣūfī s. Photo: Robert Harding Picture Library Ltd/Alamy



The local Meccan decision did not stick, and in the following decades the fortunes of coffee and coffee-drinking oscillated. When the question was referred to Cairo, the official Mamlūk religious establishment refused to endorse absolute prohibition, and Meccans enthusiastically returned to their coffee-drinking ways. Fourteen years later, in 1525, another jurist, one Ibn al-‘Arrāq, once again ordered all of the coffee houses of Mecca shut down, not because he considered coffee prohibited, but on the basis of the reprehensible activities associated with coffee establishments. Ibn al-‘Arrāq died the next year and the coffee houses reopened. In 1534 an anti-coffee activist in Cairo preached against coffee and instigated a riot in which coffee houses were attacked, and

rival pro-and anti-coffee mobs had at each other. The conflict was only resolved when a leading judge decided in favor of the pro-coffee faction (Hattox 1988: 39). Finally, in 1544 an Ottoman decree reportedly prohibited coffee, but without lasting effect (Hattox 1988: 38). By mid-century it was clear that the anti-coffee faction had lost the battle.

For our purposes, the outcome is less important than what the controversy illustrates of the logic of Islamic legal thinking. When the jurists of Mecca were faced with a new behavior or custom, they immediately knew their duty, and that duty was to determine, as best they could, God's estimation of that behavior. For this purpose they had inherited from the tradition of Islamic legal thinking a convenient five-point scale against which any human action can be measured. According to this scheme, the drinking of coffee and every other action must fall into one of five categories: obligatory (wājib), recommended (mandūb), neutral (mubāh), discouraged (makrūh), or prohibited (ḥarām). The basic task of Islamic jurists is to make determinations about where particular actions fall on this five-point scale, and this is what the Meccan 'ulamā' set out to do in the case of coffee-drinking.

Revelation and Reason

The problem, then, was theoretically a simple question of discovering what God had to say about coffee. For this purpose scholars had at their disposal two sources of revelation, the very Word of God, the Qur'ān, and the normative example of the Prophet, the Sunna. As we have

seen, Muslim dogma about revelation gave these sources equal authority as sources of guidance. Both the Qur'^ān and the Sunna were wa^hī, revealed to Muhammad by Gabriel, and they differed only in form, not in authority. Of the two sources, the Sunna was in practice the more useful since the Prophet had expressed himself on such a vast array of practical topics. The Sunna was also challenging to work with, however, since it did not come pre-packaged, but could only be mined from the ḥadīth, and the ḥadīth literature was rather rich in forgeries, contradictions, and uncertainties. Still, if either the Qur'^ān or the ḥadīth had anything to say about coffee, the sixteenth-century Meccan 'ulam^ā' would certainly have found themselves on familiar ground, and they would have set about exegeting the texts, sorting out contradictions, and weighing the reliability of various reports.

The obvious difficulty was that God had issued his final opinions about human behavior some 900 years earlier, in the pre-coffee era, and the majority opinion on revelation discouraged any expectation of an update. Exactly how to proceed in such circumstances is one of the oldest and most persistent questions in Islamic legal theory, and the waffling of the Meccan 'ulam^ā' nicely illustrates the two major options. According to the reports, the first instinct of the council was to apply the principle of basic permissibility according to which a substance is considered permissible until proven otherwise. God in his omniscience can be presumed to have been able to foresee the introduction of coffee, and he presumably would have warned against it if he thought it harmful. In the absence of such an explicit prohibition, one must presume

permissibility. To this way of thinking, revelation is taken to be complete and comprehensive, and definitive answers to moral and legal questions can only be known from the Qur'^ān and the Sunna. The most extreme representatives of this way of thinking, called *Ẓā*hirīs because they confined the law to what was *Ẓā*hir or externally obvious in revelation, had thrived in the tenth and eleventh centuries. By the time of the coffee controversy *Ẓā*hirīs were long extinct as an organized movement, but the powerful logic of their position still carried weight.

There was another possibility. What if God had never intended his revelation to cover all eventualities, but rather expected human beings to use their minds to extrapolate beyond the revealed sources? This option required a certain degree of confidence in the ability of human reason to handle fundamental moral questions, and consequently it was somewhat daring. Early in the development of Islamic law – a period we will consider in detail below – debate between exponents of reason and the partisans of tradition raged fiercely. The debates were both theoretical and practical. The underlying theoretical issue with which theologians had to grapple was whether human reason in any form could be trusted to make moral judgments about right and wrong. But from a juristic viewpoint the question was narrower and more practical: to what extent could reason be considered a legitimate tool for the elaboration of Islamic law, and what were the limits on its use? By the sixteenth century these issues had been largely settled, but with conflicting answers to the theoretical and practical questions. In theory Muslim legal scholars were, after the eleventh century, almost unanimously pessimistic about

the efficacy of human reason. Human beings are helpless to make moral decisions without revelation. But in practice all of the major legal schools found ways to permit the application of reason at least in limited ways.

Qiyās

Discussion of the practical application of reason centered on one particular method that Islamic scholars called qiyās or analogical reasoning. The logic of qiyās rested on the presumption that God had his reasons for commanding or forbidding particular activities, and that a clever scholar could discover these reasons and apply them to new situations. God, for instance, was widely known to have prohibited wine, or, to be more precise, a beverage which the Qur'ān calls khamr, the definition of which was a matter of disagreement. If the reason for the divine proscription on khamr was found to be its intoxicating properties, then the prohibition might be extended, by application of qiyās, to other intoxicants. This was exactly the approach that some jurists took, arguing that any intoxicant was forbidden by analogy with khamr.

The jurists gathered in Mecca in 1511 were apparently open to such an argument: if coffee could be shown to be intoxicating, it must be forbidden. They were aided by a linguistic peculiarity. The word *qahwa*, used for coffee, was also one of the words used for wine (Hattox 1988: 18). In the end their final decision did not rest on a systematic argument linking coffee and wine. There were others willing to take up just such a position, however. The argument for prohibition of coffee by analogy with wine

must have had proponents, since defenders of coffee offered vigorous refutations. The reasoning adopted by the Meccan council of ‘ulamā’ turned out to be more pallid. Coffee was prohibited simply because it is vaguely harmful to one’s well-being.

Although the assembled jurists of Mecca had reached their verdict, however, that was hardly the end of the matter. Anti-coffee jurists very soon had to face the inconvenient fact that other jurists, and as it turned out, more influential ones, disagreed with their decision. What the Meccan jurists had arrived at, in other words, was not God’s law in an objective sense, but simply their own best understanding of God’s law. No Muslim jurist would doubt that God had an opinion about coffee, but most of them shared a healthy sense of their own fallibility in understanding his opinions. They could only do their best, and their best might not be enough. This process of seeking to understand God’s law the legal scholars called *fiqh* – understanding. Scholars who engaged in this process were *fuqahā*. *Fiqh* and the rulings that resulted from it were, at best, an approximation of the true law of God, and the pro-coffee lobby was free to argue that the assembled Meccan ‘ulamā’ had gotten it quite wrong.

Fiqh, in other words, is not the same as *Sharī’a*. *Sharī’a* is the sum of all God’s rulings on human actions, and if the *Sharī’a* as a whole was precisely spelled out, we would have no doubt about whether coffee is permissible and, if so, in precisely what circumstances it might become impermissible. God has not spelled out his will at this level of precision, however. Rather, he has left that task to

human beings, as a test of our devotion. Consequently, no matter how hard we toil, there will always be a gap between God's perfect will – the Sharī'a – and our limited and fallible understanding of it, reflected in fiqh.

The Schools of Law

Disagreements over the law of God are thus to be expected. Some disagreements, however, are bigger than others. An observer of intellectuals in any field is likely to be struck by their contentiousness; but while any two given scholars may be expected to find something to disagree about, if they can discover a common intellectual enemy they will be well on their way to forming a “school.” It is roughly in these terms that we can understand the relationship among different Islamic “schools” of law, or madhhabs. Madhhabs, in other words, might be thought of as groupings of scholars who disagreed with one another less, or on less important points, than they disagreed with the scholars of another madhhab.

At the time of the coffee controversy the number of these major groupings of Sunnī legal scholars had settled out at four – the Hanafī, the Mālikī, the Shāfi'ī, and the Hanbalī schools – the same four madhhabs, in fact, that still survive among contemporary Sunnī Muslims.

Sunnī schools of Islamic law and their founders

Hanaḥī (Abū Hanaḥifa, d. 767). Associated with the city of Kūfa and known for allowing, in theory, a higher degree of juristic flexibility than other schools through the application of personal judgment (ra'y) and juristic preference (istiḥṣān). The earliest Hanaḥī works are those of Abū Yūsuf (d. 798) and al-Shaybānī (d. 805). In modern times Hanaḥīs predominate in central Asia, Turkey, Cairo and the Nile delta in Egypt, and the Indian subcontinent.

Mālikī (Mālik ibn Anas, d. 796). Characterized by acceptance of the practice of the people of Medina as a source of precedent and an indication of Sunna. Early works include the *Muwatta'*, attributed to Mālik, and the *Mudawwana* of Saḥnūn. Mālikīs make up the majority in North Africa and Upper Egypt.

Shāfi'ī (Muhammad ibn Idrīs al-Shāfi'ī, d. 822). Named for the greatest early systematizer of Islamic legal theory, but in substance similar to Mālikī law. Shāfi'īs are most numerous in Malaysia, Indonesia, southern Arabia, East Africa, and parts of Upper Egypt.

Hanbalī (Aḥmad ibn Hanbal, d. 855). Known for emphasis on ḥadīth and sometimes considered a grouping of traditionists rather than a school of

law. Ḥanbalī scholars, especially Ibn Taymiyya (d. 1328), have had an enormous influence on later developments in Islamic law by virtue of their opposition to taqlīd and insistence on going back to the sources, the Qur'ān and Sunna, for themselves. Ḥanbalīsm is the official and dominant madhhab in modern Sa'ūdī Arabia.

Zāhirī (Dāwīd ibn Khalaf, d. 884). Now extinct, but nevertheless influential by virtue of a consistent refusal to go beyond the plain meaning of revelation in applying the law.

The madhhabs differed not just on particular legal points, but also on questions of method and theory. On the matter of intoxicants, for example, the Ḥanafīs differed from the other schools of law in holding that the Qur'ān did not prohibit all intoxicants as a class, but only beverages which fit within the strict definition of khamr. In other words, they resisted the application of qiyās to extend the prohibition on khamr to other intoxicants. For Ḥanafī jurists, khamr was limited to (1) fermented raw grape juice; (2) cooked grape juice of which more than one-third of the original volume remains; (3) intoxicants made from dates; (4) intoxicants made from raisins. According to Ḥanafī “understanding” or fiqh, then, alcohol content was not, in itself, the central issue. Drunkenness is still forbidden, but beverages containing alcohol that are made from honey, wheat, or barley are not, in themselves, prohibited. These may be forbidden in certain

circumstances, when taken with the unlawful intention of making oneself drunk, for example, but the *potential* for intoxication is not, in itself, reason enough for prohibition.

From a Ḥanafī perspective, then, any effort to prohibit coffee by analogy with khamr, or because its effects were somehow seen to resemble intoxication, was out of the question. This did not mean, however, that coffee-related activities were necessarily licit; an otherwise permissible substance might well be used for illicit ends or in illicit circumstances. Consequently, Ḥanafī authorities seem to have been more amenable to closing down coffee shops than to prohibiting coffee.

Leadership of the hardcore anti-coffee faction fell to Shāfi‘ī ‘ulamā’, who had fewer reservations about prohibiting coffee outright. Theirs was an uphill battle, however, for two reasons, one practical and the other theoretical. The practical obstacle for the anti-coffee jurists was the simple fact that the political influence of the Ḥanafī ‘ulamā’ was on the rise. The rulers of the Ottoman empire made the Ḥanafī school the official madhhab of the empire, and Ḥanafī ‘ulamā’ became a part of the official bureaucracy, their fortunes intertwined with the interests of the Ottoman state. In 1517 the Mamlūk state was absorbed into the Ottoman empire, and Ḥanafī law was thereafter ascendant throughout the central Islamic lands.

Islamic Law and the State

Although the Ottomans succeeded in absorbing the ‘ulamā’ into the state apparatus to a greater extent than any

previous Muslim state (a point to be developed in chapter 14), some level of interdependence between rulers and religious scholars was nothing new. The office of *qāḍī*, or judge, was by its very nature tied to the political establishment, and government appointed *qāḍīs* were handing down legal decisions from the early Umayyad period onward. The ‘ulamā’ as an identifiable class emerged in opposition to the ruling establishment, however, and the tradition literature reflects a deep awareness among scholars of the dangers of becoming too embroiled in politics. Abū Ḥanīfa, for instance, reportedly refused on principle to take a position as *qāḍī*. The earliest great legal scholars prided themselves on their independence, and their work was, like most scholarship, an idealistic rather than a pragmatic enterprise. God’s law was God’s law, whether anyone ever chose to enforce it or not.

In any case, implementation of the law on earth was not the main object of Islamic law. The question of ultimate importance for any pious scholar was not the judgment of men, but of God, and the ultimate aim of the enterprise was to guide human beings to paradise. This meant that even if a ruler chose to ignore his rulings, the pious legal scholar still had a job to do, and the godlessness of a given regime did not excuse believers from discovering and obeying the Sharī’a for themselves. The judgment of God awaited, and paradise was at stake. For this reason it will come as no surprise that the concerns of Islamic law cover areas that could not conceivably be adjudicated in a courtroom, and that no government would care to touch. The most obvious example is all of those acts which fall

into the categories of recommended (mandūb) or discouraged (makrūh). God will certainly take these acts into account in the distribution of rewards at the Judgment, and Islamic scholars thus must be concerned with them, but they fall completely outside the purview of the state. Even where absolute obligations and prohibitions are at stake, there are huge areas of Islamic law that do not belong in a courtroom, particularly the detailed requirements of religious ritual. In practice human courts are limited to adjudicating disputes between human beings and must leave disputes between human beings and God to a higher court. It was incumbent upon the fuqahā', however, to take into account the whole of God's law.

This is not to say that Islamic legal scholars were unconcerned about the earthly enforcement of whatever could be enforced of God's law. The majority insisted, in fact, that it was the duty of the state to apply the Sharī'a, and they were quite willing to tell the ruler how to go about it. Rulers, in turn, hired legal scholars as qādīs to adjudicate court cases, and as muftīs, to issue fatwas, or legal rulings, on practical questions. In the coffee controversy the Hanafīs thus had a decisive advantage by virtue of the official patronage of the state. Shāfi'ī firebrands could rant and rave and whip up mobs, but they could not suppress the coffee culture on their own. For that, the coercive power of the state was needed, and that, in the Ottoman empire at any rate, was fast becoming a Hanafī monopoly.

Ijmā'

Besides facing a political establishment lukewarm to their views, anti-coffee jurists had to contend with a theoretical obstacle arising from the internal logic of Islamic legal thinking. Simply put, the legal opinion of an individual was not worth much. Fiqh was not an individual but a collective enterprise. A particular ruling carried weight only to the extent that it was affirmed by other scholars and adopted by the community. Pro-coffee advocates were thus able to argue that the consensus, or *ijmā'*, of the community was decisively in their favor. Coffee had, after all, been consumed on the premises of the great mosque in Mecca by even the most pious of Muslims for some years. The opponents of coffee could invoke no such consensus.

The doctrine of *ijmā'*, consensus, was not just one of the deciding factors in the coffee controversy, but a crucial principle of Sunnī legal theory. Although there were differences among the madhhabs about the rules for its application, the idea of *ijmā'* was based on the simple premise that the Muslims (or Muslim scholars) could not all be wrong at the same time. An individual opinion or ruling on a point of Islamic law could only be considered tentative, or *Zannī*, because of the fallibility of the interpreter. But a tentative ruling could be moved into the realm of certainty by the agreement of the community because that consensus was, by definition, infallible. The Prophet himself had affirmed that “my community will never agree upon an error,” and the Qur’ān warned, “And whoso opposes the Messenger after the guidance had been manifested unto him, and follows other than the believers’ way, We appoint for him that unto which he himself had

turned, and expose him unto Hell – hapless journey’s end!” (4:115).

At least one pro-coffee jurist explicitly invoked the principle of *ijmā‘* to establish the permissibility of coffee. Coffee had been consumed for some time, he argued, and if it was indeed an intoxicant, pious Muslims would certainly have taken steps to forbid it, yet pious Muslims consumed coffee without compunction (Hattox 1988: 59). Thus the consensus of the Muslims was established and the permissibility of coffee can be considered certain. In the end, then, it was the umma’s enthusiastic reception of coffee that was decisive in resolving the question of whether God approved of it or not.

The Uṣūl al-Fiqh

When assembled in a tidy package, the system of legal reasoning applied in the coffee controversy nicely illustrates the four-source theory of Islamic law that dominated Islamic legal thinking from the ninth century on. According to the broad outlines of this theory the two scriptural sources of Islamic law, the Qur’ān and the Sunna, were extrapolated and applied to new situations by means of *qiyās*, and *qiyās* was, in turn, given certainty by *ijmā‘*. There was disagreement around the edges, and especially about some supplementary principles of law (see below), but on the whole Muslim jurists from the ninth to the nineteenth century showed remarkable agreement on the basic four-source framework. The theory itself became the focus of an entire branch of scholarship, the study of the “roots of jurisprudence” or *uṣūl al-fiqh*.

Sources and principles of Islamic law

The Qur'ān. The basic source for knowledge of divine commands, but not to be interpreted or applied apart from its elaboration in the example of the Prophet. About 600 verses of the Qur'ān have relevance to Islamic law, most of these dealing with religious duties ('ibādāt). About eighty verses have legal relevance in the narrower sense of law that Westerners are used to.

The Sunna. The most important material source of law. The words and actions of the Prophet Muhammad are both an authoritative commentary on the Qur'ān and a source of authoritative precedent in their own right. The Sunna of the Prophet is contained and transmitted in the ḥadīth literature. Shī'ī jurists include within the Sunna the rulings of the Shī'ī imāms, since the precedents set by the imams are considered authoritative.

Qiyās. A means of applying a known command from the Qur'ān or Sunna to a new circumstance by means of analogical reasoning. When the rationale ('illa) of a command is known, other similar cases can be judged according to the same rationale.

Ijmā'. The consensus of Muslims on a point of law. The majority of Sunnī jurists consider consensus to be infallible, giving rise to certain knowledge. They differ, however, on what constitutes authoritative consensus and how to arrive at it.

Ijtihād. The toil or effort exerted by a scholar in seeking to discover the intent of the Lawgiver on a given point of law. *Ijtihād* is not a source of law, properly speaking, but a reference to the process by which the law is elaborated. The terms *ijtihād* and *qiyās* are sometimes used interchangeably. A jurist qualified to exercise *ijtihād* is called a mujtahid. From the fifteenth century onward Muslim scholars argued about whether there were any mujtahids left and thus whether *ijtihād* could still operate.

Taqlīd. Adherence to authoritative precedent. A jurist not qualified to exercise *ijtihād* must limit himself to the application of established rulings. In modern times *taqlīd* has developed a bad reputation, and is often interpreted to mean blind and dogmatic adherence to past decisions. In premodern usage it might be better seen as a simple acknowledgment that not everyone is a genius.

Istih̄sān. The application of a jurist's personal judgment allowing him to depart from the strict

application of *qiyās*. The method is defended by Ḥanafī jurists, but criticized by al-Shafi‘ī as arbitrary.

Istiṣlāḥ. The overruling of the strict application of a legal rule on the basis of considerations of the public good (*maṣlaḥa*).

Zarūra. The principle of necessity according to which an established rule of law is suspended in dire circumstances.

Not all Muslims bought into this system. The four-source theory of Islamic law illustrated by the coffee controversy is specifically Sunnī, especially in granting such a decisive role to consensus. The largest of the Shī‘ī communities, the Twelvers, for instance, follow a distinct legal tradition called the Ja‘farī school, traced to the sixth Shī‘ī leader, Ja‘far al-ṣādiq. Ja‘farī fiqh does not differ markedly from the major Sunnī schools on most points of substance, although there are significant exceptions. For example, Shī‘ī jurists allow a form of temporary marriage called *mut‘a*, require more stringent procedures for divorce, and differ significantly from Sunnīs on the rules of inheritance. More importantly, the Twelvers diverge from the Sunnīs on two key points of legal theory. First, they held that the Sunna encompasses the teachings of the Shī‘ī *imāms* in addition to those of the Prophet. Second, the doctrine of consensus has less relevance for Shī‘ītes since, ideally, authority vests in the living representatives of God, the *imāms*.

Moreover, from a Shī‘ī point of view the majority of the community, that is the Sunnīs, patently did agree upon a rather egregious error by failing to recognize the unique claims of ‘Alī and his descendants. Consequently, the infallibility of the community is a hard sell among the Shī‘a.

The Substance of the Law

The sixteenth-century coffee controversy, while useful for illustrating the theory and internal logic of Islamic law, is in certain respects misleading. In particular, it may leave us with the impression that Islamic law was an infinitely flexible, malleable, and evolving system and that Muslims were constantly going back to the Qur’ān and Sunna and happily exercising qiyās, ijtihād, and ijmā‘ in an unceasing quest to discover anew for themselves the will of the divine lawgiver in the midst of changing circumstances. This is exactly what a number of modern Muslim thinkers would like Islamic law to be, and some have worked hard to make it so. In fact, however, the theory of Islamic law did not shape the law so much as it justified what was already in place. The substance of the law was well established before the theory of the sources of Islamic law was fully articulated, and the articulation of the four-source theory of the law did not lead to the revaluation of the substance of the law – it merely provided justification for rulings previously established.

Another respect in which the coffee example may mislead is by giving the impression that the concerns of Islamic law are very much like those of the modern undergraduate.

The world of coffee and coffee shops feels comfortably familiar to many moderns, and we can happily cheer on the jurists who rose in defense of the universal right to a coffee high. (That *ṣūfī*s were at the heart of the coffee culture is bound to heighten sympathy.) In reality the major concerns of Islamic legal scholars are so utterly alien to the normal concerns of many modern non-Muslims as to almost defy translation. In manuals of Islamic law, which follow a fairly stable structure after the ninth century, more than half of the attention is directed to the duties that humans owe to their creator. Moreover, these religious duties or *‘ibādāt* are not reducible to the sort of formless notions of piety or good behavior which the modern Methodist churchgoer might feel warm toward. God, it turns out, has specific and demanding ideas about how his servants must show their respect.

Ritual Purity

One must not, for instance, attempt any act of worship – including touching a copy of the Qur’ān – without first attending to matters of ritual purity. Consequently, manuals of Islamic law begin by outlining in detail the rules for purification, or *tahāra*. These begin with *wuḍū’*, the minor ablutions required before the five ritual prayers. For an act of prayer to have any meaning the worshiper must first wash his face, his hands up to the elbows, his head, and his feet up to the ankles in accordance with the command of God in Qur’ān 5:6. On the face of it this might seem a simple enough requirement, but the jurists know better. They differed over whether it was obligatory or merely recommended to rinse one’s mouth and nostrils

as well. They argued over whether the area between the beard and the ears constitutes the face, and whether the whole beard must also be washed. They disagreed about whether elbows were included with arms, how much of the head needed to be wiped, and whether one could keep one's turban on through the process. They discussed whether the feet must be washed, or could just be wiped, or whether it made no difference (Ibn Rushd 1994, 21: 3–20).

Figure 10.2 Worshipers in New Delhi, India, performing ritual ablutions. Photo: Grant Rooney/Alamy



These arguments involve the minor ablutions. If, however, one has fallen into a state of major impurity, a full bath (ghusl) is required before religious duties can be performed. Occurrences that bring on a state of major impurity include sexual intercourse, wet dreams, menstruation, and postnatal bleeding. External objects

could also be a source of pollution or najāsa, among them alcohol, pigs, dogs, and carrion. Jurists disagreed over whether someone in a state of major impurity could enter a mosque, some prohibiting it absolutely, others permitting it conditionally. Most jurists proscribed recitation of the Qur'ān in such a state of impurity (Ibn Rushd 1994, 21: 3–50).

These requirements are stringent, but not inflexible. Adjustments were made in particular for travelers and the sick. Nor should these requirements be interpreted as a way of putting substance to a conviction that cleanliness is next to godliness. The issue was not cleanliness, but obedience to God's specific requirements. Thus a substantial section of law deals with tayammum, the use of clean earth to satisfy the requirements of ritual purity when water is not available (Ibn Rushd 1994, 21: 67–79).

Acts of Worship

When the requirements for ritual purity are met and the believer sets out to perform a required act of worship, God's first concern is with attitude. "An act," according to a well-known saying of the Prophet, "is valued according to its intentions" (Ibn Rushd 1994, 1: 3). Going through the motions will not do; without proper intention the duty to God is not fulfilled, and the act of worship invalidated. Moreover, the statement of intention must be specific to the particular act of worship. If the worshiper sets out to perform the maghrib prayer, for example, he must state his intention to fulfill that specific obligation and to perform the required three units of prayer.

As the table below indicates, the prayers are divided into units (rak‘a), each ending in prostration; the number of units differs depending on the particular time of prayer. The precise limits on the times of the prayers were a matter of some discussion, but the table reflects general practice.

Prayer	Units	Earliest start	End
Fajr	2	Dawn	Sunrise
Zuhr	4	Sun at its zenith	An object’s shadow equals its length
‘Aṣr	4	End of the zuhr	Immediately before sunset
Maghrib	3	After sunset	The disappearance of twilight
‘Ishā’	4	End of maghrib	Dawn

The actual manner of performing the prayers turns out to be only a small part of the concern of jurists. One of the more sobering questions that kept them alert was whether a Muslim who acknowledges the obligation to perform the prayer, but intentionally refuses to do so, should be executed, or merely imprisoned until he mends his ways. Only a small minority favored execution (Ibn Rushd 1994, 1: 98). Other considerations were more commonplace, but no less important. One of the requirements of prayer, for example, is to face Mecca, and a necessary prerequisite of prayer is thus establishing the qibla. This is simple enough in a mosque, where the work has been done for you, but what if the worshiper is alone in unfamiliar territory at prayer time and happens to have a faulty sense of direction? Most jurists agreed that it was sufficient to give it one’s best effort, even if the direction ended up being off. But what if, after praying, the worshiper discovers that he was wrong? Al-Shāfi‘ī held that the prayer was invalidated and had to be repeated. Mālik and Abū Hanīfa thought that repeating the prayer was unnecessary because they held that the effort in itself fulfilled the obligation

Copyright © 2011. John Wiley & Sons, Incorporated. All rights reserved.

(ibid. 121–5). Mālik did think it a good idea to repeat the prayer, however, if there was sufficient time. Any number of other errors could invalidate prayer. These included immodest dress and speaking or laughing during prayer. Interrupting prayer to kill a scorpion or snake is generally thought to be permissible, however (ibid. 130).

The five obligatory prayers were but the start. There were special rules to be outlined for Friday congregational prayers, for prayer while on a journey, for prayers during wartime, and prayers for the sick. Then there were bonus prayers, not obligatory, but a source of merit, and special prayers for rain, special prayers during the month of Ramaḍān, and special prayers for the two major ‘Īd festivals. All of these were set topics that every teacher of Islamic law had to deal with, and every manual of Islamic law discussed in detail.

Beyond prayer, all the other major religious obligations called for equally detailed attention. Consequently, four of the so-called “five pillars” – the confession of faith, ṣalāṭ, almsgiving, pilgrimage, fasting – take up a huge amount of space in manuals of Islamic law. These are not alone, however, and there is a sense in which they are inseparable from a variety of other obligations listed below.

Islamic religious duties (‘ibādāt) in Islamic legal texts

Ṭahāra. Requirements for ritual purity, discussed above.

Ṣalāṭ. Ritual worship performed five times each day at prescribed times, and in the prescribed manner.

Funeral obligations. Requirements for the bathing of the dead (except battlefield martyrs, who are buried unwashed), funeral shrouds, prayers over the dead, and burial.

Zakāṭ. Poor-tax, usually administered by the state, for the support of eight categories of people named in Qur'ān 9:61: “Zakāṭ is for the poor and needy, and those who collect zakāṭ, and those whose hearts are to be reconciled, and to free captives and the debtors, and for the cause of Allāh, and for the wayfarers; a duty imposed by Allāh. Allāh is Knower, Wise.” Zakt is levied on certain categories of wealth above a certain defined threshold called the niṣāb. For holdings of gold and silver, the tax rate is 2.5 percent; for camels, cows, and sheep the formulas are rather more complicated.

Ṣiyām. Fasting, including obligatory and bonus fasts. The major obligatory fast involves abstention from food, drink, and sexual intercourse from dawn to sunset during the month of Ramaḍān.

I'tikāf. The practice of secluding oneself, usually in a mosque and often during Ramaḍān, for a set period of time. I'tikāf is voluntary, but rendered obligatory in fulfillment of a vow.

Hajj. The once-in-a-lifetime obligation, contingent upon physical and financial ability, to perform the ritual pilgrimage in Mecca. The jurists are particularly preoccupied with outlining the complex requirements for the valid completion of each stage of the pilgrimage.

Jihād. The obligation to make war against polytheists. The majority of jurists defined the duty as a collective rather than an individual duty; so long as some within the community fulfilled the duty, the requirement was fulfilled for all. Jurists discussed specific rules regarding allowable means, treatment of prisoners, conditions for the declaration of war, and the making of truces. Jurists also discuss, in detail, the rules for division of the spoils of war.

Additional topics included in most legal texts. Oaths and vows; sacrifices; slaughtered animals; hunting; sacrifice on behalf of newborns; foods and beverages; use of prohibited substances under duress.

So far the Western-trained lawyer will have found little that she will recognize as law, properly speaking. When jurists move on from discussion of obligations to God (‘ib \bar{a} d \bar{a} t) to consider human obligations to one another (mu‘ \bar{a} mal \bar{a} t), however, the issues seem familiar. Here we enter the more recognizable world of marriage and divorce, contracts, property law, inheritance, and criminal penalties. Such issues clearly belong in the courtroom. The impression of crossing some great divide from religious concerns to real law is misleading, however. The kinds of concerns and the style of legal reasoning are much the same whether a jurist is dealing with prayer or marriage.

Marriage and Divorce

Discussions of marriage in Islamic legal texts place it squarely in the category of civil contracts. A marriage is a contract entered into by the groom and the bride or a male guardian of the bride, the walī, usually her father. The first topic in discussions of marriage is the question of whether marriage is an obligation, and, if so, who is subject to that obligation. Only the Zāhirī school held marriage to be an obligation, although some Mālikīs held it to be obligatory on some, depending on how liable the individual is to fall into evil. The validity of a marriage contract depended, first of all, on the consent of the contracting parties. There was a good deal of discussion, however, about whose consent was required and in what circumstances. Jurists distinguished between those who had reached puberty and those who had not, between virgins and non-virgins, and between slave and free. Jurists generally agreed that minor sons and daughters could be married without their

permission. Jurists disagreed about whether a *walī* was a requirement in all cases for a valid marriage contract, and they discussed at length exactly who qualified as a guardian.

A second major requirement of a valid marriage contract was the payment of dowry, in accordance with the command of the Qur'*ān*, “And give unto the women, (whom you marry) free gift of their marriage portions” (4:4). Jurists disagreed over whether there was an absolute minimum for the dowry. Those who argued for such a minimum often considered the dowry a form of compensation paid to the woman, and drew an analogy to laws relating to theft. They agreed that there was no maximum for the dowry, and that the dowry remained the property of the woman.

Jurists discussed at length the various impediments to marriage, and they divided these impediments into two categories: perpetual and temporary. Perpetual impediments are established by lineage or marriage. Marriage to mothers, daughters, sisters, paternal aunts, maternal aunts, and nieces is prohibited by virtue of lineage. Marriage to mothers-in-law or daughters-in-law is prohibited because of the relationship established through the prior marriage. Foster relationships and wet-nursing also establish permanent impediments like those established by lineage. A foster-son is prohibited from marrying his foster-mother or foster-sister. Among temporary impediments, a man may marry no more than four women at the same time, two sisters may not be married to the same man, and marriage to an idolater or

idolatress is prohibited (although marriage to one of the “people of the book” is permitted).

A woman, once married, has the right to food and clothing from her husband. Jurists disagreed, however, about whether this right should be seen as a form of compensation for sex. Jurists agreed that in the case of a polygamous marriage, a wife also has the right to justice among the wives in regard to sexual relations.

Islamic jurists treat slavery matter-of-factly, as an ordinary facet of life, and discussions of marriage therefore encompass questions about marriage between slaves, whether marriage of a free man to a slave woman or a free woman to a slave man is permissible, and whether a slave can be compelled to marry. These discussions also touch on concubinage, that is, the right of male slave-owners to sexual relationship with female slaves, although more detailed discussion of these issues is taken up in chapters on slavery.

A major preoccupation of jurists with regard to divorce (*tal āq*) was what constituted an irrevocable divorce. The general rule established by the Qur’ān (2:229–30) is that a third declaration of divorce gives the divorce permanent effect, and that until that point the husband is free to think again. The tricky question was whether a threefold declaration pronounced at a single place and time constituted irrevocable divorce, or whether it just counted as a single declaration. Whether revocable or irrevocable, the declaration of divorce initiates a waiting period (*‘idda*) to establish whether the wife is pregnant. In the case of a

revocable divorce, the husband has the unilateral right to take the wife back with or without her consent during the waiting period. The waiting period will vary in length depending on whether the wife menstruates or is pregnant. In the case of an irrevocable divorce remarriage is only possible if the divorced wife is first married to and divorced from another man.

All of this is likely to come across as rather medieval to the modern reader. The reason is simple. It is. One should hardly expect twelfth-century legal preoccupations to match twenty-first-century expectations. The problem this raises is obvious. How are modern Muslims to respond to this voluminous, brilliant body of legal literature which purports to elucidate the eternal, unchanging law of God when so much of it seems anachronistic? What is of unchanging value here, and what is liable to revision? As we will see in the chapters 16 and 17, this has been one of the great challenges and preoccupations of modern Muslim reformers.

The Origins of Islamic Law

The resulting system of law, composed of jurisprudential theory and substantive law, is one of the great achievements of Islamic civilization. The intricacies and puzzles of fiqh engaged the greatest Muslim minds, and the resulting literature is monumental. The elaboration of the law, in fact, is rightly portrayed as a signature achievement of Islamic civilization, for, according to one of the most widely distributed maxims in modern surveys of Islamic law, law is the very “core and kernel of Islam” (Schacht 1964: 1). This magnificent system was fully

formed by the tenth century. This is not to say that no development took place after that (to the contrary, some of the most creative and controversial legal minds – al-Ghazālī and Ibn Taymiyya – made their contributions in later centuries), but the basic material of Islamic law had been worked out by this time. The question naturally arises for Muslims and non-Muslim scholars alike: where did it all come from?

The question of the origins of Islamic law has two parts. First, when and how did the theory of Islamic law (marked especially by the dual authority of the Qur'ān and prophetic Sunna) take hold? Second, where did the material of Islamic law – the substantive rules and practices that the jurists inherited and worked with – come from? Of the two questions the first is the easier to answer.

Al-Shāfi'ī and Islamic Legal Theory

Something resembling the four-source theory of law first shows up in the writings of the brilliant jurist Muhammad ibn Idrīs al-Shāfi'ī, who died about two centuries after Muhammad in 822. Al-Shāfi'ī's introduction to legal theory, his *Risāla*, is a dazzling piece of work and historians of Islamic law should be excused for having credited al-Shāfi'ī with having almost single-handedly shaped Islamic jurisprudence. As it turns out, no one paid much attention to al-Shāfi'ī's work for more than a century, and in more recent scholarship he has therefore been lowered from founder of Islamic jurisprudence to eccentric genius whose ideas were well ahead of their time and would only be appreciated much later (Hallaq 1993:

587–605). Be that as it may, the career of al-Shāfi‘ī in the early ninth century represents the earliest possible date for the coming together of the four-source theory of Islamic jurisprudence. The theory of Islamic law may have come into general acceptance only much later, but it could hardly have been earlier. We know this because it is clear from al-Shāfi‘ī’s writings that the views of the law that he had to contend with were quite different from those that would become orthodox legal theory.

The main issue centered on the idea of prophetic Sunna. For al-Shāfi‘ī and later mainstream jurists, Sunna meant the Sunna of the Prophet, and the Sunna of the Prophet could only be known from ḥadīth reports. In other words, a reliable ḥadīth report from the Prophet trumped all other sources of precedent. Shāfi‘ī’s logic was simple and compelling: who better than the Prophet to explain the meaning and practical application of revelation? If we know what the Prophet did or said on a particular occasion, it must reflect God’s will, for it is unthinkable that God’s chosen messenger would have departed from revelation. This elevation of prophetic Sunna and identification of Sunna with authentic ḥadīth reports is the chief mark of Islamic legal theory in its mature form.

Compelling or not, the trouble with al-Shāfi‘ī’s program was that Muslim jurists already had in place a body of law to protect. Circles of legal scholars in Kūfa, Medina, and Syria had been busily shaping their legal traditions without any special emphasis on prophetic ḥadīth. They were not about to sacrifice all of their hard work to satisfy the demands of al-Shāfi‘ī’s theory, no matter how compelling.

So they put up a fight, and the late eighth and early ninth centuries became a period of intense controversy centered on the *uṣūl al-fiqh*, and especially the meaning and status of Sunna.

For al-Shāfi‘ī’s rivals and predecessors, Sunna was a flexible concept. Certainly, one could appeal to the Sunna of the Prophet, but one could also talk about the Sunna of Abū Bakr or the Sunna of ‘Umar in the same breath. Thus there were many “*sunnas*” and many sources of authority to draw from. Moreover, even if the Sunna of the Prophet deserved special respect, al-Shāfi‘ī’s rivals were not convinced that *ḥadīth* was the most reliable source for that Sunna. A convincing argument could be made (and has been revived in modern times) that the best indicator of the Prophet’s Sunna is the living practice of the community. Thus the Medinan jurists relied heavily on the practice of the people of Medina in the argument that the people of Medina had faithfully continued the practice of the Prophet. Consequently, Islamic legal literature before al-Shāfi‘ī was remarkably light on *ḥadīth*.

Figure 10.3 Mausoleum of al-Shāfi‘ī in Cairo. Photo: © Creswell Archive, Ashmolean Museum, Oxford. neg. EA.CA.4394. Image courtesy of Fine Arts Library, Harvard College Library



After al-Shāfi‘ī the logic of the partisans of ḥadīth became overwhelming, and the “schools” of law in Kūfa, Medina, and Syria were put on the defensive. They were

left with only one alternative, and that was to come up with ḥadīth to justify their positions. It was not necessary, however, to draw reports out of thin air. All that was necessary was to find ways of attributing existing reports to the Prophet. The result was that laws that in the eighth century were attributed to a caliph were traced back to the Prophet in the ninth, and the ḥadīth literature ballooned in size and in diversity as rival schools of law sought to justify their legal theory by couching it in ḥadīth.

In summary, we can divide the evolution of Islamic legal theory into four periods:

1 For the first hundred years or so after the conquest, the caliphs were at center stage in legal developments and if there was any theory at work, it centered on the authority of the caliph as a source of Sunna and thus of law.

2 During the eighth century legal circles in opposition to the caliphs developed in regional centers, formulating independent legal ideas and traditions. The most important of these centers were Medina and Kūfa.

3 From the late eighth century the flexible and ad hoc style of legal reasoning in the regional schools of law came under challenge from a growing traditionist movement. Partisans of ḥadīth, most eloquently represented by al-Shāfiʿī, argued that all substantive law must be traced to the Qurʾān or ḥadīth traced to the Prophet. The result was a period of polemics and controversy over the sources of Islamic law.

4 By the beginning of the tenth century the traditionist thesis had won the day, and the four-source theory of Islamic law was widely accepted.

The origins of the substance of Islamic law are much harder to trace. If the Qur' \bar{a} n is placed in a seventh-century Arabian context, then it is clear that certain rudimentary elements of Islamic law grew up in response to scripture. The basic religious duties, laws of inheritance and marriage regulations, for example, are articulated in embryonic form in the Qur' \bar{a} n. Consequently, tracing the origins of these foundational elements of Islamic law amounts to the same problem as tracing the origins of the Qur' \bar{a} n itself, and many scholars are satisfied to simply attribute the origins of Islamic law to Muslim concern to apply the Qur' \bar{a} n. This apparently reasonable hypothesis will fail, however, if a later date for the canonization of the Islamic scripture is accepted. If the Qur' \bar{a} n originated in seventh-century Arabia, then some basic elements of Islamic law also originated there. If, on the other hand, the Qur' \bar{a} n was canonized after the Arab conquests, then it may be taken to reflect the early formative period of Islamic law rather than shaping it.

Regardless of which way we go on this debate, however, Islamic law contains much that cannot be explained simply as a response to the Qur' \bar{a} n. The question here is whether the Arabs brought all of this with them from Arabia, or simply picked up what they found after the conquests. The evidence is heavily in favor of the latter. As we have seen, the ḥadīth literature—our main documentation for the growth of Islamic law—clearly reflects the concerns of the

Near Eastern environment within which Islam came to maturity. The question of where each particular element of Islamic law came from is not all that important, however. The reality is, that regardless of where particular legal ideas or practices came from, Muslim jurists “islamized” the law by fitting it into a coherent and all-embracing system. Whatever the genetic origin of a particular legal idea, it is the system of Islamic jurisprudence which we discussed above that makes the law Islamic.

Thus we will get an accurate sense of the nature of Islamic law, not by trying to trace the origins of its minutiae, but by stepping back and taking stock of its broader place within the structure of Islamic life and thought. Islamic law is arguably the foundation of this structure. It is the means of practical guidance for daily life, the medium for discussion of political institutions, and the essential grounding for the spiritual life. Law is the hub of the wheel that connects to every aspect of Islamic belief and practice. The most important reality of the universe is that God cares how humans act, and that they defy his will at their peril. We have seen a system like this before. In granting this place of primacy to the law, Islam clearly belongs in the same family as rabbinic Judaism. Both systems grew up independent of prevailing political structures. Where rabbis drew on Torah and Mishna, the ‘ulamā’ had their Qur’ān and Sunna. While the rabbis issued responsa, muftīs wrote fatwas. Islamic law is the rabbinic ideal universalized.

Resources for Further Study

The best general introduction to the field of Islamic law is Noel J. Coulson, *A History of Islamic Law* (1964). Other introductions include Asaf A. A. Fyzee, *Outlines of Muhammadan Law* (1949), Ignaz Goldziher, *Introduction to Islamic Theology and Law* (1980), and Joseph Schacht, *An Introduction to Islamic Law* (1964). My source for the extended illustration which begins the chapter is Ralph Hattox, *Coffee and Coffeeshouses: The Origins of a Social Beverage in the Medieval Near East* (1988).

Important Islamic legal texts in translation include Muhammad ibn Idrīs al-Shāfi‘ī, *Islamic Jurisprudence: Shāfi‘ī’s Risāla* (1961), Ibn Rushd, *The Distinguished Jurist’s Primer* (1994), and Ahmad ibn Naqīb al-Misrī, *Reliance of the Traveler* (1994). Bernard Weiss provides a detailed summary and analysis (though not a translation) of another important work in *The Search for God’s Law: Islamic Jurisprudence in the Writings of Sayf al-Dīn al-Āmidī* (1992).

On Islamic legal theory and the debate over the origins of Islamic law, see Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (1950), Yasin Dutton, *The Origins of Islamic Law* (1999), John Burton, *The Sources of Islamic Law: Islamic Theories of Abrogation* (1990), Ahmad Hasan, *The Early Development of Islamic Jurisprudence* (1970), and Wael Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī uṣūl al-fiqh* (1997).

More specialized studies in Islamic law include Abraham Udovitch, *Partnership and Profit in Medieval Islam*

(1970), Baber Johansen, *The Islamic Law on Land and Rent* (1988), David Powers, *Studies in Qur'an and Hadith: The Formation of the Islamic Law of Inheritance* (1986), Franz Rosenthal, *Gambling in Islam* (1975), Jamal J. Nasir, *The Islamic Law of Personal Status* (1986), Jeanette Wakin, *The Function of Documents in Islamic Law* (1972), John Kelsay and James Turner Johnson (eds.), *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions* (1991), Majid Khadduri, *The Islamic Law of Nations: Shaybani's Siyar* (1955), and Patricia Crone, *Roman, Provincial and Islamic Law: The Origins of the Islamic Patronate* (1987b).