THE MUSLIM ALMANAC

A Reference Work on the History, Faith, Culture, and Peoples of Islam

Azim A. Nanji,
Editor

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Islamic Law

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Muslim society has developed several approaches to define piety. Islamic law is one such approach; it stipulated that rules and regulations presumed to have been divinely revealed in the Quran are an ordained way of life for all Muslims. Mysticism, philosophy, theology, and esotericism also attempted to define Muslim life and these various approaches and have served to be mutually influential in religious spheres.

♦ THE FOUNDATION OF ISLAMIC LAW

Sharia, the Arabic term for Islamic law, literally means path or way to a water hole in the desert. Since many Arabs who lived during the time of the Prophet Muhammad were desert dwellers and/or were influenced by the ways of the desert, water and direction were essential to life. In the same vein, Muslim jurisprudence sees Islamic law as essential to Muslim life. The Quran explains that Allah has regulated the universe with certain laws (*sunna*). Laws that were revealed through his Prophets are referred to as the *sharia*. Like the *sunna*, the basic religious message (*din*) in these revelations is similar. Since the source of both *sunna* and *sharia* is the same, there is no perceived conflict between them for Muslims.

For Muslims obedience to Islamic law is voluntary. This approach to religion—obedience to revealed laws by choice and the surrender of individual will—is the essential meaning of Islam: submission.

Submission to Islamic law is accepted by Sufis, Muslim mystics, who stress complete surrender of individual will to the divine will of Allah. However, Sufis differ with the jurists (the most strict interpreters of the *sharia*) in their interpretation and understanding of *din* and *sharia*. Sufis insist that the legal approach focuses on external and formal meanings of religion, whereas the inner of spiritual meanings are quite different. Sufis acknowledge that, although *tariqa* (the Sufi "way" or "path") represents a higher and ultimate approach, it cannot be completed without *sharia*.

The philosophical approach to religion in Islam focused on the inner meaning of revelation as understood by reason. A number of Islamic philosophers have borrowed extensively from Greek philosophy, trying to provide a rational framework for *sharia*. A group of them, known as *Ikhwan al-safa*, offered a complete system of philosophy of religion based on an understanding of inner meanings. The Ismailis, a branch of Shiism, who, according to some studies are identified with this group, also offer still an approach to *sharia*, that integrates the two aspects of faith.

The theological approach (*kalam*) focuses more on a strictly defined creed and belief and considers deeds as an outcome of that creed. Abu Hanifa's (died 767) treatise on creed was entitled *al-Fiqh al-Akbar* (*Greater Understanding*) and is an example of how Muslim theology and law is interconnected. During this period, law books also contained chapters on creeds, later, however, theological matters were separated from legal matters. The theological approach to religion rigorously prevailed among the Mutazila and Ithna Ashariyya (the Twelver Shia), who treat the question of *imam* (leader, religious authority) and related matters of creed as essential (*usul*, roots) and details about rituals and social life as secondary (*furu*, branches).

These approaches were not only in competition but were mutually influential. The literalist interpretation of Islamic law or *sharia* ultimately came to be accepted as the most fundamental expression of the Muslim faith. A more specific interpretation of Islamic law, though interpreted diversely in detail by various Muslim sects that recognize diverse methodologies, has been recognized as an essential component of the belief system.

The methodology of Islamic law has been opposed by the *hadith* scholars. The *hadith* (literally meaning "narration") comprises a record of the sayings or deeds of the Prophet Muhammad. Such scholars have insisted

that only such narrations constituted exact law as it informed Muslims about the *sunna*, (the way) of the Prophet Muhammad, a model that every Muslim is obliged to follow. Other sources were to be regarded as mere conjecture or individual opinion. The legal approach insisted that law consisted in an understanding (*fiqh*). *Hadith* scholars saw the *fiqh* as being too conservative, literal and formalistic.

Islamic law has developed a system of classification of legal subject matters, categories and values of legal authority, and a methodology of legal reasoning. Those who adopted this approach were called *fuqaha* (jurist/scholars). They differed from *hadith* scholars who emphasized narrative precedents. The ensuing debate between them has given rise to the question of the definition and authenticity of sources. The jurists accept *hadith* as a source of law next to the Quran, but they differ with *hadith* scholars on the criterion of authenticity. The *fuqaha* insist on the application of analogical reasoning (*qiyas*) to rationalize Quran and *hadith* in order to extend their application to other cases. The *hadith* scholars disagree with rational analysis. The schools of law that emerged among the *hadith* scholars have denied the validity of this type of reasoning. The *hadith* approach was, however, influenced by the legal approach, as eventually all *hadith* literature came to be patterned on the model of *fiqh* books consisting of chapters on legal subject matters (i.e., Bukhari's (died 870) great work, *Al-Jami al-Sahih*).

Developed in this doctrinal context, Islamic law aims at total submission to God's will and consists of two parts, *sharia*, divinely revealed ordinances, and *fiqh*, interpretation of *sharia* by Muslim jurists. Islamic law expresses itself in three notable forums: courts, responsa, and texts and glosses.

♦ DEVELOPMENT OF ISLAMIC LAW

The history of Islamic law begins with the revelation of the Quran, which contains legal principles and injunctions dealing with such subjects as ritual, marriage, divorce, succession, commercial transactions, and penal laws. The Quran was revealed to the Prophet Muhammad gradually over a period of twenty-three years. An overview of the Quranic regulations reveals the following three principles of legislation: removal of hardship, limited obligations, and gradual introduction of laws. The Quran introduced two basic reforms in Arabian society. First, the pre-Islamic laws of inheritance, which were essentially patrilineal, were changed into fixed shares of inheritors, including female relatives. Second, the Quran altered the status of women, allowing women the right of property and transaction and enhanced their legal position within the family.

The Prophet Muhammad not only acted as the head of state in Medina, but also as arbiter and judge. After the Muslims conquered other territories, he appointed judges in these areas to enforce Muslim law. The Islamic system differed from the pre-Islamic tribal system, which rested on the agreement of the parties of dispute to accept a person as an arbiter. A Muslim judge derived authority by way of his appointment by the ruler. However, conflicts arose between some judges and caliphs. During the first two centuries of Islam, these conflicts resulted in the supremacy of *sharia* over the rulers. During subsequent periods, suggestions and attempts were made by rulers to permit them authority of interpretation and legislation, but jurists resisted such attempts. They even opposed the creations of uniform laws. Consequently, two parallel systems of law grew alongside each other: rules promulgated by the rulers, as well as the jurists' law.

Muslim jurists concentrated on practice of the faith and on personal law. When they speculated on other matters of law (e.g., laws relating to property, transactions, etc.), local customs in various parts of the Muslim world usually prevailed over their interpretations. When they wrote constitutional, administrative, and fiscal laws, these were not incorporated into regular legal manuals. In disputes concerning commercial and trade transactions, it was usually the local custom that prevailed. The jurists' law usually conformed with practice in these matters. On the other hand, matters relating to practices of the faith were excluded from court jurisdiction; cases relating to such matters as family disputes, and succession, were decided according to jurists' law.

Normally, the jurisdiction of a judge was defined in his letter of appointment. He abided by the school of law in which he had received his training, and the disputing parties would also be adherents of that same school of law. In these matters, judges followed the texts of the school. The judges were encouraged, and often required, to consult jurists on points of law. In practice, however, precedents based on court judgments developed separately from jurists' law. Since judges were not bound by preceding judgments, the judgments were not preserved as records of law. The biographies of judges preserves a record of a great number of such judgments.

In Spain and North Africa, the judicial aspect of Islamic law grew more distinctly from jurist law. In addition to literature on judicial documents, formularies, and procedural matters, local judicial practices emerged in the form of treatises. These treatises were local in nature defining judicial convention, developing on certain legal subjects as well as general judicial practices. Judges were required to follow these practices, even against the consensus of jurists, and were officially assisted by jurists known as *Mushawirs*.

In addition to regular courts, there were also three other significant institutions for the administration of Islamic law: *Hisba*, *Nazar fil Mazallim*, and *Ifta*.

Hisba *Hisba* (inspection) courts had summary jurisdiction. The holder of this post, the *muhtasib*, was an inspector of the market and a general guardian of morals. He was a controller of weights and measures, prices, and the quality of merchandise. He would also make sure that religious and moral laws of Islam were observed. Like the position of judge, this institution was established as early as the period of Umar (634–644), the second caliph. There is evidence that women were regarded as being equally qualified for this post and were appointed to such positions. Manuals for the function of a *muhtasib* were also written. This institution stills exists in Muslim societies in different forms. In Pakistan, for instance, the office of *muhtasib* has been established since 1980 to deal with public petitions against government offices and officers.

Nazar Fil Mazalim *Nazar fil Mazalim* courts were established by Abbasid caliphs separate from regular courts. Initially they were presided over by the caliphs; later judges were appointed to this position. These courts were not governed by *sharia* or *fiqh*, but by *Siyasa* (administrative laws). Procedural laws for these courts were given in books separate from *fiqh* texts, usually along with constitutional and administrative laws. Ibn Taymiyya appears to have been the first jurist to try to streamline this branch of law that was secular in nature with *sharia*, as recorded in his book *Al-Siyasat al-Shariyya*.

Ifta It was during the Mamluk period (1250–1382) in Egypt that jurists were attached to these courts as jurisconsults (*muftis*). A *Mufti* was a jurist who rendered opinions about Islamic law. The difference between a judgment rendered by a judge and an opinion by a *mufti* was that while the former is enforceable, the latter was not; both judge and *mufti* were considered equal as far as qualifications.

In the early days of Islam, no distinction appears to have been made between a teacher and a *mufti;* prominent scholars also functioned as *muftis*. Special training was, however, given to a person who wanted to be one. Usually such a person spent a certain number of years as apprentice with a qualified *mufti*, who on satisfaction, gave him his license (*ijaza*).

In the fourth century of Islam, manuals were written describing the qualifications of a *mufti*, along with the cautions, requirements, and etiquettes for writing a *fatwa*. Unlike judgments, the *fatawas* were systematically recorded and collected. This practice still continues, and such opinions and responses are published.

Two types of books appeared under the title of *fatawa*. The first consists of those that contained actual answers to questions. The second consists of those that were not answers but the accepted opinions of great jurists. Following the development of schools of law, the jurists classified this second type of literature as lower in grade of authority than the texts written by the founders of the schools.

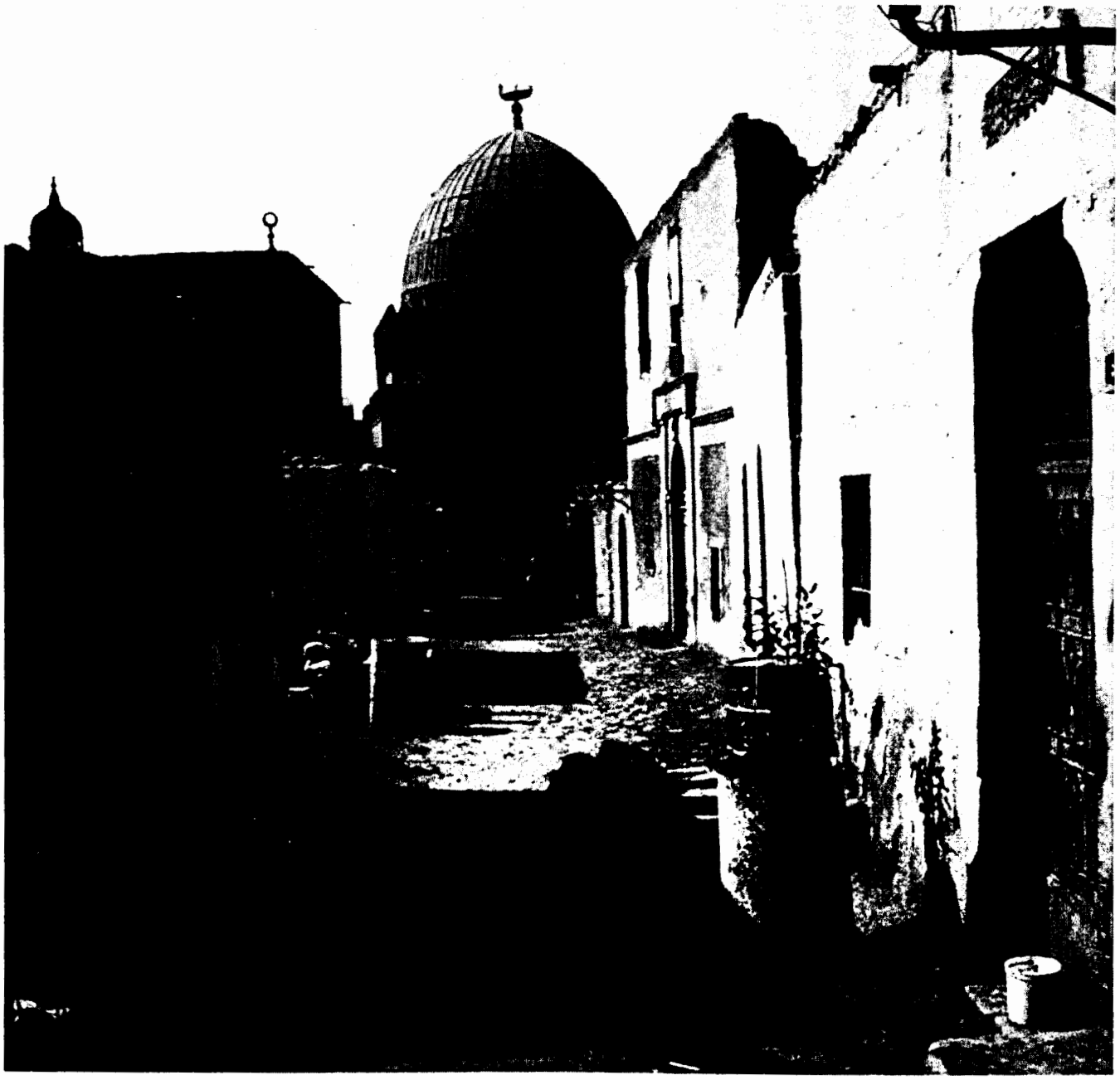
The well-known *Fatawa Qadi Khan* (1196) and *Fatawa Alamgiryya* (1685–1707) are of the second type of collection in which the accepted and prevalent view of the Hanafi school is given (the Hanafi school being one of four schools of Muslim jurisprudence). The contents of the second type of collection are restricted to and classified by subjects. The previously mentioned collection has a wider scope, covering such subjects as philosophy, theology, political science, and economics, which are not the subjects of regular legal texts. Even the forms of communication of giving opinions have changed in modern times. A modern *fatwa* may be issued in a newspaper, on radio, by telephone, on a television program or on the Internet.

Schools of Law

Aside from the courts and official legal institutions, Islamic law also developed as local legal traditions that emerged later into systematized schools of law that produced a vast legal literature. These local traditions grew in various prominent cities during the early period of Islam. The companions and descendants of the Prophet were consulted by the community on religious matters and areas of proper Muslim behavior. During the Prophet Muhammad's life, about twenty-five companions distinguished themselves as interpreters of *sharia*. Toward the end of the first century some of them moved away from Medina and settled in Egypt and Yemen.

Two movements are notable in this period. One movement relied on *hadith* and its literal interpretation, despite the application of differing standards. For example, the Shia who followed Imam Ja far al-Sadiq (died 765) accepted narrations by persons of the house of Muhammad, whereas the Sunni accepted narrations from the Hanbali school of jurisprudence (established by Ahmad ibn Hanbal, d. 855). The second movement accepted *hadith* as a source of Islamic law but, like Abu Hanifa (died 767), preferred *hadith* that were narrated by persons of legal understanding or, like Malik (died 795), accepted those on which local consensus had emerged.

The Shafii school, attributed to Muhammad ibn Idris al-Shafii (died 820), grew out of a further refinement of these two movements. Shafii defined the sources of Islamic law to be the Quran, *hadith*, *ijma* (consensus of the companions of the Prophet), and *ijtihad* (legal reasoning). He wrote a treatise defining the principles of interpretation and assigned *hadith* the most vital position, as a source that explained Quranic verses, as he



Imam Shaffii's Mausoleum, Cairo, Egypt.

felt that it was necessary to turn to *hadith* for explanation and understanding of these verses. He also adopted the methodology of the *hadith* school and further refined it for its use in legal reasoning. Shafii's emphasis on *hadith* and on the clear and expressed meanings of Quran and *hadith* gave rise to the school of Zahiris (literalists) attributed to Dawud ibn Khalaf (died 884).

The doctrine of *taqlid* (adherence to a particular jurist or school) solidified these schools. *Taqlid* was prompted by the policy of the Muslim rulers who usually appointed judges with official affiliation and adherence to a particular school. *Taqlid* gave rise to a conflict of laws that led jurists to develop *usul al-fiqh* (the principles of law) to justify the legal theories of the school. Early *fiqh* literature with the title of *usul* usually dealt with the basic principles of a particular school of law. These principles were either generalized to include all the doctrines of the school, or limited to a particular legal subject.

Later, when the question of authoritative sources for the interpretation of Islamic law became prominent,

usul came to be referred to by its primary sources—Quran, *hadith*, *ijma* and *qiyas*. *Ijma* referred to the agreed opinion of scholars of a community. It gradually came to be defined as the consensus of jurists of the whole Muslim community. *Qiyas* referred to analogical reasoning by which a jurist deduces rules from a primary source.

The literature on the subject reflects continued intellectual activity by Muslim jurists about questions of legal theory. Philosophical, theological, and purely juridical interest in legal questions produced varying approaches. Abul Husayn Basri's (died 1085) *Al-Mutamad* is a theological approach and Ibn Rushd's (died 1198), *Fasl al-Maqal'* is philosophical.

The following are the major schools of law: Hanafi, Maliki, Shafii, Hanbali, Ibadi, Ismaili, Jafari, and Zaydi. At the present, the Hanafi school is followed in south Asia, Turkey, Eastern Europe, China, central and west Asia, and in some parts of the Middle East. Shafiis flourish on the coastal areas of South Asia, East Africa, East Asia, Egypt, and some parts of the Middle East. The Malik school is followed in North and West Africa and in some southern parts of the Middle East. Hanbalis are found mostly in Saudi Arabia. Among the Shia schools, Ithnaashari school are found in Iran, Iraq and south Asia, and the Zaydis in Yemen. Ismailis are found in many parts of the world. All of these schools have developed a large body of legal literature.

Legal Literature

The legal literature developed in all the schools along a similar pattern. The earliest texts consisted of the doctrines of the founder and his disciples. Later, abridgements, elaboration or compendia, glossaries, and commentaries were written on these texts. These books, although their orders varied, classified legal subject matters into the following categories:

Ibadat *Ibadat* includes rituals dealing with the practices of the faith and the pillars of Islam (i.e., prayer, almsgiving, fasting, and pilgrimage), and laws dealing with personal status (including marriage, divorce, custody of children, maintenance, testate and intestate succession, rights of divorce and inheritance. Also included in this group are transactions dealing with contracts and obligation, legal capacity of a person, and different kinds of transactions relating to property and services. Islamic laws dealing with transactions, though based on mutual consent and freedom, protect parties by assuming certain terms in the contract that provide options against defects, fraud, and one-party risk. Islamic transactions are also governed by the prohibition of *riba* (excess interest) in loans and exchange of certain valuable foods.

Jinayat *Jinayat*, or Islamic penal laws classify crimes and offenses according to penalties into three categories: (1) *Qisas* (retaliation) deals with offenses against the person, including homicide and assault. They are punishable exactly by the same treatment to the offender. (2) *Hudud* (fixed) laws deal with offenses against property and honor, including theft, robbery, false accusation, extramarital sex, and drinking. Severe punishments are fixed for these offenses, ranging in very severe cases, in some traditional interpretations, to amputation of hands for theft to severe punishment, stoning to death, for extramarital sex. (3) All other offenses are dealt with under laws in which punishment is left to the discretion of the judge.

Application of the Law

Local customs and social practices have contributed a great deal to the formation of most doctrines, since local linguistic usage and custom play an essential role in the understanding and interpretation of these laws. Several local practices have been incorporated into family law. Local customs play a more decisive role in punishments. *Fiqh* books therefore often contain chapters explaining these specific laws of judicial procedure. Laws about rituals, marriage, divorce, succession, and so on are largely derived from the Quran.

Islamic procedural laws attach burden of proof to the party who claims against the legal presumption. In principle, freedom is the basic assumption. Evidence is usually drawn on the basis of reliable witnesses or written documents; circumstantial evidence is acceptable only in the absence of an eyewitness. Even if a party fails to prove the case, the other party is asked to take an oath. The admittance of female witnesses in certain parts of the Muslim world is very limited.

♦ MODERN DEVELOPMENTS

It may be noted that *fiqh* was not the only law in force in Muslim societies. It was a source of law among others used by the courts, only in specific matters of family and personal status. State fiscal, administrative, and penal laws existed alongside each other. For commercial laws, *fiqh* often followed, rather than led the market. Consequently, reforms in Islamic law in the modern period pose very basic problems. European colonial rule treated Islamic law as a matter of religion and local custom, and limited its application to situations pertaining to personal status and ritual, preventing its growth as a modern legal system. However, when reforms were eventually undertaken in these areas, reformers often faced resistance. Two views developed on the question of reform. Reformers treated Islamic law like any other law that could be

changed, amended, or repealed by state legislation. Many Muslims, conservative scholars, and orientalists regard Islamic law (*sharia/fiqh*) as religion and not law in the proper sense. Thus, reform in the strict sense of the word, according to them, cannot be undertaken as it would violate the sacred character of the faith.

Khalid Masud

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