

Unity through diversity: the Shar'ī Vision

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Islam: Faith, Submission and Action

Islam emerged as a moral challenge to humanity to respond to the call of the faith and create an ethically just public order that would reflect the 'active submission' (the term, *Islām* signifies this sense) to the Divine Will. Accordingly, creation of the just public order was viewed as the direct consequence of faith in the Islamic revelation where mere profession of faith without moral and religious commitment to create an Islamic order was considered hypocritical. In fact, the Qur'ān views faith (*Īmān*) as generating moral social behavior which ought to be translated in the creation of a morally just order on earth. Consequently, the term Islam should never be defined as mere 'submission' without the understanding that the necessary consequence of that 'submission' results in the transfiguration of the individual into a 'righteous' person, and the society into an ideal public order.

The Qur'ān, however, also took note of the weaknesses in human nature and prescribed solutions for humanity to rise above these mostly self-cultivated weaknesses when confronted by 'glitterings' of the worldly, material life. The Qur'ānic prescription consisted of creating a system whereby humanity, having responded to the Divine call, was thus held responsible in two areas of its relationship. First, in the area of its relationship to Allah (SWT) by virtue of being created by Him; and, second, in the area of interpersonal relationship by virtue of its composition of individual human beings.

In the first area, where religious prescriptions directed the human life towards an existence of devotion and commitment, the purpose of Divine guidance was to endow humanity with volition and cognition to realize the necessity of showing gratitude to the Creator. It, therefore, proceeded with an exercise of choice, even when the faith was declared as a Divine gift. The reason was that humanity could not be held responsible for ignoring the call of the faith if there was compulsion involved in the initial offer of faith. After all, becoming a faithful person, according to the Qur'ān, is to

establish a special relationship with Allah (SWT) and as such no human agency had the authority to impose this relationship. Moreover, Allah (SWT) created in human beings an 'innate disposition' (*fitrah*) which, if preserved in its natural healthy state, was guaranteed to lead one to an acknowledgement of the Creator. Maintaining the good health of that 'innate disposition' was left to human beings who were obliged to pay heed to the intimations of the 'innate disposition' toward God-conscious existence. In addition, however, part of the Divine plan was directed towards appointing His representatives on earth who would assist humanity in preserving its good moral-spiritual health. That plan, in addition to the endowment of natural reasoning, included sending of numerous prophets whose main function would be to 'remind' humanity of the 'innate disposition' that they possess and to 'uncover' the human potentials which might have become buried under the dirt of ancestral traditions and inherited prejudices. These potentials, as the prophets were to point out, were created in the first place to enable human beings to serve the cause of Allah (SWT) and to make it succeed.

This latter need for guidance had decisive consequences for the second area of human relationship, namely, interpersonal relationship in a society. In order to further human relationship, the religious prescriptions provided the necessary guidance that directed moral life of humanity to establish the just social order. This area of Divine guidance was crucial for the ultimate goal of the faith in the society. The well being of the society would thus depend on following these moral directions and accepting the authority of those individuals, such as prophets, who represented the Divine Will on earth. The Qur'an urges the believers, who have already exercised their volition in accepting the challenge of Islamic revelation, to obey the Prophet (ṢAAS) and those who have been invested with authority (*ulū al Amr*) among the believers to accomplish the task required by their 'submission'. This 'submission' to the authority of Prophet Muhammad (ṢAAS), is in fact, 'submission' to the Will of Allah (SWT), which is embodied in the *Sharī'ah* (the moral-religious law of Islam). That the Prophet (ṢAAS) was the personification of the Divine Will, which manifested in the form of the Law, was a notion that was common in all the montheistic traditions of which Islam regards itself as a continuation. As such, obedience of the Prophet (ṢAAS) has always implied obedience to the religious and legal prescriptions set forth in the Islamic revelation.

The Qur'ān and *Sunnah*

The Islamic revelation, consequently, included both the revealed text of the Qur'ān and the 'paradigmatic behavior' (*Sunnah* = 'model pattern of behavior') of the Prophet (ṢAAS). Muslim jurists regard both these sources

as authoritative and the only valid basis for religious prescription. However, there is a substantial difference in the estimation of these two sources: whereas the Qur'ān is regarded as the infallible word of Allah (SWT), void of any omission or commission, the 'paradigmatic behavior' of the Prophet (ṢAAS) is overshadowed by historical vicissitudes of the community that recorded it in the subsequent periods. The latter fact has been very gradually and cautiously admitted by the Muslim scholars after obvious dissension and differences of opinion about its compilation after almost two centuries following the death of the Prophet (ṢAAS). This brings us to the consideration of a very sensitive issue in the Muslim community regarding the status of the *Sunnah* which can be regarded as the main source of diversity in the Islamic legal prescription.

There is no doubt that efforts were made to create a uniform *Sunnah* of which all the scholars could agree in their issuing judicial decisions. As a matter of fact, the agreement (*ijmā'*) of the scholars in the matter of the admittance of the duly authenticated *Sunnah* as a valid documentation became an independent source for the derivation of the *Sharī* decisions. But, their agreement required further extrapolation of the record of the precedents preserved in the *Sunnah*. It was only these precedents that were recognized as the valid basis which could be utilized as evidence and made relevant to the concrete situation for a judicial decision through a rational exegesis of the terms of a tradition. This intellectual process in the interpretation of the revealed sources became still another source for religious prescriptions in Islam and became known as either 'analogical deduction' (*qiyās*), or 'sound opinion' (*ra'y*), or simply 'intelligence' (*'aql*) in the usage of different legal scholars. It is significant that the development of *uṣūl al fiqh* (theoretical basis or principles of Islamic law) under the great legal scholar Imām al Shāfi'ī (d. 204 A.H./819 A.C.) responded to this need of the Muslim scholars to systematically define the intellectual procedures for deductively inferring judicial decisions from the given textual and contextual circumstances. And, importantly, their efforts were directed to make relevant the record of the Prophetic paradigm through exegetical method based on what came to be designated as *al ijtihād*, more particularly, *al ijtihād al sharī* (the independent reasoning based on the extrapolation of the revealed sources like the Qur'ān and the *Sunnah*). Without the consensus of the Muslim jurists and their application of the intellectual method that evolved gradually, the juridical corpus, as it emerged at the end of the (first and second century Hijrah/eight century A.C.), would not have provided a more or less uniform religious prescription to deal with the two areas of human relationship, namely, God-man and man-man relationship.

Al 'ibādāt and al Mu'āmalāt

These two areas of relationship (God-man, man-man), which came to be designated as *al 'ibādāt* and *al mu'āmalāt* respectively, is the subject matter of the applied jurisprudence in Islam. The two areas of classification implicitly recognize the division of religious and moral laws in Islam. Although such designation in this paper calls for caution because of the overlapping between the two areas in the teachings of Islam which has not acknowledged any division of religious and secular realms of human activity. The Muslim scholars have conceded the Qur'ānic concern regarding those acts that are done purely to 'seek closeness to God' (*qurbatan 'ilā Allāh*) and those that are undertaken by virtue of being members of human society.

In the former case, only Allah (SWT) provides sanctions for their violations (whether in this world or the next); whereas, in the latter case Muslim authority, in whom political power is invested, provides the sanctions for their violations. Thus, a person who neglects his obligation of worshipping Allah (SWT) at prescribed times cannot be punished by human agency; whereas, a person who fails to fulfill the terms of a valid contract can be brought to justice and forced to obey the decision made by the Muslim authority. As mentioned earlier, however, there are certain acts in the God-man relationship which have implications for man-man relationship. Such is the case, for example, with *al Zakah* (the obligatory sharing of one's wealth with the poor and the community at a specific rate of appropriated wealth above a certain minimum) which, as shown by the early experience of the Muslim community under the 'Rightly Guided' Caliphate, had political implications for the Muslim public order and, accordingly, the authority invested with power had to deal with the violators of this obligation severely.¹ Nevertheless, in most of the prescriptions in God-man relationship, the jurists are in agreement that ultimately these rulings deal with an individual's spiritual destiny and as such no human agency can impose them; and, it is only in those cases where the violations in this area have moral and social implications that the ruler can exercise his discretion to require obedience. On the other hand, the prescriptions dealing with man-man relationship have presupposed the executive agency that can effect the laws for human welfare. In this sense, these religious prescriptions deal with the rights and duties of human beings toward each other, for which there is a need for an authority who can enforce

¹In my chapter on Liberty of Conscience and Religion in the Qur'an," in *Human Rights and the Conflict of Cultures: Western and Islamic Perspectives on Religious Liberty* (University of South Carolina Press, 1987), co-authored with David Little and John Kelsay, I have discussed at length the religious-moral implications of *al Zakah* in reference to the early history of Islam under the Caliphate of 'Abu-Bakr.

or exact obedience.

It is relevant to note that although the juridical corpus of the Muslims do not have a section dealing with, for instance, *bāb al huḳūmah* (Book of Governance) or *bāb al saltānah* (Book of Exercising Power), it can be amply demonstrated that the rulings dealing with interpersonal relationship presupposed the existence of a just ruler (*sultān ʿādil*) who could exercise his authority without any impediment to cause the purposes of Allah (SWT) to be effected in human society. The clause about the existence of a just ruler as a prerequisite in some administrative and official prescriptions was not merely a theoretical proposition; rather, it reflected the Muslim aspiration for a prophet-like authority whose obedience could not be challenged on the grounds of his being incompetent and unrighteous ruler over the Muslim *Ummah*.

The Khilāfah and The Shariʿah

The termination of the ideal *Khilāfah* (Caliphate) of the ‘Rightly Guided’ *Khulafāʾ* (Caliphs) in the first century of Islam (seventh century A.C.) caused major reevaluation of the extent of authority of those who could exercise power (*Saltānah*) in the Muslim community. Indeed, the Muslim scholars found themselves living under the corrupt rulers who could not be regarded as the ideal just authority to exercise the power that the religious prescriptions presupposed as necessary condition for their fulfillment. Under these political circumstances the jurists saw the possibility of emancipating the Muslim community from the religious obedience of their rulers and instead they required them to be obedient to the norms of the *Shariʿah*, (the Sacred Law). The most crucial implication of such an adherence to the *Shariʿah* (the juridical corpus meticulously composed by the jurists) without a precondition about the acknowledgement of a just constitutional authority, signified the insistence of the jurists upon religious autonomy of the Muslim community from their unjust rulers. The juridical corpus became the *Imām* in exactly the way Imam al Shāfiʿī had advised the Muslims to “make the Qurʾān and the *Sunnah*’ *Imām*.”² This advice by al Shāfiʿī must be seen against the background of the absence of the ideal *Imām*, the ‘rightly guided’ *Khālīfah* who, in theory, provided the ‘model’ for the community to emulate. That the unity of the *ummah* depended on such a centralized conception of authority can be

²al Shāfiʿī, *Kitāb al Umm* (Cairo, 1381 A.H. 1961 A.C.), Vol. 7, p. 307-308, advises the Muslims to make the ‘Qurʾān and the well-established traditions (two main sources of Islamic legal-moral-religious prescriptions) “a guiding *Imām*.” Such a guidance became the major criterion for expounding the legal contents of the Islamic revelation.

comprehended from the fact that the allegiance was transferred from the Imām as a person to the equally important conception of the ‘revelation’ (both the Qur’ān and the *Sunnah*) and its unifying capacity.

The adherence to the Islamic revelation, the Qur’ān and the *Sunnah*, meant to convey the authority of the central figure of the Imām in Islamic psyche, because the existence of such an authority as a unifying force was underscored in the early political development of Islamic community. At that time, immediately following the death of the Prophet (ṢAAS), it was the issue of the leadership of the Islamic polity that had to be resolved if the *Ummah* were to remain loyal to the early conception of the politico religious community united under the Prophet (ṢAAS) of Allah (SWT). The measures adopted by AbūBakr as the head of the Madinah government corroborate our observation that the unity of the community under new leadership was the most important consideration in maintaining the sense of continuity following the death of the Prophet (ṢAAS). This sense of continuity of that authority was provided by the *Khulafā’* and after the termination of the ideal *Khilāfah* by the *Sharī’ah*. It was for this reason that the Qur’ān and the *Sunnah* became the *Imām* in the absence of the ideal, ‘rightly guided’ *Imām*, and, hence, the unifying force in the Muslim community after the political decentralization and disintegration of the Muslim authority. Indeed, the *Sharī’ah* (that is, the Islamic legal system derived from the revelation) is the only thing that has continued to provide the sense of continuity in the mind of the Muslim community right up to the modern age.

More importantly, the Islamic *Sharī’ah* provided a center of unity, with an explicit recognition of diversity of the opinions of the jurists. This diversity was legitimized by the consensual interests of the scholars who, having given up the hope for the creation of the just Islamic order under the rulers, had made the *Sharī’ah* and their interpreters as the legitimate centers of Islamic sense of loyalty. In this way, the *Sharī’ah* as represented in the juridical works of the individual scholars, became the guide for the Muslims to create an adequately just public order, because, in the absence of socio-political justice, the *Sharī’ah* provided the ideal for the Divinely ordained just order. Consequently, the Muslim faith was shifted from requiring the existence of an Islamic state under a just ruler to the adherence to the system that guaranteed the Divine public order. In the final analysis, what assured the believers regarding the actualization of the Islamic ideal was the belief that the *Sharī’ah* as the Divinely ordained system guaranteed the creation of a just polity. Accordingly, it became part of the faith to insist upon the rule of the *Sharī’ah* in the post- ‘Rightly-guided’ *Khilāfah* era because it fulfilled the universalism of the Qur’ānic message. In addition, such an undertaking to implement the Islamic law in all its aspects in the society by any political authority afforded a sort of legitimacy that was otherwise lacking in most of them. It is probably

correct to say that in many instances of unjust rule in the Islamic history, the Muslim jurists became the legitimizing sources for those who wielded power unjustly by their evaluation of the political authority's commitment to the Islamic law and its implementation. Based on their evaluation of the glory of Islam under that particular ruler they were provided with the necessary religious recognition of his rule as an example of 'Islamic governance' (literally, *al Ḥukūmah al ʿādilah* (the just rule)). This can be regarded as the legacy of the classical age of Islam which has continued to dominate the present day 'fundamentalist' vision of the community. 'Fundamentalism' here must be defined as the 'endeavors to actualize the Islamic vision of the just public order by implementing the Shari'ah in all the aspects of life.' Such a vision has generated the sense of unity among the Muslims, in spite of their national and cultural diversity in the modern times. It has also furnished the Islamic movement with a kind of a blue print on which the unified ideal system could be constructed without requiring the existence of a central authority of the *Khilāfah*. The *Shari'ah* is both the *Imām* and *khalīfah* for the Muslims in the modern age. In other words, authority is invested in the community of the believers, the *Ummah*, collectively to create an Islamic public order where *Shari'ah* would provide the norms and principles to regulate God-man and man-man relationship.

The Ideal and the Real in the Shari'ah

It is important, however to remind ourselves that "*the life of the law has not been logic, it has been experience,*" as stated by Justice O. W. Holmes.

The Islamic legal system, which is regarded as a Divinely ordained system, preceding, and not preceded by the Muslim state, has been treated by some scholars in complete isolation from the historical development of society as such. The efforts of the Muslim jurists has been discussed as a process of discovering and formulating the revealed Will of Allah (SWT) by the purely subjective standard of its intrinsic worth. In fact, *ijtihād* has been defined as that effort to 'discover' the legal ordinances from the revelation. This *ijtihād*, as we have pointed out above, is *al ijtihād al shar'i*, in which human intellectual faculties have been utilized with utmost care to 'discover' the intrinsicness of the revealed law in reasoning. Accordingly, Islamic law has been treated as completely lacking in historical phenomenon, closely tied with the progress of society. While it is accurate to maintain that the elaboration and the analysis of Islamic law has been essentially *in abstracto*, the terms of the judicial decisions (*fatāwā*) do not lack practical considerations realistically related to the needs of the society. The development of *uṣūl al fiqh* can be cited as a proof for the practical considerations in deductively inferring the judicial

decisions. Moreover, it is in the area of *uṣūl* that the creative intelligence of the Muslim jurists can be measured and the use of another kind of *ijtihād*, namely *al ijtihād al 'aqlī* (reasoning based on purely rational evidence), can be documented. The rational procedures detailed in the works of *uṣūl* take into account methodological advancements in the extrapolation of the sources of Islamic law to derive decisions when there does not exist any concrete textual proof to support the relevant judicial decision. Indeed, in the area of the theoretical basis of Islamic law, the jurists have been the creators of the principles rather than merely the discoverers of them.

The judicial decisions deductively inferred on the basis of these principles of jurisprudence, however, do not exhibit the essential feature of the positive law emanating from the judicial tribunals; rather than are deduced from the ideal doctrine.³ The consequences of this latter judicial process was felt in the growing cleavage between the ideal system expounded in the juridical prescriptions that ought to have been followed by the Muslim courts and the actual practice of these courts, which sometimes coincided with or deviated from this ideal system. Hence, in the study of Islamic jurisprudence, it is important to keep in mind this cleavage between normative religious law and the demands of concrete situation, adumbrated, in many cases by the arbitrary power of the political authority, which, in a tacit way required the administrators of justice to adopt a discretionary policy of ignoring rather than denying the only valid basis for juridical prescription, namely, the Islamic revelation. Thus, besides juridical inquiry undertaken by the jurists, which accounts for the diversity in the opinions in the legal injunctions, the cleavage between the normative doctrine and the concrete situation became another source for the breakdown of the universal order under the Islamic law. Under the political circumstances that prevailed in almost all the periods of Islamic history when the normative prescriptions were for the most part ignored, if not denied, administration of justice (the very symbol of Divine justice) relied more heavily on the then current legal practice than on the norms provided by the *Sharī'ah* law. The result of this situation was the gradual emergence of two types of judicial authority in the organization of the Islamic public order: that headed by the *qāḍī* (judge) with jurisdiction over the *Sharī'ah* courts; and the other headed by a powerful official of the state with jurisdiction over the court of complaints (*maẓālim*).⁴

This development of the dual court system was the logical outcome of the essential function as it came to be ascribed to the Islamic law which

³For this characteristic of Islamic law, see: N. J. Coulson, *A History of Islamic Law* (Edinburgh, 1964), especially Chapter 9, p. 120f. Also, Joseph Schacht, *Introduction to Islamic Law* (Oxford, 1964), p. 199f.

⁴Coulson, *History*, p. 128.

exhibits a category of legislation that includes neither the possibility of appeal nor the promise of change: the law may be disobeyed, it may be forgotten, but it cannot be altered. Its historical character is thus severely restricted, for an acknowledgement of the linear progression of time requires recognition of the need to modify, to repeal and to further disclose the inapplicability or otherwise of a juridical prescription. As Islamic history progressed the intention of Islamic law came to be identified as 'guidance' (*hidāyah*), formulated within the framework of the community guaranteeing a measure of security and continuity. Significantly, as mentioned earlier, it was in this sense of 'guidance' that Islamic law was able to generate loyalty and a sense of unity among the members of the community whose religious autonomy and unity depended on the acknowledgement of the *Sharī'ah* as the *sacred law* ordained by Allah (SWT) for the establishment of the Islamic public order. The law became an *Imām*, who in religious literature of the Muslims was the source of precedent for religious prescription. The commands and prohibitions of an *Imām* are permanent models whose value and significance continue in the realm of ideal. It is in this context that Islamic juridical decisions as compiled by the Muslim doctors were characterized by acknowledgement of dispute (*al khilāf*) and by appeal to the authority of paradigmatic precedent, that is the *Imām* who could resolve the dispute by using his personal judgement on an issue.

The concept of *Imām* as it emerged in juridical literature, was central to all Islamic juridical discussions, and though variously applied, always denoted authority, that reserved the right to demand obedience but **could not** command obedience. The latter type of authority was vested in the *de facto* political sovereign who also assumed supreme judicial power.⁵ The jurisdiction and authority of the Islamic courts were subject to such limits as he saw fit to define. The Muslim jurists, of course, resented this situation and protested against the vulnerability of the decisions given by the *qāḍīs*. But, they also realized that the Islamic legal system formulated by them could not provide the necessary direction to the complex growth in the interpersonal relationship in the Islamic state because its formulations failed to take into consideration the new exigencies created by concrete situations. It is precisely

⁵I have discussed this cleavage in my forthcoming work on *The Just Ruler in Shī'ite Islam* (Oxford, 1988), in the chapter dealing with the political theory of the *Imāmī* 'Shī'ites which developed in the period following the termination of the theological *Imāmate* of the Twelve *Imāms*, and which resembles the similar situation in the 'Sunni' thought where the ideal Caliphate was limited to the period of the 'Rightly Guided' caliphs (11-40 A.H./632-660 A.C.). The subsequent period was marked by the *de facto* authority that lacked religious legitimacy but was, nevertheless, legitimized by the Muslim jurists consensual interest as 'just' authority. But, even then, the *de facto* rulers were never afforded the reverence that was confined to the 'Rightly Guided' caliphs.

this recognition on the part of the Muslim jurists and their giving it to the pressure from the political authorities that led to the creation of what can be described as the cleavage between the ideal and the real. More importantly, the situation also led to the creation of what can be cautiously designated as “secular” and “religious” courts. Although all functions in the Islamic public order were theoretically religious in nature, the jurisdiction of the *qādīs* or “religious” courts and the jurisdiction of the head of complains (*ṣāhib al mazālim*) or “secular” courts comes close to the notion of Divine law and the ruler’s law, respectively⁶

The “Religious” and the “Secular”

The division between “religious” and “secular” also marked the period in Muslim history when the rulers were no more regarded as possessing the religious legitimacy that was afforded to the ‘Rightly Guided’ and a few others in the classical age. More importantly, it ushered in the period of the *Ummah* loyal to the *Sharī* vision of justice without requiring the actual wielder of power to abide by the doctrinal underpinnings of that vision. More and more power came to be recognized as inherently unjust as such, and those who were pious remained unsullied by its corruptions. In fact, the probity and piety of a religious scholar were measured in terms of their detachment from the wordly power and political involvement. There was no other area in the Islamic jurisprudence that exhibited the dichotomy between ‘religious’ and ‘secular’ than in the field of public law. Thus, for instance, in the area of criminal law, homicide was regulated in meticulous detail, but was treated as a private and not as a public offence which could then be sanctioned by the state. Moreover, criminal law did not exist in the technical sense of a comprehensive scheme of offences against the public order. Religious belief played a decisive role in deciding a criminal case under the legal system which assumed that a witness whose moral and religious probity was ascertained would always tell the truth and that even the most hardened criminals would hesitate to swear a false oath of their innocence. The assumption displayed an altruistic reliance upon the force of religious belief which often proved to be inadequate to verify practical circumstances of litigation.⁷ Indeed, this aspect of Islamic jurisprudence corroborates our observation made earlier regarding the restricted historical character of the system and the fundamentally academic and idealistic approach adopted by

⁶Coulson, *History*, p. 129.

⁷al ‘Awwā, ‘Muhammad Salim, “The Basis of Islamic Penal Legislation,” in *The Islamic Criminal Justice System*, ed. M. Cherif Bassiouni (New York, 1982), p. 127-147.

the early jurists who clearly saw their role as the *Imāms*, the ‘models’ whose actions and commands or opinions were precedents that might be used as source or justification for the law. If one examines Imām al Shāfi‘ī’s *Kitāb al Umm* or Imām Mālik’s *Muwatta’* it becomes apparent that these books of Islamic law were books of ‘guidance by the “guides”’: the Imams, al Shāfi‘ī and Mālik. Accordingly, they were to be adhered to in the realm of religious faith and, as it happened, their application became limited in the sphere of God-man relationship even when they provided detailed prescription in the area of man-man relationship. In this God-man sphere, the *Sharīah* maintained its supreme application even when in other spheres it was ignored by the political authorities. Furthermore, the God-man relationship always retained its revelational position as the source of unity among the believers. In modern times when *Sharīah* has limited application in the realm of modern financial and social structure, the Islamic *sacred law* has provided a keen sense of unity in the spiritual aspect of the *Sharī* prescription.

In addition, beside the area of criminal law, the nature of legal procedure left little or no scope for the exercise of any discretion by the juridical authority like the *qāḍī* in controlling the proceedings before him. The rules of evidence to verify the truth of claims with utmost certain (*ilm* or *qat’*) was rigidly formalistic as demonstrated in the rule that proof of the offence of fornication could be established only by the testimony of four righteous male eyewitnesses to the actual act of immorality. Such rigidity in other cases could and did result in injustice.⁸

These circumstances led to the removal of certain types of cases of public law from the jurisdiction of the “religious” courts, more so, when it was obvious that the absence of appeal in the Islamic law made it possible for unscrupulous defendants to avoid civil or criminal liability which reason declared to exist. Consequently, these cases were heard in what have designated as “secular” courts which considered circumstantial evidence, heard the testimony of witnesses of dubious character, put them through various procedures to discover guilt. More significantly, the decisions made in these courts were regarded as the direct expression of the supreme judicial and executive powers combined in the *de facto* ruling authority. Such a recognition of the competence of the ruler to formulate principles of substantive law additional and supplementary to the normative Islamic law was afforded by the jurists themselves who laid down the doctrine of assumption of such an authority by a qualified ruler.⁹ It was, after all, the sovereign who could give effect

⁸ Awad, Awad M., “The Rights of Accused under the Islamic Criminal Procedure,” in *The Islamic Criminal Justice System*, p. 91-107.

⁹ Schacht, Joseph, “Law and Justice,” in *The Cambridge History of Islam*, ed. P. M. Holt, A. K. S. Lambton and B. Lewis (Cambridge, 1970), Vol. 2B, p. 539-56.

to the general purposes of Allah (SWT) for the Muslim community. Accordingly, the *de facto* ruler was provided with an overriding personal discretion to determine, according to time and circumstances, how the purposes of Allah (SWT) for the Islamic community might best be effected. The latter factor, that is 'effecting' the purposes of Allah (SWT) was certainly beyond the *Imāms* of the legal schools who could, at the most, urge the rulers to obey the dictates of the normative law. It is probably correct to suggest that the separation between the legal theory based on the Islamic revelation and its interpretation and its execution by the one invested with political power marked the separation between the religious and the political in the Islamic history. Whereas the Muslim jurists retained their monopoly over the religious life of the community, the *de facto* rulers exercised their discretionary power in directing their mundane life.

The assumption that the Muslim society consisted of a group of people who performed the acts prescribed by the *Sharī'ah* such as purification and prayer, alms and religious war, fasting in the month of *Ramaḍān*, engaging in commercial activities, effecting marital relations etc.—that they judged and carried out all such and other daily functions consciously in the sight of Allah (SWT) was never questioned. In fact, that was an inalienable part of the religious faith in Islam, where intention (*nīyah*) was crucial to render all the acts undertaken as part of the religious life. Beyond that structure, variations and options were created or limited by a variety of social, political, economic and personal factors, not easily, perhaps not at all, quantifiable. However, to assume that the process of defining the law was mechanical rather than profoundly creative, would be to underestimate the achievement of the jurists in defining the culture in their juridical corpus.

The jurists directed their attention to the creation of a sense of unity on the basis of the Islamic revelation; but, they also belonged to their regional and cultural localities which produced variations in the interpretation of the Prophetic paradigm preserved in the traditions attributed to the Prophet (ṢAAS) himself. This latter factor can be designated as the contextual aspect of the Islamic juridical literature. Moreover, it is this aspect that has given rise to variations in the judicial decisions of different schools of legal thought. It is for this reason that authentic cultural interpretation of Islamic law is inevitably dependent upon both the contextual as well as textual analysis of the legal corpus that exegetically extrapolates the Islamic revelation to make it relevant to the life and experience of the Islamic *Ummah* in its diverse environment.

In the complex development of the Islamic law in its classical formulation, where the legal system is elevated to the plane of normative and ideal ordainment, denying the linear progression of time, meticulous textual studies become extremely valuable in defining the culture in which these norms found

expression in the religious aspiration of the jurists in the literary corpus. It is, therefore, indispensable to undertake serious textual analysis of the traditional Islamic law, in order to discover the classical cultural categories there first, and then verify their existence in the context of modern Muslim culture. Two important categories in this respect are *unity* and *diversity*, which in the literature, are underscored by the legal doctrine about all law having emanated from One God, the Lawgiver, for humanity, the many and the diverse, respectively. There is a firm belief extrapolated from the Qur'ānic passages that it is only Allah (SWT) who is immutable and immortal; whereas, by Divine creation, humanity is both mutable and mortal. The ultimate confidence that the humanity needs in its source of value and meaning cannot depend on human source. It has to come from the Divine source, the *only* reliable and trustworthy source. But, the *Sharī'ah* as the Divinely ordained system, at least, according to the Muslim belief, exhibits the characteristics of positive law which has led to the unresolvable tension between the Divine demand of uniformity and the human tendency of the diversity in the accomplishment of the goal of creation. This is the mystery – the Divine Mystery – in requiring humanity to believe in One God and creating a disposition in man to seek diverse paths to acknowledge that Reality. The *Sharī'ah* (literally, the 'way' that leads to 'watering place' in the desert) is the system that calls the believers to adhere to the path, the only path of salvation; whereas, there are other forces in the society that cause diversion for the believers on the path. The important point in this journey to the salvation, as the Qur'ān demonstrates, is the unquestioning devotion to the One Creator, the only source of existence on earth. As such, the diversity becomes not so much an obstacle to the attainment of the unity under One God, but a Divine mystery designed to test the commitment of an individual: Will he/she commit him/herself to Allah (SWT) or to a particular perception of the Will of Allah (SWT) through literary expression in the works or jurisprudence? In the long history of human religiosity, it has been observed that humanity has often succumbed to the worship of the self-cultivated images of God rather than to Allah (SWT) alone. As long as the *Sharī'ah* remains the means to fulfill the Will of Allah (SWT), it has the symbolic power of uniting the Muslims in the worship of Allah (SWT); but, as soon as it attains the level of becoming the goal, then it results in the worship of Islam, – a new form of 'associationism' which was to be rejected as the consequence of the worship of the only God, Allah (SWT). Thus, *Sharī'ah* provides the vision of Unity of Allah (SWT) in the diversity of humanity for the creation of an ethically just order on earth.

It is in this context that the *ḥudūd* ('fixed') and *ta'zīrāt* ('discretionary') punishments for criminal offences make sense. Significantly, according to the majority of the *Sunni* legal thinkers, in order to institute these punishments the presence of the ruler has been ruled necessary; because, whereas the

Islamic law explained the purposes of Allah (SWT) in terms of rights and duties of individuals and had established certain inviolable standards of conduct, the all-encompassing and supreme obligation of the ruler was the protection of the public interests (*al maṣāliḥ al āmmah*) which he did by fulfilling the obligation of “commanding the good and interdicting the evil.” Administration of justice, including the penalties for violation of religious and moral code, came under this general obligation.¹⁰ Consequently, *ḥudūd* and *taʿzīrāt* punishments are regarded as prevention of any conduct prejudicial to the good order of the Muslim society. As such, the function of administration of juridical authority was necessarily classified as a constitutional position requiring proper appointment from the political authority, who alone could exercise that authority or delegate it to the official to effect the legitimacy and sanction of the Islamic public order.

Ḥudūd punishments are specifically determined in the revelation, however, *taʿzīrāt* punishments, may be imposed by the ruler in the public interest. The distinction between *ḥadd* and *taʿzīr* these punishments is not one of ‘religious’ versus ‘secular’ form of punishment.¹¹ Even when a violation affecting ‘God’s claim’ occurs, in the Qur’ānic usage it is simply regarded as a prelude to ‘claims of man’, whose welfare is the prime concern of the Divine sanctions. The Muslim jurists have regarded the crimes deserving *ḥaddīd* punishments as the serious religious crimes against the purposes of Allah (SWT) for humanity. As such, by committing these crimes an offender has disrupted the ethical public order. Construed in this sense, then *ḥadd/al taʿzīr* categorization in the Islamic penal code does not indicate the division between religious and secular in Islamic law where such a distinction, at least in the legal doctrine, was inconceivable. In the Islamic doctrine there was no human action that had no reference in the hereafter. As a result, even when a person was engaged in a mundane act his action was religiously accountable. This characteristic of Islamic faith has had enormous implications in the vision for the creation of the ideal Islamic public order. In this ideal order the Muslims never relinquished the interdependence of the religious and moral on the one hand, and the spiritual and temporal on the other. The Islamic movement in the modern times has a goal to reunite these two realms of human existence under the rule of *Sharīʿah* which is believed to have provided the Divine blue print for the ideal rule of justice and equity on earth. Nevertheless, it is clear that *taʿzīrāt* covered all those cases for

¹⁰In *The Just Ruler* I have examined the Islamic juridical corpus dealing with the administration of justice in Chapter IV which is entitled: “The Deputyship of the Jurists” in *wilāyah al qaḍāʾ* (Administration of Juridical Authority).

¹¹Rosen, Lawrence, “Responsibility and Justice in Islamic Law and Culture,” paper presented to the Center for Advanced Studies, University of Virginia, 1987.

which specific punishments were not mentioned in the Qur'ān and the discretionary authority in determining the level of punishment was vested in the *de facto* ruler who could and did delegate this authority to his officials for that purpose.

Conclusion:

The *Sharī'ah* has been regarded as the embodiment of the Divine scale of justice. In order for the Muslims to attain that Divine scale of justice they need to implement these norms of justice in their everyday life. This latter endeavor is the practical implication of 'submission' to the Will of Allah (SWT). Faith and action in Islam could not be conceived separately. Consequently, the *Sharī'ah* became the exoteric expression of the faith, and as such, the only authoritative standard against which any commitment to the faith could be measured. But, as we observed in this paper, the *Sharī'ah* became limited in application as the Muslim society moved further in its historical development. It became universally applicable only in the area of God-man relationship (*al 'ibādāt*); whereas, in the area of social interaction (*al mu'āmalāt*) its role became circumscribed by the laws introduced through the discretionary authority of the ruler. This aspect of the *Sharī'ah*, that regulated interpersonal relationship, became removed from the real life of the community. Ironically, the tension felt by the Muslims in the fulfillment of the *Shar'ī* vision in its entirety was due to the elevating of the historical development of the Islamic law which had produced the juridical corpus in the classical age to the plane of restricted historicity of the religious prescriptions for everyday life. An important point, neglected in the later studies of these early sources, was the fact that Muslim jurists, by exercising their rational faculty to the utmost, had recorded their reactions to the experience of the community whom they were engaged in guiding their particular periods in Islamic history. They created, rather than discovered, Allah's law through continuous reference to the early socio-political interaction of the community. What they created was a literary expression of their aspirations, their consensual interests and their achievements, what they provided for Islamic society was an ideal, a symbol, a conscience, and a principle of order and identity. The *Sharī'ah* thus took the form of a Divinely ordained system which, if and when implemented, could become the valid expression of Divine Justice. However, it was probably the lack of religious and moral commitment on the part of the rulers who came to power through the use of force, rather than through any procedure so far recognized by the community as a legitimate method of assuming discretionary control over its affairs, that arrested the development of the *Sharī'ah* at the interpersonal

level to create a uniform practical system. Furthermore, the works of jurisprudence became victims of the ahistorical casuistry, detaching itself from the concrete situations in the social order. What did represent a real constraint on the exegetical and legislative activities of the jurists to respond to these new exigencies, were those judicial conventions of the classical age based on a common inalienable structure designated so aptly by Muhammad Arkoun as 'logocentricity'.¹²

The assumption that the Muslim society consisted of a group of people who performed the acts prescribed by the *Sharī'ah* such as purification and prayer, alms and religious war, fasting in the month of *Ramaḍān*, engaging in commercial activities, effecting marital relations etc.—that they judged and carried out all such and other daily functions consciously in the sight of Allah (SWT) was never questioned. In fact, that was an inalienable part of the religious faith in Islam, where intention (*nīyah*) was crucial to render all the acts undertaken as part of the religious life. Beyond that structure, variations and options were created or limited by a variety of social, political, economic and personal factors, not easily, perhaps not at all, quantifiable. However, to assume that the process of defining the law was mechanical rather than profoundly creative, would be to underestimate the achievement of the jurists in defining the culture in their juridical corpus.

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¹²Arkoun, M., "Logocentrisme et ve'rite' religieuse dans la pensee' Islamique d'apres al *I'lām bi manāqib al Islām* d'al 'Amiri," in *Studia Islamica*, Vol. 35(1972), p. 5-51.

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