

# An Introduction to Islamic Law\*

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## A. Introduction

This article provides an easily accessible introduction to Islam and Islamic Law for non-Muslims.<sup>1</sup> The need for a correct and open-minded understanding of Islamic Law has become one of substantial importance, especially today. Negative propaganda, about Islamic Law, has exacerbated the disagreements and disputes between the Muslim world and the West, and deepened the disconnect between the two cultures. Unless Islamic Law is correctly understood by both Muslims and non-Muslims, the violence in our world will not come to an end. The article is an attempt to explain the sources of the Law in order to help the reader understand where the real rules are found and which of them are certain and which of them merely probable and, thus, not binding on the Muslim community and not regarded as part of the Law.

This article starts with a brief introduction about Islam as a faith, its historical background and the basic Muslim beliefs. It defines Islamic Sharia and draws a line to distinguish it from Islamic Jurisprudence. This is done in an attempt to

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1 Although there are quite many good books on Islam in English, few have tried to provide such an introduction in just a few pages. Among the better books is K. Armstrong, *Islam – A Short History*, Phoenix Press, London, 2001. For a very short and simplified account, albeit with some minor mistakes, interested readers may also turn to Z. Sardar & Z.A. Malik, *Introducing Islam*, Icon Books, Royston, 2004, as well as C.H. Dodge, *The Everything Understanding Islam Book: A Complete and Easy to Read Guide*, Adams Media, Avon, 2009. Specifically for Islamic Law see *inter alia* P. Bearman, R. Peters & F.E. Vogel (Eds.), *The Islamic School of Law – Evolution, Devolution, and Progress*, Islamic Legal Studies Program, Harvard Law School, Cambridge, 2005; N.J. Coulson, *A History of Islamic Law*, Edinburgh University Press, Edinburgh, 1964; R. Gleave & E. Kermeli (Eds.), *Islamic Law – Theory and Practice*, London, 2001; W.B. Hallaq, *A History of Islamic Legal Theories*, Cambridge University Press, Cambridge, 1997; W.B. Hallaq, *The Origins and Evolution of Islamic Law*, Cambridge University Press, Cambridge, 2005; A. Hasan, *Principles of Islamic Jurisprudence*, International Islamic University, Islamabad, 1993; M.H. Kamali, *Shari'ah Law – An Introduction*, Oneworld Publications, Oxford, 2008; I.A.K. Nyazee, *Islamic Jurisprudence*, The International Institute of Islamic Thought, Islamabad, 2000; H.M. Ramadan, *Understanding Islamic Law – From Classical to Contemporary*, AltaMira Press, Lanham, 2006; and B.G. Weiss, *The Spirit of Islamic Law*, The University of Georgia Press, Athens, 2006.

show how the law is founded and what it consists of. Subsequently, the sources of Islamic Law are clarified, showing their legal basis, binding force and position on the hierarchical chart. Furthermore, the article explains the concept of Individual Reasoning known as 'Ijtihad' and its importance in the development of Islamic Law and enabling it to accommodate the change in our fast-paced world. The article also lightly touches on the subject of 'Fatwa' and its binding force. A brief introduction about the most prominent schools of Islamic thought follows, and, finally, the author addresses the question of whether Islamic Sharia can practically accommodate change to suit the needs of the Muslim community in our modern-day life.

The author genuinely believes that the rules, correctly understood and applied, constitute one of the fairest and most just legal systems ever known in human history but that our comprehension and application of it has proven to be disappointing and flat out in contradiction to the intention of its creator.

With the political turmoil in the Middle East, specifically the Arab dream of democracy, freedom and the rule of law that eventually turned into the nightmare of chaos, violence and religious intolerance, the need to understand Islamic Sharia has become greater than ever before. Opinions and attitudes about Islam have become primarily influenced by misrepresentations and propaganda against Islam and not by actual knowledge of its foundations, history and beliefs. And what better way to dismantle myths and misrepresentations than to comprehend where the Law comes from and which sources are infallible and certain and which sources are merely human attempts that may or may not be correct?

## B. Historic Background<sup>2</sup>

### I. *The Birth of Islam*

The best and most common translation of the word *Islam* is *submission*. It specifically refers to the submission or total surrender to 'the will and guidance of God'.<sup>3</sup> *Islam* is derived from the Arabic root (s-l-m).<sup>4</sup> Other derivations of the word include *salam* (*peace* or *salvation*). A *Muslim* is simply somebody who *submits* to God, that is follows Islam, and the word *Allah* is just the Arabic word for *God*.<sup>5</sup>

Muhammad Ibn Abdulla was born in AD 570 in Mecca. Before becoming Allah's chosen Prophet, Muhammad (P) was a shepherd and later a caravan

2 See, *inter alia*, J. Esposito (Ed.), *The Oxford History of Islam*, Oxford University Press, Oxford, 1999; A. Hourani, *A History of the Arab Peoples*, Harvard University Press, Cambridge, 1991; and A. Rippin, *Muslims – Their Religious Beliefs and Practices, Vol. 1: The Formative Period*, Routledge, Oxfordshire, 2005.

3 S.A. Nigosian, *Islam – Its History, Teaching, and Practices*, Indiana University Press, Bloomington, 2004, p. xv.

4 B. Lewis, *Islam the Religion and the People*, Wharton School Publishing, Upper Saddle River, 2009, pp. 7-8.

5 In the Holy Bible, Jesus has used the same word in Aramaic, 'Alaha', to refer to God or Allah. See M.D. Siljander, *A Deadly Misunderstanding*, Harper One, New York, 2008, pp. 46-53.

trader. He was known for his honesty and good manners among the people of his tribe and came to be known as 'the honest and trustworthy one'.<sup>6</sup>

When he turned 40, Muhammad (P) started getting messages (revelations) from God through an angel called Gabriel. Muhammad (P) knew that his messages would be met with fierce resistance in Mecca. At the time, the political and economic establishment was drawing considerable power and revenue from polytheism, which his message threatened.<sup>7</sup> Thus, Muhammad (P) initially kept the message secret and only told his wife, closest companions and relatives about his revelations.

As more people turned to the new faith, the Meccan leaders started to notice and oppose Muhammad (P) and his message. His followers suffered boycott, physical attacks and torture. After the death of his wife and uncle who had been protecting him, Muhammad (P) became more vulnerable than ever. In A.D. 622, Muhammad (P) fled to Yathrib (Al Medina) for safety. By contrast to his own tribe in Mecca, the people of Medina were delighted to welcome Muhammad (P) and his message and offered to protect him and his followers.

After the momentous move to Medina, called the 'Hejra',<sup>8</sup> Islam rapidly attracted large numbers of followers and various kinds of support because of its doctrine of rule of law, equality, social justice and brotherhood of man. Muhammad (P) became the religious and political leader of his community in Medina, and Islam became more than just a religion. Stronger than ever before, it became a distinct political power that progressively constituted itself as a state and government.

In A.D. 630, the Muslims, led by Muhammad (P), returned to Mecca. Just when the Meccans thought Muhammad (P) would seek revenge for persecuting him and his early followers, he gathered them and said his famous words: "Go, you are free."<sup>9</sup> Thus, he forgave them and established the city of Mecca as the centre of the Islamic State.

Muhammad (P) continued to receive God's revelations over 23 years until he died in A.D. 632.<sup>10</sup> The Islamic Holy Scripture, known as the *Quran*, is the record of these revelations and contains all fundamental rules of Islam. While the Quran is the word of God, it is supplemented by the teachings of the Prophet Muhammad (P), known as the *Sunnah*. Only the Quran and the *Sunnah* are considered Islamic Legislation. Since only the Quran and Muhammad's teachings have the

6 Dodge, 2003, p. 38.

7 M. Kamrava, *The Modern Middle East – A Political History Since the First World War*, The University of California Press, London, 2005, pp. 14-15.

8 The term means *migration*, also spelled 'Hijrah' or 'Hegira'. Among other things, the Hejra marks the beginning of the year 1 of the Islamic calendar. See C. Glassé, *The New Encyclopedia of Islam*, AltaMira Press, Walnut Creek 2001, pp. 180-181.

9 D.W. Odell-Scott, *Democracy and Religion – Free Exercise and Diverse Visions*, Kent State University Press, Kent, 2004, p. 130.

10 For a highly readable account of the events immediately before and after the Prophet's death, see L. Hazleton, *After the Prophet – The Epic Story of the Shia-Sunni Split in Islam*, Random House, New York, 2009. See also B. Rogerson, *The Heirs of Muhammad – Islam's First Century and the Origins of the Sunni-Shia Split*, Overlook Press, London, 2008.

force of legislation, it logically follows that the legislative process was completed by the time of the death of Muhammad (P).<sup>11</sup>

## II. *The Shi'i-Sunni Divide*<sup>12</sup>

After the death of Prophet Muhammad, the Muslims were confronted with the question of succession. Because Prophet Muhammad had not clearly appointed a successor, the Muslim community had to improvise. One opinion was that the successor should be appointed by a tribal election, while another opinion was to restrict the succession to the Prophet's bloodline. While the Sunnis chose Abu Bakr, the Prophet's closest friend and the first to convert to Islam from the Prophet's friends, the Shi'is claimed that the Prophet had, in fact, chosen Ali ibn Abi Taleb to succeed him. Ali ibn Abi Taleb was the Prophet's cousin, son-in-law and the first to convert to Islam among the Prophet's family members. Abu Bakr was elected by the majority of the Muslims, and after him, Caliph Umar ibn al Khattab and Uthman ibn Affan; Uthman was assassinated, and thus Ali finally became the fourth Caliph of the four rightly guided Caliphs, also known as 'Al Khulafa'a al Rashidun'. But Uthman's former Ummayyad governor, Muawiyah ibn Abi Sufyan, together with Aisha, the Prophet's wife, and two of the Prophet's companions, waged a war on Ali, to avenge the death of Uthman and overthrow Ali. This became known as the Battle of the Camel. Ali won the battle but was assassinated shortly thereafter, and from there the feud only grew, and so did the violence.

This background explains a couple of differences in beliefs between the Sunni and Shi'i Muslims, such as the fact that Shi'i Muslims do not accept any of the Prophet's sayings that were transmitted by Aisha or anyone who was considered Ali's enemy. Another distinction from Sunni belief is the belief that Prophet Muhammad's direct descendants were also divinely inspired, and thus their opinions are as important and binding as the opinions of Prophet Muhammad himself because, like him, they were infallible. As will be seen below, this understanding is completely different from the Sunni belief. Today, 10%-13% of Muslims are Shi'is, particularly in Iran and parts of Iraq, as well as Syria, and therefore when explaining Islamic Sharia both beliefs should be displayed.<sup>13</sup>

## C. **Basic Muslim Beliefs**

*There is only one God:* Muslims believe that God is like no one and nothing else; he is greater than all. He created everything and to him all shall return.

11 "Today, I have completed your religion, perfected my blessing upon you, and I have decreed Submission as the religion for you." [Quran 5:3], as translated by Prof. Rashad Khalifa (the Authorized Translation of the Holy Quran). There are several translations of the Quran into English, and throughout this paper I alternate between them, using at each occasion the one that I consider the closest to the original Arabic text.

12 R. Bhala, *Understanding Islamic Law (Shari'a)*, LexisNexis, San Francisco, 2011, pp. 179-226.

13 *Id.*, p. 184.

[2:284] To GOD belongs everything in the heavens and the earth.

*The Message:* Muslims believe in Angels and in the three Holy Books of Judaism (the Talmud), Christianity (the Bible) and Islam (the Quran) as revelations by the one and only God. They believe in all of God's messengers and prophets, including Moses, Abraham and Jesus. [Quran 2:136] "Say, We believe in GOD, and in what was sent down to us, and in what was sent down to Abraham, Ismail, Isaac, Jacob, and the Patriarchs; and in what was given to Moses and Jesus, and all the prophets from their Lord. We make no distinction among any of them. To Him alone we are submitters."

They believe that Muhammad (P), Peace Be upon Him, was God's last Prophet. According to Muslims, Muhammad (P) did not establish a new religion but rather was given a message from the same God of the Jews and Christians to remind the people who have gone astray to return to the path of righteousness.<sup>14</sup>

*The After Life:* Muslims believe in the resurrection and that all humans will be recalled to life after death to be questioned on judgment day. Subsequently, they will spend the afterlife either in Heaven or in Hell, depending on their deeds and misdeeds during their life on Earth.

[2:281] And guard yourselves against the day when you are returned to GOD, and every soul is compensated for what it earned, without the least injustice.

[And] [99: 6,7,8] That Day, the people will depart separated [into categories] to be shown [the result of] their deeds (6) So whoever does an atom's weight of good will see it (7) And whoever does an atom's weight of evil will see it (8).

#### D. Definition of *Sharia* = Islamic Legislation

Literally, the Arabic word *Sharia* can either mean 'the straight way' or 'the water source'.<sup>15</sup> One can deduce from the combination of both meanings that the intended meaning of the word is 'the straight way that leads to salvation'. Therefore, *Sharia* in the jurisprudential sense of the word is to be understood as the way that God has bestowed on humans to live according to, which means that the word *Sharia* is also used for other monotheistic religions like Christianity and Judaism.<sup>16</sup> Indeed, those are referred to as the 'Heavenly Sharias' or in the Arabic transliteration 'Al Shara'i Al Samawiya'. But *Islamic Sharia*, specifically, refers to "the sum of legal rules that God has legislated and sent to the people through Prophet Muhammad (P). *Sharia*, thus is incorporated in the *Quran* (*the Holy book*

14 J.L. Esposito, *What Everyone Needs to Know About Islam*, Oxford University Press, New York, 2002, p. 7.

15 M.K. Imam & R. El Shoroubassy, *The Introduction to Islamic Jurisprudence*, Dar al Matbouat Al Gami'eya, Alexandria, 2010, p. 5.

16 *Id.*

of Islam) and the *Sunnah* (actions and saying of Prophet Muhammad (P)).<sup>17</sup> The legislative process of Islamic Law took place only during the life of Muhammad (P) and ended with his death since only he was allowed to legislate because he was *divinely inspired*, or directly inspired by God. Thus, the sources of Islamic Legislation or *Sharia* are only the Quran and Sunnah. Any scholarly opinions or rules provided by the companions or followers of Muhammad (P) are, therefore, not part of legislation but merely attempts to understand and apply the law.

### E. Definition of *Fiqh* = Islamic Jurisprudence

*Fiqh* literally means *knowledge* or *comprehension*. In the context of Islamic Law, *Fiqh* means knowledge and comprehension of the practical legal rules that enable Muslims to conduct their lives according to the Islamic Law provided by the Quran and the Sunnah. That is to say, this knowledge and comprehension are based on the Quran and the Sunnah but do not constitute binding legal rules in themselves, as will be seen below.<sup>18</sup>

### F. The Scope of *Fiqh* and *Sharia*

*Sharia* is the divine law, and *Fiqh* is the human interpretation and application of it. In addition to interpreting *Sharia*, *Fiqh* also provides more specific substantive legal rules in the following areas:

- issues related to the worship of God known as 'Ibadat' (rules for prayer, fasting, etc.),
- criminal law - 'Uqubat' (details about crimes and punishments),
- civil law - 'Mu'amalat' (rules for sales and purchase transactions, settling of debts, etc.),
- family and personal law (rules about marriage, divorce, child support, etc.),
- Administrative and constitutional law - 'Siyasah Shariyah' (matters involving the state/government and complaints against a ruler or his decisions/rulings) and
- International law (peace and war issues, including rules on international agreements, etc).

Whereas *Sharia* (the Quran and Sunnah) sets the general limits, *Fiqh* provides the details of the general rules stipulated in *Sharia*. It logically follows that any detailed rules provided by *Fiqh* *cannot* be inconsistent with any of the general principles set by the *Sharia*. However, while *Sharia* is static, *Fiqh* is dynamic and evolves with time. Therefore, the function of *Fiqh* is not only to interpret and apply Islamic *Sharia*, but also to cover more issues and situations in life and ena-

17 R. El Shoroubassy, *The Introduction to Islamic Jurisprudence*, Dar Al Gami'a Al Gadida, Alexandria, 2003, p. 5.

18 Imam & El Shoroubassy, 2010, p. 6.

ble the Sharia to accommodate change, stay up-to-date and stay comprehensible in different times and places.

### G. Sources of Islamic Jurisprudence 'Fiqh'

There are many sources for scholars and jurists seeking to develop and interpret the rules of Islamic Law. Although it is not uncommon to refer to Fiqh as *part of Sharia*, after having seen the difference between Fiqh and Sharia, we know that this is not accurate.

The Rules of Islamic Sharia divide human actions and behaviour into the following categories:

- 1 Obligatory (Fard)
- 2 Recommended (Mostahab)
- 3 Permissible (Mobah)
- 4 Reprehensible (Makrouh)
- 5 Prohibited (Moharam)

One can say that Fiqh (jurisprudence) was created in order to classify the actions and behaviours that were not expressly mentioned in the Quran or Sunnah and to find solutions for problems that had not arisen at the time of the Prophet and thus had no explicit solution in Sharia.

#### I. *Fiqh (Practical Jurisprudence) versus Usul al Fiqh (Theoretical Jurisprudence)*<sup>19</sup>

A distinction must be made between the two terms for a clear understanding of the sources. While Fiqh aims at finding the practical rules of Sharia, Usul al Fiqh aims at finding the tools and methodology to deduce such rules. The word Usul literally means foundations or origins; thus Usul al Fiqh means the origins of the practical jurisprudence, or where it comes from. We can also say that the actual rules of Fiqh are the result of following the methodology set in the study of Usul al Fiqh. A scholar applies the methods of Usul al Fiqh in order to correctly deduce a practical rule from the original source – the Quran or the Sunnah.

Moving on to the sources of Islamic Jurisprudence, the scholars largely agree that the Quran, Sunnah, Ijma (consensus of scholars) and Qiyas (analogy) are all sources of Islamic Jurisprudence. They divide the sources into divine and human sources as well as primary and secondary ones. The Quran and Sunnah are always at the top of the hierarchy. Let us first discuss the agreed-upon sources:

#### II. *Primary Sources (Divine Sources)*

##### 1. Quran

The Arabic word Quran is derived from the Arabic root [q-r-a], which means to read. In fact the first word in the first revelation to be given to Prophet Muhammad from God was 'Iqra' or 'Read!' The Jurists, however, define the Quran

19 Weiss, 2006, Preface.

as “The words of God that have been sent down on Muhammad (P) through Angel Gabriel and passed on to the later generations through the earlier ones.”<sup>20</sup>

It must be emphasised that for Muslims not only does the Quran contain the message that God sent to Muhammad (P), but the words used in the Quran are the actual words of God.<sup>21</sup> The message alone is not considered Quran, hence any translations of the original text cannot be the Quran but only interpretations of the words of God.<sup>22</sup>

Because the Quran is the actual word of God, it is regarded as the main and ultimate source of Islamic Sharia, *the constitution* that governs the Muslim *Ummah* (community).<sup>23</sup> As any constitution, the Quran mainly sets the general framework of Islamic Law. It states the general principles that govern Muslims around the world and, with few exceptions, does not go into detail. More detailed rules must be derived from sources other than the Quran but have to be in line with its general principles, otherwise they are wrong, invalid and inapplicable. Conversely, the Quran cannot be overruled by any other source because all other sources obtain their legitimacy from the Quran.

When reading the Quran, one cannot help noticing the many verses in which God encourages Muslims to frequently read the Quran and seek to understand and memorise its verses. In fact, that is what the word Quran means: ‘one that is read frequently.’ Perhaps these verses intend to keep Muslims aware of the general principles of their faith so that those who know the Quran well will immediately realise that a man-made rule is wrong if it contradicts a Quranic general principle.

The Quran contains 114 chapters (Surahs), and each Surah contains a number of verses (Ayahs). These Surahs and Ayahs were revealed to Muhammad (P) neither all at once nor in the order we find today. They were revealed over 23 years, often responding to events at the time, and directing the lives and actions of the Prophet and his companions.<sup>24</sup> When trying to understand a particular verse it is therefore very important to know the circumstances and reasons for its revelation to the Prophet at the time.<sup>25</sup>

*The collection and revision of the Quran.* Whenever the Angel Gabriel came with a new chapter of the Quran, Muhammad (P) would gather those whom he called the *inspiration writers*. He then recited the chapter(s) to them, and they wrote it down. During the last year of Muhammad’s life, the Angel Gabriel repeated the entire Quran twice to make sure that Muhammad (P) had correctly understood and dictated the entire text.<sup>26</sup> After his death, his companions decided to collect

20 El Shoroumbassy, 2003, p. 165. See also N.P. Aghnides, *Mohammedan Theories of Finance*, Biblio-Bazar, New York, 2009, p. 30.

21 A.S. Roald, *Women in Islam – The Western Experience*, Routledge, London, 2001.

22 Imam & El Shoroumbassy, 2010, p. 167.

23 M. Khadduri & H.J. Liebesny, *Law in the Middle East*, Law Book Exchange, New Jersey, 2008, p. 3.

24 See, e.g., Glassé, 2001, p. 264.

25 A. Khan, *Islam, Muslims and America – Understanding the Basis of their Conflict*, Algora Publishing, New York, 2003, p. 180.

26 El Shoroumbassy, 2003, p. 169.



the chapters of the Quran that were written by the inspiration writers on “pieces of papyrus, flat stones, palm leaves, shoulder blades and ribs of animals, pieces of leather, wooden boards, and the hearts of men”<sup>27</sup> into one book.<sup>28</sup>

*Quran as a source of Islamic Sharia.* The Quran is the first, main and most important source of Islamic Sharia. Thus, no resort should be made to Sunnah or any of the other sources if there is a rule set out clearly in the Quran.<sup>29</sup>

Muslims believe that everything that was left out of the Quran was left out deliberately to provide Sharia with a certain degree of flexibility. This is where Sunnah comes into play, the second most important source of Islamic Sharia: to complete and interpret some of the rules of the Quran and cover some additional issues.

## 2. Sunnah

The second source of Islamic Sharia is the Sunnah. Sunnah is the record of Prophet Muhammad’s actions and sayings.<sup>30</sup>

There are three types of Sunnah: (a) the Prophet’s sayings, that is his own words, known as *Hadiths*; (b) the Prophet’s actions and (c) his tacit or implied consent to things going on in his presence without his objection. In the case of tacit or implied consent, his silence creates an assumption that the act is allowed.<sup>31</sup>

Examples of popular Prophet’s sayings or *Hadiths* are “Do no harm and [if harmed] do not harm back” and “God has no mercy on the ones who have no mercy on others.”<sup>32</sup> According to the Muslim belief, Hadiths are God’s meanings but Muhammad’s words.

*Is Sunnah binding?* Sunnah is the second of the two divine sources. It is binding because in the Quran God says that Muhammad (P) is His messenger and inspired by Him and therefore Muslims should follow what Muhammad (P) said.

[59:7] And whatever the Messenger has given you – take; and what he has forbidden – refrain from.

[4:59] Oh you who believe, you shall obey GOD, and you shall obey the messenger [...] <sup>33</sup>

As seen from this verse, the Sunnah acquires its legitimacy as a binding source of Islamic Law directly from the Quran. Consequently, the Quran and the Sunnah

27 Glassé, 2001, p. 267.

28 For more details on the process of collection of the Quran, see Roald, 2001.

29 Khan, 2003. In its 14th Chapter, the book provides a brief but satisfying introduction to the Quran and Sunnah and the relation between them.

30 M. Izzi Dien, *Islamic Law – From Historical Foundations to Contemporary Practice*, Edinburgh University Press, Edinburgh, 2004, p. 38.

31 Ramadan, 2006, p. 12.

32 Khan, 2003, p. 183.

33 The Quran provides many times that those who obey the Prophet are obedient to God (I am only mentioning examples).

cannot be regarded as two equal sources. The Quran is at the top of the hierarchical pyramid, and all the other sources, including Sunnah, come beneath.

Because the Sunnah was not codified like the Quran and is still the second most important binding source after the Quran and comprises an enormous part of the law, Muslim scholars had to make sure that every part of the Sunnah that was passed on to them was genuine and not fabricated. The most problematic part was the verification of the Hadiths. Before his death, Muhammad (P) had asked the Muslims not to write down his Hadiths. Consequently, the Hadiths were not compiled or recorded for almost 200 years after his death. By the time the Muslims decided to document the Hadiths,<sup>34</sup> many fake Hadiths had already crept into the faith. Therefore, Muslim scholars had to find a technique to distinguish fake Hadiths from genuine ones.<sup>35</sup>

In some cases it was easy to see that a Hadith was fabricated. In other cases it was a challenge to tell. Hadiths that were excluded from the canon include some passed on by someone who was known to be a liar and others that simply did not make any sense. Also, an alleged Hadith that promised a large reward for a simple action or that required serious and even corporal punishment for a small mistake was identified as a not genuine saying by the Prophet. For example someone claimed that Muhammad (P) had said that anyone who says, 'God is the Almighty' 99 times a day will be regarded as if he has never sinned. Another sign of fabrication is if an alleged Hadith sets out rules that contradict the express or implicit rules of the Quran. An example is an alleged Hadith by the Prophet that "an illegitimate son is destined to go to hell." Such a sentence would be inconsistent with the Quranic verse: "Every soul is judged *based on everything it had done, without the least injustice.*"<sup>36</sup> Contradicting a main principle expressly stated in the Quran, the Hadith must be declared fake.<sup>37</sup>

It is worth mentioning here that not every act of Muhammad (P) is considered a binding source of Islamic Sharia. Muhammad (P) lived three different lives. He was a messenger of God, a political ruler and a normal human being. Only those sayings and actions related to his being a messenger of God are binding on all Muslims. Similarly, his acts and sayings as a political ruler are binding on political rulers.<sup>38</sup>

So if Muhammad (P) acted out of being a normal human, such as enjoying certain foods or dressing in a certain style, these acts are not part of the binding Sunnah we are talking about here. Taking Muhammad (P) as a role model and imitating him out of love and respect is one thing, but turning his *human* actions into a binding source of law is inappropriate.<sup>39</sup>

34 Information on the different collections of Hadiths can be found in Glassé, 2001, p. 159. An important feature of the collections is the chain of reference, *i.e.* for each Hadith, the information on who was told by whom and who first heard it from the Prophet.

35 For more details on the subject see S.M. Deen, *Science Under Islam: Rise, Decline and Revival*, 2007, pp. 54-58. ; and G. Marranci, *Jihad Beyond Islam*, Berg Publishers, Oxford, 2006, pp. 20-22.

36 Quran [2:281], emphasis added.

37 Imam & El Shoroumbassy, 2010, p. 178.

38 El Shoroumbassy, 2003, p.196.

39 Izzi Dien, 2004.

Different parts of the Sunnah fall into three categories, depending on how they have been related to subsequent generations<sup>40</sup>:

- 1 Sunnah Mutawatara (passed on or *confirmed* repeatedly by many): This type of Sunnah was passed on by a large group of generally honest and trustworthy companions and contemporaries of the Prophet to the next generation of honest and trustworthy followers, who then passed it on to their honest and trustworthy successors and so on. To be Sunnah Mutawatara, the sayings of and stories about the Prophet cannot be passed on by just anybody, lest they become Sunna Mash'houra (popular). Only those parts of the Sunnah that were independently confirmed by many trustworthy followers become Sunnah Mutawatara. An example of Sunnah Mutawatara is when Muhammad (P) said: "Do not write after me anything except the Quran and those of you who have written after me other than the Quran, erase it, but tell what I have told, with no limits."<sup>41</sup> Many trustworthy followers have confirmed that he said this in pretty much these same words.
- 2 Sunnah Mash'houra (popular): Sunnah Mash'houra was passed on by a limited group of companions and contemporaries not big enough to be regarded as a Sunnah Mutawatara. However, it became widely recognised and popular during the next generations.
- 3 Sunnah Ahadeya (solitary Hadith): The Sunnah Ahadeya, also known as Khabar al Ahad, was passed on to us by an individual or a smaller group of narrators who were not specifically known for their honesty or who did not possess sufficient knowledge and understanding of the subtlety of the language and the religion to guarantee that they could not have misunderstood or passed on the Sunnah in the wrong way.

Different types of Sunna have different levels of binding force. The rule is that if a part of the Sunnah is certain, then it is binding. Sunnah Mutawatara is certain, and therefore it is binding, because Muhammad (P) is inspired by God.<sup>42</sup> Sunnah Mash'hura is *almost* certain. Therefore, it is binding only if it is in line with the Quran and does not contradict any of its principles.<sup>43</sup> Sunnah Ahadeya is even less certain and therefore cannot possibly be binding unless backed up by other evidence.<sup>44</sup>

Unfortunately, most of the Sunnah that was passed on to us belongs to the category of Khabar al Ahad, whereas Sunnah Mutawatara is very limited in

40 Aghnides, 2009, p. 39.

41 A. Ibn Hanbal, *Al Musnad*, Mu'assassatu'l Risala,, Vol. III, p. 12, available at <www.shiaonlinelibrary.com>. Hadith was also cited in El Shoroumbassy, 2003, p. 182.

42 Quran [53:2] "Your friend (Muhammad) was not astray, nor was he deceived. [53:3] Nor was he speaking out of a personal desire. [53:4] It was divine inspiration. [53:5] Dictated by the Most Powerful."

43 El Shoroumbassy, 2003, p. 183.

44 A. Saeed, *Interpreting the Quran, Towards a Contemporary Approach*, Routledge, New York, 2006, p. 78.

scope.<sup>45</sup> Additionally, the number of false/fabricated Hadiths that reached us greatly exceeds the number of genuine ones.<sup>46</sup>

*The role of Sunnah.* The Sunnah can either explain a certain rule or add details to an established rule that is stated in the Quran only briefly or vaguely (Sunnah Shareha). For example, in the Quran God says that Muslims should pray and give the obligatory charity:

[2:277] Those who believe and lead a righteous life, and observe the Contact Prayers (Salat), and give the obligatory charity (Zakat), they receive their recompense from their Lord; they will have nothing to fear, nor will they grieve.

But the verse does not state *how* Muslims should pray or pay the zakat (obligatory charity). The Quran does not state the *details of ablution* (ritual washings) either. The Sunnah, however, adds such practical details.<sup>47</sup>

The Sunnah can also emphasise a rule that was expressly laid down by the Quran (Sunnah Mo'akeda). Take for example the Hadith: "You are not allowed to take possession of another's property except with their mutual consent."<sup>48</sup> This Hadith emphasizes the following verse in the Quran:

[4:29] Oh you who believe, do not consume each other's' properties illicitly – only mutually acceptable transactions are permitted.

What the Sunnah cannot do, however, is to establish new legislative rules separately from the Quran. Although some scholars argue that this is possible, the majority of scholars disagree with this opinion because of the verse in the Quran that says that every rule that God wanted in the book has been added and that everything that was left out was left out deliberately.

[6:38] We did not leave anything out of this book.

Therefore, the Sunnah that establishes new rules not previously mentioned or referred to in the Quran can guide Muslims only if it does not frustrate any of the principles laid down by the Quran.

*Can the Sunnah be overruled by the Quran?* Yes, the Sunnah, being the second source of Islamic Sharia, can very well be overruled by the first source, the Quran. Muhammad (P) was human, and apart from his prophetic utterances made mistakes. Therefore, when Muhammad (P) said or did something that God wanted differently he sent down the correct rule embodied in a Quranic verse.<sup>49</sup> Maybe

45 El Shoroumbassy, 2003, pp.182-184.

46 B.W. Hallaq, *An Introduction to Islamic Law*, Cambridge University Press, New York, 2009, p. 17.

47 V.J. Cornell, *Voices of Islam*, Praeger Publishers, Westport, 2007, p. 127.

48 G.A.D. Al Soyouty & Y. Al Nabahany, *Al Fat'hul Kabir*, Vol. III, p. 253.

49 Izzi Dien, 2004.

this was deliberate to emphasise to the people that Muhammad (P) was human, not divine *per se*. The Shafi' school of thought disagrees with that opinion and does not allow overruling of the Sunnah by the Quran.<sup>50</sup>

*Can the Quran be overruled by the Sunnah?* No, the majority of Muslim scholars agree that a Quranic verse cannot be overruled by the Sunnah, a source that is lower on the hierarchy chart.<sup>51</sup> The proof for this opinion of the majority of scholars is the Quranic Verse that stipulates that:

[2:106] When we abrogate a verse or cause it to be forgotten, We produce another [one] better than it or equal to it. Do you not know that Allah is over all things competent?

The Sunnah is not equal to, let alone better than the Quran. Therefore, the Quran cannot be overruled by the Sunnah.<sup>52</sup>

### III. *Secondary Sources (Human Sources)*

The following sources are human and not divine sources of law, although they are based on the two divine sources, the Quran and the Sunnah. These sources are also referred to as the 'agreed-upon sources' since the majority of the scholars accept them as sources of Islamic Law.

#### 1. *Ijma'* (Consensus of Scholars)

*Ijma'* is generally recognised as the third source of Islamic Sharia and the first of the human sources. It is third on the hierarchical pyramid, after the Quran and the Sunnah. Therefore, a scholar cannot possibly turn to *Ijma'* if the issue in question was previously resolved by the Quran or the Sunnah.

Professor Kamali defined *ijma'* as: "the unanimous agreement of the mujtahidun<sup>53</sup> of the Muslim community of any period following the demise of the prophet Muhammad on any matter."<sup>54</sup> It is based on the Hadith by the Prophet that the Ummah (community) of Muhammad cannot be in agreement in error. *Ijma'* never happened during the life of Muhammad (P) because during his life he was the only one to be asked for answers and interpretations, and his authority was supreme. After his death, however, new incidents occurred, and many new questions arose and needed answers, and this was how *Ijma'* came into existence.

*Types of Ijma.* *Ijma'* can either be express or implicit. If all scholars expressly announce their support for a certain answer or interpretation, there would be an express *Ijma'*. More likely, however, there will be explicit support only by a major-

50 Imam & El Shoroubassy, 2010, p. 192.

51 *Id.*, p. 194.

52 For more on this subject, see Saeed, 2006, where the author discusses this issue in more detail.

53 Mujtahidun (pl.) or Mujtahid (sing.) refers to a knowledgeable legal scholar competent to deduce the rules of Islamic Law from the original sources.

54 M.H. Kamali, *Principles of Islamic Jurisprudence*, 3rd edn, Islamic Text Society, Cambridge, 2003, p. 230.

ity of well-respected scholars, with tacit acceptance or at least the absence of significant dissent by everyone else. This would be an implicit Ijma. The silence in the latter case should be deliberate, triggered by the approval of the other scholars. It logically follows that if the reason for silence by the other scholars was the mere fact that they had not heard of the opinion, were not ready with an answer or were forced to agree – for a political reason perhaps – then there was no Ijma.<sup>55</sup>

*Is Ijma binding?* If all the well-respected scholars of a certain age, who are known for their profound knowledge of the Quran and Sunnah, unanimously agree on a certain rule, definition or solution, they cannot all be wrong. Therefore, such an Ijma is considered binding. When accepting Ijma as a binding source, however, we refer primarily to express Ijma and rarely to implicit Ijma. That is because sources become binding only when they are certain, and in the case of implicit Ijma it is usually not certain that Ijma actually occurred because the reason for the silence of those scholars that did not expressly agree remains unknown.<sup>56</sup>

The binding force of Ijma is based on the verse in the Quran that says: “And before thee also the messengers We sent were but men, to whom We granted inspiration: if ye realise this not, ask of those who possess the Message.” [16:43]<sup>57</sup> and the Hadith that says: “My Ummah (community) shall never agree on an error.”<sup>58</sup> As long as such an Ijma is in line with the divine sources, there is no reason to doubt it, especially because those who agreed were the most knowledgeable scholars, and they were in consensus.

Although Ijma was indispensable for the development of generally accepted interpretations of the two divine sources after the death of the Prophet, nowadays Ijma can create a barrier against the development of Islamic Law. If the past agreement of scholars can no longer be subject to change because of the impossibility of agreement today, this may render parts of the Sharia overly rigid and ultimately irrelevant in today’s world. That is why the door for discussion should always stay open, especially as we have seen time and again that scholars changed their opinions after they unanimously agreed. In effect, although a rule may have been agreed upon by consensus in a different time and age, and was therefore binding in that time, if there is no longer a consensus supporting the rule today, it should no longer be considered binding.

55 Imam & El Shoroubassy, 2010, pp. 209-210.

56 If Ijma actually happened it would be binding, but practically speaking, today, it is almost impossible to know the opinion of all well-respected scholars of a given age even if they all were to agree. It is true, some scholars argue, that the consensus reached within one Islamic country is sufficient, but from a legal point of view, Ijma then loses its legal basis, because the Hadith of Prophet Muhammad, which bestows such legal basis on Ijma, states that the *Ummah as a whole* will not agree in error. More details on the subject are available at Aghnides, 2009, p. 61. See also Glassé, 2001, p. 208. The latter accepts Ijma even in the face of a measure of dissent, as long as there is support by ‘a greater or lesser majority’ of the relevant scholars. This is not strictly in line with the language of the Quran.

57 Translation by A.Y. Ali, *The Holy Quran, Text and Translation*, Islamic Book Trust, Kuala Lumpur, 2007, p. 314.

58 A. Ibn Hanbal, *Al Musnad*, Vol. VI, p. 145. Available at <<http://IslamHouse.com/140685>>, last visited May 13th, 2014.

## 2. Qiyas (Reasoning by Analogy)

Qiyas is the fourth of the agreed-upon sources and the second of the human sources. Literally translated, Qiyas means *measurement*.<sup>59</sup> In our context, it refers to the method of obtaining new rules by way of analogy.<sup>60</sup>

Since the death of Muhammad (P), Muslim scholars have been constantly confronted with new questions and cases. The Quran contains mainly general principles, and the Sunnah primarily provides answers to those questions that came up during Muhammad's life. Therefore, there was a need for formulating a technique to guide the scholars to the rule that God had intended for new kinds of questions and cases. This technique is Qiyas, and when Muslim scholars are faced with a new question that has not been answered by the Quran, Sunnah or Ijma, they turn to Qiyas (analogy).

Qiyas does not contain substantive rules; it is merely a process of reasoning by which the scholar finds a rule for a case by applying the rule of another case that is similar to it, shares the same rationale and is provided in one of the first three sources.<sup>61</sup> Qiyas is very similar to the idea of *Legal Precedents* known in the Anglo-Saxon legal systems. For example, the only alcoholic drink prohibited in the Quran is *Al Khamr*, which refers to wine made of grapes. Even during the lifetime of the Prophet, the Arabs had other alcoholic drinks made of dates. The Quran neither prohibits nor permits those other alcoholic drinks. To know whether or not other alcoholic drinks are prohibited, scholars applied Qiyas. The most important element in Qiyas is the rationale of the rule of the original case, namely why was wine prohibited? Is it because it was made of grapes or because it can lead to intoxication? In the Quran the rationale is the intoxication, and therefore any alcoholic drink that leads to intoxication must be equally prohibited. And, of course, nowadays the rule covers not only the alcoholic beverages known during the lifetime of the Prophet but all kinds of alcoholic drinks, as long as they can lead to intoxication.<sup>62</sup>

The example illustrates the components of Qiyas, namely the original precedent (*asl*), the new resembling incident (*far'*) and the effective cause or rationale of the rule in the first incident (*illa*).

*Is Qiyas binding?* The majority of scholars agree that Qiyas is a binding source of Islamic Sharia. One of the verses of the Quran that back up the scholars' opinion is 59:2]: "You should learn from this [lesson], Oh you who possess vision." This verse emphasises that adherents should think about why certain matters are the way they are and act accordingly.

Also, there is a Hadith that Muhammad (P) was sending Mouaz ibn Jabal to be a judge in one of the cities. Before he sent him, he asked, "On what basis will you establish your judgments?" He said, "the Quran." So Muhammad (P) said, "and if you do not find a rule there?" To this the judge said, "I base my judgments

59 Izzi Dien, 2004.

60 Aghnides, 2009, p. 67.

61 For a comprehensive explanation of Qiyas, see K.S. Vikør, *Between God and the Sultan: A History of Islamic Law*, Oxford University Press, New York, 2005, pp. 54-72.

62 *Id.*, pp. 55-57.

on your Sunnah.” Muhammad (P) then said, “and if you don’t find a rule there either?” So finally the judge said, “ajtahid” (I will think and strive to get to the right answer). At this point, Muhammad (P) said, “Thank you God for enabling your servant to do what pleases you.”<sup>63</sup>

When applying Qiyas, scholars must make sure that the rule given for the original incident was not established specifically and exclusively for that incident. Similarly, some rules were tailored especially for Muhammad (P), and cannot by analogy be applied to other people. For example, the rule that Muhammad’s wives cannot remarry after his death is a rule that was specifically made for the wives of Muhammad (P) and is not applicable otherwise. Scholars must also make sure that both incidents share the same *effective cause* or *rationale* known as the *illa*. Last but not most importantly, applying Qiyas to a given incident must not lead to the application of a rule that is inconsistent with the Quran or Sunnah.

#### IV. *Disputed Sources*

##### 1. Al Masaleh al Mursala (Considerations of Public Interest)

Literally, Masaleh means *interests* or *benefits* and Mursala means *free of restrictions*. Al Imam Al Ghazali, a very well-respected Islamic scholar, established the doctrine of Masaleh Mursala in an attempt to find solutions to the social, economic, as well as the political problems that arose as the Islamic state grew and developed. Masaleh Mursala refers to all the actions that have neither been permitted nor prohibited by one or more of the agreed-upon sources. To decide whether these actions are allowed according to Islamic Shari’a, some Islamic scholars consider whether it brings benefit to the society. In other words, if a certain idea brings benefits and promotes welfare, it is permitted, whereas if it brings harm, it is prohibited.<sup>64</sup>

The problem with Masaleh Mursala is that benefit, social welfare and public interest are all soft terms. In many ways they are relative and not absolute values. So what constitutes public interest, and what does not? Can a benefit to many outweigh harm to some? To overcome this problem, Imam Ghazaly<sup>65</sup> established what are today known as *The Five Essentials/Necessities* (Al Daruriat Al Khams). These became the objective criteria for scholars to determine whether an idea or solution does or does not promote the public interest. According to Imam Ghazali, Masaleh (benefits) are only those that aim to protect one of the following five essentials<sup>66</sup>:

- 1 Protecting lives
- 2 Protecting lineage
- 3 Protecting religion

63 Sunan Abu Dawoud, Hadith, 3585.

64 S.M. Ghazanfar, *Medieval Islamic Economic Thought: Filling the “Great Gap” in European Economics*, RoutledgeCurzon, London, 2003, pp. 23-44.

65 For background information on this important Muslim scholar, see, *inter alia*, J. Naify, in R.H. Popkin (Ed.), *The Pimlico History of Western Philosophy*, Pimlico, New York, 1999, pp. 163 *et seq.*

66 For details, see Kamali, 2003, pp. 351 *et seq.*



- 4 Protecting intellect
- 5 Protecting property

The Masaleh Mursala concept is one of the most essential vehicles for the development of Islamic Law. It helps greatly with the resolution of new questions – if a certain question arises and does not have an answer, either in the Quran, or in the Sunnah, Ijma or Qiyas. If, however, the action in question is bound to bring harm to some and benefits to others it can only be allowed if the benefits it brings supersede the harms so that it benefits the majority of the people. Furthermore, the rule deduced by the method of Masaleh Mursala must be reasonable, logical and in line with the Quran, Sunnah and the overall spirit of the Sharia.

Masaleh Mursala was indispensable for the Islamic community to decide whether concepts such as foreign investment, and political or economic boycott were consistent with Islamic Shari'a. Because Masaleh Mursala aims at accommodating the change of times and societies, rules deduced by way of Masaleh Mursala can change the moment the social interests change.

*Is Masaleh binding?* Masaleh is a disputed source of Islamic Sharia, but the majority of scholars have accepted it and relied on it. To prove the validity of al Masaleh as a tool to answer the questions of the Islamic community, the proponents of al Masaleh argued that it was used by the companions of Prophet Muhammad on various occasions such as the decision to collect the Quran under the reign of Abu Bakr, the first successor of Muhammad (P) when they feared that the Quran would be lost with the death of the men who knew it by heart. The Public interest was to save the Quran from being lost or forgotten, which qualifies as part of the 'protection of the religion'.

However, if Masaleh Mursala rules are based upon public interest, this means that if the public interest changes, the rules must change accordingly and therefore the scholars of a subsequent age are not bound by the opinions of their ancestors in this regard.<sup>67</sup>

## 2. Istihsan (Juristic Preference)

Istihsan literally means *to prefer the better option*. It is another technique by which scholars deduce new rules to face new situations that were not covered by the Quran, Sunnah or Ijma.

Istihsan seeks fairness and equity. To use Istihsan is to "ignore the rule derived from Qiyas."<sup>68</sup> In other words, Istihsan leads to the solution that achieves greater equity even though it may contradict a Qiyas-derived rule. This conflict between Qiyas and Istihsan is accepted as long as the decision is made for strong reasons that are otherwise fully in line with the divine and agreed-upon sources of Sharia.

67 For more details on the development of the concept of Masaleh Mursala, see A. Amanat & F. Grif-fel, *Shari'a – Islamic Law in the Contemporary Context*, Stanford University Press, Stanford, 2007, pp. 62-82.

68 Vikør, 2005, p. 65.

An example of Istihsan would be the case of allowing the Salam and Istisna'a contracts. These contracts entail the sale of goods that are non-existent at the time of conducting the agreement, which is otherwise prohibited in Islamic Law. Salam refers to sales of agricultural products before their plantation, while Istisna'a relates to the manufacturing of goods on demand, where the buyer pre-pays the price and the goods are delivered at a later time. In both cases, the subject of the contract has not yet come into existence at the time of conducting the contract, which would normally entail too much uncertainty, also known as 'Gharar', and that was prohibited by the Sunnah of Prophet Muhammad (P). The Qiyas-derived rule, thus, would entail the prohibition of such contracts, but Istihsan would allow them because of a stronger reason – the principles of 'eliminating hardship' and 'necessity'.<sup>69</sup> That is because in most of these cases if the buyer does not prepay, the products will not come into existence because the seller does not possess the necessary funds to plant the land or manufacture the goods without the prepayment of the seller.

As a concept, Istihsan is very similar to the Western concept of equity. Both ideas are based on fairness, and both allow disregard of a rule if that rule would lead to an overall unfair result. The Western concept of equity has been called a *reasoned distinction of precedent* in Anglo-Saxon legal systems. Hence, Istihsan could be referred to as the "reasoned distinction of Qiyas."<sup>70</sup> The main difference between Western equity and Istihsan is that the latter still remains subject to the divine sources and general principles of Sharia.<sup>71</sup>

*Is Istihsan binding?* Scholars have disagreed on whether Istihsan is a valid source, and thus a rule derived by Istihsan is not binding on other scholars. Some schools of thought absolutely refuse this method, such as Imam al Shafi, the founder of one of the most prominent schools of Sunni legal thought, who is reported to have said that: "he who applied Istihsan, has given himself the right to legislate."<sup>72</sup> Other schools of thought not only approved of it, but actually praised it and used it regularly for deducing fairer rules, such as the Hanafi school of thought.

### 3. Al Urf (Custom or Normative Custom)

When translated into English, Urf means *that which is known* and has been defined as the "recurring practices which are acceptable to people of sound nature" (Ibn Nujaym Ashbah).<sup>73</sup> Before Islam, traditions and customs largely governed the conduct of the Arabs. The traditions and customs that prevailed at the

69 Imam, & El Shoroumbassy, 2010, p. 233. Also see Hallaq, 2009, p. 26.

70 J. Makdisi, 'Legal Logic and Equity in Islamic Law', *The American Journal of Comparative Law*, Vol. 33, No. 1, 1985, pp. 63-92.

71 See Kamali, 2003, pp. 323 *et seq.*

72 Although the actual quote could not be traced in his books, *al Rissala* or *Al Umm*, as is commonly quoted by other scholars, the quote is very popular, and in any case he has indeed written a book called *Ibtal al Istihsan*, which literally means 'the voiding of Istihsan', which was part 7 of his book *al Umm*.

73 Kamali, 2003, p. 369.

time of Muhammad (P), to the extent they were overruled neither by the Quran nor by Muhammad (P) himself, became part of the sources of Islamic Sharia. The authority of Urf as a source of law derives not from the pre-Islamic traditions of the Arabs but from the Sunnah, namely the implicit acceptance of certain prevailing customs and traditions by Muhammad (P).

*Is Urf (Custom) binding?* There is a consensus between scholars that Urf is binding if it does not contradict any of the higher sources of Islamic Sharia. At the time of Muhammad (P), a lot of the pre-existing customs were declared invalid, and that is why scholars believe that customs that the Quran and the Sunnah did not try to change were deliberately allowed. For example, one of the customs that were overruled by the Islamic Sharia was the treatment of women in inheritance matters. Before Islam, women in the Arab world – and most of the rest of the world – were deprived of inheritance rights. However, this custom was overruled by the Quranic verses that provide clear rules for the inheritance rights of men and women alike.

For a custom to be binding, it must be in line with the Sharia and its principles and purposes. It should be common and generally observed without exceptions. Additionally, an agreement concluded before the creation of a certain custom prevails over it.<sup>74</sup>

#### 4. Sadd Al Tharaea (Avoiding Evil or Blocking Evil)

Sadd al Tharaea, or what is commonly referred to as Sadd al-Dhara'i, literally means *blocking the way that leads to evil*. In other words, it refers to the concept of prohibiting an act that is not prohibited *per se* in the Quran or Sunnah in the belief that it may lead to another act that is prohibited by either source or both, when a lawful means is used for an unlawful end. An example would be the following: Drinking wine is prohibited for Muslims, and so is selling wine. Selling grapes, however, is not prohibited. Sadd al Tharaea, however, requires the seller of the grapes to decline the transaction if he suspects that the buyer is purchasing the grapes in order to make wine from them.<sup>75</sup>

The problem with Sadd al Tharaea is that it may be used to prohibit things that God did not intend to prohibit. It narrows the scope of freedom that God has granted to the believers. In the case of selling grapes, the problem is not dramatic, but other rules that have been derived through Sadd al Tharaea have led to the stagnation of Islamic Law and its appearance as a backward and outdated law. An example would be the prohibition of adultery (*zina*). The Quran is clear about that prohibition. However, Sadd al Tharaea then extends the prohibition to any meeting of one man with one woman who are not husband and wife in any kind of private place on the ground that such a meeting could lead to *zina*. This may extend to meetings at the workplace and in any social setting and complicates interaction of men and women in some Muslim countries. In such cases, where the prohibition becomes overarching, it would be frustrating to see Sadd al

<sup>74</sup> El Shoroumbassy, 2003, p. 243.

<sup>75</sup> *Id.*, p. 248.

Tharaea become a binding source. In fact, since the rule in Islamic Jurisprudence is that whatever was not prohibited by the Quran and Sunnah is permissible, and the Quranic verses expressly forbid prohibiting what God has allowed, Sadd al Tharae lacks a strong legal basis.<sup>76</sup>

#### 5. Qawl Al Sahabi (the Opinion of a Companion of Muhammad (P))

During the lifetime of the Prophet, any opinions of his companions, whether agreed to by consensus, by a majority or even by a single person, became part of the Sunnah on the basis of tacit approval by Muhammad (P). After his death, when his companions had to take over the religious and political leadership of the Ummah, such opinions were still binding law if agreed upon by consensus, as outlined above in the discussion of Ijma (the Consensus of Scholars). Much less clear, however, is the relevance of the opinion or *Fatwa* of a single companion after the death of Muhammad (P). Those who support the binding nature of such sayings rely on the fact that the companions were specially qualified in light of their intimate understanding of the Quran, the way the Prophet approached the challenge of leadership and the spirit and general principles of Islamic Law. Others recognise some of the companions as truly learned and important, but not all of them. Is Qawl al Sahabi binding in the sense that it becomes part of Sharia and must be observed by subsequent generations? Or are the opinions merely *Ijtihad*, personal opinions that may or may not be followed by the community as a whole? Overall, there is no consensus on this question.<sup>77</sup> It seems that nowadays a majority of scholars would argue that Qawl al Sahabi cannot be considered a binding source of Islamic Sharia because the companions of Muhammad (P) were ultimately normal human beings and not divinely inspired by God. They made mistakes, and they disagreed among themselves.<sup>78</sup>

#### V. What Is *Ijtihad*? (Personal Interpretation)

*Ijtihad* is the use of original thinking for development of new rules for new questions. It has been called "the most important source of Islamic law" after the Quran and the Sunnah.<sup>79</sup> The word *Ijtihad* literally means *to strive or struggle*. It is derived from the Arabic root 'J-h-d'. Another derivation of this root is the word

76 [7:32] "Say: 'Who prohibited the nice things that GOD has created for His creatures, and the good provisions?' Say, 'Such provisions are to be enjoyed in this life by those who believe.'" And [6:119] "Why should you not eat from that upon which God's name has been mentioned? He has detailed for you what is prohibited for you, unless you are forced. Indeed, many people mislead others with their personal opinions, without knowledge. Your Lord is fully aware of the transgressors."

77 For a comprehensive discussion, see Kamali, 2003, pp. 313-322, with further references.

78 El Shoroumbassy, 2003, p. 246.

79 See Kamali, 2003, p. 468.

*Jihad*, also meaning to strive and struggle to follow the guidance of God.<sup>80</sup> Similarly to the idea of Jihad, *Ijtihad* refers to “exerting all mental effort one can possibly exert in a certain matter in order to make a legal decision about a certain question, by independently interpreting the Quran and Sunnah.”<sup>81</sup>

Rules in Islamic Law can be divided into the following categories:

- Rules that are clearly and expressly stated in the Quran and/or the Sunnah so that it would be impossible to disagree on their interpretations or meanings. An example is the verse on performing prayers:

Perform prayer, and spend in charity, and bow down in prayer with all who thus bow down. [Quran 2:43]

This type of a rule is not subject to interpretation or *Ijtihad* according to the principle of Islamic Jurisprudence that there shall be no *Ijtihad* in the presence of a clear text in the Quran or a Hadith.

- Rules that are either not mentioned in the Quran and/or the Sunnah, are ambiguous or just briefly mentioned, without sufficient details: this is the type of rules that are subject to *Ijtihad*. For instance, there was no mention of any rules relating to boycotting the products that were manufactured in an *enemy state* in the Quran or the Sunnah. Thus, when Muslim scholars were faced with this question regarding Israel, they had to exercise *Ijtihad* to find the correct rule and to issue a Fatwa in this regard.

Before exercising *Ijtihad*, a *Mujtahid* (a scholar who performs *Ijtihad*)<sup>82</sup> must fulfil a number of requirements. First of all, the *Mujtahid* must have a good command of the (classical) Arabic language. He or she must also have sufficient knowledge of the Quran, Sunnah and the issues upon which there has been consensus among scholars. Furthermore, the *Mujtahid* must be familiar with *Qiyas* and its methodology. Finally, he or she must have sound evaluation and good overall knowledge of the spirit of Sharia and its purposes.

*Ijma*, *Qiyas* and all the other human sources are all types of *Ijtihad* because they are all attempts by humans to deduce new rules and find answers to new

80 One of the widespread misconceptions today is the claim that the word *Jihad* always means Holy War, in particular the fight of Muslims against non-Muslims. The truth is that there are various types of Jihad, and the highest and most important form of Jihad is Jihad against one's self, one's temptations and desires. In other words, Jihad refers to the *struggle* to control oneself and to follow the path of righteousness despite our human nature and weaknesses. Only one of 14 types of Jihad refers to the Holy War, and the only form of war it permits is the defence of Islam from attack. By definition, Jihad cannot be an offensive war against non-Muslims, and Jihad can never be invoked to justify war by some Muslims against other Muslims. Unfortunately, the idea of Jihad is nowadays probably the most abused and distorted concept of Islam. The 14 different types of Jihad are explained in Cornell, 2007, pp. 206-209. See also Glassé, 2001, pp. 240-241.

81 El Shoroumbassy, 2003, p. 251.

82 A *Mujtahid* is an eminent jurist who has the authority to exercise *Ijtihad*. The term is not to be confused with *Mujaheddin*, which refers to those who exercise *Jihad*. As previously stated, Jihad does not necessarily mean fighting. It can be exercised by thought, word or action and is not limited to defending one's land or religion.

questions that emerged after the death of Muhammad (P) and the completion of his message.

Around the ninth century, Sunni scholars, allegedly led by Al Imam Al Shafi, the founder of the Shafi school of thought, started discussions about the 'Closing of the Door of Ijtihad'.<sup>83</sup> Suddenly, the right of every Mujtahid to exercise Ijtihad ceased to be self-evident. The rationale at the time seemed to be that all the main issues had been settled by the Master Jurists and no matter how renowned the new scholars were they would never achieve more knowledge than the Master Jurists who had already settled all the questions.<sup>84</sup> While most open-minded scholars opine that the closing of the door of Ijtihad led to the stagnation of the Law and its appearance as backward and outdated, others still argue that it protected and preserved the Law over the years. Shi'is, on the contrary, never closed the doors of Ijtihad and believe that a Muslim will always need the guidance of Ijtihad.<sup>85</sup>

#### VI. *What Is Fatwa? (Mufti's Opinion)*<sup>86</sup>

A Fatwa is the result of the Ijtihad of a *Mufti*, who is asked for a legal opinion, on a certain matter, and who then exerts all mental effort to give a legal opinion that is compliant with the rules and spirit of Islamic Law. This opinion, however, is not merely a piece of personal advice; it is a legal verdict, though not binding in itself.<sup>87</sup> An example can be found regarding the rules on theft, which are generally very strict in Islam. When a man, out of hunger, stole food during a time of famine, the question arose whether he should be punished like one who stole out of self-indulgence and greed. The answer to that question constituted a Fatwa.<sup>88</sup>

*Is Fatwa binding?* The principle established by Prophet Muhammad (P) is that a Mujtahid whose opinion is correct gets rewarded twice: once for exercising Ijtihad and a second time for finding the correct rule. Even a Mujtahid who does not reach the correct rule is still rewarded once, for merely trying to exercise Ijtihad. This Hadith is of great importance. First, it illustrates the importance put by the Prophet on the exercise of one's mental faculties. Second, it shows that even a Mujtahid may very well get 'it' wrong. Both should be remembered especially nowadays, when so many Muslims seem to regard themselves as Muftis and Mujtahids. The principle encourages *scholars* to think out of the box in order to further the development of Islamic Law, but it also implies that they may very well be wrong. Hence, a Fatwa cannot be binding law forever because it is not certain. This also means that if Ijma was reached regarding a certain Fatwa, the

83 Bhalal, 2011, p. 334.

84 *Id.*, p. 335.

85 *Id.*, p. 337.

86 A Mufti is a judge or legal officer with the power to adopt decisions in religious matters.

87 K. Abou El Fadl, *The Search for Beauty in Islam: A Conference of the Books*, Rowman & Littlefield Publishers, Maryland, 2006, p. 46.

88 The severe punishment foreseen for theft is suspended in times of famine and food shortages pursuant to a legal opinion adopted by Caliph Omar, one of the *Four Rightly Guided Caliphs*. For more details on the subject, see A. Christmann (Ed.), *The Qur'an, Morality and Critical Reason: The Essential Muhammad Shahrur*, Brill, Leiden, 2009, p. 190.

Fatwa becomes binding law because it has become certain. However, once there is no longer a consensus, certainty ceases and the Fatwa is no longer binding because times have changed.

## H. The Most Prominent Schools of Islamic Thought (Al Madhahib A Fiqhi'ya)

In a literal sense, the word Madhhab is derived from the Arabic root [Dh-ha-B], which means 'went'.<sup>89</sup> Hence, the word Madhhab in the traditional sense of the language would refer to the direction that one chooses to go. In other words, it is their opinion on a certain matter.<sup>90</sup>

The simplest synonym for the word Madhhab (Sing.) is a 'school of thought'. It is a specific and distinct manner of thinking, resulting in a unique set of juristic opinions, established by a chief jurist, transmitted to a group of students or followers who subsequently develop and disseminate such opinions. The Madhhab or school is usually named after the chief jurist who established it.

The majority of scholars and historians seem to agree that these schools have emerged in the late seventh century and the early eighth century in two main geographical centres: Al Hijaz (Saudi Arabia today) and Iraq. The two centres, however, had different methodologies. Al Hijaz, being the home of Prophet Muhammad (PBUH), built its body of doctrine mainly on Hadith, and that is why they were referred to as 'The people of the Hadith'. On the other hand, the Iraqi Jurists seem to have based their juristic thought upon personal opinion (Al ra'y) owing to their limited access to Prophet Muhammad's Hadiths, and thus they were dubbed 'People of al Ra'y'.<sup>91</sup>

Although these different approaches of the different schools did lead to significantly different set of opinions and thus judgments – the disagreements between these schools – there were no major disagreements on the spiritual aspects of the Law, at least between the Sunni schools.<sup>92</sup>

The four most prominent schools of Sunni thought are the Hanafi (started in Iraq), the Maliki (started in Hejaz), the Shafi (started in Egypt) and the Hanbali (started in Baghdad).<sup>93</sup> In Sunni thought, a Muslim is allowed to choose whatever school he or she finds more convincing, even if the school that he/she is following is not the officially pre-dominant one in the country where he/she lives.<sup>94</sup>

The most prominent Shi'i schools of thought are the Twelver (Iran) and the Zaydi (Yemen) schools of thought.<sup>95</sup>

89 M. Ali, *The Religion of Islam*, Motilal Banarsidass, Delhi, 1994, p. 3.

90 Hallaq, 2009, p. 31.

91 Kamali, 2008, p. 69.

92 *Id.*, p. 68.

93 Hallaq, 2009, p. 37.

94 Bhala, 2011, p. 391.

95 Hallaq, 2009, p. 37. And Bhala, 2011, pp. 179-230.

## I. Can Islamic Sharia Accommodate Change?

The rules of Islamic Sharia have been tailored in a manner that allows the application of the Law in different times and places, and under different circumstances. Many of the rules are broad, flexible and ambiguous and thus need to be interpreted and supplemented by Jurisprudence (Fiqh). As mentioned before, Sharia is the divine law, and Fiqh interprets and adds details to that divine law. This allows the details to change as long as they are still consistent with the general rules in the Sharia.

The general principle in Islamic Law is that *if the reason, why a certain rule was established no longer exists, the rule shall no longer apply*. The problem is that the rationales of some rules in the Sharia are not mentioned in the Quran and the Sunnah. In these cases, Muslims generally follow the rules without questioning them, accepting that God knows better. Sometimes this unquestioning acceptance makes non-Muslims look at Islam as a backward religion. In at least some of these cases, however, the rationales for the rules or better solutions for the problems can be found right in the Quran and Sunnah with enough effort and open-mindedness. Once we find and understand the correct rules, Islam does not look outdated at all. This shall be illustrated by the following example:

Under the Egyptian legal system, a woman was not allowed to get divorced if the husband did not consent. If she still wanted to get a divorce, she had to go through a humiliating procedure that included going to court and proving that her husband mistreated her or did not fulfil his marital obligations. If the husband disputed the claims, the wife had to show evidence, in particular in the form of witnesses. Since it is normally not easy and quite humiliating to prove the fact that a husband is not, for instance, fulfilling his marital obligations, divorce was essentially available only to women who could show bruises and other evidence for being beaten by their husbands. This was one of the main flaws in the law, and it should probably have been rendered unconstitutional upon adoption as it put all the power in the hands of only one of the two parties of a marriage contract. But because the people were told that this is how it is in Islamic Law, Muslims obeyed.

Later, a concept called *Khul'a* was made popular. *Khul'a* gives a woman the right to divorce her husband without his consent. Under the rules of *Khul'a*, there is no need for any of the above-mentioned justifications. The rule is based on the story of a woman who went to Prophet Muhammad (P) and told him that there was absolutely nothing wrong with her husband but that she did not want to live with him anymore and feared committing a sin (becoming unfaithful to him). Muhammad (P) asked her whether she would be willing to return to her husband the garden he had given her as a wedding gift. When she said she would willingly



do that, Muhammad (P) called the man and told him to take the garden and grant the divorce.<sup>96</sup>

In a divorce initiated by the husband, the only form accepted previously in Egypt, the husband has to pay certain sums of money to the wife and cannot demand return of the wedding gift(s). Under the rules of *Khul'a*, to prevent abuse of the divorce option by the women, the wife who initiates the divorce does not get all promised sums and has to return the wedding gift(s). So nowadays, if the woman has no witnesses or medical reports for being beaten, she is not without hope because *Khul'a* does not even require that she should explain her reasons.<sup>97</sup> Moreover, it seems more and more obvious that the fact that a woman can now divorce her husband in Egypt is influencing the behaviour of husbands towards their wives. The balance of power has been returned to what was always intended by God and the Prophet.

This is an example of a rule that was applied incorrectly in Egyptian law, which gave the impression that Sharia was unfair to women. However, the correct rule was always there, except that the Egyptian jurists had not integrated it in the law or applied it.

## J. Conclusions

The sources of Islamic Sharia are only the Quran and the Sunnah. All the other sources are based on the first two and are sources of Islamic Jurisprudence, not Sharia. *Ijma*, *Qiyas*, *Istihsan*, *Masaleh Mursala* and *Ijtihad* are all tools that are used to provide Islamic Sharia with a considerable amount of flexibility and responsiveness to change according to the prevailing interests and conditions of society during different times.

In light of the hierarchy of sources, we must conclude that to find the true intention of God, we must always turn to the Quran first. It is considered the Islamic Constitution, and any rule derived from any other source must be in line with the Quran or otherwise is invalid and wrong. Although corruption finds its way into everything in this world, Muslims believe that the Quran has and always will be God's own words and therefore it shall maintain its level of superiority until the end of time.

As for the Sunnah, it can be binding only if it is certain. Unfortunately, only a limited number of certain Sunnah have been passed on to Muslims. The Sunnah cannot by any means contradict the Quran nor overrule it. It merely emphasises or explains the verses of the Quran and is not capable of establishing new rules on its own.

96 The supporting Quranic verse is [4:19] "Oh you who believe, it is not lawful for you to inherit what the women leave behind, against their will. You shall not force them to give up anything you had given them, unless they commit a proven adultery. You shall treat them nicely [...]" The translation is not very accurate but is the closest to the Arabic text.

97 For more details on the subject of *Khul'a*, see: A.A. Engineer, *The Rights of Women in Islam*, Sterling Publishers, New Delhi, 1992, pp.143 *et seq.*

Ijma and Qiyas are types of Ijtihad, the same as Istihsan, Masaleh Mursala and Sadd el Tharaea. Human sources cannot be binding on the entire community and subsequent generations because normal humans are not divinely inspired and can make mistakes. When the source of a certain rule is human, one can never guarantee that this rule reveals the true intention of God for all time, and thus the efforts of scholars, as much as they are appreciated, cannot constitute a rule that is binding forever regardless of which methodology the scholar used to arrive at the rule or solution. If scholars' opinions became binding law, this would frustrate the main purpose of Fiqh, namely to retain the flexibility and relevance of Sharia. Islamic Law would no longer be able to accommodate change if the scholars of a certain age could fix for posterity the details that God deliberately left open, thus forcing their successors to apply rules that may no longer be suitable in their world.

Last but not least, because of the hierarchy of norms and the requirement that all rules and solutions conform to the overall purpose and spirit of Sharia, whenever we hear of a new rule or Fatwa, we must consult the infallible main source of Sharia, the Quran.