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Natural Law and the Šarīʿah: The Enclave of Reason Between Islamic ʾuṣūl al-fiqh and Al-Ghazali's maqāṣid al-šarīʿah

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Abstract

This paper will examine the role played by the faculty of human Reason in Islamic Shariah law in pre-modern times. It is generally accepted that Natural Law played no part in the inception and development of Shariah and that natural morality is alien to the Islamic tradition, which is based mainly on a written religious tradition, namely the Quran, the Sunnah and the Hadiths. However, because law based on Revelation has a limited reach, which becomes more evident as time progresses, Reason may have played some part in the development of the Islamic legal system. In this article, we will see the significance of Reason in Islamic jurisprudence or *fiqh* and how Al-Ghazali felt the need to design a device called *maqāṣid al-šarīʿah* in order to bring under control the use of rational thinking in Islamic *fiqh* system so as not to endanger Sunni orthodox views on how the will of God makes itself manifest to men.

Keywords: *Natural Law*, *Shariah*, *Islamic Law*, *Usul al-fiqh*, *Fiqh*, *Maqasid*, Reason, Revelation, Islam, *Al-Ghazali*

Introduction

Many people are familiar with the term *Shariah law* from what they see or hear in the media. Most of us, at one point or another, have seen or heard something about women being stoned to death for adultery or people having their hands cut off for stealing, somewhere in the Islamic world. For most people, much of this sounds like something out of the Middle Ages, but those are the consequences of having a legal system directly dependent on theology. In his essay on "The Church and the scandal of sexual abuse," Benedict XVI writes that "until the Second Vatican Council, Catholic moral theology was largely founded on natural law, while Sacred Scripture was only cited for background or substantiation. In the Council's struggle for a new understanding of Revelation, the natural law option was largely abandoned, and a moral theology based entirely on the Bible was demanded." In the aftermath of the council, the Church tried to develop a morality based entirely on Scripture. That task failed, and "in the end, it was chiefly the hypothesis that morality was to be exclusively determined by the purposes of human action that prevailed," concludes Ratzinger, for whom, as a consequence, "Catholic moral theology suffered a collapse that rendered the Church defenceless against (…) changes in society."[1] This is an interesting reflection inasmuch as it encapsulates the problems raised by the clash between rational and theological morality. Abandoning rational morality and trying to build a new morality based on Revelation alone led to the current Church's ineffectiveness in dealing with the challenges with which modern society tests the Church. Islam is faced with a similar problem but of a more ancient origin and with much more severe implications, as Muslim moral laws serve as civil legislation in many countries where Muslims are a majority.

Whereas Natural Law derives its moral and ethical principles from men's rational nature and will consequently produce a universal, save for cultural differences, code of morality, Revelation, in turn, which is often dependent on subjective interpretations of what a particular deity may have said, will produce as many different codes of morality as there are different religions in the world. Islamic Shariah law is a code of conduct based on Revelation. Its sources are primarily the Quran, which for the Muslims stands as the uncreated word of Allah exactly as it was

[1] Benedict XVI, "Letter of Pope Emeritus Benedict XVI regarding the Report on Abuse in the Archdiocese of Munich-Freising," (Vatican City, 6 February 2022). https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2022/02/08/220208b.html.

revealed by the Archangel Gabriel to their prophet Mohamed. The Shariah is not dependent only on the Quran but also on other traditional written sources, namely the Sunnah and the Hadiths. However, as it is common in systems of theologically framed morality, these written sources are often insufficient or silent on matters of current morality. For such cases, Shariah has devised mechanisms to derive new rulings, namely *Ijma* and *Qiyas*, which are already forms of rational-legal thinking. Despite that, given Revelation's weight in Islam, *Natural Law* is unknown as a *theory of law* within Islamic legal tradition.

What follows is an attempt to see what role(s) Reason played in the Islamic legal system and tradition in pre-modern times. Questions concerning Shariah law in modern times have more to do with a conflict between civil and religious law and how suitable it is for Shariah to stand as a country's legal system in the 20th century[2].

Natural Law and Shariah Law

Shariah law (شَرِيعَة *šarīʿah*) refers to the Islamic religious legal system, which is a core element of Islam, the religion of around one-quarter of the population of the world[3]. It is calculated that 1.9 billion people follow the Islamic religion, of which 1.7 billion are adepts of the Sunni variant of this religion.[4] Shariah could be

[2] The present article results from a paper I gave in a series of public talks on Natural Law at USJ, Macau, in the academic year of 2020/21. As this lecture series was aimed at presenting different themes related to Natural Law to a non-specialised public, I included in my talk then and in this article now some introductory elements related to Islam and Shariah law. I also added a series of bibliographical references for those unfamiliar with Sunni Islam and Shariah.

[3] For a comprehensive introduction to *Shariah*, see Hallaq (2009) or Doi (1984); for a historical overview, see Coulson (1971).

[4] Islam is divided into different denominations. The main denominations are *Sunnī* (سَنِيّ) Islam and *Shīʿa* (شِيعَة) Islam; these two groups anathematise one another. Sunni Islam represents over three-quarters of the followers of Islam around the world. The division between Sunni and Shiite Muslims begins with the death of Mohamed and the question of his succession. Mohamed was both a religious and a political leader. After his death, his companions chose his Abū Bakr (أَبُو بَكْرِ عَبْدُ ٱللهِ إِبْنِ أَبِي قُحَافَةَ *abū bakr ʿabd allāh ibn ʿabī quḥāfa*, ca. 573-634) as *caliph* (خَلِيفَة *khalīfah*), a word which in Arabic just means 'successor'. However, a portion of the Muslim community wanted his cousin and son-in-law Ali to be his successor. The Shiites derive their name from the Arabic phrase شِيعَة عَلِيّ *šīʿat ʿalī*, meaning *faction of Ali* or *partisans of Ali*. Ali finally became the fourth caliph, but for the Shiites, the three caliphs before him were usurpers. There are many theological and doctrinal differences between the Sunnis and the Shiites. A significant difference is that the Shias do not accept the whole body of Hadiths and Sunnah as authentic since some of them were compiled by companions of Mohamed, whom the Shias consider usurpers and traitors. As such, the ones who accept the authority of this whole body of textual testimony became

considered an equivalent to Jewish Halacha, at least in concept, were it not for the fact that Shariah has served as the *civil law* or *the law of the land* in nations where Islam is the dominant religion. In fact, Shariah law is still the law of several Islamic nations such as Iran, Yemen, Sudan, and now also Afghanistan, to mention but a few, where it is adopted in different degrees of observance[5].

According to Calder and Hooker (2007, 321–26) the word شَرِيعَة *šarīʿah*, which in this work will adopt the English spelling *Shariah*, has a constellation of meanings and is often used just to designate *religion* as a code, e.g. شَرِيعت مُوسَأ *šarīʿat Mūsā* 'religion or Law of Moses'. Nevertheless, a more common use of the word Shariah nowadays is to refer to the *rules or laws by which the followers of Islam are supposed to conduct themselves and govern their lives*. In theology, *Shariah* refers to the laws revealed by God to his prophet, whereas in legal Islamic literature, *Shariah* designates the interpretation that Islamic scholars make of those laws. This term is also used to refer to the body of legal pronouncements elaborated

known as *Sunnis* from the Arabic phrase أَهْل السُّنَّة *ʾahl alsanah* meaning *the people of the Sunna*, a phrase which became common during the second *fitna* or civil war (680–92) caused by the death of caliph Muawiya I (معاوية بن أبي سفيان *muʿāwiya ibn abī sufyān*, b. 597/605–d. 680), which would accentuate the disputes between supporters of the Caliphate and the followers of the Shiite Imams. As the Shias do not accept the authority of the Hadiths and the Sunnah, they advocate the authority of their Imams instead. For the Shiites, the Imams are believed to be *infallible* (مَعْصوم *maʿṣūm*) because they are provided with *Isma* (عِصْمَة *ʿiṣmah* "protection") or *incorruptibility* and *Hikma* (حِكْمة *ḥikmah*) or *wisdom*. The Shiites accept the authority of twelve Imams (اَلْأَئِمَّة اَلاثْنَا عَشَر *al-ʾaʾimmah al-ʾithnā ʿašar*) who are considered direct descendants of the prophet Mohamed through his daughter Fatima. This is why the Shiites are also known as the *Twelvers*. The first Imam was Ali ibn Abi Talib ibn Abd al-Muttalib (عَلِيّ بْن أَبِي طَالِب بْن عَبْد اَلْمُطَّلِب *ʿalī ibn abī ṭālib ibn ʿabd al-muṭṭalib*, ca. 600–661) who was the cousin of Mohamed and was married to his daughter Fatima (فَاطِمَة اَلزَّهْرَاء *fāṭima al-zahrāʾ*, 605/15–632). From 656 until his assassination in 661, he was the fourth and last caliph of the Rashidun caliphs. The twelfth and last of the Shia Imams is Muhammad ibn Hasan al-Mahdi (محمد بن الحسن المهدي مُحَمَّد بِن اَلْحَسَن اَلْمَهْدِي *muḥammad bin al-ḥasan al-mahdī*,) who went into hiding during his lifetime and then, Shias believe, was taken into what is called the *Major Occultation* (اَلْغَيْبَة اَلْكُبْرَىٰ *al-ġaybah al-kubrā*) which basically means that he is still in hiding or in *occultation* to this day. He is to return at the end of time as the messianic figure of the *Mahdi* (اَلْمَهْدِيّ *al-mahdī* 'the guided one') to deliver justice. For an overview of Shia Islam, see Momen (1985) or Halm (2004). For the history and reasons for the split between Sunnis and Shias, see Rogerson (2007).

Smaller denominations worthy of mention here are Sufism and Wahhabism. Sufis (الصُّوفِيَّة *aṣ-ṣūfiyya*) are a mystical-ascetic group famous in Turkey for their spinning dancing. In reality, Sufism is not a *denomination* per se, as Sufis can be found in both Sunni and Shiite Islam. *Wahhabism* (اَلْوَهَّابِيَّة *al-wahhābiyyah*), the official Islamic denomination of Saudi Arabia, is a fundamentalist branch of *Sunnī* Islam founded and preached by the 18th-century Arabian theologian and Ḥanbalī scholar Muhammad ibn ʿAbd al-Wahhab (محمد بن عبد الوهاب بن سليمان *muḥammad ibn ʿabd al-wahhāb ibn sulaymān al-tamīmī*, 1703–1792), from whom its name derives. Wahhabism has become more recognisable thanks to the reforms that the crown prince of Saudi Arabia, Mohammed bin Salman, has been implementing in his country. Many of these reforms are opposed by the Wahhabi religious establishment. For a small introduction to the main denominations of Islam, see Shahrastani (2009).

[5] Vikør (2014), for comprehensive instruction on Islamic religious law, see Hallaq (2009).

by the Medieval Islamic jurists at the time when Islam was developing its legal system.

There is no actual agreement as to the origin and primary meaning of the Arabic word شَرِيعَة *šarīʿah*. Its uses in literature without religious connotations have led some scholars to argue that the original meaning might have something to do with 'way' or 'path' intending to say "pathway to be followed", which would make it similar to the meaning of the Hebrew term *halacha* 'path'[6]; in its sole appearance in the Quran, شَرِيعَة *šarīʿah* means 'way' or 'path', see:

Quran 45:18

ثُمَّ جَعَلْنَٰكَ عَلَىٰ شَرِيعَةٍ مِّنَ ٱلْأَمْرِ فَٱتَّبِعْهَا وَلَا تَتَّبِعْ أَهْوَآءَ ٱلَّذِينَ لَا يَعْلَمُونَ

Then we set you on a right path, so follow it
and do not follow the whims of those who do not know.

The most common interpretation of the Arabic word Shariah, when related to Islam, is to designate *Islamic Law* in general. In the Middle Ages, the term شَرِيعَة *šarīʿah* was often used by Arabic-speaking Jews to translate the Hebrew word Torah 'law, teaching'. Later, Christian writers too will use it to translate νόμος 'law', such as in the expression νόμος τοῦ θεοῦ 'God's Law' (Rom 7: 22) which being a translation of Hebrew תּוֹרַת אֱלֹהִים *tôraṯ ʾĕlôhîm*, was rendered to Arabic شَرِيعت الله *šarīʿat Allāh*. It was only in the 19th century that the phrase الْقَانُون الْإِسْلَامِي *al-qānūn al-islāmī* meaning 'Islamic law' was coined from European similar phrases to be used in the Muslim world when referring to a non-religious legal system in the context of a modern state.[7]

There are four primary sources for Shariah law.[8] The first is obviously the *Quran* (الْقُرْآن *al-qurʾān* 'recitation'), believed by the Muslims to be the *uncreated word of God* as it was revealed to the prophet Mohamed by the angel Gabriel. There are several hundred verses in the Quran which have direct legal relevance, whereas others can be used as indirect sources for general legal principles and

[6] Calder and Hooker (2007, 326).
[7] Calder and Hooker (2007, 323).
[8] These four sources could be divided into two sets: a *direct source* set made up by the *Quran, Hadith*, and the *Sunnah*, and an *indirect* or *analogical source* set constituted by the *Ijmāʿ* and the *Qiyas* legal mechanisms.

rulings[9].

The second source is the *Hadith* and the *Sunnah* body of texts. These two are often considered to be the same by the faithful, but scholars, such as Malik Ibn Anas and the scholars of the Hanafi school, do make a distinction between them[10] . The *Hadith* (حَدِيث *ḥadīṯ*), literally meaning *discourse* or *speech*, is the record of the words of the prophet, whereas the *Sunnah* (سُنَّة *sunnah*), which literally means *habit*, describes the actions of the prophet[11]. There are thousands of *Hadiths* and *Sunnah* recorded in six main compilations[12]. In view of their chain of transmission, the authenticity of some of the Hadiths has been questioned. As such, not all are recognised as authentic, nor do all schools agree on which ones are authentic. The *Sunnah* and the *Hadiths* became legally binding precedents within the Islamic legal tradition, even if questions of authenticity can bring discord between different groups regarding a pronouncement of law based on them.

In Sunni Islam, a third source of Shariah Law is *Ijma* (إِجْمَاع *ijmāʿ*), which is the Arabic word for 'consensus' and it refers to a *consensus or overall agreement* of the Islamic community on a point of Islamic law which could elevate a ruling to a mandatory verdict. This idea of consensus of the community is based on the text of the Hadith 2167"[13]

إِنَّ اللَّهَ لَا يَجْمَعُ أُمَّتِي عَلَى ضَلَالَةٍ وَيَدُ اللَّهِ مَعَ الْجَمَاعَةِ

Verily, Allah will not let my nation agree upon an error.

[9] For a short but very comprehensive introduction to the Quran, see Cook (2000); for a somewhat more robust introduction, see Saeed (2008).
This paper's passages from the Quran are taken from the typical edition. The translations, or paraphrases as Muslim scholars prefer to call it, as translations of the Quran are forbidden, are taken from Yusuf Ali (2009). At times, whenever necessary, although still based on Yusuf Ali (2009), the translation of the Quran passages may be modified by me so as to present it in a more literal manner, should that fit the purposes of the point being made.

[10] Nasr (1991, 97).

[11] For a discussion of the origin, value and legal standing of the Hadiths, see Musa (2008) and Osman (2019); for the Sunnah, see Hamza (2014); on the problems surrounding the authenticity of the Hadith tradition, see Brown (1996, 81-107)

[12] See next ftn.

[13] Saying taken from *Sunan al-Tirmidhī* 2167 in Shākir (1937-65). The *Sunan at-Tirmidhi* (سُنَن التِّرْمِذِيّ *sunan at-tirmiḏiyy*), also known as *Jamiʿ at-Tirmidhi* (جَامِع التِّرْمِذِيّ *jāmiʿ at-tirmiḏiyy*) is a collection of around 4400 of sayings (*hadiths*) of the prophet complied by the Sunni scholar Al-Tirmidhi in Persian around the ninth century; it is the fifth of the *Kutub al-Sittah* (اَلْكُتُب اَلسِّتَّة *al-kutub as-sittah*) 'the six books' which are the six main collections of hadiths.

The hand of Allah is over the united community.

The problem is that among Islamic scholars, there has been no consensus on whose consensus it ought to be[14]. According to Malik, a binding consensus could only come from Mohamed's companions and their successors in Medina, while Hanifah, Hanbal, and Al-Zahiri excluded the prophet's companions' successors from the consensus. For Al-Shafiʿi, the consensus is only binding if held by the entire Muslim community. In contrast, Al-Ghazali held the view that the *consensus of the entire community* (إِجْمَاع اَلْأُمَّة *ijmāʿ al-ʾummah* 'community consensus') was only necessary in regard to wider religious principles; legal details were to be left to the consensus of learned scholars or the *religious authorities* (إِجْمَاع الْأَئِمَّة *ijmāʿ al-ʾaʾimmah* 'consensus of the Imams'). Al-Ghazali's views on *Ijma* are widely accepted amongst Sunni Muslims[15].

Another possible source of Sharia Law is the deductive process called *Qiyas* (قِيَاس *qiyas* 'comparison, analogy'). This legal process refers to an analogical reasoning mechanism used to derive a ruling for a situation not directly addressed by the *Quran*, *Hadiths*, or *Sunnah* by analogy with a scripturally based ruling. A typical and comprehensive example is the Quranic prohibition of drinking alcoholic beverages, cf.

Quran 5:90

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوٓا۟ إِنَّمَا ٱلْخَمْرُ وَٱلْمَيْسِرُ وَٱلْأَنصَابُ وَٱلْأَزْلَٰمُ رِجْسٌ مِّنْ عَمَلِ ٱلشَّيْطَٰنِ فَٱجْتَنِبُوهُ لَعَلَّكُمْ تُفْلِحُونَ

O ye who believe! Strong drink and games of chance and idols and divining arrows are only an infamy of Satan's handiwork. Leave it aside in order that ye may succeed.

This prohibition is extended to all intoxicating substances, including cigarettes and today even to drugs, because the *illa* (عِلَّة *ʿillah*) or *cause of the prohibition*—in this case, the effects of the alcoholic intoxication—are similar to the effects of these substances. On the other hand, when the *illa* is not evident, the teachings of the *Quran* and the *Hadiths* on a specific matter are compared so as to try and

[14] Ahmad (2019).

[15] For a short discussion on *Ijmāʿ*, see Hasan (1967); for the identification of the scholars mentioned here, see ftn 27.

make the *illa* more explicit.

Shia Islam does not consider the *Qiyas* process a valid source for Shariah law, and among the Sunni schools, the Hanbalites condemned the Hanafi for the use they made of the *Qiyas* mechanism of legal analogy[16].

Natural Law and Islam

Just as it happens with the Judaic Halacha, Islamic Shariah law is deeply controlled by theology, whose authority over the law is determined by the fact that both the Halacha and the Shariah define themselves as law systems reliant on divine Revelation.

One of the problems surrounding the question of Natural Law in Islam is that the separation between the theological and the legal is not conceptualised in the same way as it has been in the West, at least since the French Revolution, and in some cases even before that. Even today, in many Islamic countries, this dichotomy between civil law and religious law is unknown to Islam because primacy is given to theology, and Revelation is placed above Reason. It is in this context that many Sunni theologians and jurists deny the existence of Natural Law in Islamic tradition as, for them, the phrase *Natural Law* embodies a Western concept alien to Islam and, in the view of many, in frank opposition to Revelation.[17] Indeed, the phrase *Natural Law* is never found in Medieval Islamic jurisprudence texts, contrary to what happened in Judaism, where already in ca. 1425, the phrase *Natural Law* had been coined, probably from Aquinas, and used by Albo in his *Book of Principle*. And even though the Hebrew word טִבְעִיָּה *ṭiḇʿîyâ* 'natural' was coined on the basis of the Arabic adjective طَبِيعِيّ *ṭabīʿiyy* 'natural', neither this adjective nor the noun طَبِيعَة *ṭabīʿa* 'nature' at its base are ever used in texts of jurisprudence or philosophy, except for Natural Philosophy[18].

Despite that, Emon (2019, 193)[19], a Professor of Law at the University of

[16] Melchert (1992, 38, 47).
[17] Griffel (2007, 42–44).
[18] For the uses of the term طَبِيعَة *ṭabīʿa* 'nature' in Islamic Philosophy, see Emon (2014, 158–177).
[19] I rely heavily on the works published by Prof. Anver M. Emon, who, despite the generalised idea that the concept of Natural Law is alien to Islamic jurisprudence and legal system, has developed the notion that pre-modern Islamic jurists were followers of either a *hard* or *soft approach* to Natural Law

Toronto, argues that "the absence of such a term does not mean that the fundamental questions underlying a broad range of natural law theories (e.g. questions of Reason and authority) were unknown to Muslim jurists or irrelevant to them. Nor does this lexical absence suggest they did not think or reflect on creation and its implications for how they might reason to norms and law to govern the infinite variations of human experience and conflict."

He argues that it is in *usul al-fiqh* (أُصُول الْفِقْهِ *ʾuṣūl al-fiqhi*), an Arabic phrase which corresponds *grosso modo* to our concept of *legal theory* or *jurisprudence*, is where jurists are found flexing their rational muscles by thinking theoretically about Reason and its contribution to the law; he goes on to say that it is in *usul al-fiqh* texts "[where] we find a curious debate that bears the hallmarks of natural law thinking, allowing us to identify two versions of natural law among pre-modern Muslim jurists, which we will call Hard Natural Law and Soft Natural Law."[20]

Emon identified the rationalists *Mutazilis*[21] as the followers of this hard-

theory. According to him, even though there are no actual explicit references to Natural Law in Islamic jurisprudence texts, Reason still played a significant part in the Islamic legal machinery when Scripture and revealed law sources were either insufficient or altogether silent. He developed these concepts in his doctoral thesis, which has since been published, see Emon (2010). It was followed by a series of articles reiterating his conclusions; see Emon (2014) and (2019). These works, as well as other articles he published, especially Emon (2006) and (2018), are the basis for the final part of this article, where I deal with the Hard-Natural Law Mutazilites and the Soft-Natural Law Asharites and the mechanism of *maqasid al-Shariah*.

[20] Sic Emon (2019, 186), see also Ziadeh (2009).

[21] Emon (2010, 25-7; 2014, 149; 2019, 186-7).

There were four leading schools of Aqidah in Sunni Islam. (The Arabic word عَقِيدة *'aqīda*, which means *belief* or *dogma*, often stands for an equivalent of what in the West is referred to by the word *theology*.) The *Mutazilis* were scholars from the *Mutazilah* (الْمُعْتَزِلة *al-muʿtazilah*) school of Aqidah, which was a rationalist school of Islamic theology with Greek influences. It flourished in Basra and Baghdad, both now in modern-day Iraq, from the 8th to the 10th centuries. Examples of Hard Natural Law Mutazilis jurists were Al-Qadi ʿAbd al-Jabbar (ca. 935–1025) and Abu al-Husayn al-Basri (d. 1044). The Mutazilis started to decline after the *Mihna* and ended up disappearing.

Mihna is the word by which the محنة خلق القرآن *miḥnat khalaq al-qurʾān* 'tribulation [about] the createdness of the Quran' is usually referred to. The Mihna was a religious persecution started by caliph Al-Mamun (المأمون *al-maʾmūn*, 786–833) in the year of his death. It lasted until 851. Scholars who did not uphold the Mutazilite doctrine were imprisoned and even condemned to death. According to the Mutazilite Aqidah, *the Quran was created at the time of its revelation*. This meant that for the Mutazilites, the Quran *only applied to the prophet's time*, meaning that its reading needed not to be literal. Other schools of Aqidah and Fiqh who were against this principle defended that the *Quran is the uncreated word of God* and, therefore, stands for all times and its reading must be literal. Of late, the Mihna has been revisited and looked at from different angles; see Nawas (1994) and (1996); Hurvitz (2001).

A revival of Mutazilism has reappeared advocating for amore rational approach to Islam. In 2017 the ARIM - *Association pour la renaissance de l'islam mutazilite* was founded so as to offer '[un'] *autre manière de concevoir l'islam afin de faire contrepoids aux interprétations irrationnelles et dogmatiques*

Natural Law approach to Islamic jurisprudence and the semi-rationalists *Asharites*[22] as the followers of the Soft Natural Law approach. Amongst the *Asharites*' ranks was Al-Ghazali, one of the most influential Sunni theologians, jurists and philosophers, who was known even in Medieval Europe. So, even though no actual reference to *Natural Law* is made in Shariah law texts, that does not mean that Reason did not play a part in the Islamic legal system. Consequently, Emon takes the phrase *Natural Law* in a broader sense, as referring to the *part played by Reason within usul al-fiqh and in the Shariah legal procedures*.

The role of Reason in *ʾuṣūl al-fiqh*

Usul al-fiqh[23], the Islamic equivalent to our jurisprudence or legal theory, of-

actuelles'; it can be found here: http://mutazilisme.fr/.

For an overview of the medieval *Mutazilah* school's contributions to Islamic theology and science, see Ess (2006, 79–116); for a more in-depth view of Mutazilism, see Martin et al. (1997), and for (a summary of) the thought of the most important members of this school, see Emon (2010, 45–88).

[22] Emon (2010, 31–7; 2014, 151–2; 2019, 187–8).

The *Asharites* were the followers of the *Ashariah* (اَلْأَشَاعِرَة *al-ʾašāʿirah*) Aqidah school. The Ashariah School was the most important theological school of Sunni Islam. It was responsible for establishing an "orthodox dogmatic Sunni standard based on scriptural authority and semi-rationalism" which is still operative today. This school of thought was founded by the Arab theologian Abu al-Hasan al-Ashʿari (أبو الحسن علي بن إسماعيل الأشعري *abū al-ḥasan ʾalī ibn ismāʿīl ibn isḥāq al-ashʿarī* d. 936), in the 10th century. The school takes its name from the founder's name. Some of this school's most influential theologians and jurists are Al-Ghazali, Al-Tufi (d. 1316), and Al-Shatibi (d. 1388), to quote only some of the most relevant ones. Abu Hamid Al-Ghazali Al-Ghazali (أَبُو حَامِدٍ مُحَمَّدُ بْنُ مُحَمَّدٍ اَلطُّوسِيُّ اَلْغَزَالِيُّ *abū ḥāmid muḥammad ibn muḥammad aṭ-ṭūsiyy al-ġazzālīy*, ca. 1058 – d. 1111) deserves an especial mention as for many, after Mohamed, he is considered the most important scholar of Islam. He is considered a *reformer* (مُجَدِّد *mujaddid* 'renewer') of the Islamic religion; he is the Maimonides of Islam.

For an overview of the *Asharite* School, see Halverson (2010, 127–42); for the place of the *Asharites* within Sunni orthodoxy, see Halverson (2010, 13–31) and Frank (2020), and for (a summary of) the thought of the most important members of this school, see Emon (2010, 131–84), more specifically for al-Ghazali, see Moad (2021).

[23] The Arabic masculine noun فِقْه *fīqh* is derived from the Arabic root ف ق ه *fqh*. From this root, we derive the first conjugation verb فَقِهَ /يَفْقَهُ *faqiha/yafqahu*, which means 'to understand, to comprehend' but in an intransitive manner, that is, 'to be in possession of understanding' or 'to be knowledgeable. The second conjugation فَقَّهَ /يُفَقِّهُ *faqqaha/yufaqqihu* has the causative meaning 'to instruct, to teach' from *to cause someone to be knowledgeable*. From this, it is clear that the root means 'to have knowledge' more than 'to know *something* (trans.)' and therefore, the term فِقْه *fīqh* essentially means *understanding, insight or the knowledge (which one is in possession of) and not the knowledge of something (which one is trying to obtain)*. In the context of Shariah law, this term is used to refer to the understanding that one has of the law and how the law works. Consequently, it is usually translated as *jurisprudence or legal theory, understood as the active knowledge of the law*.

The phrase أُصُول الْفِقْهِ *ʾuṣūl al-fiqhi* has as its first element the word أُصُول *ʾuṣūl*, the plural of the word أَصْل *ʾaṣl* which means 'origin, source, basis'. In linguistics أَصْل *ʾaṣl* is used to refer to the root of the words. Thus, the phrase أُصُول الْفِقْهِ *ʾuṣūl al-fiqhi* literally means *roots* or *sources of fīqh*. Often, however, it is also translated as *jurisprudence* or *legal theory*. These "translations" result from an attempt to find

ten took the form of legal texts where "scholars trained in both theology and law debated ontological first principal and developed an epistemological framework that moved from those first principals to derivations of law."[24] This is the place where theology and the law meet. The main objective of *usul al-fiqh* was to make sure that the law and its applications were kept within the boundaries designed by theology. However, for Emon, after Ahmed (2012), *usual al-fiqh* represented a *safe space* to try and see how far the boundaries of orthodoxy could be stretched when applying the law or when creating new laws. The debates amongst scholars from different schools are where they exposed their ideas. As Natural Law is not mentioned explicitly in Islamic jurisprudence, it is in these debates that we can find examples of Reason being used in the application and/or the creation of laws.

An example of how Reason had a role to play in Islamic *usul al-fiqh* can be found in how scholars used the legal heuristic mechanisms known as *huruq Allah* (حُقُوق الله *huqūq ʾallah*), meaning *rights or claims of Allah and huquq al-ibad* (ٱلْعِبَاد حُقُوق *huqūq al-ʿibād*), meaning *rights or claims of individuals*. These two phrases do not mean to oppose the claims or rights of God to those of men but the rights of the wider community in relation to the claims of individuals. Indeed, the *huruq Allah or rights of Allah* refer to God as the guarantor of what is right and just, stemming from the principle that *what God wants or orders is necessarily good and right for all men*. On the other hand, the *huquq al-ibad* or *claims or rights of individuals* have nothing to do with those rights that we have become accustomed to in our age of civil liberties. More than a question of individual rights, it refers to questions of *individual interests*, such as property rights, the validity of contracts, inherency, family rights, etc., especially when these run at odds with the community's interests[25].

In order to demonstrate how this legal heuristic mechanism works and how it accounts for the use of Reason in legal Islamic theory, Emon (2006; 2019,189-192) gives as an example the case of *hudud* (حُدُود *ḥudūd*) or amputation of the hand(s)

equivalents in the Western legal systems to the concepts and nomenclature of the Islamic system. Some prefer to establish a distinction between the two terms and translate *fiqh* as *legal doctrine* and *usul al-fiqh* as *legal theory* or *jurisprudence*. For a discussion on these two concepts and their meaning and place within the Islamic legal process, see Calder (2009), Rabb (2009) and Schneider (2014).

[24] (Emon 2019, 183).

[25] For a deeper understanding of the legal heuristic mechanisms of حقوق الله *huqūq 'allah* 'the rights or claims of God' and حقوق العباد *huqūq al-ʿibād* 'rights or claims of individuals', see Emon (2006) and Izzidien (2019); for the question of Human Rights, not individual rights, and Islam, see Bhat (2018).

for theft[26]. For this particular crime, there is an actual pronouncement of Shariah based on Scripture:

Quran 5:38

وَٱلسَّارِقُ وَٱلسَّارِقَةُ فَٱقْطَعُوٓا۟ أَيْدِيَهُمَا جَزَآءًۢ بِمَا كَسَبَا نَكَٰلًا مِّنَ ٱللَّهِ ۗ وَٱللَّهُ عَزِيزٌ حَكِيمٌ

As to the thief, male or female, cut off his or her hands: a punishment by way of example, from Allah, for their crime: and Allah is exalted in power, full of wisdom

Hand amputation for theft is a case of *huqūq Allah*, even if prima facie it might appear that it should be a claim of an individual, namely the one who was the object of the theft. However, for Shariah, theft is a violation of the community's welfare because the loss of one's property may have a bearing on the common public interest, for example, in business or trade. Respect for private property is an assurance for the community as a whole and not only for the owners of the goods which were stolen[27].

However, in a theft scenario, a *huquq al-ibad* or a *claim of individuals* can still be raised because the thief's hand amputation does not make the one whose property has been stolen whole again; despite the harshness of the punishment, he remains with the loss.

Members of different Islamic legal traditions, such as the Hanafi, the Shafiʿis, the Hanbalis or the Malikis[28] often disputed cases such as this in order to find dif-

[26] Hand amputation for theft or hudud is still practised in Iran, Yemen, Saudi Arabia, the United Arab Emirates, Brunei, and Nigeria.

[27] For understanding in detail how stealing is a *huqūq 'Allah* and not a *huqūq al-'ibād,* see Al-Ayni (2000, 216–17).

[28] There were four main Sunni schools of Islamic Law or Islamic *fiqh*, namely the *Ḥanafī* School (ٱلْحَنَفِي ٱلْمَذْهَب *al-maḏhab al-ḥanafī*) named after its founder Abu Hanifah (d. 767), the *Shāfiʿī* School (ٱلْشَّافِعِي ٱلْمَذْهَب *al-ḥanbalī al-Shāfiʿī*), named after Al-Shafiʿi (d. 819), the *Hanbalī* School (ٱلْحَنْبَلِي ٱلْمَذْهَب *al-maḏhab al-ḥanbalī*), named after Ahmad Ibn Hanbal (d. 855) and the *Mālikī* School (ٱلْمَالِكِي ٱلْمَذْهَب *al-maḏhab al- mālikī*) named after its founder Malik Bin Anas (d. 795). These schools' legal traditions manifestly derive from a common source: Malik was the master of Shafiʿi, who in turn was the master of Ahmad ibn Hanbal. Malik and Abu Hanifah were both students of Jaʿfar al-Sadiq (d. 765), the founder of the Jaʿfari School. The *Jaʿfari* School (ٱلْمَذْهَب ٱلْجَعفَرِي *al-maḏhab al-jaʿfarī*), which is known as the fifth Islamic School of fiqh, and the Yemenite Zaydi School (ٱلْمَذْهَب ٱلْزَيْدِيَّة *al-maḏhab al-zaydīyyah*) are the two schools of Shia Islamic fiqh.
Nowadays, the different Islamic communities around the world follow different fiqh schools for their

ferent jurisprudential solutions to questions about which the existent *usul al-fiqh* was insufficient. Thus, faced with the idea that satisfying a *claim of God* did not make justice to the injured part, the different schools of legal thought resourced to *reasoning* so as to try and find a solution that could satisfy both claims.

Recognising both the public and private harms, the Hanafi scholars, basing themselves on a textual source taken from the *Hadiths*, believed that a choice could be made between physical punishment and monetary compensation to the injured part.

However, the scholars of the other legal traditions disputed the authenticity of this piece of *Hadith* and defended that the physical punishment prescribed by the *Quran* was unavoidable. So, in addition to the physical punishment, the Shafiʿis and the Hanbalis postulated that the thief should pay the injured party compensation.

The Malikis, in turn, introduced a third claim, a *huquq al-ibad* in favour of the defendant. Although they remained concerned with the first *huquq al-ibad* of the injured part, they considered that to make the defendant pay compensation on top of the hand amputation was, in effect, a double punishment for a single crime. The Malikis went even further by adding an extra *huruq Allah* claim, saying that, should the defendant be twice charged for one offence, he might become unable to fence for himself afterwards and consequently become a burden to the community.

The final result of this dispute is immaterial; what is relevant is to see how the different *fiqh* schools were able to argue rationally around a particular legal problem. This type of argumentative legal discussion, which is reflected in the pre-modern fiqh texts, shows that without resourcing to either theology or preestablished *usul-al-fiqh*, jurists tried to come up with solutions to legal conundrums where Scripture was of little or no help. Even in cases such as the above, where the *Quran* gave clear indications that ended up being insufficient when applied to actual cases, In trying to find justice unhinged by the constraints of theology, what

interpretation of Shariah law: Hanafi fiqh is followed by Muslims in India, Pakistan, Turkey and parts of the Middle East, Maliki fiqh is popular in Africa, Shafiite fiqh is followed in some parts of the Middle East and Hannibalic fiqh is predominate in Saudi Arabia. For the schools of Islamic Law and Jurisprudence and the legal traditions they set up, see Kamali (2008:68–98), Hussin (2014) and Ziadeh (2009b); for the Ḥanafī, see also Tsafrir (2004); for the Mālikī, see also Cilardo (2014b); for the Shāfiʿī, see also Yahia (2009), Cilardo (2014a) and Khadduri (1987).

these legal debates show is that "reason operated in the absence of source texts to determine specific legal outcomes."[29] These debates clearly show Reason's role in Islamic law even if aspects of Natural Law as we define it in the West are never evoked.

Maqāṣid al-šarīʿah: Al-Ghazali's Device for Controlling Reason

In the act of dispensing justice, Sunni jurists who were constrained by their views of a theologically controlled law often came across cases where Revelation was unable to help, either because it went silent on the matter at hand or because it failed to provide clear enough guidelines. In these instances, they were confronted with the possibility that resourcing to Reason might provide them with valid solutions. The fear was that once men started creating laws to address those situations where Revelation seemed to fail, these new manmade laws could be perceived as having the same standing as divine law. Although this concept was repugnant to the Sunni theologians, they still had no choice but to recognise the problem and acknowledge that *rational-legal thinking* might be unavoidable at times.

The great Asharite scholar Al-Ghazali came to the rescue. In order to avoid this *'slippery slope*', Al-Ghazali devised a legal mechanism whose main objective was to limit the scope of Reason in reaching law decisions so as to guarantee that pronouncements of non-revealed law should never rival those from revealed sources[30]. This limitation methodology had at its core two basic concepts of legal theory and procedure, which have since become fundamental elements of Islamic *usul al-fiqh* and are, to this day, basic operational concepts in Shariah law. The first concept was *maslahah* (مَصْلَحَة *maṣlaḥah*), a word which in Arabic means *interest* or *benefit*. As a legal principle, *maslahah* could be described as "anything that allows one to obtain a benefit or to repel a harm" and it takes the form of a *prohibition* or *permission* concerning something depending on how it serves the welfare or public interest of the Islamic community (أُمَت ألإسلَام *ummat al-Islām*). Al-Ghazali defines it as "any interest that upholds and preserves the purpose of divine law."

[29] Emon (2019, 192).

[30] Emon (2014, 152–58), see also (2019, 188–9) where the quotations for Al-Ghazali's definitions are given; for a more detailed study on Al-Ghazali's concepts of *maqasid* and *maslahah,* see Emon 2010 (134–146).

Accordingly, a *maslahah* can be classified as a *real necessity* (ضَرُورَة *ḍarūrah*), a *want* (حَاجَة *ḥājah*) or as *an advantage* or *profit* (تَحْسِين *taḥsīn*)[31].

The other important concept introduced in Shariah Law by Al-Ghazali is the notion of *maqasid*. The word مَقْصِد *maqāṣid* is the Arabic word for *aim, objective* or *purpose* and when applied to Islamic Law (مَقْصِد الشريعة *maqāṣid al-šarīʿah*) it refers to the *purpose* of the law, that is, the purpose for which the *maslahah* is required. Al-Ghazali recognised five primary *purposes* or *maqasid* for which, in general, the law ought to provide, namely the *preservation of one's life* (نَفْس *nafs*), the preservation of one's family (نَسْل *nasl*), the *preservation of one's mind or spirit* (عَقْل *ʿaql*) the preservation of one's property (مَال *māl*) and, finally, the preservation of religion (دِين *dīn*); whatever is related to preserving one of these five fundamental Islamic values is classified as a *maslahah*.

So, when Revelation goes silent on a particular matter deemed of public interest, that is to say, when a pronouncement of Shariah law cannot be made based on the *Quran* nor the *Hadiths* and the *Sunnah*, nor can it be deduced analogically though the *Qiyas* mechanism, and if it rises to a question of preserving any one of the five *maqasid* or purposes of the law recognised by Al-Ghazali, then we are dealing with a *maslahah* deemed *darurah* or *necessary* and so a pronouncement of law must be issued and it will have equivalent authority to one based on a Scriptural source[32].

There are two main reasons for which Al-Ghazali devised this legal mechanism. The first motive was recognising that Scripture is often insufficient for addressing all legal problems that might arise as life progresses in the material world. Progress cannot be stopped, and as life changes, so will the reality around us to the point that it will no longer match the world as it is portrayed in Scripture. As Emon puts it, "Muslim jurists knew that the world of lived experience could not be captured between the Qur'an's two covers or by the large body of Hadith."[33] Thus, the precepts of Scripture must be adapted, and new laws have to be made, befitting the new realities not predicted in the old legal sources. This is a problem which Shariah shares with the Halacha.

[31] Opwis (2007), Brown (2009).
[32] Opwis (2019), Gleave (2012).
[33] Emon (2014, 148).

The second motive is not unrelated to the first; in fact, it proceeds from it at the same time as it precedes it. Despite any mechanisms of control, trying to patch up Revelation's shortcomings by resourcing to rational thinking would inevitably lead to the theological question of *how the will of God manifests itself* to man, by Revelation alone or could men grasp God's will through human Reason after all.

Between the 8th and the 10th centuries, two main theological scopes concerning God and the expression of His will were developing within Sunni Islam. At the heart of the discussion was the question of *God's own freedom of will*. Two conflicting understandings of this problem opposed the conservative Asharites to the rationalist Mutazilites who, in the absence of scriptural source texts, approved the use of Reason as a source of Law.[34] Their opposing theological views had immediate consequences in their *usul al-fiqh* conceptions, particularly in what concerns the concept of *God's justice* (عَدْل الله *ʿadl Allāh*)[35].

The Mutazilites believed that men, through their intellectual capacity, are able to grasp the very basics of morality. Within this view of theology illuminated by Reason, they argued that when God created the world, He did not do it just for Himself but as something good from which men profit. They postulated that since God is good, it is only logical to think that he would do so, and the world being a good thing, it offered a blueprint of God's justice and goodness. The Mutazilites believed that through Reason, men could read that blueprint and understand what is good and just for God. In other words, God revealed himself through his creation, and through our rational capacity, we can understand that creation and its laws. They saw the world as a reflection of God's law, as if the world were a kind of manual of what *ought to be*, a manual which men could read and from which they could take moral conclusions. "Hard Natural Law jurists granted Reason the ontological authority to analyse and investigate the world around them and thereby derive new norms. For them, one could rationally deduce the good from Nature and transform that finding into a normative Shari'ah-based value since the empirical goodness of Nature also contains normative content stemming from the will of God."[36]

This view was strenuously opposed by the Asharites, to whom the idea that God *had* to have created the world as a benefit just because he was good was unacceptable. They argued that the presupposition that God *had* to have created the

[34] Emon (2014, 149); Hourani (1985).
[35] Emon (2010, 13–8, 27–31; 2014, 150–1; 2019, 184–5)
[36] Emon (2104, 149).

world as a benefit for men because that is *how a good God would act* is to impose onto God not only standards of human justice but also restrictions to His freedom to act as He wills. As such, the Asharites conclude that "one cannot infer from the facts of nature any moral norms and obligations that enjoy the imprint of the divine."[37] Against the Mutazilites, who argued that God *could not* act against what Reason demonstrates to be good or just, the Asharites thought that God, being omnipotent, good is whatever God commands, and evil is whatever He forbids. What God does or commands, as revealed by Scripture, is by definition just, and what He prohibits is by definition unjust; *right* and *wrong* are not objective realities determined by our rational faculties; instead, *right* and *wrong* derive from what God wills them to be. Therefore, it is not inconceivable to consider that God, because he is just, cannot do or command something unjust –*is it just to condemn someone to hell over something beyond their control?* To have certain expectations about how God is supposed to act is to bring the absolute freedom of God under the scrutiny of human concepts of justice and goodness. Even if some of God's actions might seem unjust to us, it is not up to men to understand the way God wills; our judgment of God's actions is irrelevant.

On the other side, the Mutazilites argued that whatever God commands is necessarily good and just and whatever he forbids is necessarily evil and unjust because God *can only command what is good and forbid what is* evil and "the evaluation of justice and injustice is something that humans can reason about and presume of God."[38] For the voluntarist Asharites, God's justice is a function of God's will, so they conclude that God's will is by definition just, whereas the Mutazilites argue in ethical rationalism fashion that God wills only what is just.[39]

They defended that God created the world as he wanted, not with the end of being something good for men, but through God's 'mercy' (رَحْمَة *raḥmah*) and 'generosity' (فَضْل *faḍl*) the world ended up being something good for mankind. By reasoning this way, the Asharites are able to maintain their views on God's absolute freedom and omnipotence and still accept the world as something good for men because, if God can change his mind since He hasn't, then the world must be good after all. This way, the opinion on the nature of the world is an observation a posteriori, not a presupposition, which allows the Asharites, as the Mutazilites did,

[37] Emon (2019, 151).
[38] Emon (2019, 185).
[39] Makdisi (1985).

to see the world as a blueprint of what is good.

Despite meeting the Mutazilites in the same square through a different alley, the Asharites, the group to which Al-Ghazali belonged, were still afraid that man-made laws could rival laws derived from revealed sources. Were that ever to happen, then Reason could be seen as being at the same level as Revelation, proving that the Mutazilites were right in saying that the will of God could be grasped by reading the world since God acted according to what men thought human Reason knew to be good. This would seriously challenge the voluntarist views adopted by Sunni orthodoxy. Consequently, Al-Ghazali devised the *maqasid al-Sharia* mechanism in an attempt, first, to oversee and bring under control any role that Reason might play in *usul al-fiqh* and in the Islamic legislative process as a whole and, secondly, to try and limit the creation of manmade laws by keeping it to the strictly necessary−only *maslahah* deemed *darurah*. Al-Ghazali hoped that by limiting the scope of Reason over the legal system, he would also limit the discussion about how the will of God manifests itself in the law.

In conclusion, we could say that Al-Ghazali's attempt to control the use of rational thinking in Islamic fiqh is the ultimate proof of its relevance; it was significant enough to cause concern and to deserve its own mechanism of control.

However, even though this control mechanism was designed with the clear objective of limiting the scope of Reason within the Islamic legal system so as to protect Sunni orthodox voluntarist theology, Al-Ghazali's *maqasid al-shariah* is in itself a Reason-based legal device in so far as it is reliant on the use of rational thinking for the selection of which *maslahah* ought to give rise to pronouncements of law, to give just one example. Furthermore, the creation of the *maqasid al-shariah* shows how Al-Ghazali was aware that, on the one hand, Revelation had its limits and, on the other, that, because of these limits, the Islamic theologically-based legal system could not function adequately without resourcing to the use of rational thinking in its law-making and justice-delivering procedures.

Likewise, the theoretical exercises in *usul al-fiqh* using the heuristic mechanisms known as *huruq Allah* vs *huquq al-ibad* performed by the different schools of Islamic Fiqh demonstrates that, despite the restrictions imposed by their heavily theological environment, Islamic jurists were still capable of producing sophisticated reasonings even in cases where Shariah law actually had scripture-based

ready-made pronouncements of law, such as the case of *hudud* or *hand amputation* for theft.

These examples demonstrate that Reason had a role to play within the complex legal system of Islamic Shariah, and they give testimony in favour of Emon's central idea that *the lack of explicit mentions of Natural Law in Islamic jurisprudence is not an indication that Reason and rational thinking had no place in Islamic legal tradition*.

τὸ τέλος. τῷ Θεῷ δόξα.