Islamic Law:
A Long Work in Progress

By Dr. David Vishanoff

The more one studies the details of Islamic law, the more one is alarmed at the prospect of its being enforced by British courts, applied to Americans abroad, or enshrined in the constitution of a new democracy such as Afghanistan or Iraq. Even many devout Muslims, for whom the heritage of Islamic law carries an aura of timeless authority, find it grotesquely anachronistic when set against their own present circumstances and ideals. But if one takes a longer view, gazing backward over the history of its development, and forward beyond the horizon of this present generation, Islamic law turns out to be no less adaptable, and potentially no less democratic, than American law.

For one thing, the sacred texts that give Islamic law its authoritative basis do not actually determine its content. Since about the 9th century, Muslim legal scholars have imagined their law as a tree: its many branches – detailed rules governing every conceivable human circumstance – grow naturally and ineluctably out of its roots – the text of the Quran and reports (hadith) about the Sunna (words and deeds) of the Prophet Muhammad.

But those texts do not contain a comprehensive law. The Prophet did not deliver a complete legal system to his followers; rather, he adopted and gradually modified many of the norms and practices that were prevalent among the Arabs and Jews of 7th century Arabia. What he demanded of the nascent Muslim community was, for the most part, to live according to what their own society already considered just and proper. Even when he laid down specific rules, these were mostly variations on existing customs. Following the Prophet's death, Muslims carried on many of his practices, but also continued to adopt and adapt the customs of the peoples among whom they spread, including everything from marriage arrangements to taxation systems.

Several centuries elapsed before the need for a more distinctively Islamic religious identity finally led most Sunnis to agree that their law should be based entirely on divine revelation – the Quran and the Prophet's Sunna. This concept of a revealed Islamic law, which was first successfully championed by Muhammad ibn Idris al-Shafi'i (d. 820), implied that the Prophet's *ad hoc* and sometimes inconsistent modifications of pre-Islamic norms and practices had to be reinterpreted as a coherent and original legal system. But this reinterpretation could not afford to disrupt existing governmental and social practices, which were too firmly entrenched to be overturned by the idealistic notion of a divinely revealed law.

So, in the end, the Quran and hadith were used mainly to give a religious justification, and an aura of revealed authority, to laws that were actually rooted as much in pre-Islamic practices and administrative pragmatism as in the Prophet's message. Revealed texts were interpreted, and some hadith were even invented, so as to justify existing legal doctrines. Those few revisionists, such as the Zahirite ("literalist") school of jurists, who actually wanted to let scripture determine the content of Islamic law, were marginalized and ignored. Thus although Islamic law came to be regarded as the inevitable outworking of a fixed set of sacred texts, its content was in fact largely derived from the diverse and evolving practices of Near Eastern peoples.

Even once it was dignified with the authority of divine revelation, the law did not become stagnant. Muslim scholars recognized, as a matter of principle, that changing times demanded new rules. For

example, a system of fixed land taxes inherited from the Sassanians was praised by some Muslim scholars as consistent with revealed Islamic principles, but when it was found to cause financial difficulties and to discourage development of new agricultural land, a new proportional taxation system was justified by appeal to different texts and principles. Sometimes jurists knowingly and unabashedly abandoned a precedent set by the Prophet in favor of what they felt was more prudent. No one denied, for instance, that the Prophet had unequivocally affirmed women's participation in public prayer at the mosque, but some jurists argued that deteriorating standards of morality made it necessary to exclude women from mosques. Such changes were only accelerated by the rapid cultural, political, economic, technological and social transformations brought on by colonialism and modernity.

How can a legal system whose authoritative basis is an absolute and final divine revelation be so open to modification by shifting human concerns? Classical Islamic legal theory itself accounts for the law's fluidity. First, the textual corpus of revelation is not as fixed as it appears: it consists mostly of hadith whose authenticity can be contested. A jurist who wants to justify a novel legal opinion thus has some leeway in selecting the body of texts that he must take into account. Then he also has great flexibility in assigning meaning to those texts: one of the best kept secrets of Islamic law is the jurists' tremendously sophisticated analysis of language, which enables them to turn a text on its head, or creatively modify its apparent meaning by appealing to some other text. Alternatively, a jurist can argue that one text is simply superseded by another text, or by a mere report that there once was such a second text: thus the Quran's clear pronouncement that adulterers should be flogged is commonly said to have been superseded by another Quranic verse prescribing stoning, which, however, was omitted from the Quranic text we have today.

If the interpretive path from revealed texts to legal rules provides ample room for evolution and diversity in jurists' legal opinions, the path from a rule to its implementation provides still more opportunities for renegotiating the law. A rule does not decide concrete cases on its own. For example, the penalty of stoning for adultery, so assiduously justified with murky textual evidence, has seldom been carried out because stringent rules of evidence were built up around it to prevent its application. When a legal scholar was presented with a problematic legal case, he could often shape the outcome by choosing from among an array of conflicting views expressed by earlier jurists, and by deciding whether to emphasize private property rights, human welfare, the form of a contract, or some other consideration. Even then, a legal scholar's opinion had no practical consequences unless a state-appointed judge decided to apply it to particular litigants. Studies of past court records, and of those modern courts where some form of Islamic law is still enforced, reveal that there are many ways for litigants and judges to make a seemingly rigid and anachronistic set of rules serve new goals and values.

Thus the revealed texts that supposedly govern Islamic law come to have an effect on the real lives of individual Muslims only through the medium of a complex chain of human choices – selections, interpretations, and applications – all of which are shaped by the changing values and concerns of Muslims themselves. Islamic law as a religious concept is timeless and ordained by God, but as a discourse and practice it is thoroughly human and historical. Muslims have long recognized this by distinguishing between Shari'a – God's will which can never be known with certainty – and fiqh – the intellectual construct of human jurists. Precisely because the Quran and Hadith do not offer a consistent and comprehensive law, they can be reconciled with just about any moral or legal vision that Muslims choose to embrace, thanks to the jurists' flexible mechanisms of selection, interpretation, and application. The Quran and hadith put few real limits on what Islamic law can become.

What, then, is responsible for the fierce conservatism and resistance to reform that outsiders often associate with Islamic law? First, it should be pointed out that little of what passes today for

"traditional" Islamic law is actually representative of classical jurisprudence. The 20th century saw more reform than continuity, but that fact is often masked by Western expectations of what reform should look like. The legal views of so-called "conservative" Saudi Arabian jurists often represent stark departures from classical legal thought, frankly motivated by modern social issues. Those modern states that adopt Islamic law in limited areas such as marriage and divorce typically impose modern codifications that depart significantly from classical scholarship. The evolution of Islamic law in response to social change is thus alive and well. At the same time, newspaper headlines frequently bear witness to the fierce devotion that some Muslims maintain toward a few highly publicized aspects of classical law, such as the famous penalty for adultery, which has been officially adopted and occasionally even applied in a few modern states such as Nigeria. The most obvious factor favoring such resistance to reform is the Sunni jurists' doctrine of consensus: whatever opinion gains the explicit or tacit approval of a whole generation of legal scholars becomes as authoritative as revelation itself; it can never again be contested. Such consensus, however, can never be proven to exist, least of all to someone who disagrees with it. A claim of consensus on a specific point of law, therefore, is never more than a rhetorical tactic; it is convincing only so long as Muslims are willing to be convinced by it.

A second factor that restrains reform is, ironically, the modernizing process whereby some Muslim states have enshrined Islamic legal rules (usually only on matters of personal status) in European-style legal codes; this reduces the law to a single monolithic set of rules, and thus undermines courts' ability to choose among competing legal opinions. But these codes still remain subject to revision through the very mechanisms that produced them, so the evolutionary nature of Islamic law is kept alive, albeit in a new form. Yet another conservative force is the culture of educational institutions, which have long imbued aspiring Muslim jurists not only with the technical tools of Islamic legal discourse, but also with a conservative moral and social vision. Yet these institutions too are changing; traditional legal education is now usually combined with a Western general education and training in modern law, with the result that today's legal scholars have only one foot in the conservative world of classical scholarship.

The one factor that presents the most serious impediment to reform is the role that religion plays as a marker of personal and national identity. Certain isolated features of the law become symbolic of the very concept of Shari'a, so that it becomes impossible for Muslims to challenge those specific features without being perceived as opponents of the very concept of revealed law, and thus of Islam itself. For example, the general principle that most men receive twice as much inheritance as women was regarded as so essentially Islamic that when it was eliminated by the Iraqi personal status law of 1959, there was a public outcry, and unequal inheritance was quickly restored. That development was derailed not for lack of a mechanism or a justification for reform, but because of popular opinion. The greatest conservative force restraining the evolution of Islamic law is not revelation, or classical legal discourse, but Muslims themselves.

Islamic law, then, is controlled by both transformative and conservative forces; but those forces have little to do with the law's specifically Islamic or revealed nature. The forces that shape Islamic law – educational institutions, shifting social norms and practices, changing political and economic and technological conditions, and even popular feelings of religious identity – are the same forces that shape Western legal systems. American law is likewise governed by a combination of foundational texts and cumulative precedent, whose effect on individuals and society likewise evolves only slowly, through a variety of interpretive and legislative mechanisms, in response to practical pressures and shifting social norms. In the here and now, Islamic laws and American laws are starkly opposed on many important issues. In this generation, some Muslims will undoubtedly continue to regard as essentially Islamic certain rules that are morally unacceptable to most Westerners (and to many

Muslims). But Islamic law is and will remain subject to the very same pressures as Western legal systems – the pressures of social change and popular opinion. In the long run, Islamic law will be whatever Muslims want it to be. It is not the product of timeless texts, but of living people. As one gradually comes to know and trust those people, the long-term prospect of living alongside or even under Islamic law seems less and less alarming.

David Vishanoff is an Assistant Professor in the Religious Studies Program at the University of Oklahoma. He earned his Ph.D. in West and South Asian Religions, with a focus on Islamic thought, at Emory University, after completing an M.A. in Religious Studies at the University of Colorado. His research is principally concerned with how religious people interpret and conceptualize sacred texts – both their own, and those of other religious traditions. He recently completed his first book, The Formation of Islamic Hermeneutics: How Sunni Legal Theorists Imagined a Revealed Law. He is beginning new projects on contemporary Islamic hermeneutical thought, and on Muslim uses of the Bible.