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Shari'a and Fiqh: Embodiments of the Theoretical and the Practical

Margaret Pettygrove

The relationship between law and morality is such that it is not easy to separate the two concepts. Generally in Islam, law and morality are one and the same, and speaking of them as distinct ideas is not really possible. It is largely a problem of language, in that English distinguishes between law and morality, whereas Arabic does not clearly do so. It is, nevertheless, possible to parse the Shari'a into aspects that resemble morality and those that resemble law, as Bernard Weiss does in *The Search for God's Law*. The Shari'a is the "totality of 'divine categorizations of human acts'" (Weiss 1). However, the Shari'a does not provide clear enough rules to guide behavior, and so must be articulated by Muslim scholars into concrete laws. The result is that Shari'a comes to represent a theoretical law that cannot alone provide the legal code for a community. Despite the difficulty of separating law and morality within Islam, it is possible to view the Shari'a as constituting morality and not law.

In Islam law and morality are not divorceable. However, by adopting nuanced conceptions of law and morality as two parts that comprise one entity, it is possible to look at ways in which law and morality differ. In that morality represents punishment on judgment day and law represents punishment on earth by human judges, we can distinguish law and morality as two different aspects of Shari'a categorizations (4). This is how Weiss distinguishes between law and morality in the categorizations of the Shari'a. According to Weiss, particular categorizations of the Shari'a—such as the categorizations of obligatory and forbidden—constitute rules of law because they give no option but to comply (3). Yet, he says, they also fall within the scope of morality. From this, Weiss concludes that, although law and morality in Islam are one and the same, they can be viewed as different aspects of the same concept (3-4). The key distinction between law and morality is "relevance to judicial proceeding" (4). The Shari'a categorizations of obligatory and forbidden constitute both law and morality because they are relevant to

enforcement on earth and on the Day of Judgment. Thus, that which is relevant to enforcement by human judges corresponds to law, while that which is relevant to divine judgment constitutes morality.

Weiss uses this idea of relevance to judicial proceeding to illustrate that the categorizations of the Shari'a are comprised of both law and morality. It seems, however, given Weiss' conceptions of law and morality, that the Shari'a is more congruous with morality and less so with law. Law and morality are inseparable in Islam, and so in a sense Shari'a must still constitute both. Yet given the distinction that Weiss makes between law and morality based on relevance to earthly or divine judgment, the Shari'a falls more under the scope of morality. Because the Shari'a ultimately plays the role of an ideal and theoretical law, its direct relevance to this-worldly judicial proceedings is limited. Weiss says that Muslims live "under the shadow of two tribunals, one this-worldly and presided over by a human judge and the other other-worldly and presided over by the divine judge" (4). Both aspects constitute law (where law is a set of enforced rules), but divine judgment more closely resembles morality.

It would be reasonable to argue that neither realm of judgment really constitutes morality—in a modern conception of the term—because morality today is generally taken to mean guidelines for behavior for which there is not necessarily going to be a punishment. In all cases in Islam, there will be some form of retribution, whether by a human or divine judge. Thus behavior is always dictated by the threat of punishment, and as such might not constitute behavior based on morality. However, even in the modern context of morality, given a religious framework, it is usually seen as deriving from obedience to a god or higher power. Thus it does still make sense to equate divine judgment with morality.

Because the Shari'a only becomes functional when it is interpreted and formulated by jurists into practical rules for behavior, it does not constitute "law" in the manner that Weiss describes. It is the ideal model from which practical judgments are made but does not serve as law in itself, and so falls into the category of morality. The categorizations of the Shari'a are made concrete in *fiqh*, and it is only through these articulations that

applicable laws are created. Weiss uses "law" to mean "positive law," as opposed to "moral code" (5). As a moral code is something that prescribes behavior but will only be enforced in another world (or not at all), the Shari'a is more like a moral code than it is positive law. The Shari'a does represent authority from which *fiqh* is derived, but it is *fiqh* which provides the actual understanding of divine law, and so it is *fiqh* which lays down the positive law under which Muslims live.

It is in this manner that the Shari'a falls solidly into the realm of morality and out of the realm of law. Although the Shari'a consists of divine law that will be enforced by God on Judgment Day, it is only with the articulations presented in *fiqh* that actual rules for how to act are established, and thus the Shari'a in itself represents only a theoretical law. It is from the formulations of Muslim jurists that "we find law that may be applied in courts" (16). The Shari'a bears very little direct relevance to this-worldly justice because its categorizations are not applicable in a practical sense until they are fully articulated in *fiqh*. Weiss uses morality to describe rules that pertain to justice in the afterlife; the Shari'a is primarily relevant to other-worldly justice. It is not that the Shari'a is concerned only with rules that will be enforced in another world, but that it is an ideal law that does not function as a guiding system until it is articulated in *fiqh*. The Shari'a consists of categorizations that pertain to this-worldly matters, but it is in a form that needs to be interpreted and reformulated into workable laws. As Weiss explains, the Shari'a is a "sort of Platonic ideal that scholars try to realize" (16). The Shari'a is the inspiration and source of authority for Islamic law as expressed in *fiqh*, but because the Shari'a represents only an ideal for which to strive, it remains a largely theoretical body of law. The theoretical relevance of Shari'a to earthly justice as the source of practical law is not sufficient to grant it the status of law. *Fiqh* is able to stand as law "in its own right," and thus it makes sense to call Shari'a morality rather than law (16). Once law is articulated in *fiqh*, a community could potentially dispose of the Shari'a and still have rules to govern life. Whatever legal prescriptions the Shari'a makes, it is *fiqh* that actually instructs Muslims on how to behave. Even if the Shari'a is called "God's law" and *fiqh* "the jurists' law," it is still *fiqh* that articulates both

divine and earthly law. The formulations of the jurists are obligatory to understanding law, including divine law.

Law in Islam is “not a given,” but must be interpreted and deciphered from a “set of indicators,” which are found in the Qur’an and Shari’a (16). This looks distinctly like law derived from morality. To the extent that morality is a loose framework off of which one bases actions, the Shari’a is morality. Morality gives us ideas about what is right and wrong, but does not provide strict rules about particulars. Morality gives generals, from which can be derived rules about particulars. If morality stipulates that killing is wrong, then it may be the role of law to say if it is always wrong or if there are specific cases in which it is justified. Morality can inform legal decisions, but morality alone cannot constitute positive law. *Fiqh*, as the articulation of particulars from generals contained in the Shari’a, represents law; the Shari’a represents morality.

Early Muslim scholars were primarily concerned with the understanding of the Shari’a as it is associated with practice or action (3). Transitioning from theoretical law to practical law allowed for the definition of particulars from generals, and both were necessary in creation of a system of law that could practically govern a community. The Shari’a provides prescriptions for behavior in its five categorizations, but these are somewhat vague and unspecific. It became necessary to take the divine law given in the Shari’a and formulate it into concrete rules for behavior. Jurists articulated what was in the Shari’a into practical law, or *fiqh*. By inferring practical law from the Shari’a, jurists moved from the general to the particular.

Although Weiss distinguishes law and morality only by relevance to judicial proceedings, there is another important distinction between the two concepts, which lies in the formulation of rules by each. Morality provides a fluid outline of what are right and wrong behaviors, whereas law communicates more particular rules and prescriptions for behavior. This differentiation between generals and particulars can also be viewed in the distinction between theoretical and practical. Broad general rules provide a theoretical moral framework, while particulars dictate practical rules that govern very specific actions.

If there are actions that are not ruled by this-worldly law—that is, they will only be judged by God in the afterlife—

these may be considered as belonging solely to the realm of divine law. In this way Shari'a can still be seen as constituting a form of law, in that it pertains to rules that will be enforced by reward or punishment. Yet given Weiss' use of the term "law" to indicate relevance to adjudication by human jurists, Shari'a does not constitute law because it does not provide the actual rules that comprise the earthly legal system. As explained above, it is *fiqh* that establishes rules pertaining to this-worldly law, not the Shari'a.

We can call God's revelation law because its rules are eventually enforced, but this divine law more closely resembles morality because we cannot take it alone to provide practical rules for community living. There is a necessary intermediate step between the ideal law and its practical formulation. From divine law jurists must create a set of laws to guide behavior, and without this practical articulation it would be difficult to understand how to behave in accordance with what God desires. The vagueness of the Qur'an and Shari'a necessitates articulation of a practical law.

Fiqh is the articulation and understanding of the Shari'a (24). Islamic philosopher al-Amidi placed particular emphasis on the understanding of Shari'a as attainment of a special kind of knowledge. Possessing this knowledge elevated one to a higher status as a learned person (25). One implication of this is that those who reach this understanding of the Shari'a obtain power. Only Muslim jurists are qualified to articulate the rules of *fiqh*, and these jurists have extra authority because they have the understanding. Amidi writes that although interpretation of the categorizations contained in the Shari'a is very much a matter of opinion, *fiqh* is "knowledge, based on incontestable perception, of what constitutes [valid] conformity to those categorizations" (Weiss 25). The Shari'a can be interpreted in multiple ways, so it is left to those with authority to establish the correct interpretation. Understanding of Shari'a categorizations is fallible, but acceptance of jurists' articulations is necessary in order to have practical laws under which a community can function (26).

Through the articulation of universals, Islamic jurists established orthodoxy, which meant essentially the codification of morality. Scholars understood a morality given by God in the Qur'an and Shari'a which they then transcribed into practical

rules. The unity of law and morality is maintained in the creation of Islamic orthodoxy (not only what one must believe, but also the set of required practices). That is, orthodoxy prescribes law, but it equally connotes morality because one is compelled to obey based on a belief in God and commitment to obeying him. Practical jurisprudence is the manifestation of theoretical jurisprudence and the ideal law. This creates practical rules for behavior in an attempt to maintain the spirit and ideals of the theoretical law. In using the term orthodoxy, I mean orthodoxy as the created set of accepted practices and beliefs that are particularly intended to have widespread, practical application. *Fiqh* or practical jurisprudence are orthodoxy, whereas the Qur'an or even Shari'a are not inherently orthodox. Something becomes orthodoxy once it is processed and adopted by those in power and claimed to be the truth or the only right way. Islamic jurists had to work out practical law given a rather open set of decrees in the Shari'a, and this was where orthodoxy could be established. Orthodoxy is important with regard to jurisprudence because it creates a standard framework of prescriptions while maintaining the motivation or derivation from morality and religious devotion. If rulers simply said 'you should do x, y and z because it's good and we will punish you if you don't,' this is harder to impose broadly. But under jurisprudence, leaders could create equally rigid laws by appealing to religious devotion and belief in God. A practical articulation (*fiqh*) of the Shari'a as it applies to everyday life is necessary to create a unified community with a standard set of behaviors and practices. Then it becomes necessary to call this law and enforce it on this earth. Where the creators of law can appeal to a model of religious morality they will have greater success in unifying a community and controlling behavior. In interpreting the Shari'a and creating the articulation of practical law in *fiqh*, jurists created orthodoxy that maintained a moral basis for law.

Fiqh itself is authoritative, in that it constitutes each individual's understanding of the Shari'a, and each must abide by this particular understanding (14). The Shari'a is immutable, but *fiqh* is flexible enough to remain open to diverse interpretations. Thus, in articulating practical law from a body of theoretical universals, Islamic jurists could exercise power and authority over a community in a manner that did not conflict with the authority

of God given in the Qur'an and the Shari'a. *Fiqh* brought the Shari'a into the realm of interpretation and human control.

In the end, we are still confronted by the linguistic problem created in the attempt to separate law and morality. It makes sense that law and morality cannot truly be divorced in Islam, because the two concepts are inherently intertwined. Also, there is a significant dichotomy between theoretical and practical jurisprudence that lends difficulty to the categorization of Islamic texts as law or morality. However, with deliberate and clear understanding of what is meant by the terms law and morality they can be distinguished. Although separate words for law and morality do not exist in Islam, there are evident differences between theoretical and practical law that closely resemble the distinction between morality and law. Law and morality may never exist without each other, but this does not mean we cannot speak of them as different concepts.