

History of Shari'a Development

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Shari'a can broadly be divided into two parts – Personal and Legislative. Personal shari'a refers to rules of faith practice as mandated in the Qur'an. It includes the individual's behavior, morality, manners, worship, character, etc. The Qur'an furnishes an essential framework of beliefs, duties, obligations, exhortations and sanctions along with broad principles and leaves considerable room for developing details by the people to safeguard against restrictive rigidity.¹ Legislative shari'a by comparison, is the human effort to develop a Qur'an compliant system of legislation; this was developed in the eighth and ninth century by the Abbasid Caliphate. A full understanding of legislative shari'a and its historical evolution is critical because radical Muslim groups demand its implementation to usher in the *Islamic* system of governance. It is important to highlight that the radicals' ultimate objective is the establishment of a [mythical] *Islamic* State to be ruled by a Caliph under shari'a.

Prophet Muhammad's^{sa2} death in 632 CE left a sudden leadership vacuum among the Muslims. They elected (or selected) a leader (caliph) from the Prophet's closest companion for leadership and guidance. Four such caliphs, elected on the basis of piety, were the Prophet's closest companions. They are referred to as the righteously guided caliphs and this Caliphate lasted about 30 years. It was terminated due to considerable political upheaval after which the Caliphate was assumed by the victor and became hereditary. The aftermath of this political turmoil caused the Sunni-Shia split.

The questions faced by the righteously guided caliphs were relatively simpler than those faced by their successors. The later caliphs faced momentous dilemmas when resolving difficult legal matters especially in areas where the Qur'an did not provide specific details. Their much larger, varied and increasingly more complex citizenry along with developments in education, science and arts, posed more difficult problems. The need for developing a Qur'an compliant law – Legislative shari'a – was thus felt to preserve the essence of the first community when the prophet was alive, but under very different and ever changing circumstances.

The foundation for developing the Qur'an compliant system of legislation – Legislative shari'a – was developed under the Abbasid Caliphates³ of al-Mahdi (775-785 CE) and Harun al-Rashid (786-809 CE) by two noted scholars Malik ibn Anas and al-Shafii. Shari'a was designed to create a uniform legal system

¹ "Oh ye who believe, do not keep asking about things which, if they were expounded to you, would become troublesome for you ... Allah has left them out. Allah is most Forgiving, Forbearing. A people before you made such demands, and when they received directions they repudiated them" (Qur'an Ch 5, v 102-3).

² Customary salutation meaning peace be on you.

³ The Islamic caliphate was formed after the Prophet's death to lead the community. The first four caliphs (Abu Bakr, Umar, Uthman, and Ali), elected based on piety and are known as the "rightly guided caliphs". Internal dissent resulted in the assassination of the last three caliphs and a civil war broke out after Ali's murder. The winner, a provincial governor Mu'awiyah, formed the Umayyad dynasty and claimed the caliphate in 661. The Umayyad Dynasty was defeated by the descendants of Muhammad's^{sa} uncle Abbas ibn Abd al-Muttalib who formed the Abbasid dynasty in 750 CE and also claimed the caliphate.

based on Qur'anic injunctions of equality, peace, and justice. It was to be applied uniformly to a diverse and growing population within the expanding Empire that included new converts of different cultural and social backgrounds. Its scope was to continually evolve and address the population's ever changing needs. The Abbasid Caliphs created a distinct class of scholars to interpret the Qur'anic principles and develop Qur'an compliant legislation. A comprehensive and elaborate three tier process was thus developed for this purpose (Figure 1).

The Qur'an – the primary source – constituted the first tier which provided broad principles, but required further development for which two supplemental sources were developed.

The first supplemental system was the compilation of the Prophet's practices (sunnah) and exhortations (hadith). This was to serve as reference to exemplify the Qur'anic teachings by reference to the Prophet's life. The scholars painstakingly compiled the Prophet's practices and exhortations by collecting and collating verbal accounts from people whose ancestors had passed on the Prophet's traditions through generations. The authenticity of these accounts was validated through the person's piety and family lineage. Six such books⁴ were completed between 194 and 273 AH⁵ (816-895 CE), about two hundred years after the Prophet's death. As a general principle, these compilations are subservient to the Qur'an and must be rejected if found to be contrary to the Qur'an.

The second supplementary system, developed in consonance with Qur'anic injunctions,⁶ included analogical reasoning (qiyas and ijihad), precedence, and consensus (collective reasoning or ijma) based on the jurists' judgments and opinions. This third tier can be classified as derived sources.

This three tier process for Qur'an compliant legislation became known as [Legislative] shari'a and contained a wide range of ethical and moral principles, legal methodologies, and many conflicting and competing judgments. This rich and diverse matrix of opinions and judgments was collectively considered to be God's law. This multifaceted approach became the basis for a Muslim legal system. Given the diverse social and cultural conditions within the Caliphate, multiple interpretations were acceptable for the derived sources provided they were consistent with fundamental Qur'anic principles. The derived sources were regularly updated to remain current with changing needs due to the expanding territory, evolving knowledge and changing societal and cultural norms within the state. It was not a "one size fits all" approach and Legislative shari'a allowed the judges' discretion as the current secular law does.

⁴ Sahih Bokhari (194-256 AH); Sahih Muslim (204-261 AH); Jamia Tirmazi ((209-279 AH); Sunan Abu Daud (202-275 AH), Sunan Nasai (215-306 AH) and Sunan ibn Majah (209-273 AH).

⁵ AH (Anno Hagirae) or 622 CE marks the formal beginning of the Muslim calendar. Based on the lunar calendar, with nineteen ordinary years of 354 days and eleven leap years of 355 days in a 30-year cycle, Islamic dates cannot be converted into CE dates by simply adding 622 years. Allowance must be made for the fact that each Hijri century corresponds to only 97 years in the Christian calendar. The year 1428 AH coincides almost completely with 2007 CE.

⁶ And those who hearken to their Lord, and observe Prayer, and whose affairs are *decided* by mutual consultation, and who spend out of what We have provided for them, (Qur'an Ch 42, v 39)

The ethos of shari'a, like that of the Qur'an, was egalitarian. Special provisions were included to protect the weak, and no institution, such as the caliphate or the court, had any power to interfere with the personal decisions and beliefs of the individual. Each Muslim had the unique responsibility to obey God's commands (Personal shari'a), and no religious authority, institution, or a specialized group of "clergy" could intercede between God and the individuals who were all considered equals. Shari'a was thus an attempt to rebuild society on criteria that were entirely different from those of the emperor's court.

Unfortunately, during the 10th century, this process of legislation came to an end because later *scholars* ventured into resolving theoretical and hypothetical situations. Rather than broaden the horizon of jurisprudence, their speculations on hypothetical issues served to freeze further development because the process became more speculative than constructive.⁷

Prof. Khaled Abou El Fadl, Professor of Law at the University of California, Los Angeles (UCLA) defines shari'a as "the sum total of all the legal opinions according to the various schools of thought, in addition to the principles and methodologies, were known collectively as the shari'a." He further explains shari'a as:⁸

"... Rather, Islamic law is produced by jurists interpreting textual sources and applying particular methodologies according to a fairly complex set of rules. The primary sources of Islamic law is the Qur'an, which Muslims believe is the literal, unadulterated word of God; the *Sunna*, which is a body of oral translations describing what the Prophet and his Companions said and did [collected and collated about two centuries after the prophet's death]; rule by analogy, which is effectively the following of precedents so that a judgment in an old case is adhered to in a similar new case; and consensus of the jurists (or, according to some, consensus of the Prophet's Companions, and according to still others, consensus of Muslims in general, as opposed to jurists). Other than these main sources, a ruling in Islamic law could be based on equity, public interest, or custom. This, of course, is a general overview of the sources that Muslim jurists relied upon in constructing and building the Islamic legal system. But it ought to be noted that there were extensive debates and disagreements about the exact meaning and application of each of these sources. ... Muslim jurists exercised the dominant role in producing the set of judgments and rulings that we now know as Islamic law. In theory, Muslim jurists searched and interpreted the Divine law, and they exercised considerable leeway and discretion in deciding what is valid or invalid, what is legitimate or illegitimate, what to count and what to abjure, what to rely on and what to exclude. Because most of Islamic law is the product of juristic reasoning and interpretive activity, on any significant issue one will find multiple legal opinions all claiming to be correct. In the first couple centuries of Islam, well over thirty schools of legal thought, organized along the lines of methodological and interpretive differences, competed for the hearts and minds of Muslims. Although the competition among the various schools of thought was often intense, all schools were considered equally legitimate and orthodox. The sum total of all the legal opinions according to the various

⁷ Zafrullah Khan, "Islam and Human Rights" p 16

⁸ Khaled Abou El Fadl, "The Great Theft: Wrestling Islam from the extremists", p 31

schools of thought, in addition to the principles and methodologies, were known collectively as Shari'a (the holy law of God). In the classical age the state could not produce Shari'a law; only the jurists could do so. Laws passed by the state were considered regulatory rules not included as part of Shari'a law."

Illustrating the diversity of shari'a, Prof. Fadl describes his collection of about fifty thousand titles on Islamic law in his personal library – the vast majority written between the ninth and sixteenth century.

Legislative Sharia was developed during a period when the global economic base was agrarian. Its purpose was to establish a peaceful and equitable society, which encouraged people to abide by the law and penalize the transgressor, with a view to reform and rehabilitate them; capital punishment was prescribed for exceptional crimes where the probability of reformation was extremely low. This structure provided a form of separation between spiritual matters and politics. The Caliph resolved spiritual matters while political rulers resolved other matters.

The most obvious evidence of this system's success was the rapid development and prosperity of Muslim societies and the emergence of the Ottoman Empire as the dominant power in the world. Muslim ascendancy ceased when the Europeans transformed the global economic basis to industrial and colonized Muslim lands in search for markets and raw materials.

In the ensuing leadership vacuum, some Muslim *leaders* characterized their downfall as divine punishment and urged believers to revert to the *pristine* form of Islam. Several reformation movements emerged during the last two to three centuries and proposed different, and at times competing, versions of *pristine* Islam. Some proposed the formation of an Islamic State where Muslims could practice their faith.

The process of industrialization evolved after the long and painful process of reformation and renaissance spearheaded by Western nations and required new and more elaborate standards of education and governance. The education system for the industrial system mandated that knowledge be obtained to solve problems. The nature of knowledge changed with the problems and gave birth to the need for continuing research in all fields. The legislation system required new laws to address industrial era issues and developed a new form of governance for the industrial economy. This constitution-based form of governance has been adopted by virtually all countries and replaced the legislation procedure developed by Abbasid Caliphate which was primarily developed for the agrarian economy.

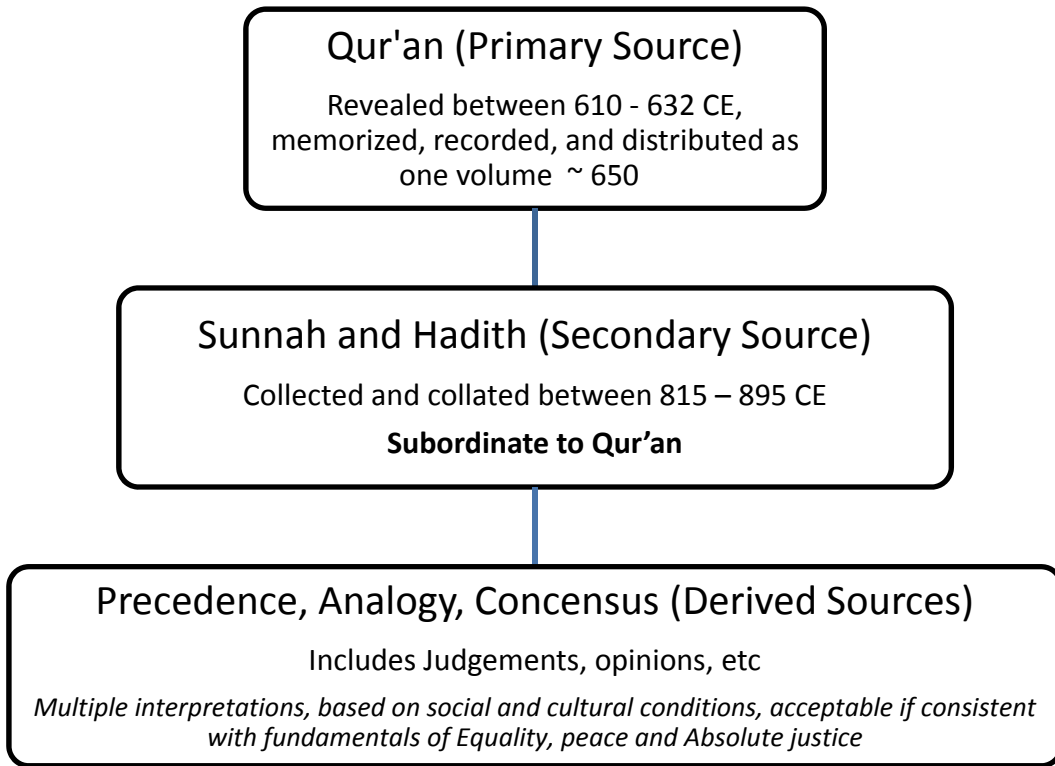


Figure 1. Three tier process for Legislative Sahr'ia Development adopted by the Abbasid Caliphate