

# AN INTRODUCTION TO ISLAM FOR JEWS

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## Session 8: Islamic law (*shari'a*)

### *Sources of law*

Adapted from Daniel Brown, *A New Introduction to Islam* (Blackwell, 2004), pp. 124-5

*The Qur'an.* The basic source for knowledge of divine commands, but not to be interpreted or applied apart from its elaboration in the example of the Prophet. ...

*The Sunna.* The most important material source of law. The words and actions of the Prophet Muhammad are both an authoritative commentary on the Qur'an and a source of authoritative precedent in their own right. The Sunna of the Prophet is contained and transmitted in the hadith literature. Shi'i jurists include within the Sunna the rulings of the Shi'i imams ....

*Qiyas.* A means of applying a known command from the Qur'an or Sunna to a new circumstance by means of analogical reasoning. When the rationale (*'illa*) of a command is known, other similar cases can be judged according to the same rationale.

*Ijma'.* The consensus of Muslims on a point of law.

*Ijtihad.* The toil or effort exerted by a scholar in seeking to discover the intent of the Lawgiver on a given point of law. *Ijtihad* is not a source of law, properly speaking, but a reference of the process by which the law is elaborated. ... From the fifteenth century onward Sunni Muslim scholars argued about whether ... *ijtihad* could still operate. (Shi'ite jurisprudence uses it.)

*Taqlid.* Adherence to authoritative precedent. A jurist not qualified to exercise *ijtihad* must limit himself to the application of established rulings. ...

*Istihsan.* The application of a jurist's personal judgement allowing him to depart from the strict application of *qiyas* ...

*Istislah.* The overruling of the strict application of a legal rule on the basis of considerations of the public good (*maslaha*).

*Darura.* The principle of necessity according to which an established rule of law is suspended in dire circumstances.

*Maqasid ash-shari'ah,* the 'aims and objectives of the law', which might override other elements.

In both Sunni and Shi'a traditions, women have often been leading *mujtahids* (and still are in the Shi'ite world).

## *Schools of Islamic law*

<b>School</b>	<b>Founder</b>	<b>Origin</b>	<b>Features</b>	<b>Area</b>
Hanafi	Abu Hanifa, d. 767	Kufa, Iraq	Flexible; promotes <i>istihsan</i> , <i>qiyas</i>	Central Asia, Turkey, N Egypt, Indian subcontinent, Israel/Palestine
Maliki	Malik ibn Anas, d. 796	Medina	Uses practice of Medina as source, as well as legal rulings of first 4 caliphs	North Africa, southern Egypt, Kuwait, Bahrain
Shafi'i	Muhammad ibn Idris al-Shafi'i, d. 822	Gaza, Baghdad	Close to Maliki	Malaysia, Indonesia, E Africa, Yemen, S India, Syria, Israel/Palestine
Hanbali	Ahmad ibn Hanbal, d. 855	Baghdad	Strict, conservative	Saudi Arabia, Qatar, most Salafi groups
Ja'fari (Shi'ite)	Ja'far as-Sadiq, d. 765 (= 6 <sup>th</sup> imam)	Medina	Emphasis on <i>ijtihad</i> ; controversial practices include temporary marriage	Iran, parts of Iraq

### *Some legal terms*

*Fiqh* – jurisprudence, study of law

*Fatwa* (plural: *fatawa*) – legal rulings (= *teshuvah*, *pesak*)

*Faqih* – expert in *fiqh*

*Qadi* – judge (= *dayan*)

*Mufti* – scholar who can give *fatawa* (= *posek*)

*Muhaddith* – expert in *hadith*

*'Ulama* (singular: *'alim*) – general term for any of the above, trained scholars

### *Basic legal categories*

1. *Ibadat* – 'religious' duties (= *mitsvot bein adam lamakom*, commandments between humans and God)
2. *Mu'alamat* – 'legal' duties (= *mitsvot bein adam la'adam*, commandments between humans)
3. Status of actions:
  - wajib* – obligatory
  - mandub* – recommended
  - mubah* – neutral
  - makruh* – discouraged
  - haram* – prohibited

## ***Shari'a and the state***

Khaled Abou el-Fadl, 'Islam and the Challenge of Democracy', *Boston Review*  
<http://www.bostonreview.net/BR28.2/abou.html>

To date, Islamist models, whether in Iran, Saudi Arabia, or Pakistan, have endowed the state with legislative power over the divine law. For instance, the claim of precautionary measures (blocking the means [to perform evil acts]) is used today in Saudi Arabia to justify a wide range of restrictive laws against women, including the prohibition against driving cars. This is a relatively novel invention in Islamic state practices and in many instances amounts to the use of Shari'ah to undermine Shari'ah.

Traditionally, Muslim jurists insisted that the rulers ought to consult with the jurists on all matters related to law, but the jurists themselves never demanded the right to rule the Islamic state directly. In fact, until recently neither Sunni nor Shi'i jurists ever assumed direct rule in the political sphere. Throughout Islamic history the jurists (*'ulama*) performed a wide range of economic, political, and administrative functions but most importantly acted as negotiative mediators between the ruling classes and the laity. ... While they legitimated and often explained the rulers to the ruled, the jurists also used their moral weight to thwart tyrannous measures and at times led or legitimated rebellions against the ruling classes. Modernity, however, has turned the *'ulama* from 'vociferous spokesmen of the masses' into salaried state functionaries who play a primarily conservative, legitimist role for the ruling regimes in the Islamic world. The disintegration of the role of the *'ulama* and their co-optation by the modern praetorian state, with its hybrid practices of secularism, have opened the door for the state to become the maker and enforcer of the divine law; in so doing the state has acquired formidable power that has further ingrained the practice of authoritarianism in various Islamic states.

### ***The huddud penalties***

#### ***A. Theft (sariqa) – Qur'an 5: 38-39***

As to the thief, male or female, cut off his or her hands: a retribution for their deed and exemplary punishment from God and God is Exalted in Power, full of Wisdom. But if the thief repent after his crime, and amend his conduct, God turns to him in forgiveness; for God is Oft-Forgiving, Most Merciful.

#### ***B. Fornication and adultery (zina) – Qur'an 24: 2***

The woman and the man guilty of adultery or fornication— flog each of them with a hundred stripes: let not compassion move you in their case, in a matter prescribed by God, if you believe in God and the Last Day: and let a party of the believers witness their punishment.

#### ***C. False accusation of fornication (qazf) – Qur'an 24: 4-5***

And those who launch a charge against chaste women, and produce not four witnesses [to support their allegation]— flog them with eighty stripes: and reject their evidence ever after: for such men are wicked transgressors, unless they repent thereafter and mend [their conduct]: for God is Oft-Forgiving, Most Merciful.

*D. Waging of war against Islam or spreading disorder in the land (hariba and fasad fi'l-ard) – Qur'an 5: 33-34*

The punishment of those who wage war against God and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion [= suspension from a cross] or the cutting off of hands and feet from opposite sides, or exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter.— Except for those who repent before they fall into your power: in that case, know that God is Oft-Forgiving, Most Merciful.

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*Vengeance for violence (qisas) – Qur'an 5: 45*

We ordained therein for them: 'Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal.' But if anyone remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to judge by what God has revealed, they are wrong-doers.

Khaled Abou el-Fadl, *The Search for Beauty in Islam* (2005), ch. 80

The Shaykh again nodded his head and said in a matter of fact way, 'I always remind you that when presented with a legal question, first you expend your best efforts investigating the evidence and the precedents. After you have done your homework, there always remains the question: What is the most merciful? What causes the least hardship? What is in the public interest? Your response to any of these questions should tip the balance in determining your choice of law. In all cases, you are under a duty to achieve the objectives of the law, which are compassion, mercy, and justice, and thus, you might have to fashion a solution in response to each particular case—each case with its own specific elements. But what you cannot do is to mechanically apply a set of rules without asking yourself: am I fulfilling the objectives of Shari'a in serving the public interest and achieving justice? Always remember, you are not applying the rules to corpses—you are applying the rules to living beings and this means the law must be as alive as those who are bound by it.' ... In the years I spent with the Shaykh, the single most important lesson I learned is that the essence of God's law is justice, compassion, and mercy. If it is not, this necessarily means human beings abused it, and deformed it into becoming what is at odds with the beauty that is God's nature.

### **Further Reading**

Sadat Kadri, *Heaven on Earth: A Journey through Shari'a Law* (Vintage Books, 2013)

Daniel Brown, *A New Introduction to Islam* (Blackwell, 2004), chapter 9: 'Islamic Law'