ISLAMIC LAW AS ISLAMIC ETHICS[1]

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ABSTRACT

After arguing that Islamic law is more basic to Islamic ethics than is either Islamic theology or philosophy, the author analyzes three basic terms associated with law (and therefore ethics): *fiqh, shar'* and *sharī'ah.* He then sets forth the four roots (*uṣūl*) of legal/ethical understanding (*fiqh*), describes the manner in which a judgment (*ḥukm*) is reached in any particular case, discusses the taxonomy of such judgments, and concludes with some comments on the relation within Islamic law and ethics of knowledge to action

One of the perplexities woven into Western studies of Islam is the conflation of Islam as a religious system of faith and practice, parallel in scope to Christianity, with Islam as the whole of the history and custom of Muslims, parallel in scope to India or Christendom. In an attempt to disentangle this conceptual snarl, Marshal Hodgson has introduced a helpful distinction between Islamic as "pertaining to Islam in the proper, the religious sense" and Islamicate as "the social and cultural complex historically associated with Islam and Muslims" (Hodgson, 1974: I: 59).

If we accept this distinction, then it is arguable that Islamic ethics can refer only to Islamic law and legal theory. Excluded from Islamic ethics would be the cultural practices which distinguish Algerians from Pakistanis, including their behavioral norms, as well as philosophical ethics. These would fall into the domain of Islamicate ethics, and constitute an important field of study in themselves. Yet because ethics is basically a practical science that studies normative action, the purely theoretical efforts of Islamic theologians (such as Mu'tazilites and Ash'arites) to describe, for example, whether God creates and is responsible for human actions, is arguably not part of Islamic ethics either. The Islamic summons has by and large been understood by Muslims to be a call to righteous action in conformity with the guidance of Revelation. There is no doubt that if most Muslims were asked which science is decisive for the determination of right action, they would nominate the Islamic legal sciences, namely, the *fiqh* sciences. Among the Islamicate intellectual disciplines, only Islamic law is both practical and theoretical, concerned with human action in the world, and (strictly speaking) religious. In this sense, Islamic law and legal theory must be the true locus of the discussion of Islamic ethics.[2]

My purpose in proposing such distinctions is to elucidate the position of the *fiqh* sciences in Islamic intellectual life rather than to disparage other aspects of Islamic studies. Indeed, there is no hermetic seal between the various disciplines of Islamic thought. No Muslim scholar studied Islamic law without also being familiar with Islamic theology. No Islamic philosopher was unaware of the aims and methods of Islamic law. What is important here is to emphasize that Islamic law is the central domain of Islamic ethical thought, both for Islamic studies and for comparative religious ethical studies.

Since the legal sciences are basic to an understanding of Islamic ethics, as they are indeed to an understanding of Islamic religious life in general, how is it that the study of Islamic law has been to such an extent neglected by Islamicists?[3] The answer is easily found. Islamic legal books, considered in themselves, are very difficult to read and understand. It is as if, in order to discuss twentieth century American ethics, we were forced to use only short summaries of first-year law school books, together with notes from the lectures of introductory law courses. From our knowledge of American history we might acknowledge the importance of law in twentieth century American life. But it is highly likely that legal and ethical studies of twentieth century America would, for the most part, get very perfunctory attention. To extract a detailed understanding of American legal or ethical theory from such sources would be a great deal of work for a seemingly small reward.

Moreover, Islamicists in the last century had recourse for the most part to books written after the twelfth century C.E., that is, to a time long after the basic questions had been asked and argued. These late medieval Muslim scholastics upon whom the Islamicists depended for an understanding of Islamic thought either contented themselves with a recapitulation of the broad areas of scholarly consensus or labored in gilding the mosaics and arabesques of the law. An observer unfamiliar with the grand design is in no position to appreciate subtleties of ornament or texture. In short, students of Islamics have been reading the wrong books in the wrong way, which has led to both distaste and distortion in the treatment of Islamic law. This essay, however, is an attempt to present Islamic legal thought in a manner that conveys something of its true fascination by showing that, properly understood, Islamic law is not merely law, but also an ethical and epistemological system of great subtlety and sophistication.

THREE BASIC TERMS

There are three terms usually translated as Islamic law, but often misleadingly so. These are *fiqh, shar'* and *sharī'ah. Fiqh,* as it is used in the Qur'ān and during the first two Islamic centuries, is a verbal noun meaning understanding or discerning.[4] This usage holds into the period of Abū Ḥanīfah

(d. 150 A.H./767 C.E.) and the compiling of the classical collections of *ḥadīth* (reports of the Prophet's acts or sayings).[5] It is important to grasp the significance of the term *fiqh,* especially in early usage, because it is only by a careful comprehension of this and other terms that we can come to know what Islamic law really is.

The author (Abū Ḥanīfah) of one of the earliest surviving Islamic creeds (*The Great Understanding—al-Fiqh al-Akbar*) says that "understanding (*fiqh*) in religious matters (*dīn*) is better than understanding (*fiqh*) of scriptural sources of law (*'ilm*) and legal statutes (*al-ḥudūd*)" (Abū Ḥanīfah, 1948: 5; Wensinck, 1932: 104; 110–112). *Fiqh* therefore, means understanding, and the objects of *fiqh*-understanding are either religion (*dīn*) or sources of law and statutes (*'ilm wa-l'ḥudūd*).[6] The *fiqh*-process is often called, elliptically, *fiqh* from *'ilm al-fiqh* (the science of *fiqh*). The concept usually translated by the term Islamic law, is really a process of discerning what religious conduct is, what the sources of such knowledge are, and what the consequent statutes must be. *Fiqh*-law is therefore not legislated but understood, not produced but discovered and formulated. The *fiqh*-process is highly formal and has as its aim to understand the import of Revelation for human moral life. This process, as we shall see, is quasi-inductive; it assumes a large but limited body of data as the raw material for its process of transformation from Revelational account or text into moral/legal norm. More specifically, the *fiqh*-process is the disciplined search for the *ḥukm* (determination, assessment, ruling, judgment) that is appropriate to a given situation or act, about which more will be said later.

By contrast, the other two terms often translated as Islamic law (*shar'* and *sharī'ah*) refer not to the process of knowing moral law, but to the way in which that knowledge came to be knowable and in force. It is often said that *sharī'ah* originally meant a highway (e.g., Rahman, 1979: 100; Gibb, 1962: 64). The image conveyed is that of a highway along which to travel in order to lead the moral life.[7] It is clear, however, that while lexical works did adduce this meaning, a conflation has taken place with the word *sunnah* (see below), which does mean path. However, in the earliest surviving Arabic dictionary (al-Khalīl, 1968: 1, 293; see also *The Encyclopedia of Islam,* vol. 4: 962) the author and his redactors offer a field of meanings which suggest a different image from that of a well-worn path of virtue. According to this source, the verbal form of the root *sh-r-'* means "entry into something" ("the water-bearer went into the water"), and the noun *sharī'ah,* "a place on the bank of a river where animals can enter the water." A further lexical source is the Qur'ān, where the verbal occurrences have God as their subject (42: 13, 21) and the nominal forms refer to something appointed by God for humankind (45: 18; 5: 48). The Qur'ānic (and therefore normative) image is thus of God going into the world in Revelation, and by means of His Revelation establishing an access to His realm.

Considered from another point of view, *shar'* and *sharī'ah* are bounded in time by the dates of the Prophet's revelation and his death. *Shar'* is both the fact of divine immanence in history and the moral imperative that remains. *Sharī'ah* is only that moral imperative and its specific contents. *Fiqh,* on the other hand, has a *terminus a quo:* the death of the Prophet. After that moment, which ended the direct access to God that Muhammad had provided, Muslims are enjoined to discern, according to a formal method, what the *shar'* implies and includes, and to act upon that knowledge.

We have discussed these basic terms at such length because it is important to understand what the enterprise is about, and because existing introductions misstate the matter. Wilfred Cantwell Smith has provided one of the very few careful studies of the *shar'/fiqh* distinction (Smith, 1981: 88–109). It is important to acknowledge one of his conclusions, namely, that the actual statutes (the law strictly speaking) are a by-product when considered in relation to their source and to their power to compel. In light of the discussion above, it can be said that the statutes or ordinances are the result of some sort of entry (*shar'*) by God into the world in order to provide a means (*sharī'ah*) to Him. The way into that ford between the mundane and the divine is disciplined understanding (*fiqh*).

THE FOUR ROOTS (UṢŪL) OF UNDERSTANDING (AL-FIQH)

The *fiqh*-process, as it developed, was understood as a movement from the bases or roots (*uṣūl*) of Revelation to specific determinations (*aḥkām*—plural of *ḥukm,* which means judgment, assessment, determination) that constitute the actual dictates of divine law. The first and most important of these Revelational bases or roots was of course the Qur'ān. For the Muslim, the Qur'ān is the very Word of God, impeccably revealed through Muhammad, the most perfect medium for the transmission of God's Word. As such, discussion of legitimate action must revolve around the text and the context in which it is to be applied. There is no question and no discussion of whether the Qur'ān is significant in itself. Therefore, the foundation of the entire system of *fiqh*-thought is the Qur'ān. The significance of the Qur'ān is not only that it is the record of a particular irruption by God into the world at a particular time through a particular Messenger, although it is that also and part of its significance derives from that fact. Its significance is chiefly that the Qur'ān is an unparalleled window into the moral universe. It is a source of knowledge in the way that the entire corpus of legal precedent is for the common law tradition: not so much as an index of possible rulings as a quarry in which the astute inquirer can hope to find the building blocks for a morally valid, and therefore true, system of ethics (Burton, 1977: 4,111, *et passim*).

For the Islamic scholar from the third century onward (from approximately 950 C.E.) the Qur'ān has been understood to be a collection of indicators (*adillah*) or revelational determiners (*al-qawāṭi' al-sam'iyyah*) (al-Juwayni, n.d.: 2A) which point the way to moral knowledge.[8] By the disciplined use of these indicators the scholar could hope to arrive at knowledge which is morally valid, and which informs him of the assessments (*aḥkām*) of acts. Thus the *fiqh*-process consists, first of all, of a search for straightforward indicators in the Qur'ān text which can be juxtaposed with a human predicament. This juxtaposition places the act in its proper moral context and informs the scholar of the act's assessment (*ḥukm*).

By the fourth Islamic century it was generally acknowledged that the reports of the Prophet's words and actions (*ḥadīth*) formed the second binding source of law, that is, a second source of indicators, elaborative of and supplementary to the Qur'ān. The standard six or so collections of *ḥadīth*-reports (see note 5) represent the consensus of the first four centuries as to what the Prophet did or said, subject to further criticism of the reports' transmitters. Thus there were two material sources for the *fiqh*-process, the Qur'ān (the actual word of God) and the *ḥadīth*-reports of the Prophet, which, given his immaculate status, was a record of the Qur'ānic norms as lived in this world.

The *ḥadīth*-reports, considered as a whole, contain the *sunnah* of the Prophet, which is not simply a record of Prophetic doings but of the Prophet's significant, exemplary acts, non-acts, and sayings.[9] The Qur'ān's integrity was guaranteed by its miraculous inimitability and plural transmission; the prophetic *sunnah* was vouched for by the immaculate protection (*'iṣmah*) of the Prophet, Qur'ānic attestation, and plural transmission. What is noteworthy is that, except in broad outline, the *sunnah* was not a mere catalog of model behaviour to be emulated, but rather a collection of data which required assessment and application in an appropriate context. A life lived totally in accord with the Moral becomes a window into moral knowledge. The Prophet is thus, for the practitioner of *fiqh,* not really a model but a normative case, not so much a person as a principle.

There have been described so far two sources or bases (literally "roots") of *fiqh*-understanding (Qur'ān and *ḥadīth*). Both are material roots or sources, that is, they are collections of indicators to which the scholar has recourse when asking, "What is the moral assessment of this act?" The third and fourth roots are procedural and are used both hermeneutically (to interpret Qur'ān and *ḥadīth*) and substantially (to augment the two material sources).

The third root, consensus (*ijmā'*), refers to an agreement by an authoritative body about the assessment of an act or practice. It tells us what the bearing of a Qur'ān or *ḥadīth* text is, since it is among other things the agreement about the application of a particular Qur'ān or *ḥadīth* indicator. It is also a record of agreement on an issue not covered by the two material sources

and, as such, constitutes a material source in itself. There has been considerable discussion, never fully resolved, as to whose consensus was binding, that of the Companions of the Prophet or that of the scholars of each generation.[10]

The extent to which *ijmā'* is a procedural or material source varies from school to school.[11] For example the Hanbalis, who arose in a climate of theological and intellectual dissension, were the most mistrustful of ungrounded speculation by the Muslim community, and therefore most methodologically committed to the myth of the pristine early community of the Prophet and the four "rightly-guided caliphs." Most Hanbalis accepted as *ijmā'* only the consensus of the Companions of the Prophet because the gap between the Companions' moral quality and that of other Muslims was enough to render an agreement by the Companions and their immediate successors categorically different from that of any subsequent generation. Therefore, Aḥmad ibn Ḥanbal and others of his school said that only the consensus (*ijmā'*) of the Companions was a third source of moral knowledge. The record of the Companions' agreement is a source like the prophetic *ḥadīth*-reports; it is the *sunnah* of the Companions. Consensus is not, therefore, a procedural source in this case.

This was not so for most Hanafis. They held that agreement of the scholars of an age constituted a source of knowledge for succeeding generations. As the first of the legal schools to develop, they seem to be both closer in time to the early generations and more historically egalitarian. They held that the gap between the first generation of Muslims and later ones is an accident of time, not a determinant of or reflection on moral quality. Thus when a new problem occurs, both the record of past consensus and a present-day consensus should serve, they believed, as sources of moral knowledge. "My community will never agree on an error," said the Prophet, and the Hanafis understood the "never" as being an unbounded promise.

The fourth root of jurisprudence is analogical reasoning (*qiyās*). Let us suppose that after following the *fiqh*-procedure we come to a certain *ḥukm A*, which is produced by consideration of the factors *p* and *q*. When faced with a problem *B*, we look first for the presence of factors similar or equivalent to *p* and *q* so that the ruling about *B* can be made by analogy with *A*. In daily life it is clear that situations and cases will arise for which (especially given a closed *ḥadīth*-corpus) there is no appropriate explicit text (*naṣṣ*) in the two closed material sources, and for which there is no consensus. Thus the *qāḍī* (judge) or *muftī* (jurisconsultant) extracts the motivating cause (*'illah*) from a previous unambiguous *ḥukm*. Let us use a standard example. Wine made of grapes is explicitly forbidden in the Qur'ān. But is whisky, for example, forbidden? If one says grape wine is forbidden because it intoxicates, then a cause (*'illah*) has been extracted from the explicit text (*naṣṣ*). Erwin Graf (1960: 18) offers the following syllogistic formula:

(1) All intoxicating drinks count as grape-wine (*propositio minor*);
(2) All grape wine is forbidden (*propositio major*);
(3) Therefore every intoxicating drink is forbidden (*conclusio*).

In this case whisky is brought into juxtaposition with wine by defining wine to include a factor that is also constitutive of whisky. It should be obvious that the choice of the significant or relevant factor, and the defense of that choice, constitutes the substance of *qiyās* argument.

The legitimacy of *qiyās* as a legal method contains an implicit acknowledgment of the inadequacy of the material sources. It is remarkable, however, that the *fiqh* system allows for response to novel circumstances only where the response is grounded in one of the closed Revelational sources. This requirement of groundedness has as its purpose the prevention of what Muslim scholars dreaded most, namely, capricious opinions (*ahwā'*). By grounding all of life in the relatively small body of Revelational texts, Muslim scholars insured the universalistic and transnational character of Islamic intellectual and moral life.

MAKING A DETERMINATION (ḤUKM)

Fiqh then is the process of bringing these four roots into conjunction with the problem at hand in such a way as to produce knowledge of a determination (*ḥukm*). As it came to be understood, knowledge of the Qur'ānic dictum, "Do this," is not by itself sufficient to know the moral assessment of the act. One has to seek a context, namely, the actual context of the prescription in the text of the Qur'ān, in other relevant passages in the Qur'ān, in relevant *ḥadīth,* or in possible community consensus (*ijmā'*). Only the sum of all of the relevant indicators could be considered true moral knowledge, namely, an accurate (or at least functionally accurate) understanding of God's will in the field of human activity: the *shar'*.

What kind of knowledge is this understanding of the *ḥukm* of an act? With this question we come to one of the most interesting aspects of the theory of *fiqh.* Al-Juwaynī (n.d.: 2A) concedes that all *fiqh*-knowledge is suppositional knowledge (*ẓannī*), that is, not certain knowledge. The *fiqh*-process is, as al-Shāfi'ī makes clear (1979: 497, sec. 1332; Khadduri transl., 1961: 290, sec. 495), one of coming to relative certainty since absolute certainty in things hidden is the sole prerogative of God. Yet, al-Juwaynī argues (n.d.: 2A) *fiqh*-knowledge includes "the certain knowledge (*'ilm*) of the necessity (*wujūb*) of acting upon the establishment of suppositional knowledge [obtained through the *fiqh*-process]." This means that one knows with certainty through the *fiqh*-process of the necessity of acting upon suppositional *fiqh*-knowledge. Certainty lies in moral action more than in knowledge, which is always an attempt to know the hidden. Knowledge can be imperfect, but ac-

tion based upon imperfect knowledge, correctly obtained, is nevertheless righteous action.

At the end of the process described above, one comes to a *ḥukm,* a determination of some sort. Because the *ḥukm* is guaranteed by sources which are of God, it has the same imperative status as a direct command from on high.[12] It is therefore true and morally valid.[13]

There were two fundamental perspectives on the nature of the *ḥukm* and its ontological relation to the act. It would seem that in the earliest period to which we have access there was a consensus that innately some acts were morally reprehensible or obligatory and as such could be known before or without Revelation. Revelation's purpose then was to confirm or supplement this pre-Revelational knowledge. Such a position seems justified by a number of Qur'ānic appeals to non-Revelational moral knowledge.[14] More scholarly supporters of the notion that moral knowledge was possible outside of Revelation defended their position by arguing that the moral quality (*ḥukm*) of the act was part of its ontological nature and was therefore discernable by *'aql* (usually "reason" but I believe here to be understood as innate or commonsense knowledge). There was, nevertheless, an impulse to give primacy to the *shar'* as the means by which we know moral assessments (*aḥkām*). This movement arose in part as a result of the growing consensus that human beings need reliable knowledge to know the moral assessment of acts, knowledge which could not be obtained by (or, at least could not be grounded in) human knowing. Else, why Revelation? Yet at the same time this mistrust of the human intellect coexisted with a general mistrust of information conveyed solely through language, particularly if not corroborated by multiple transmission or some other source.[15] There was indeed a general skepticism of the possibility of purely human knowledge being certain at all.[16]

By the fourth Islamic century, therefore, Muslim intellectuals were divided into those who held that there was, even in the absence of or before Revelation, enough knowledge to assess acts morally and those who held that acts unsanctioned or unjudged by Revelation were outside the bounds of Islam and therefore reprehensible or, at best, indifferent. Alternatively, many held that in the period after Revelation's coming all acts could be morally assessed by use of the material sources of *fiqh*-knowledge. According to them, if it appeared that no assessment was possible through the *fiqh*-process, it was only because of the deficiency of the scholar who was unable to define the context of the act in such a way that the appropriate indicator was evident.[17]

THE TAXONOMY OF THE DETERMINATION (ḤUKM)

The *ḥukm* may be any of three kinds: (1) a determination of judicial fact (*ḥukm al-qāḍī,* and sometimes *ḥukm al-muftī*), (2) a determination of va-

lidity (*ḥukm waḍ'ī*), and (3) a determination of moral status (*ḥukm taklīfī*).

(1) A determination of judicial fact (*ḥukm al-qāḍī*) (a) is not disputable and (b) does not establish a precedent. Assuming the judge (*qāḍī*) to be just and qualified, his ruling may not be reversed or disputed. His ruling is "performatively" true in that it settles the particular case with whatever consequences are involved. It does not, however, set a precedent for other cases. This is because the ruling may actually be in error, and therefore not "ontologically" true (*iḥāṭatu l-ḥāqq fī-l-ẓāhiri wa-l-bāṭin*) (al-Shāfi'ī, 1979: 478, sec. 1328; Khadduri transl., 1961: 289). Nor need the ruling be evidence of a consensus. What the judge has arrived at functions as true moral knowledge, but is not certain moral knowledge.

(2) A determination of validity (*ḥukm waḍ'ī*) is either of two sorts. (a) It is a finding that a particular act meets the necessary conditions for that kind of act. For instance, it judges that a specific form of contract satisfies the requirements for a valid contract as laid down in Qur'ān and *ḥadīth,* and as such has the attributes that such valid instruments have, namely, it is both binding and effective. Or (b) a determination of validity is a finding that the object under consideration constitutes a coextensive occasion (*sabab*), a necessary condition (*sharṭ*), or an impediment (*man'*). The following are classic examples of this sort of *ḥukm waḍ'ī.* The observation that the moon has arrived at its crescent form is the "proof" that the fasting month of Ramadan has begun. Such a lunar observation, therefore, is the coextensive occasion (*sabab*) for the beginning of the fast. Again, when it is determined that a particular act of ritual worship (*ṣalāh*) has been performed with intentionality (*niyyah*), that ritual act is valid because intentionality is a necessary condition (*sharṭ*) for such worship. Finally, the observation that a woman has menstrual blood establishes that there is no need for her to perform ritual worship since menstruation is an impediment (*man'*) to formal worship.

Both the determination of judicial fact (1) and the determination of validity (2) have in common that they are "performative": the determination of "x" brings "y" into force. Finding a coextensive occasion (*sabab*) such as the crescent moon brings into force the requirement to fast. And finding that an individual did steal brings into force the penalty for theft. In another sense both kinds of determination are "indexical," that is, they point from the visible (the arrival of a crescent moon, the absence of intentionality, the presence of menstrual blood, the persuasive evidence of theft) to the invisible or the more abstract (the boundary of an Islamic month, the invalidity of worship, the acknowledgment of ritual impurity, the reality of a theft having occurred). As indices or signs, both kinds of determination are accepted conventions. They do not guarantee that the *qāḍī*'s judgment is a reflection of actual truth, for that is God's knowledge alone. Nevertheless, the *qāḍī*'s determination must be acted upon. Similarly, there is no particular reason why a month begins with the sighting of the crescent moon, but it is agreed that the sighting defines the month.

(3) The determination of moral status (*ḥukm taklīfī*) involves consideration of the five-fold classification of moral acts.[18] With this classification (which is found most characteristically in the Shafi'i and Hanbali schools of *fiqh*), Muslim scholars categorized all human behavior.[19] Although this is not to say that these were the only terms used,[20] it is the case that the following five categories represent the entire range of moral assessment.[21]

a) Required, obligatory (*wājib* or *farḍ*). These are the acts which are incumbent upon every Muslim regardless of aspiration to saintliness or piety. They constitute, as it were, a minimum condition for membership in the Islamic community, and neglect of them ought to be punished both in this world and in the next (al-Qādir, 1938–40: 8:111). Repudiation or denial of this need to perform them is proof of apostasy. In the classical reformulation, "it is that for the neglect of which one is punished [and most sources add] and for the doing of which one is rewarded."

b) Proscribed, taboo-like, prohibited (*maḥẓūr* or *ḥarām*). These acts, like those of the required class, serve to determine one's membership in the community. Performance of certain of these acts, or declaration of the legitimacy of performing them, is proof of apostasy. These are acts (according to the classical formulation) "for the performance of which there is punishment [and most sources add] and for the avoidance of which there is reward."

c) Recommended (*mandūb*). Sometimes synonymous with agreeable (*mustaḥabb*) or exemplary practice (*sunnah*). This is one of the categories with virtue connotations in the Islamic moral system. It contains acts which are commendable but not required. "[They are acts] for the doing of which there is reward, but for the neglect of which there is no punishment."

d) Discouraged, odious (*makrūh*). Acts of this category ought to be avoided as a way to piety but (like recommended acts) are not definitive of one's status within the Muslim community. "[They are acts] for the doing of which there is no punishment, but for the avoidance of which there is reward."

e) Permitted (*mubāḥ*). Often functionally means indifferent. Considerable discussion occurs as to whether these acts are inside or outside the system, that is, whether there is a group of authorized but unrewarded and unpunished acts, or whether these are simply acts with no moral status, and hence no moral consequences. This is ultimately a question of the nature and boundaries of the *shar'*. Classically, these are "the acts for the performance or avoidance of which there is neither reward nor punishment."

These five categories represent not only the Islamic understanding of how the upright life is to be lived in the world, but an explicit rejection of the bi-polar view of moral categorization as simply good and bad. However, one group of Islamic scholars (the Mu'tazilites) did try to define the moral world in terms of good and evil (*ḥasan* and *qabīh*) and argued that the mind instinctively divides acts into these two categories, together with a third, obligation (*wujūb*). That the mind does so, they argued, is proof that the ontological categories of acts are good and evil, and that these ontological assessments

can be known. However, this system of categorization was rejected. Nevertheless it was eventually conceded that the mind's instinctive perceptions might reflect Revelational (*shar'ī*) determinations in such a manner that good (*ḥasan*) and evil (*qabīh*) might be acceptable, if imprecise, synonyms for the more precise five-fold terminology. But as an independent scheme of moral categorization, good and evil were repudiated. The tendency of the mind innately to form judgments was granted, even though the moral accuracy of these judgments was not. Rather the Ash'arites argued that such judgments reflected different criteria: perfection, interest, conditioned response, and so on (see al-Ghazālī, n.d.: I: 55–65).

The historical significance of the five-fold system is that it represents the compromise which was made in the first two centuries between the moral perfectionists, represented at the extreme by a group called the Kharijites, and the practical requirements of a world-wide polity that was inclusive and expansionist. To demand of Muslims that they be saints was not only impractical, but arguably contrary to an important Qur'ānic distinction. "[Rather than saying] 'we have faith' (*āmannā*), say 'we submit' (*aslamnā*), for faith has not entered your hearts. Yet if you obey God and His Messenger, He will not withhold anything [of the reward of] your deeds. God is Forgiving, Merciful" (Qur'ān 49: 14). There is therefore a two-tiered membership in the community: those who are nominally obedient and those who are faithful, those who live between the boundaries of "must and must-not" and those who strive to do the recommended and avoid the discouraged. The five-fold system allows for this inclusive and hierarchical moral system while a bi-polar system does not.

It should be noted as well that the two levels of moral action correspond to common moral experience in that we perceive some norms to be binding and others to be objects of aspiration. While the Muslim would recognize that some moral failures are more consequential than others, he might argue that the imperative to aspire to virtue is not categorically different whether there is punishment for failure or only the absence of the commendation that belongs to the virtuous.

THE RELATION OF KNOWLEDGE TO ACTION

Thus far a sketch has been drawn of the theory of ethics that characterizes the *fiqh*-sciences, a theory that involves a particular process which produces moral knowledge. What remains is to describe the power to necessitate action inherent in that knowledge. Put another way, what remains is to describe how the human being, by virtue of being human, must respond to the moral knowledge derived from the *fiqh*-process.

There seem to be two classical theories of the imperative which compels

an individual to respond to the knowledge of the moral classification of an act. Al-Sarakhsī (1952: II: 332–353) has one of the clearest descriptions of one of the two theories of the nature of obligation.[22] According to al-Sarakhsī (490 A.H./1096 C.E.), from the moment of birth human beings have a competence (*ahliyyah*) to undertake a trust from God. This competence lies in the fact that God has created man with instinctive knowledge (*'aql*) and with a covenant (*dhimmah*) which is his by virtue of being of sound mind. There are many subtleties discovered by al-Sarakhsī in his discussion of this matter, but for our purposes it is enough to know that the covenant does not come into force until one can be said to be *'āqil*, that is, fully endowed with innate knowledge (*'aql*), what we would call *compos mentis*. Thus, that which effects human responsiveness to moral knowledge is the presence of innate knowledge and the duty (*ḥurmah*) to act upon that knowledge so as to accomplish the terms of the covenant with God that is a feature of human nature.[23]

For the mature human being an obligation comes into force by reason of a coexistensive occasion (*sabab*) (al-Sarakhsī, 1952: II: 334 *et passim*). The occasion is, of course, preceded by an order to do something. But though we know the significance of the occasion by means of the communicative act (*khiṭāb*) – in this case a command – it is nevertheless the occasion that brings the duty into effect and not the command.

Thus the chain is:

(1) Creation of human beings with competence to be obligated.
(2) Communicative act stipulating that a certain occasion requires a certain response.
(3) Judgment and knowledge; that is, the power of effective response.
(4) Occasion and therefore determination (*ḥukm*) of obligation.
(5) Discharge or failure to discharge the obligation.

This all seems quite abstract, and it is helpful to consider an example provided by al-Sarakhsī. In the example, the given is that the Qur'ān forbids killing of other humans except in legitimate war, and similar cases. Thus all human beings are obliged not to kill their fathers. To kill one's father is the coextensive occasion for infliction of a specified punishment. Yet if a young boy kills his father, he is not liable to the statutory penalty. Why? The argument goes as follows: although (a) the coextensive occasion (*sabab*) for the punishment exists in the son's "resolution of his own accord" (*'amdun maḥḍun*) to kill (namely, it was not an accident and he was not compelled to do it), and although (b) the locus or agent of the obligation not to kill exists in the son (for example, it was not a goring by a bull), nevertheless (c) the effective power of response (*ṣallāḥiyyah*) to the obligation (*ahliyyat al-adā'*) is vitiated because the underage son lacks the power to "accept consequences and duties" (*istisfā'*). Therefore (d) the son is not capable of being in the state of deliberateness (*qaṣd*) to kill his father as far as the *shar'* is concerned (Qur'ān 2: 336) and,

as the power to discharge is lacking, the obligation to obey the stipulation is voided.

The concept of competence represents the power of moral knowledge to oblige human beings by the fact of their being human. "We are moral animals," al-Sarakhsī may be understood as saying, "and by our nature we are fit to be obligated by the knowledge that Revelation gives."

The second theory of the way knowledge necessitates action came from the Hanbali and Shafi'i schools. They preferred to stress the fact of Revelation as an event that brought morality into being. Accordingly, they discussed moral necessity not in terms of "being obligated" by a covenant that is part of our natures, but in terms of "being obliged" by the injunction (*taklīf*) that Revelation contains.[24] By contrast with the somewhat internalistic notion of competence (*ahliyyah*) as a boundedness arising from the fact of humanity, subject only to information as to what one is bound to do, the Shafi'i/Hanbali approach stresses the external nature of the bond to act upon moral knowledge. For the same source that tells us what we ought to do also tells us that we ought to do it. It is the event of the Qur'ān that brings both the bond and the knowledge that makes that bond possible. It is the power of the Legislator, that is, God (*al-Shāri'*), to oblige us morally by virtue of our nature as His creation. For the Shafi'i and Hanbali it is important to realize that virtue comes about by the fact of Revelation, and by the internal knowledge which enables us to be tested. When we respond positively to the test and are obedient to the stipulations brought in the *shar'*, then we are virtuous. There is no virtue in real terms outside the response to Revelation. The communication (*khiṭāb*) brings into being a new attribute attached to the act, which enjoins us to respond to it (al-Taftāzānī, n.d.: I, 298: 19). The image is that of a morally inert humanity, transformed into moral beings by Revelation.

Yet even among the advocates of this second theory about how knowledge necessitates action, there is a notion that human capacity is involved. It is only that the emphasis is shifted. Human beings, in order to be enjoined, must have the power to be receptive: they must be fully endowed with innate knowledge, and free from compulsion.[25] This innate knowledge (*'aql*) is the unique quality of human beings. It remains true for all schools that morality is a property uniquely and essentially human. The Hanafi model is of a bond that is in force from birth but not executable in early childhood. The alternate model is of a duty rendered the moment the order is understood. Hence, we have two theories of the relationship of human beings to moral knowledge. On the one hand, they must act because of an internal disposition which is part of their nature. On the other hand, they must act because of the external power of injunction (*taklīf*). Both of these theories of the suasive power of knowledge depend upon the capacity of the human to know, and his having been addressed in the *shar'*.

In conclusion, it may be said that Islamic law stands as a significant example of a moral and legal theory of human behaviour in which initial moral insights are systematically and self-consciously transformed into enforceable guidelines and attractive ideals for all of human life. As the intellectual realm of the moral life of a great religious civilization, the *fiqh*-sciences deserve to command our respect and attention. The sophistication, discipline, and moral aspiration of Islamic law may also evoke our admiration.

NOTES

1. Professors Wolfhart Heinrichs and Frederick Carney and Ms. Anne Royal read an early draft of this article and made substantial suggestions. In addition, Ms. Royal lent her eye to the preparation of the manuscript. Mr. Aron Zysow has been a helpful colleague in an arcane field. Much of the merit of this paper reflects their contributions and no doubt this would have been a better work had I accepted and incorporated all of their suggestions. Any shortcomings here are therefore entirely mine.

2. A possible exception to this argument might be the case of the ethical norms taught in the context of Sufism (Islamic mysticism). For the Sufis, however, right action is seen as a preliminary to the mystical task. Moral behavior is not (to my knowledge) systematically defined and analysed. Sufism presumes the norms of *fiqh* while proposing to go beyond the competence of *fiqh*.

3. It should be noted that the study of Islamic law has been carried out by philologians and comparative lawyers. Although researches of the philologians have defined and established the field of Islamic law, the comparative lawyers have influenced the field by tending to minimize its moral content. What is especially surprising, however, is that most students of Islamic religion and religious thought have been so little interested in Islamic law *per se*. The paucity of studies of Islamic law proper is reflected in its treatment as a synchronous set of general principles which have origins but no real development. See, for example, Schacht and Bosworth (1974: 392), where law is called "the most typical manifestation of the Islamic way of life," yet is described merely as a phenomenon which "guarantees . . . unity in all its diversity" (396), as "systematic" (397), and as "analytical and analogical" (397). This sort of functionalist generalization about Islamic law by Schacht and Bosworth is to be contrasted with their presentation of Islamic theology which, despite being characterized as "never [having] been able to achieve [an importance] comparable [to law] in Islam" (392), is nonetheless presented by them as a set of problems worked out over time by specific scholars. The development of these problems in Islamic theology is described, the scholars are named and located, and their individual contributions are discussed (359–365).

4. "They said: 'O Shu'ayb: There is much of what you tell us we do not understand (*nafqahu*)'" (Qur'ān 11: 91).

5. The two most important collections of *ḥadīth* are by al-Bukhārī (256 A.H./870 C.E.) and Muslim (261 A.H./875 C.E.). These are followed in importance by the collections of Abū Dā'ūd (275 A.H./889 C.E.), al-Tirmidhī (279 A.H./892 C.E.), al-Nasā'ī (303 A.H./915 C.E.), and Ibn Mājah (273 A.H./886 C.E.)

6. Compare the alternative wording used in another early creed, *The Lesser Understanding (al-Fiqh al-Absaṭ)*. For this see Wensinck (1932: 111, note 2).

7. This image is particularly appealing because of its parallel to *halakha* (Jewish law) and *tao* (the Chinese "way" that must be followed in order to live harmoniously).

8. Al-Ghazālī (n.d.: I, 5: 5) says "the roots (*uṣūl*) of moral discernment (*fiqh*) are the indicators (*adillah*) [that point] to [moral] determinations (*aḥkām*)."

9. Bravmann (1972: 155) has recently demonstrated that *sunnah* means actively differentiating one part of one's conduct as normative.

10. There are a number of other possibilities, but these two represent the most prominent. The concept and usage of ijmā' is discussed at length in Zysow's dissertation (n.d.: ch. 2) from which I take much of my understanding of this matter See also Hourani (1964: 13–60).

11. The way in which the Qur'ān and *ḥadīth* are used varies, as do also ensuing judgments. By the end of the fifth century A.H./eleventh century C.E., these different approaches had crystallized into four schools of thought (*madhhab*). These were the Hanafi (named after Abū Ḥanīfah), the Malikı (named after Mālik Ibn Anas), the Shafi'ı (followers of Muḥammad Ibn Idrīs al-Shāfi'ī) and the latest school to develop, the Hanbali (whose eponym was Aḥmad Ibn Ḥanbal).

12. "The moral determination (*ḥukm shar'ī*) is the primordial (*qadīm*) pronouncement of God in conjunction with the acts of the morally responsible agent, by stipulation either of a specific duty (*iqtiḍā'*) or stipulation of choice (*takhayyur*)," according to al-Qarāfī (1973: 67). "[We say] primordial to distinguish [the *ḥukm shar'ı*] from the texts (*nuṣūṣ*) which signify the determinations. These are indeed the address of God [also], but they are not a determination unless there is a uniting of the signifier (*dalīl*) with the 'case to which the signifier applies' (*madlūl*). But this [bringing together] is created-in-time . . . [We say] 'stipulation of a specific duty' so as to exclude informational pronouncements (*akhbār* [those portions of the Qur'ān and *ḥadīth* which are narrative or of no indicational significance]; and [we say] 'stipulation of choice' so as to include [those acts which are] permitted (*mubāḥ*)."

13. "What the *muftī* opines (*mā aftā bihı l-muftī*) is the *ḥukm* of God (*fa-huwwa ḥukm ıllāhī*" (ar-Rāzī, n.d.: 1B).

14. For example, "Lo! In the creation of the heavens and the earth and the difference of night and day . . . and the water which God sends down from the sky, thereby reviving the earth after its death . . . are signs for people who have sense (*ya'qılūna*)" (Qur'ān, 2: 164—Pickthall tr. modified). Also "When it is said to them 'Follow what God has sent down,' they say rather, 'We follow that in which we found our fathers.' Even if your fathers had no sense (*ya'qılūna*) and had no guidance?" (Qur'ān, 2: 170).

15. This is an important aspect of the Muslim debate over the nature of language, whether conventional or revelational. A "natural" language has a degree of certainty and reliability that makes knowledge-from-language more certain. See Weiss (1974: 33–41).

16. See al-Ghazālī (n.d.: I: 3: 9–11) where the purely rational sciences are described as "something between blameless but false supposition (and some suppositions are sins) and truthful but useless knowledge" [text corrupt].

17. This debate is the topic of my *Before Revelation: Muslim Sources of Moral Knowledge,* a forthcoming Harvard University dissertation.

18. I am indebted for part of my analysis of these categories to Frederick Carney's article, "Some Aspects of Islamic Ethics" (1983: 160–168).

19. I shall follow the order presented in Ibn al-Ḥājib (n.d.: 23–28).

20. Graf (1977) counted one hundred and nine different terms of act assessment in one chapter alone of a famous *fiqh* manual (al-Ṭūsī's).

21. It is noteworthy that Ansari (1972: 294–298) finds that the five-fold system is implied in texts which predate the formal development of the system. It is reasonably clear, in any case, from the terminology and grammatical forms used (passive participle) that most of the terminology of the five-fold system is extra-Qur'ānic.

22. This theory goes back, however, at least to al-Shaybānī and probably precedes him, for al-Sarakhsī's analysis is a commentary upon and reorganization of al-Shaybānī's work.

23. It should be noted that al-Sarakhsī actually says that from birth one has a duty (*ḥurmah*) to be bound by moral knowledge. Upon attaining intellectual majority one acquires a second duty, namely, to discharge the terms of the covenant with God (*dhimmah*) because of the acquisition of effective power of discharge (*ṣallāḥiyyah*).

24. Injunction (*taklīf*) is defined by al-Zarkashī (n.d.: 41B: 8–9) as "the willing by the enjoiner of an act [to be performed by] the enjoined, which [act] is troublesome to [the enjoined]."

25. "The necessary condition of being enjoined (*mukallaf*) is that he be *compos mentis* (*'āqil*), understanding the communication (*khiṭāb*) . . . The implication of enjoining is obedience and following orders. This is not possible except by intentionality to follow orders (*qaṣd al-imtithāl*). The necessary conditions of intentionality are knowledge of the thing intended and understanding of the injunction. Every second-person address (*khiṭāb*) includes the command, 'Understand!'" (al-Ghazālī, n.d.: I: 83: 12–15).

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