

Sources of Islamic Law

Teaching Manual

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Contents

Introduction	3
Aims and Objectives.....	3
Teaching Methods.....	4
Course Outline	10
Course Material	11
Supplementary Material	12
Tutorial Essays.....	14
Course Assessment	15
Chapter One	17
Overview of Sources of Islamic Law	17
The Qur’an	18
<i>Sunna</i> (Prophetic Traditions)	21
Secondary Sources	27
Seminars	34
Assessment Essay Question	34
Reading	35
Supplementary Reading.....	35
Chapter Two	36
Understanding the Sources of Islamic Law.....	36
Understanding the Content and Scope of the <i>Sharia</i>	36
Extrapolating Legal Norms from Religious Sources	40
<i>Naskh</i>	42
Permutations of Legal Schools of Thought	44
Surveying Islamic State Practices.....	48
Impact of European Imperialism on Muslims	52
Seminars	54
Assessment Essay Question	54
Reading	55
Chapter Three	56
The Application and Interpretation of Sources in Jurisprudence	56
Law Making Based on the Qur’an	56
Law Making Based on the <i>Sunna</i>	62
Application of Islamic Jurisprudence.....	66
Concluding Remarks	77
Seminars	77
Assessment Essay Question	78
Reading	78
Supplementary reading	78
Recommended Bibliography	79

Introduction

Aims and Objectives

The term '*Sharia*' has been increasingly incorporated into the English language over recent years. But what does it actually mean? The literal Arabic translation of the term '*Sharia*' is 'the road to the watering place'. (R Landau, *Islam and the Arabs* (London, George Allen and Unwin Ltd, 1958) 141). The concept of *Sharia*, however is not confined to legal norms, but conveys a more holistic picture.

Interestingly, *Sharia*, unlike Canon law or *Kirchenrecht* (*Church law*), does not simply represent religious laws, but covers a wide range of secular laws and ordinances. These include areas as diverse as international commercial law, criminal law, constitutional and administrative law, humanitarian and human rights law. Accordingly, this manual is written with the purpose of articulating and examining the primary and secondary sources of Islamic law as a whole. However, as the manual establishes, extrapolating legal norms from the labyrinth of religious sources has been a taxing and complicated task for Islamic Jurists and States in their practices. The manual aims to demonstrate that the *Sharia* does not represent a monolithic system.

The sources of Islamic law mainly consist of primary and secondary sources. The former comprises of the *Qur'an* and Prophetic Tradition. The latter includes consensus, analogy, independent reasoning and equity. A major function of the course is to provide a sound understanding as to how sources of Islamic law are formed and incorporated into the main body of Islamic law, and to critically examine the importance of these sources within Islamic jurisprudence.

This manual aims to provide an introduction to the Sources of Islamic law and jurisprudence with a view to its teaching as a free-standing one term course at undergraduate or postgraduate level or as part of a course on Islamic law such as Islamic family Law, Islamic international law and Islamic criminal justice.

Teaching Methods

In terms of course structure, where a teaching year is divided into three semesters, the nature of this course requires that it be taught in the first one. It shall be reasonable if the teaching of sources of Islamic law is divided into following structure:

- (i) Introduction into sources of Islamic law
- (ii) Application and interpretation of sources of Islamic law in schools of law: this section is further subdivided into an introduction of each school of interpretation
- (iii) Formation of secondary sources of Islamic law, in particular Islamic states in medieval and pre-modern periods
- (iv) Application of sources of Islamic law in modern times. Particularly, special focus shall be given to the practical aspects of the application of sources of Islamic law in contemporary Islamic states, as this demonstrates a present condition of the law.

The general methods of teaching that are applied to other areas of law are also relevant to teaching sources of Islamic law. Among them, the following methods are particularly useful and ought to be given serious consideration:

- (i) Weekly class contact which shall involve all course participants and facilitates an effective discussion

- (ii) An introduction to the sources through practice at adopting an analytical approach
- (iii) Problem solving exercises which are directly relevant to teaching Sources of Islamic law as it is a usual practice in Islamic law to put a specific problem to a jurist so that he may interpret it in order to find a proper answer or fatwa to the same. In this situation students might be divided into those who ask and those who answer questions. Problem solving exercises are also helpful in the sense that they develop the necessary skills and experience useful to a student who intends to practice in this area of law
- (iv) Generating a general discussion is an effective method of teaching as students are encouraged to think analytically whilst presenting a particular view point.

Innovation in Teaching Methods

Teaching Islamic law requires a distinctive approach as it mainly deals with two areas of sensitivity: law and religion. The longstanding traditions of Islam which have survived many centuries bear witness to the effectiveness of those methods and approaches that have been applied up to date.

The central idea that ought to be brought to the attention of the students is the remarkable pluralism that exists in Islamic legal scholarship. It is the one that has allowed a tolerance of distinctive ideas over many centuries and through many societies and should now serve as an anchoring point for those who intend to teach Islamic legal studies. This begs the question as to whether this is the only criteria that should be taken into account when teaching Islamic law. The answer is certainly not. Either there is a remarkable feature of Islamic law or there is remarkable link that exists between law and the Islamic faith. This link is often ignored and the majority of scholars tend to view it as a pure substantial legal subject like Roman law, for instance. Islamic law is

more than law but a concept that harmonises both law and religion. A student who starts his journey into the world of Islamic law often tends to ask questions like: Why are certain religious rituals like prayer and fasts being regulated by law? Why aren't they considered in a separate context? What they fail to understand is that the very law of Islam emanated from the practice of the regulations of these rituals and often served as a pre-requisite for a Muslim who wished to qualify as an Islamic lawyer.

Another difficulty that is often faced during the current teaching practices of Islamic legal studies is either a scarcity of the primary sources or a complexity of the secondary. Brannon Wheeler pointed to these problems in his observations. "Unfortunately", he wrote, "the materials available to students about Islamic cannon law are few and are often inaccessible, even when available in translation, because of uneven standards in translation or because of mere bulk". "Simple terms such as '*zakat*' or '*hajj*'", he continued, "are often left untranslated and unexplained". Further, he rightly noticed that secondary literature "...especially in the fields of *Hadith* criticisms and law, is usually far too technical for beginning students". (Brannon M. Wheeler, *What can't be left out? The essentials of teaching Islam as a religion in ed.* Brannon M. Wheeler, Teaching Islam, Oxford University Press, Oxford, 2003 p. 6). These issues raised by Wheeler certainly deserve special attention by the lecturer and require a specific approach.

The methods of teaching Islamic legal studies should be discriminatory in the sense that the beginner student should not be given copious amounts of information and consequently perplexed by those difficult concepts that are usually offered to more experienced students or scholars. A student new to this area should be able to understand for instance, how the concept of prayer in the *Qur'an* differs from the concept as addressed in the *Hadith* (Prophetic Traditions). He should be taught of the link that exists between the two and how this emerged. It is true that the majority of students that undertake Islamic legal studies are often already familiarised with the basic concepts of Islamic law. However, this does not mean that teaching the elementary basics

of Islamic law should be omitted in order to advance further. Those students that are already familiarised with the foundations of Islamic law should be given another opportunity to review their knowledge in Islamic legal studies.

One of the major flaws that the authors of this manual has detected in the major textbooks of Islamic law is that the authors of textbooks have a tendency to describe or present basic concepts of Islamic law in isolation from practice. An example to illustrate this point is that a student may well read that *ijma* is considered to be a consensus of Muslims or Islamic jurists, but does not learn how it is applied in practice on the basis of simple legal rulings. It is therefore not unusual to have a student who often reviews textbooks on Islamic law only know a concept in theory and not be able to demonstrate the concept properly. The authors are of the opinion that where a student initiates his study in Islamic law, theory should be supplemented with practice. Thus more specifically in relation to the concept of *ijma*, the following observations can serve as an example:

“To prevent any controversy and contradictions in legal opinions, Muslim jurists extensively referred to consensus (*ijma*). The consensus of jurists has been long admitted as one of the major sources of Islamic law, even though it was not meant in the beginning to play such role. Due to overwhelming disagreements between early jurists, the rulings and opinions were grouped in separate judgements that in further jurisprudence has been expressed as ‘our jurists said’ or ‘our jurists agreed’ as we notice them in the works of Abu Yusuf, Shafii or Malik. Malik might be admitted as a foremost jurist who often used such expression but in reference specifically to jurists of Medina. Often consensus of jurists of one legal centre would disagree with consensus of jurists of different centre of scholarship. However often jurists of different centres of scholarship would agree with each other confirming with their consensus. One example would suffice: “Malik informed us: “Thawr ibn Zayd ad-Dili informed us that Abdullah ibn Abbas was asked about the slaughtered animals of Arab Christians and he said, ‘There is no harm in it’ and then he recited this *ayah*, ‘Any of you who takes them as friends is one of them’ (*Qur’an* 5:21)” Muhammad (Shaybani) said: “We adhere to this, and it is the verdict of Abu Hanifa and our *fuqaha* in general”. There is an agreement among three centres of legal scholarship, namely, Medina (Malik), Mecca (Ibn Abbas) and *Kufa* (Abu Hanifa and jurists in general)”.(unpublished work by Aibek Ahmedov).

As the excerpt demonstrates, there is a need to both analyse *ijma* from a theoretical perspective as well as provide a useful example of the application of it in practice. It is intended that a student exposed to a similar extended explanation of a particular concept will inevitably have a greater understanding of it.

An interesting concept that has been offered by Kevin Reinhart is that of “the matrix of Islam” which suggests that “Muslims have encountered the elements of matrix – *Qur’an*, Prophet, Ritual, Dissent – over and again throughout Islamic history”. (A. Kevin Reinhart, On the “Introduction to Islam” in ed. Brannon M. Wheeler, *Teaching Islam*, Oxford University Press, Oxford, 2003 p. 27). In this context it is very important to present and explain these elements separately by giving considerable weight to each on an individual basis. In order for the student to have a clear grasp, each element should be demonstrated. As Reinhart puts it, “our approach is to make sense of the *Qur’anic* content and show it presenting a cosmology, an anthropology, a soteriology, and a Heilsgeschichte (approx. Salvation history)”. (Ibid). Muhammad as a Prophet and the person who delivered the *Qur’an* to the people should be discussed in the context of both the *Qur’an* and Islam. Reinhart suggests that the role of Muhammad should be reconstructed from *Qur’anic* citations and special attention should be given to his place in Islam, his role being “as a vehicle for the miraculous, rather than as a miraculous being himself”. (Ibid). Certainly, the discussions about the role and the nature of the *Qur’an* and Prophet should not be limited to those aspects stipulated by Reinhart but expanded as considered necessary. The principles of ritual shall, of course, not to be discussed in isolation from the *Qur’an* and Prophet. The student ought to be taught how and why certain rules of ritual have been extracted from within these two elements and how they were applied.

An equally important feature of teaching Islamic law is the requirement for a correct presentation of Islam. In this regard, Brockopp observed: “Both through voluntary and involuntary choices, reflecting personal competencies or availability of suitable texts, the instructor determines which aspects of the Islamic tradition will be considered. As a result, the presentation of Islam in the classroom is necessarily partial and incomplete... While a great deal of harm can be mitigated by emphasizing the incomplete nature of the presentation to the students, the search for the essence of Islam continues”. (J Brockopp, *The essential Shari’ah: Teaching Islamic law in the religious*

studies classroom ed. Brannon M. Wheeler, Teaching Islam, Oxford University Press, Oxford, 2003, p. 78). This statement confirms the idea that there can be no ‘right’ way to teach Islamic law and further makes multiple approaches to the study of Islamic traditions a necessity. “One cannot look at the *Qur’an*”, Brockopp emphasized, “to understand the establishment of Islam in North Africa”. (Ibid). In light of the observations by Brockopp, it is contended that when studying Islamic law and jurisprudence, the audience should not be restricted to either the study of *Sunni*, *Shii* or *Hanafi* jurisprudence, but be exposed to the foundations of all eight schools of Islamic law, which are *Hanafi*, *Maliki*, *Shafii*, *Hanbali*, *Jafari*, *Ismaili*, *Zaydi* and *Ibadi*. A lecturer who delivers a lecture on Islamic jurisprudence should not adopt a one-sided or biased approach towards the other schools and should be able to present them in a fair and objective way.

Course Outline

It is recommended that the course ought to be taught over a period of 10 weeks. The flexible nature of this manual does enable the lecturer to either shorten or expand upon the course, should he consider either of the two more appropriate. The areas covered in this manual are as follows:

1. Overview of the sources of Islamic law
2. Understanding the sources of Islamic law
3. Application of Islamic law in Islamic jurisprudence
4. Application of sources of Islamic law in modern states

Course Material

Primary sources and materials

M. al-Bukhari, Z. az-Zabidi, Summarized Sahih al-Bukhari, trans. by Dr Muhammad Muhsin Khan, Darussalam, 2006,

A. Hameed Siddiqi, Sahih Muslim, Islamic Book Service, India, 2005

Muhammad Tufail, Sunan Ibn-i-Majah, Kitab Bhavan, India, 2000

Ahmad Hasan, Sunan Abu Dawud: English Translation with Explanatory Notes and Introduction, Kitab Bhavan, India, 1993

A.A.A. Nasa'i, Sunan Nasa'i, trans. by S.M. Iqbal, Kitab Bhavan, India, 2005

Textbooks

Ignaz Goldziher, Muslim Studies, Vol. II, George Allen and Unwin, London, 1971,

Joseph Schacht, The Origins of Muhammadan Jurisprudence, ACLS History E-Book Project (Jan 2001)

Burton, J. The sources of Islamic law: Islamic theories of abrogation, Edinburgh etc.: Edinburgh University Press, 1990

Kamali, M.H., Principles of Islamic jurisprudence. Rev. ed. Cambridge: Islamic Texts Society, 1991

Yasin Dutton, The Origins of Islamic Law: The *Qur'an*, the *Muwatta'* and Madinan Amal (Culture and Civilization in the Middle East), Routledge Curzon; New Ed edition (18 Jul 2002)

Recommended Purchase

G.H.A. Juynboll, *Encyclopaedia of the Canonical Hadith*, Brill, Leiden, 2007

Khadduri, Majid, *al-Shafi'i's Risala (Treatise on the foundation of Islamic Jurisprudence)*, Islamic Text Society), Cambridge, 1997

Supplementary Material

After the students have familiarised themselves with the major modern scholarly works in the field of sources of Islamic law, they should be introduced to the emergence and evolution of sources of Islamic law. The following titles are designed to introduce students with a timeline within which sources of Islamic Law formed and developed.

The Discourse of Sources of Islamic Law

Prepare: Burton, J. *The sources of Islamic law: Islamic theories of abrogation*, Edinburgh etc.: Edinburgh University Press, 1990. xi, 232 pp.

Read: Kamali, M.H., *Principles of Islamic jurisprudence*. Rev. ed. Cambridge: Islamic Texts Society, 1991. xxi, 417 pp.

Sources of Islamic legislation during Prophet Muhammad

Prepare: R. B. Serjeant, The "*Sunnah Jāmi'ah*," Pacts with the *Yathrib* Jews, and the "*Taḥrīm*" of *Yathrib*: Analysis and Translation of the Documents Comprised in the So-Called 'Constitution of Medina', *Bulletin of the School of Oriental and African Studies*, University of London, Vol. 41, No. 1 (1978), pp. 1-42

Read: Michael Lecker, The "Constitution Of Medina": Muhammad's First Legal Document (*Studies in Late Antiquity and Early Islam*), Darwin Pr (30 Jul 2005)

Rec: Richard Bell, W.Montgomery Watt, *Introduction to the Qur'an (Islamic Surveys)*, Edinburgh University Press; New Ed edition (21 Feb 1995)

Study of Prophetic Traditions

Prepare: I. Goldziher, Muslim Studies, Vol. II, George Allen and Unwin, 1971 “On the development of *Hadith*”

Read: G.H.A. Juynboll, Encyclopaedia of the Canonical Hadith, Brill, Leiden, 2007

Rec: Abu Ubayd Al-Qusim Ibn Sallam, The Book of Revenue: Kitab Al-Amwal (Great Books of Islamic Civilization):ed. by Ibrahim M. Oweiss, trans. by Imran Ahsan Khan Nyazee, Garnet Publishing Ltd; New Ed edition (1 Jun 2005)

Sources of Islamic law in early schools of law

Prepare: Hanifah Abu Imam, *Kitab Al-Athar* of Imam Abu Hanifah, trans. by Clark Samad Abdus, Turath Publishing (November 25, 2006); *Al Muwatta* of Imam Malik ibn Anas: The First Formulation of Islamic Law, trans. by Aisha Abdurrahman Bewley, Madinah (2005)

Read: Joseph Schacht , The Origins of Muhammadan Jurisprudence, ACLS History E-Book Project (January 2001)

Rec: Harald Motzki, The Origins of Islamic Jurisprudence: Meccan Fiqh Before the Classical Schools (Islamic History and Civilization) trans. by Marion H. Katz, Brill Academic Publishers (December 1, 2001)

Sources of Islamic law in schools of law

Prepare: Bernard, M. “*Hanafi usul al-fiqh* through a Manuscript of *al-Jassas*”, Journal of the American Oriental Society, 105, 4 (1985)

Read: Calder, N. “*Ikhtilaf* and *ijma* in Shafii’s *Risala*”, *Studia Islamica*, 58, (1983): pp. 55-81”

Rec: Muhammad ibn Idris Al-Shafi'i, *Kitab al-Risala*: Treatise on the Foundations of Islamic Jurisprudence, trans. by Majid Khadduri, Islamic Texts Society; 2Rev Ed edition (31 Dec 1987)

Sources of Islamic law in the modern period

Prepare: Abulmagd, A.K. "The application of the Islamic *Shari'a*" in: *The Shari'a and its relevance to modern transnational transactions/The settlement of disputes through arbitration/joint ventures*. London etc.: Graham & Trotman/International Bar Association, 1987 pp. 27-41

Read: Boisard M.A., "On the possible influence of Islam on Western Public and International law", *International journal of Middle East Studies*, 11, (1980): pp. 429-450.

Tutorial Essays

All candidates are required to submit one tutorial essay on the following issues below.

Essay titles:

1. Critically examine and evaluate the Sources of Islamic Law
2. 'The general rule on the application of the *Qur'an* and *Sunnah* as main sources of Islamic law is that in case of any irresolvable conflict between a verse of the *Qur'an* and a reported *Sunnah*, the former prevails, because of its indubitable authenticity in Islamic law'. (Baderin, *International Human Rights and Islamic Law*, 2003, at p. 36).

Critically examine this statement in the light of Islamic jurisprudence.

3. How far would you agree with the assertion that *ijtihad*, *ijma* and *qiyas* are more in the nature of strategies (as opposed to independent, albeit secondary sources) for discovering law already established within the primary sources of the *Qur'an* and the *Sunnah*?

For the sake of convenience, these essays have also been listed in the seminar section towards the end of each chapter in this manual. In order to assist with the marking requirements, the questions are followed by points as to what the essays should include in terms of content. The purpose of these essays is to ensure that the students have a solid degree of understanding of a subject. Analytical skills with regards to an examination of the sources of Islamic law are also assessed. The students must be able to provide a critical examination of the issues stated; moreover they should be able to assess and examine concepts and notions related to legal terminology within this subject area. As a result of such assessments, the students ought to become capable of understanding the central concepts in sources of Islamic of law in addition to the process of evolution, development of the sources and disagreement between Islamic jurists in the extrapolation of the sources during the law-making process in *furu al-fiqh*.

Course Assessment

Although a matter for the lecturer, it is recommended that candidates for the Sources of Islamic Law course be required to sit a three hour university examination and to submit one assessment essay. It is suggested that the following examination questions should be used as a guide:

1. What is the theory of *naskh* and how it has been applied in *usul al-fiqh*? (Please provide examples with reference to specific schools of law).
2. What is the role of *Hadith* and *athar* in early *Hanafi* jurisprudence as reflected in Shaybani's *Muwatta* and *Kitab al-Athar*?

3. What is a 'living tradition' and how is it applied in *Maliki* jurisprudence?
(Please reflect your views on *amal al-Madina*).
4. What is a role of the *Qur'an* and *Sunna* in *Shafii* jurisprudence?
(Please reflect on the chapter 'On Traditions' in *Kitab al-Risala* of *Shafii*).
5. How were sources of Islamic law utilised in *Hanbali* jurisprudence?
6. What are the implications of the *Qur'an*, *Sunna* and *ra'y* in respect of the law of marriage and divorce in Islamic law?
7. What are the implications of *istihsan* for Islamic law and the differences between *istihsan* and equity?
8. What is the utility of *maslahah mursalah* in the formation of public institutions in early Islamic states?
9. What is the role of *urf* in the application of Islamic law in specific areas of Islamic dominion? (Please provide examples of application with reference to the Indian subcontinent).
10. What is *istishab* and how is it applied in Islamic jurisprudence?

The remaining 50% of the course could be examined by means of a compulsory assessment essay. It is suggested that titles for the assessment essay may be compiled by the candidate and that the same ought to be submitted for prior approval to the candidate's tutor. Alternatively, candidates may be asked to select an essay title from those provided above. In this instance, there should be no need for the candidate to submit an essay title for prior approval.

Chapter One

Overview of Sources of Islamic Law

Sessions One and Two (Weeks 1–4)

Objectives

- A detailed consideration of the *Qur'an* and Prophetic traditions as primary sources.
- An analysis of the differing secondary sources available.
- Involving the students in short exercises.

At the outset, students should be informed that a variety of primary and secondary sources constitute the *Sharia*. At the very apex, the *Qur'an* is the primary source, which is accompanied and interpreted by the *Sunna* of Prophet Muhammad (Peace be Upon Him), hereafter referred to as the Prophet Muhammad. One of the preliminary points to bring to the attention of the students is that tradition dictates it is good practice to recite the words 'Peace be Upon Him' pursuant to the mention of this Prophet and accordingly they ought to be encouraged to do the same.

As shall be examined in due course, in addition to the primary sources, *ijma*, *qiyas* and *ijtihad* represent the secondary sources. Jurists have extended the secondary sources so as to include the practices of Islamic rulers and *caliphs*, their official instruction to commanders and statesmen; constitutional laws and internal legislation of Islamic States, both in the historic as well as the modern era. For example, Professor Bassiouni has regarded the consistent practice of Muslim Heads of State (*the Khalifas*) as secondary sources of Islam.

The Qur'an

It is at this juncture that the audience ought to be introduced to the background as to the revelation of the *Qur'an*. According to the Muslim belief, the *Qur'an* is the sacred book which was revealed from Allah to the Prophet Muhammad from 610 to 632 A.D, amounting to a period of 23 years.

In terms of content and structure, the *Qur'an* contains 114 chapters, which are called *suras* in Arabic. The *suras* contain 6236 verses, which are called *ayahs* in Arabic. The *Qur'an* was revealed over two periods which are known as Meccan and Medinan. The majority of *suras* with a theological character were revealed during the Meccan period. By way of contrast, those revealed during Medinan period predominately contain *ayahs* of a political, social and legal character. The theme of strict monotheism (*tawhid*) remains as a central theme throughout the *Qur'an*. Another very much significant aspect of the *Qur'an* is the recognition of Muhammad as the last messenger of Allah.

Abu Zahrah recognises that the *Qur'an* takes the form of five types of text. It will be useful to make students aware of the same and these are as follows:

1. Explicit (*nass*)
2. Apparent (*dhahir*). - 'an apparent meaning derived from a text which is general and non-specific'.
3. Indicative (*dalil*) - 'an interpretation which diverges from its obvious meaning'.
4. Implicit (*mafhum*) - have an added meaning coinciding with its obvious meaning'.
5. Expositive (*tanbih*) - underlying reason for a judgement (like the statement 'it is filth'). (Muhammad Abu Zahrah The Fundamental Principles of Imam Malik's *Fiqh at* <http://ourworld.compuserve.com/homepages/ABewley/usul.html>).

There are a total of 200 verses related to legal rulings in the *Qur'an* and these may be classified as follows:

1. 70 verses on family and inheritance law
2. 70 verses on obligations and contracts
3. 30 verses on criminal law
4. 20 verses on procedure.

An important point for the lecturer to raise is that the *Qur'an* does not deal with just family, contract and criminal law and that the application of the principle of analogy has enabled jurists to extend the scope of *Qur'anic* rule to other areas of law. For the benefit of clarity, it would be useful for the lecturer to provide an example of this.

It ought to be reinforced that neither Prophet Muhammad nor any other human being had any influence over the divine book. This is with the exception to its structure and the names of the *surahs* (chapters) which, were established in the years that preceded the Prophet's death. While meticulously noted down and revealed in stages during the lifetime of the Prophet, the *Qur'an* was produced as an authentic whole text during the reign of the third *Caliph* Uthman. The *Qur'an* is aimed at establishing basic standards for Muslim societies and guiding these communities in terms of their rights and obligations. At the time of its revelation, it provided a set of progressive principles. It advances values such as compassion, good faith, justice and religious ethics.

The students should be reminded that the *Qur'an* is first and foremost a religious text and is not a legal document *per se*. In reiterating this point, two leading comparative lawyers, namely Zweigert and Kotz, may be referred to who note that “[o]nly a few of the statements in the *Koran* constitute rules of law capable of direct application. It consists mainly of precepts of proper ethical behaviour too generally phrased to have the precision and point of

legal rules. For example, the *Koran* prescribes that a Muslim must act in good faith, that he must not bribe judges, and that he must abstain from usury and gambling, but it does not specify what legal consequences, if any attach to a disregard of these commandments. Furthermore most of the rules of behaviour contained in the *Koran* concern the rituals of prayer, fasting and pilgrimage; even where it deals with legal problems in the narrow sense, such as those of family law, it does not offer an integrated system of rules but simply gives the solution of a few individual problems with which Muhammad was concerned as a judge and prophet of the law". (K Zweigert and H Kötz, *Introduction to Comparative Law*, 3rd edn (Oxford, Clarendon Press, 1998) 305).

An interesting point to raise is the evolution of what was considered to be the primary sources. The *Qur'an* has always been viewed by Islamic jurists as the primary and imperative source of Islamic law. After the death of Muhammad, it alone played a significant role in the decisions of the first 'rightly-guided' *caliphs*. Subsequently, during the rule of the *Umayyad caliphs*, emphasis began to be given to the independent reasoning of the *caliphs*. Moreover, during the rule of *Abbasid caliphs*, when Islamic jurisprudence reached its heights, Prophetic Traditions seem to have achieved an equal status with the *Qur'anic* rulings. Thus, Prophetic Traditions were employed in equal footing with the *Qur'anic* rulings and were accordingly considered to be primary source of Islamic law. This does not suggest that the *Qur'an* does not have legal force without the traditions of Prophet, but that the latter serves as the instrument or tool for the interpretation of the legal nature of the *Qur'anic* rulings.

Sunna (Prophetic Traditions)

The Prophetic traditions as indicated above are usually referred to as *Sunna*. The lecturer may literally define *Sunna* as meaning tradition or customs and before the emergence of Islam, it denoted the customs and traditions in pre-Islamic Arabia. Goldziher explains the meaning of *Sunna* as “flow and continuity of a thing with ease and smoothness”, whereas Ansari suggests that as a result of evolution of the word ‘*Sunna*’, it started to mean “way, course, rule, mode, or manner, of acting or conduct of life”. (Wael B. Hallaq, *The Formation of Islamic Law (Formation of the Classical Islamic World, 27)*, Ashgate Publishing (January 2004), p. 259-260).

How were the *Sunna* formed? This was as a result of traditional stories transmitted from the Prophet Muhammad called *Hadiths*. The memorisation and transmission of the *Sunna* in literary form is characterised as *Hadith*. The term *Hadith* which means ‘occurring, taking place’ represents the ‘report’ of the Prophet Muhammad’s *Sunna*. The term *Hadith* has been deployed in the *Quran* 23 times in total. The *Sunna* of Muhammad therefore is preserved and communicated to the succeeding generations through the means of *Hadiths*.

An interesting point is that the *Hadith* consists of two parts. *Isnad* and *matn*. Students need to be asked about the difference between the two. *Isnad* refers to the link, the source or the chain of narrators of the *Hadith*. Hence a *Hadith* in its *isnad* would report the person who acted as transmitters. The *matn* contains the substance of the Prophets’ sayings, deeds or actions. It is recommended that the lecturer refer to an extract from a *Hadith* to illustrate this point clearly.

Shabbir opines that *Hadith* might be transmitted in the following three forms:

1. *Qawl*, which means all the sayings and the utterances of the Prophet Muhammad
2. *F'al*, which denotes the actions and daily practices of the Prophet Muhammad
3. *Iqrar*, which denotes the tacit approval on the part of the Prophet of acts done and practices carried on by his followers.

Shabbir further states that *Hadiths* have been classified according to their origin, degree of authority and reference to persons. In respect of origin, the *Hadiths* are classified into *kudsi* and *nabvi Hadiths*. *Kudsi* generally denotes the *Hadith*, which had been uttered by Prophet under divine inspiration, whereas *nabvi* denotes the Prophet's uninspired opinion or judgment.

The lecturer may consider it useful in respect of the degree of authority, to classify the *Hadiths* into the following:

1. *Mutawatir* (continuous), *mashhoor* (well known) and *ahad* (isolated) *Hadiths* denotes the traditions continuously transferred through a long and uninterrupted chain of narrators, which are ultimately considered as genuine and authentic. It is said that they have received universal acceptance and has been narrated by an indefinite number of men belonging to the categories of companions, successors and successors of successors. *Mutawatir* has an imperative character in that it bears a binding and decisive personality.
2. *Mashhoor* is said to have been derived from the knowledge of the majority but is not universally adopted and has a lesser degree of legal enforcement in comparison with *mutawatir*.

3. *Ahad* denotes those *Hadith* which are known to isolated individuals and have no value in the sense of legal enforcement.

The last criteria for the classification of *Hadiths* refer to the persons on whose authority the *Hadith* is received:

- (i) *Ahsan* consists of *Hadiths*, the narrators of which belong to persons who are established, absolute, trustworthy, of good reputation and possess a strong memory
- (ii) *Hasan* contains *Hadith*, the narrators of which are from trustworthy persons of good reputation and good memory, but who do not fall into the category of moral excellence
- (iii) *Gharib* or *daif* narrations of *Hadiths* which are of questionable authority. The structure of the *Hadith* is such that it usually starts with the word “*haddathana* (narrated to us), then a series of narrators are cited, the last of whom heard the tradition directly from the Prophet. In circumstances where the connection with the Prophet is not established, it is called *mursal Hadith*.

The codification resulted in the emergence of books on *Hadith*, which were later classified into several categories:

- (i) *Sahifa* is a compendium of sayings of Muhammad which were written down by his companions during his lifetime.
- (ii) *Musannaf* is the large collections of *Hadiths* where the traditions relating to different topics have been put together and compiled as chapters or books dealing with a particular topic.

- (iii) *Musnad* is a collection of traditions supported by a complete, uninterrupted chain of authorities which go back to the companion who related it from the Prophet.
- (iv) *Sunans* are collections of the traditions which contain legal rulings and its scope never includes which are related to historical and theological matter.
- (v) *Mu'jams* contain treaties on various subjects and are arranged in alphabetical order, known as *mu'jam al-sahaba*
- (vi) *Ajza'* is collection of the traditions that have been handed down on the authority of one single individual, whether he is any companion or of any generation after the Prophet.
- (vii) *Rasa'il* are the collections of *Hadiths*, which deal with one particular topic out of a total of eight topics and into which the contents of *jami* books of *Hadith* may be generally classified.
- (viii) *Mustadraks* are collections of *Hadiths* where the person who has compiled them has accepted conditions laid down by those who compiled the same before him and thus created the collection.
- (ix) *Mustakhraj* are collections of *Hadiths* in which a later compiler gathers fresh *isnads* for such traditions collected by the previous compiler on the basis of different chains of *isnad*.
- (x) *Jami'* are collections of *Hadiths* which contain the traditions relating to the various subject-matters mentioned under *rasa'il*.
- (xi) *Arbainiyat* are collections of forty *Hadiths* relating to one or more subjects which may have been of special interest to the compiler.

Students may be reminded that there are six officially adopted canonical collections of *Hadiths*, which were compiled in the third century A.H. and these are as follows:

- (i) *Sahih Bukhari*
- (ii) *Sahih Muslim*
- (iii) *Sunnan* of Abu Dawood
- (iv) *Sunnan* of Tirmidhi
- (v) *Sunnan* Nasai
- (vi) *Sunnan* Ibn Maajah.

All *Sunni* Muslim jurists have undisputedly accepted all of the above six *Hadith* authentic books. By way of contrast, *Shia* Muslims have their own 'canonical' collection of *Hadiths*, which are as follows:

- (i) *Al-Kafi fi Ilm ad-Din* of Muhammad al-Kulayni
- (ii) *Man la yahduruhu al-Faqih* of Muhammad ibn Babuya
- (iii) *Tahdhib al-Ahkam* of Shaykh Muhammad at-Tusi
- (iv) *Al-Istibsar* of Shaykh Muhammad at-Tusi

An interesting method to engage the students would be to take an extract from each of the ten collections listed above. The audience could be asked to categorise the *Hadith* in light of the information provided thus far.

A further exercise that may be useful to engage in at this point relates to the work of Kamali, who makes the following points which highlight the value of *Sunna* as a source:

'The *Ulamā* are unanimous on the point that *Sunnah* is a source of *Shariāh* and that in its rulings with regard to *halal* and *haram*, it stands on the same footing as the *Qur'ān*. The *Sunnah* of the Prophet is a proof (*hujjah*) for the *Qur'ān*, testifies to its authority and enjoins the Muslim to comply with it. The words of the prophet, the *Qur'ān* tells us, are divinely inspired (*al-Najm*, 53:3). His acts and teachings that were meant to establish a rule of *Shariāh* constitute a binding proof'.

(Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, Islamic Texts Society; 3 edition (September 1, 2005) p.63).

Students may be asked to reflect upon the above statement. Was this always considered to be the case? How has the importance of *Sunna* as a source evolved? Other than the *Qur'an* which testifies the authority of the *Sunna*, what other means have assisted with this process of evolution?

The *Sunna* of the Prophet has been placed and divided into a variety. One division is what is considered to be non-legal *Sunna*. This is in contrast to that *Sunna* which relates to legal matters and constitutes an obligatory practice for Muslims. Activities such as sleeping, dressing and eating habits fall into the former category, whereas the latter includes the pronouncement of the Prophet on matters such as family laws and inheritance as well as the treatment of religious minorities.

While the *Qur'an* was recorded within a relatively short time, the recording of the *Sunna* took a much longer period. There is a significant debate over the authenticity and accuracy of some of the *Sunna* and there have been comments as to the possibility of fabrication in the recording of the *Sunna*. Commenting on this subject, Coulson interestingly makes the point that 'the

extent of [Muhammad's] extra *Qur'anic* law-making is the subject of the greatest single controversy in early Islamic legal theory'. (NJ Coulson, *A History of Islamic Law* (Edinburgh, University Press, 1964) 22).

In summary, should the concept of the *Qur'an* as providing a binding ordinance and the *Sunna* of the Prophet be taken as the source of Islamic legal jurisprudence, then significant analogies can be drawn between the sources of the *Sharia* and that of modern International law. Students may be asked to consider Article 38(1) of the Statute of the International Court of Justice, which represents the sources of modern international law and provides for both treaties and customary law. An interesting task would be for the students to make a written note of the similarities between the *Sharia* and this particular piece of modern International legislation.

Secondary Sources

Students should be reminded that in addition to the primary sources of the *Sharia*, there are a number of secondary sources. These include *ijma*, *qiyas* and *ijtihad*. There is some disagreement amongst Islamic scholars as to whether all of the above in actual fact constitute secondary sources. An example to illustrate this issue that the lecturer may use is that one view of *ijtihad* is that it is a strategy as opposed to a source of Islamic law.

Ijma

Students may be invited to answer what they think *ijma* is and when it can be relied upon. A useful explanation the lecturer may give in this regard is that in order to prevent controversy and contradictions in legal opinions, Muslim jurists extensively refer to the notion of consensus (*ijma*). The concept of *ijma* is one of those that are disputed in Islamic legal practice. Interestingly, when speaking of *ijma*, Weiss noted "an arena of much more pervasive inter-Muslim controversy, an arena in which the most fundamental matters are debated

and virtually nothing is certain”. (Bernard G. Weiss, *Search for God's Law: Islamic Jurisprudence in the Writings of Sayf Al Din Al Amidi*, University of Utah Press, U.S. (Dec 1992), p. 181).

The validity of *ijma* is based on Prophetic tradition, which claims that the Muslim community would never agree on the error. The lecturer may refer to Schacht, who claims that the concept of consensus took its roots from Medinese and Iraqi schools.

When Islamic jurisprudence makes reference to the term ‘consensus’, what does it actually mean? It appears there are two types: the consensus of all Muslims and the consensus of Muslim jurists. According to Schacht, Shafii was a firm believer in this and this particular school of law referred to both authoritative consensus and majority consensus. Schacht explains the consensus of the authoritative as “the scholars whose opinions are authoritative and had to be taken into account as those whom the people of every region recognise as their leading lawyers (*man nasabah ahl balad min al-buldan faqihan*), whose opinion they accept and to whose decision they submit.” (Joseph Schacht, *The Origins of Muhammadan Jurisprudence*, ACLS History E-Book Project (January 2001), p. 83).

The consensus of majority is illustrated as the consensus of the majority of *muftis*, whose opinion should be taken into the account in contrast with minority (*la anzur ila qalil al-muftin wa anzur ilal-akthar*).

As has been mentioned above, this principle was likely to have developed in Medina and Iraq. Schacht has differentiated these two, by criteria of territoriality: Medinese consensus is mostly the consensus of local Medinese scholars and jurists, whereas the Iraqi concept is not restricted to a specific place or location but applies to any or the whole country.

The strict restriction of Medinese jurists gave rise to the concept of *amal al-ahl Madina*, which is viewed as one of the sources of Islamic law in the *Maliki* School of law. The criteria of territoriality, by which Muslim jurists governed

themselves, applies only to *Maliki* jurists, since they tended to limit themselves to the consensus of Medinese scholars. This is in contrast to the other schools who would acknowledge the consensus of any authoritative Muslim jurists. It is surprising that such a principle is not inherent in the Meccan school of *fiqh* and consequently in the *Shafii* school of law.

Pursuing a comparative vision, further analogies can be drawn between the sources of modern international law and Islamic law. Taking into account the views of jurists, *ijma* can be regarded as akin to Article 38(1)(d) of the Statute of the International Court of Justice which allows for 'judicial decisions and the teachings of the most highly qualified publicists'. Again the students may be asked to verbally describe any similarities they find. It will be useful for the lecturer to provide copies of the relevant sections of the legislation in order to assist with this exercise.

An important point for the lecturer to discuss is that it has clearly been established that *ijma*, unlike the *Quran* or *Sunna* is not represented by or evolved in any manner from divine revelations. *Ijma* is a purely human exercise. Difficult questions arise however when investigations are made in order to devise the basis of this consensus. The students could be asked to consider whether they think the concept of *ijma* would be stretched if it were to be regarded as analogous to modern day western liberal democracy.

According to classical jurisprudence, the consent of the whole Muslim community is not required. Does the class have an opinion on this? *Ijma* became a powerful force for conformity and gradually dominated Islamic jurisprudence among the *Sunnis*, for whom it provided stability and a constant source of authentication. *Ijma*, as a doctrine, represents the traditional relationship with the community, also known as the *Ummah*. Do students think *ijma* has any limits? If so, it will be interesting to share these with the class. Islamic jurists do in fact agree that *ijma* has its own limits. This is because in certain matters it is not possible to advance *ijma* further as this would take it to

the level of questioning the very Prophethood or status of Prophet Muhammad or the existence and omnipotence of God, Almighty.

Despite the undoubted value of *ijma* as a source of the *Sharia*, debate has centred on the constituency of the *Ummah*, and the form of consensus. In order to engage the students, they may be asked to consider whether the *Ummah* for example, only represent Muslims, or whether the modern Islamic State is under an obligation to seek and consider the opinion of its national Muslim citizens.

Qiyas

A useful operation is also derived from *qiyas* which, the lecturer may in general terms, describe as an application by analogy or deduction. In the absence of concrete answers from the *Qur'an* and *Hadith*, Muslim jurists would look for an analogous situation in which a decision had been made.

A useful example to make reference to is an extract from a well-recited *Hadith* that also demonstrates that the role of *qiyas* was confirmed at the time when Prophet Muhammad (whiling sending Mu 'adh b. Jalal to Yemen to take the position of a *quid*) asked him the following question: 'How will you decide when a question arises?' He replied, 'According to the Book of Allah' – 'And if you do not find the answer in the Book of Allah?' – 'Then according to the *Sunna* of the Messenger of Allah' – 'And if you do not find the answer either in the *Sunna* or in the Book?' – 'Then I shall come to a decision according to my own opinion without hesitation' Then the Messenger of *Allah* slapped Mu 'adh on the chest with his hand saying: 'Praise be to *Allah* who has led the Messenger of Allah to an answer that pleases him'. ('Kiyas' in HAR Gibb and JH Kramers (eds), *Shorter Encyclopaedia of Islam* (Ithaca, NY, Cornell University Press, 1953) 267).

An interesting point to refer to during the lecture is that some of the different schools of law have their own specific definition as to what *qiyas* actually

means. The lecturer may refer to the *Hanafi* scholars, who define *qiyas* as “an extension of law from original text to which the process is applied to a particular case by means of a common *illat* or effective cause, which cannot be ascertained by interpretation of the language of text”. (Sadr-aš-Šari`a, Kitab at-Taudih `ala 't-Tanqih li-Sadr-aš-Šari`a `Ubaidallah Ibn-Mas`ud: wa Sadr-aš-Šari`a `Ubaidallah Ibn-Mas`ud , at- Sa`d-ad-Din Taftazani, al- Fanri ", Mulla-øHusrau, `Abd -al-Hakim, al-Matbaa al-Hairiya, 1904, p. 302).

According to Rehman, the *Maliki* scholars interpret *qiyas* as “the accord of a deduction with the original text in respect of the *illat* or effective cause of its law”. He further states that the *Shafii* scholars interpret it as “the accord of known thing with a known thing by the reason of equality of the one with other in respect of the effective cause of its law”. (Abdur Rahman, Muhammadan Jurisprudence: According to the Hanafi, Maliki, Shafi'l and Hanbali schools, P.L.D. Publisher, Lahore, Pakistan, p. 44). How would *qiyas* be defined in more recent times? According to Rehman, “a process of deduction, by which the law of a text is applied to cases which, though not covered by the language, are governed by the reason of text”. (Ibid, p138).

According to Bassiouni, *qiyas* is said to “base on the use of reason to conclude that an existing rule applies to a new situation because it is similar to the situation regulated by that rule, or to abstain from applying the existing rule from the applying to the new situation that is proven dissimilar”. (M Cherrif Bassiouni, Gamal M. Badr, The Shariah: sources, interpretation and rule – making, (2002), UCLA Journal of Islamic Near Eastern Law, pp. 155).

Students may be asked where it thinks the roots of *qiyas* originate from. Some opine that such roots can be found in the *Qur'an*, which calls for logical thinking. When the Prophet himself was asked to resolve difficult issues which related to the new Muslim community, he practiced *qiyas*. Furthermore, there exists evidence to suggest that *qiyas* was widely practiced by the companions of Prophet, especially 'Umar.

How was this concept introduced as a legal principle into Islamic law? It would appear that Abu Hanifa was the first to make this introduction. It is reported that Malik used *qiyas* in his legal decision-making. Shafii, in his *Risala* was asked about *qiyas* and he provided a clear explanation of this concept. More specifically, when Shafii was asked about the difference between *qiyas* and *ijtihad*, he responded that there are several types of legal rulings:

- (i) From the *Qur'an* and *Sunna*, which make clear what is forbidden and what is permitted
- (ii) Of special character, which consists of Traditions, transmitted to a limited number of scholars and only known to those scholars and which are not considered compulsory
- (iii) Derived from *ijma*
- (iv) Derived from *ijtihad* with the help of *qiyas*. When he was asked about the different opinions between the scholars who used *qiyas* in reaching their decisions, his response was that where a precedent existed in a case being considered, discrepancy was not allowed.

A more detailed analysis will require the students to be made aware that Islamic jurists have established rules according to which the *qiyas* may be adopted. These are as follows:

- (a) *Qiyas* should be used only when the solution to a specific issue can not be found in either the *Qur'an* or *Hadiths*
- (b) *Qiyas* should not contradict the principles of Islam
- (c) *Qiyas* should not contradict either the contents of the *Qur'an* or the traditions of Prophet
- (d) *Qiyas* should be strict and based on the *Qur'an*, *Hadiths*, or *ijma*.

Ijtihad

A further secondary source of the *Sharia* is *ijtihad*. A general definition the lecturer may rely upon is that *ijtihad* is a term that refers to the use of independent legal reasoning in search of an opinion.

In terms of background, *ijtihad* conveys a sense of exertion or a struggle and has the same origins as that of *jihad*. Inherent in this self-exertion and struggle are the fundamentals for reforming society and its legal norms. *Ijtihad* and *qiyas* are often used interchangeably although the former represents a wider, more general undertaking. One who exercises *ijtihad* is known as a *mjutahid*.

There have been times within Islamic history when all doors towards *ijtihad* were deemed closed. It was this development that led to *taqlid*, 'imitation' and the acceptance of authority without engaging in the original *ijtihad*. For centuries pursuant to the inception of Islam, Muslim scholars remained reluctant to rely upon this doctrine as this implied questioning the time-honoured (though static) principles of the *Sharia*. In order to make Islamic societies more compatible with the rapidly developing times, scholars began to advocate for the doctrine of *ijtihad*. Foremost amongst these was the Egyptian jurist Muhammad 'Abduh, who according to Badawi, advocated for a reinterpretation of the *Sharia* in order to introduce legal reform. Muhammad Iqbal, an Indian Muslim poet and scholar argued that reliance upon *Ijtihad* was not only required but was also a duty of the Muslims if Islam was to adapt to the modern world.

An exercise to engage the students in would be to ask them to think of situations where this concept has been applied. Do they think this particular application was beneficial in terms of progress and compatibility with modern times? Can they think of any situations where this concept ought to be applied? Why will this situation benefit from this application?

Seminars

The seminar structure is not rigid and may be altered both in terms of length and content at the discretion of the lecturer. Students should be encouraged to critically assess the information provided in both the lectures and reading list. Below are suggested seminar structures.

Seminar One: Overview of Sources of Islamic Law

1. It is now widely accepted that both the *Qur'an* and *Hadith* are primary sources of Islamic law. Discuss the evolutionary processes that makes this a reality.
2. What roles do the *Qur'an* and *Hadith* play on the impact on the development of Islamic law?
3. Describe and evaluate the relationship that exists between the *Qur'an* and the *Hadith*.
4. 'All *Hadith* should be accepted by all Muslim communities'. Critically evaluate this statement.

Assessment Essay Question

1. Critically examine and evaluate the Sources of Islamic Law

Reading

Joseph Schacht, *The Origins of Muhammadan Jurisprudence*, ACLS History E-Book Project (Jan 2001)

Burton, J. *The sources of Islamic law: Islamic theories of abrogation*, Edinburgh etc.: Edinburgh University Press, 1990

Supplementary Reading

Kamali, M.H., *Principles of Islamic jurisprudence*. Rev. ed. Cambridge: Islamic Texts Society, 1991

Yasin Dutton, *The Origins of Islamic Law: The Qur'an, the Muwatta' and Madinan Amaal* (Culture and Civilization in the Middle East), Routledge Curzon; New Ed edition (18 Jul 2002)

Chapter Two

Understanding the Sources of Islamic Law

Sessions Three and Four (Weeks 5–8)

Objectives

- Understanding the scope and concept of Islamic law
- Extrapolating legal norms from religious sources
- Permutations of legal schools of thought including an historical analysis
- Consideration of the impact of Imperialism on Muslims

Understanding the Content and Scope of the *Sharia*

The lecturer is no doubt aware that there are a range of misconceptions regarding the meaning, content and scope of the *Sharia*. In order to demonstrate this, it is suggested that the lecturer make reference to recent newspaper headlines which have reinforced the misconceptions that surround Islamic law and the implementation of the same.

In terms of actual misconceptions, some believe that the first of these relates to a belief that the totality of Islamic law, its interpretation and application is the ultimate expression of the Almighty. Professor Baderin in re-emphasising this issue, makes the point that '[t]here is often a traditional misconception about Islamic law being wholly divine and immutable.' (MA Baderin, *International Human Rights and Islamic Law* (Oxford, Oxford University Press, 2003) p.33).

Islamic scholars have often found themselves restricted in a debate surrounding the *Sharia* because of existing perceptions that the totality of Islamic legal system is the word of God. Any analysis or attempts to review the *Sharia* would be tantamount to heresy. Such assertions are however misleading since there exists a clear distinction between the Islamic legal systems (which represent evolutionary processes and in common with other legal system needs constant review and change) and the fundamental principles on Islam which remain unalterable. Thus, notwithstanding the fact that the *Sharia* regards the *Qur'an* and the *Sunna* as its principal sources, distinctions are inevitable features between the divine ordinances vis-à-vis man-made principles of regulating societies. *Sharia*, in this sense, is in fact no more than the understanding of early Muslims of the sources of Islam.

An interesting point to note is that the Muslim jurists who developed the *Sharia* during the second and third centuries did so in accordance with their personal understanding and comprehension of the word of God. Can it therefore be argued that the *Sharia* represents the human endeavour to understand and implement the core values and principles specifically referred to in the principal sources of Islam? While the man made legal principles are not immutable, the word of God as contained in the *Qur'an* and expanded upon by the *Sunna* remains indelible having been preserved for humanity.

In order to encourage students to assess the level of human involvement in the understanding of the law, they may be referred to a relevant statement by Bernard Weiss. He makes the poignant remark that

[a]lthough the law is of divine provenance, the actual construction of the law is a human activity, and its results represent the law of God as humanly understood. Since the law does not descend from heaven ready-made, it is the human understanding of the law—the human *fiqh*—that must be normative for society’.

(BG Weiss, *The Spirit of Islamic Law* (Athens, GA, University of Georgia Press, 1998) 116).

A related cause of significant confusion is the general belief that the *Sharia* is rigid, stagnant and cannot be made to apply to evolving situations. The issue of human involvement and interpretation of the divine line has been subject to debate amongst both oriental and western scholars and the lecturer may find it useful to refer to the same in order to facilitate discussion. Zweigert and Kotz, two leading scholars make the point in *Introduction to Comparative Law*, that

[o]ne of the consequences is that Islamic law is in principle immutable, for it is the law revealed by God. Western legal systems generally recognize that the content of law alters as it is adapted to changing needs by the legislator, the judges, and all other social forces which have a part in the creation of law, but Islam starts from the proposition that all existing law comes from Allah who at a certain moment in history revealed it to man through his prophet Muhammad. Thus Islamic legal theory cannot accept the historical approach of studying law as a function of the changing conditions of life in a particular society. On the contrary, the law of Allah was given to man once and for all: society must adopt itself to the law rather than generate laws of its own as a response to the constantly changing stimulus of the problems of life.'

(Zweigert and H Kötz, *Introduction to Comparative Law*, 3rd edn (Oxford, Clarendon Press, 1998), at 304).

This is an interesting statement that may be used for the purposes of discussion.

As subsequent discussion establishes, there is a substantial possibility of evolution in the Islamic legal system. The true essence of the *Sharia* is brought out by Parwaz who notes that: '[t]he *Sharia* refers to a straight and clear path and also to a watering place where both humans and animals come to drink water, provided the source of water is a flowing stream or spring'. (GA Parwez, *Lughat-ul-Quran: Lexicon of the Qur'an – In Four Volumes* (Lahore, 1960) at 941). It is therefore, as Hassan argues 'no slight irony and tragedy that the *Sharia*, which has the idea of mobility built into its very meaning, should have become a symbol of rigidity for so many in the Muslim world'. (R Hassain, 'The Role and Responsibilities of Women in the Legal and Religious Tradition of Islam', paper presented at a biannual meeting of a Dialogue of Jewish-Christian-Muslim scholars on 14 October 1980 at the Joseph and Rose Kennedy Institute of Ethics, Washington, DC, USA at 4). It will be useful for the lecturer to refer to an example of a situation where although a 'rigid' version of the *Sharia* has been adopted, a more fluid version would have been arguably more appropriate.

Extrapolating Legal Norms from Religious Sources

This section of the lecture may initiate with the fact that one substantial complexity facing the early Islamic jurists in formulating principles of the *Sharia* related to finding compatibility between the legally authoritative though competing injunctions of the *Qur'anic* verses and the *Sunna*.

Students should be reminded that the *Qur'an* is not a legal text. In fact, there is little in the *Qur'an* with strict legal content. From the over 6000 verses of the *Qur'an*, strict legal content is arguably attached to around 120 verses. That said, and as can be ascertained from scholarly analysis, opinions differs on the precise number of verses that contain a legal content. Professor Ali notes that the legal content can only be considered to be in approximately 80 verses. (SS Ali, 'The Conceptual Foundations of Human Rights: A Comparative Perspective' (1997) 3 *European Public Law* 261 at 266).

Professor Coulson has also made the point that

'the so-called legal matter . . . consists mainly of broad general propositions as to what the aims and aspirations of Muslim society should be. It is essentially the bare formulation of the Islamic religious ethic . . . In short, the primary purpose of the *Qur'an* is to regulate not the relationship of man with his fellows but his relationship with his creator'.

(NJ Coulson, *A History of Islamic Law* (Edinburgh, University Press, 1964) 11–12).

Save for a few specific offences there is no indication of criminal sanctions. These quotes could be used by the lecturer in order to encourage discussion.

What exactly do the verses of the *Qur'an* which specifically deal with law relate to? Some detailed legal rules can be identified regarding civil law and this includes family law and inheritance. An example may be used by the lecturer, particularly as some of these have been the subject of intense debate and argumentation.

Kamali, who offers detail on the verses of the *Qur'an* may be referred to. He states:

'There are close to 350 legal *āyāt* in the *Qur'an*, most of which were revealed in response to the problems that were actually encountered. Some were revealed with the aim of repealing objectionable customs, such as infanticide, usury, gambling and unlimited polygamy. Others laid down penalties with which to enforce the reforms that the *Qur'an* had introduced. But on the whole, the *Qur'an* confirmed and upheld the existing customs and institutions of Arab society and only introduced changes that were deemed necessary. There are an estimated 140 *āyāt* in the *Qur'an* on devotional matters such *salāh*, legal alms (*zakāh*), *siyām* (fasting), the pilgrimage of *hajj*, *jihad*, charities and the taking of oaths and penances (*kaffarat*). Another seventy *āyāt* are devoted to marriage, divorce, the waiting period of *'iddah*, revocation (*raj'ah*), dower, maintenance and bequest. Rules concerning civil and commercial transactions such as sale, lease, loan and mortgage constitute the subject of another seventy *āyāt*. There are about 30 *āyāt* on crimes and penalties such as murder, highway robbery, adultery and false accusation (*qadhif*). Another 30 *āyāt* speak of justice, equality, evidence, consultation, and the rights and obligations of citizens. About 25 *āyāt* relate to international relations regulating relations between Muslims and non-Muslims . . . It will be noted, however, that the jurists and commentators are not in agreement over these figures, as calculations of this nature tend to differ according to one's understanding of, and approach to, the contents of the *Qur'an*'.

(Kamali, Principles of Islamic Jurisprudence, Islamic Texts Society; 3 edition (September 1, 2005) p.26-27).

Naskh

As noted earlier, particular complications have arisen in articulating legal principles from a range of Islamic legal sources, some of which overlap or are in competition with each other. A useful mechanism for dealing with competing norms and values has been through the adoption of *naskh*. The lecturer may explain that the principle of *naskh* allows for a process of abrogation or repeal of the legal efficacy of a *Qur'anic* verse.

The revelation of the *Qur'an* coincides with the metamorphosis undergone by the Arab community over a period 23 years. During this phase, two broad processes are of particular significance in terms of the substance of the message contained in the *Qur'an*: the Meccan stage and the Medina stage. The Meccan *surras* are more charitable while the verses revealed in Medina show strains of actual governance, and are reflective of concrete legal and administrative problems that were confronted during that phase. Because of the changes in the context of Islam through the violent disruption in the otherwise peaceful message of it, there are noticeable differences in the approaches of the Meccan and Medinan stages. While the validity of the verses of the *Qur'an* remain intact and not in doubt, the concept of *naskh* has been deployed to challenge the legal efficacy of those verses which are deemed as being out of context, and not suited to the contemporary requirements.

If *naskh* is considered to be a valid and applicable strategy, questions have frequently arisen regarding its scope and methodology. A question the lecturer may put to the audience at this stage is whether the technique of *Naskh*, for example, should only be applicable to the *Qur'an* or should it also apply to the *Sunnah*? Furthermore, debate has often surrounded the question as to whether *Sunnah* can abrogate the *Qur'anic* pronouncements whilst relying on the concept of *naskh*. A further though related issue is the possibility of deploying secondary sources of the *Sharia* to abrogate the primary sources: could this be a possibility?

In dealing with some of the issues raised in the above paragraph, Kamali makes the following points:

'Abrogation applies almost exclusively to the *Quran* and the *Sunnah*; . . . and even then, the application of *naskh* to the *Quran* and *Sunnah* is confined, in terms of time, to one period only, which is the lifetime of the Prophet. There is, in other words, no *naskh* after the demise of the Prophet. But during his lifetime, there were instances when some of the rulings of the *Quran* and *Sunnah* were either totally or partially repealed by subsequent rulings. This was due mainly to the change of circumstances in the life of the community and the fact that the revelation of the *Quran* spanned a period of 23 years. The '*ulami*' are unanimous on the occurrence of *naskh* in the *Sunnah*. It is however, with regard to the occurrence of *naskh* in the *Quran* on which there is some disagreement, both in principle and on the number of instances in which *naskh* is said to have occurred. . . the preferable view, however, is that *ijma*, cannot abrogate the rulings of the *Quran*, *Sunnah* or *Qiyas*. However a subsequent *ijma* may abrogate an existing *ijma* in consideration of public interest (*maslahah mursalah*) or custom ('*urf*'). This would in theory appear to be the only situation in which *ijma* could operate as an abrogator'.

(Kamali, Principles of Islamic Jurisprudence, Islamic Texts Society; 3 edition (September 1, 2005) p.203,205).

The aforementioned consideration establishes that without challenging the authenticity of the *Qur'an* and *Sunna*, considerable jurisprudential disagreements have arisen as to the legal content within a number of their provisions. The process of distinguishing a body of positive rules proved such a taxing exercise that this led to an emphasis upon *ijtihad*. To formulate a cohesive set of Islamic laws differing weight was afforded to competing ordinances from the *Qur'an* and the *Sunna*, and jurist extensively relied on the

techniques of analogy and deduction. Arguments about the application and the interpretation of the *Sharia* and *Siyar* nevertheless materialised, and over a period of time, led to the creation of various schools of thought.

Permutations of Legal Schools of Thought

The History

Islam, as other major religions of the world, has witnessed differences and variations within itself. While opinions vary as to how many sects and segments can be found within this great religion, two principal branches are represented through the majority *Sunnis* and the minority *Shia* communities.

The fragmentation between *Sunnis* and *Shias* represent a historic disagreement over the issue of succession, a friction that become apparent soon after the death of Prophet Muhammad. Prophet Muhammad died in 632 AD, and with him having no established or recognised heir-apparent, Muslims were left without a leader and had to make an abrupt choice regarding his successor. Within the community itself, there were disagreements. Prophet Muhammad himself had no surviving male offspring, and even if he did have one, it is by no means certain that without the exceptional attributes of his father, he would have been acceptable as his successor. In this chaos, a small committee of Muhammad's followers assigned the role of *Khalifa* to Abu Bakar. This appointment and the whole issue of succession to *Khalafat* led to bitter disputes within the Islamic community. The *Shia*'s, the party of Ali, viewed the leadership of Islamic community as a divine right, a right which they perceived as having been bestowed upon Ali by Muhammad. Others disagreed. Alī Ibn Abī Tālib, ultimately became the *Caliph* after Uthmān ibn 'Affān's death in 656 AD. Alī was assassinated in 661. After the death of Ali, his eldest son Hasan succeeded him for six months who then abdicated his power to Muawiya who succeeded as *Caliph* throughout the Islamic world, forming part of the *Ummayyad* dynasty.

According to the *Shia* belief, Alī, the cousin and son-in-law of Muhammad was appointed by the Prophet to be his successor and that the succession was to have been inherited by the heirs of the prophet: Alī and his descendants. It is recommended the lecturer make reference to Professor Bassiouni when expanding on the distinctions between the *Sunnis* and the *Shias*. He makes the following useful observations:

“[t]he essential distinction between the *Shiite* and *Sunni* doctrines lies in the claim to the *Khilafa* (the succession) and the powers of the *Imam*. The *Shias* claim that Ali Ibn Abi-Taleb, cousin and son-in-law of the Prophet, had a more legitimate claim to the *Khilafa* than all the others and that it should have been inherited by the heirs of the Prophet, thus Ali and his descendants. The disagreement between *Sunnis*, who believe in an elective *Khilafa*, and the *Shias*, who believe in succession, was therefore mainly political and has remained so throughout the history of Islam”.

(MC Bassiouni, ‘Protection of Diplomats under Islamic Law’ (1980) 74 *AJIL* 617-618).

The above extract could be examined in further detail. What benefits could be gained for the Islamic community as a whole from the adoption of either of these ideologies in terms of succession?

The lecturer may inform the students that the additional subsequent disagreements that have arisen between the *Sunnis* and the *Shias* have also been of a political nature. There are however, limited differences, in so far as the *Sharia* and interpretation of the principal sources of Islamic law are concerned. The most prominent law school amongst the *Shias* is *Jaffari*, named after its founder, Jafar al-Sadiq, the sixth *Imam*. While believing in the two principal sources, the *Shia*’s translate the concept of *Ijtihad* exclusively through the medium of *Imams*. Amongst the *Sunnis*, the larger, more predominant Islamic community, *Maliki*, *Hanafi*, *Shafi’i* and *Hanbali* schools of law have emerged.

The Schools

The *Hanafi* School is the most liberal and flexible of the four *Sunni* schools. There is an emphasis upon *qiyas* as a means of formulating legal judgments, a practice that was deployed extensively by Abu Hanifa himself. Indeed the practice of *qiyas* and reasoning was prevalent to such an extent in Abu Hanifa's teaching that his followers were labelled *Ahl-al-Rai* or 'People of Opinion' as opposed to *Ahl-al-Sunna* or 'People of the Tradition', the latter taken to mean those relying upon traditions. This endorsement of logic and reasoning allowed followers of the *Hanafi* school of thought to carry out detailed investigations of legal sources prior to forming juridical principles. Abu Hanifa and subsequent members of his school are accredited with formulating and developing significant principles of *Siyar*. In contemporary terms, the *Hanafi* school is predominant in Central and Western Asia (Afghanistan to Turkey), Lower Egypt (Cairo and the Delta) and the Indian Sub-Continent.

The *Maliki* School was established in Medina and the *Hejaz* by Malik ibn Anas (d. 795/179). Malik was a great collector of the *Hadith* and a profound supporter of the 'living tradition of Medina'. In this regard Malik has been described by Hallaq as 'primarily a transmitter of earlier or contemporary doctrine, particularly the consensus of the Medinese jurists'. (WB Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge, Cambridge University Press, 2001) at 30). Adherents of the *Maliki* School regard juristic preferences (*istihsan*) and public interest (*al-masalih al-mursala*) as key sources for juridical decisions. The *Maliki* School has following in both North Africa and Upper Egypt.

The *Shafi* School was established by Muhammad ibn Idris al-Shafi (d. 820/204). Al-Shafi hailed from southwest Palestine (Gaza), and travelled extensively meditating under Malik in Medina, teaching and practicing law in Baghdad, and finally taking up residence in Egypt where he produced his major works before his death there. Al-Shafi's greatest contribution was in distinguishing and preferring the prophetic *Hadith* over the 'living tradition' of

Medina that his teacher Malik had cultivated. This resulted in the Prophet's prestige and authority rising ever higher and being second only to the *Qur'an* in theory, and in some cases higher in practice. The close relationship in Islamic law between the *Qur'an* and the *Sunna* of the Prophet was highlighted through the teachings of al-Shafi. Al-Shafi refined the usage of *qiyas*, and he curtailed its usage as envisaged in the *Hanafi* School. In addition to the establishment of Muhammad's *Sunna* as the second of the four 'roots' (*usul*) of law, al-Shafi defined *ijma* in its classical form and invested it with the power that enabled it to oust *ijtihad* from jurisprudence, except in the most limited sense. That is, *ijma* came to be the principle as well as the procedure that the jurists of all the *Sunni* schools increasingly used in order to determine what was authentically Islamic. Thus *ijma* extended even to the authentication of *Hadith*. It is in this context that the fateful *Hadith* is attributed to the Prophet 'My people will never agree together in error' takes on meaning. If the earlier decisions of legal experts and judges were accepted through *ijma* as definitive, then nothing more was there to be attained from a survey of new cases saves to utilise them for guidance as correct precedents. The *Shafi* School is predominant in Malaysia and Indonesia, Southern Arabia, East Africa, Lower Egypt and most of the Indian Ocean littoral.

The fourth School of thought, the *Hanabali* School, was founded by another contemporary of al-Shafi, Ahmad Hanbal (d. 855/241) who carried Al-Shafi's enthusiasm to a new level. Hanbal was a thorough conservative and believed in a rigorous interpretation of Islam. Hallaq regards him as a 'traditionalist and theologian, and his involvement with law as a technical discipline [being] rather minimal'. (Wael B. Hallaq, *The Formation of Islamic Law (Formation of the Classical Islamic World, 27)*, Ashgate Publishing (January 2004), p.40).

His deep convictions of the *Qur'an* and *Hadith* led him and his followers to adopt a rigid interpretation of the *Sharia*. His independent mindedness and resistance to theological approaches led him to suffer imprisonment and persecution by the ruling *Caliph*. While primarily a theologian, his teachings

were largely based around religiously ordained *Hadith*, and only rarely articulated in strict legal jargon. Ibn Taimiya, the thirteenth century self-proclaimed *mujtahid* was a disciple of Ahmad Hanbal. More significantly the seventeenth century *Wahabi* reformation in Arabia was influenced by his thoughts. The *Wahabi* school has continued and flourished in the Arabian Peninsula. It remains the dominant legal school of thought in northern and central Arabia (modern Saudi Arabia).

The lecturer may find it useful to use an example in order to illustrate the differences between the approaches adopted by the Schools in respect of the same matter. Perhaps the audience might be invited to consider which School they would follow in these circumstances.

Surveying Islamic State Practices

Within a century of the death of Muhammad, the Muslim empire spread across the continents. However, this developmental process and expansion was not without its problems and the lecture should make reference to this.

This manual has already considered the divide over the issue of succession. The two major sects of Islam themselves were to branch out further into smaller sects and schools of thought, undermining the orthodox Islamic vision of a singular unified *Ummah*. A significant point that was noted by Huntington in the 'Clash of Civilisations and the Remaking of World Order' could be discussed. This was that as Islam progressed, the expansion led to further decentralisation, diversification and division sanctifying the hitherto unanticipated 'illegitimacy of the Nation State' under the classical Islamic vision of the *Ummah*.

No longer was the central base of Islam concentrated in Arabia. Under the *Ummayyids* in the seventh century, the capital shifted to Damascus. The expansion of the Islamic empire also meant coming into contact with non-Arabs: the Turks, the Persians, the Mongols and Indians. Tensions were

generated in the treatment of non-Arab Muslims, their discrimination and exclusion was a major contributing factor to the downfall of the *Umayyad* household (661-750). The Collapse of *Umayyads* and the rise of Baghdad-based *Abbasids* in the eighth century (749-1258) resulted in further fragmentation of a unified Muslim empire. During the tenth century, secondary *caliphates* emerged in Cairo and Cordoba. This significant decentralization was an impinging factor on a coherent body of laws. According to Zweigert and Kotz, '[I]n the course of time serious disagreements arose between [the then existing] schools of law. Individual scholars were originally allowed to make up their own mind on matters not foreclosed by the *Koran* and the *Sunna*, but the members of the different schools, which were geographically far apart, were influenced in their views by the style of life, the stage of development, and the legal practices of the surrounding population, so it was only natural that the schools should reach different views' (Zweigert and H Kötz, *Introduction to Comparative Law*, 3rd edn (Oxford, Clarendon Press, 1998), at 307).

As indicated above, the remnants of the *Umayyads* dynasty were able to establish themselves in Spain during the *Abassid* period. The Muslim rule in Spain lasted for over 500 years. In Egypt, a *Shia* dynasty, called the *Fatimids* came to power in the tenth century, a rule which lasted in excess of 100 years. The incursions towards Afghanistan and India that had commenced during the *Umayyads* and *Abbasids* periods culminated in the founding of the *Sultanate* of Delhi in 1206. This was to mark the beginning of the Islamic dominance not only over South Asia but also led to Islam's expansion to the Far East.

While the decentralization of the Muslim empire continued, the mantle of the *Caliphate* itself was wrested away from the *Abbasid* and shifted to the Turkish invaders. The *Ottoman Turks* who had established their power during the fifteenth century with the capture of Constantinople (1453), swept across the Middle East and North Africa establishing a new *Caliphate* in 1517. In addition

to the medieval Islamic history that could be characterized as having under its umbrella the magnificent and versatile *Ottoman* dynasty of Eastern Mediterranean, Asia Minor and South Eastern Europe, it also included the *Mughal* emporium of India and the *Safavids* dynasty of Iran. However, technically under Islamic rulers, each of these Empires operated on differing ideological and political bases. The *Safavids* followed a vigorously *Shia* faith. The *Mughals* of India, as we shall consider, adopted a more benign and assimilationist approach. Thus the developmental processes of Islam with varied political, economical and ideological influences also produced divergent viewpoints on legal approaches towards the *Sharia*. These divergences were evident not only in substantive areas such as the extent of prohibiting *riba* (usury) in commercial transactions, rules regarding the non-use of force, sanctions against trading with the non-Islamic world, and formulation of labour standard regulations for *inter alia* slaves, women and children, but also in the physical implementation of the *Sharia* itself. Politics also had a significant bearing in the development and application of the legal systems. The political elite showed an unwillingness to allow the judges or *qadis* to interpret *Sharia* which was detrimental to their own personal agenda. It would be useful for the lecturer to demonstrate the differing approaches with the use of examples in order to illustrate the points raised in this paragraph.

In order to engage the audience, an extract from the work of Moinuddin, which relates to the varied forms of interpretation and application could be relied upon. Moinuddin makes the following pertinent point: [t]hough the theoretical frame of the *Siyar* was derived from *Koranic* provisions and utterances of the Prophet, the manner of interpretation and the doctrinal development supported by legal and methodological arguments rendered by the jurists left flexible room for expansion or critique. Thus the exposition of the rules of *Siyar* . . . by Muslim jurists was dictated neither by the needs of the Islamic State nor officially promoted by it. On the contrary, it was the individual and independent effort of Muslim jurists . . . to expound the Divine Law.' (H Moinuddin, The Charter of the Islamic Conference and Legal Framework of

Economic Cooperation Among its Member States: A Study of the Charter, the General Agreement for Economic, Technical and Commercial Co-operation and the Agreement for Promotion, Protection and Guarantee of Investments Among Member States of the OIC (Oxford, Clarendon Press, 1987) p.38). The *Sharia* was deemed binding on the rulers of the Islamic State, but they were free to give preference to the opinions of any one of the prevailing schools of jurisprudence. In practice the rulers deviated from strict adherence to the *Sharia* whenever political self-interest dictated such a course. The lecturer may find it beneficial to support this extract with an example from history.

In addition to the political self-interests noted in the above passage, as indicated already, there were many other factors contributing to the differing interpretations of *Siyar* or deviations from it. The developmental phase of Islam and its interaction with other traditions also influenced the *Sharia* principles in respect of international law. Islamic practices absorbed and assimilated many foreign concepts and ideals. The *Umayyad* Empire thus utilised the *Byzantine* Market inspectors as *amil as-suq*, magistrates with limited jurisdiction. From there emerged the office of *qadi*, a judge of a special kind. The office of the *qadi* had significant impact on developing the substantive law. Firstly, when local laws were applied, the work and judgment of the *qadis* reflected enormous diversity. Secondly, because the *qadis* were able to apply personal opinions (*ray*), they were able to add to existing Islamic jurisprudence. The *qadis* and subsequent jurists were also to derive advantage of the apparently competing ordinances in the *Qur'an* and *Sunna*. The jurists in particular were able to formulate subjective analogical deductions.

As Islam spread to territories alien to it, a number of influences became pre-eminent. While it was possible for many non-Arabic communities to embrace Islam, they were reluctant to give up their indigenous laws and norms of social and cultural interaction. An example to use for the purpose of demonstrating

this is from India. The *Ismaili Khojas*, *Cutchi Memons* and *Bohras* continued to follow their practices of inheritance despite conversion to Islam. A similar pattern was followed in *Java*. In light of some strong indigenous customs and traditions, the *Sharia*, as well as the courts enforcing the *Sharia*, had to make significant concessions.

Impact of European Imperialism on Muslims

It will be useful for the lecture to discuss how the doctrines of Islamic legal systems were adulterated by disturbances of colonialism. In the context of the British and French territorial possessions, Islamic laws were relegated to a position of customary laws; disengaged from their jurisprudential bases they were framed in a colonial legal system and court structure. Strawson may usefully be referred to and he notes that during this process, the classical structure of Islamic laws—established on divergent sources with flexible interpretations—were replaced by a law, which assured the dominance of a colonial elite. The *Tanzimat* reforms brought within the *Ottoman* Empire during 1839-1876 reflected a substantial influence of the French Commercial and Penal code. In order to apply these new codes, *Nizamiyya* courts (a new set of secular courts) were established. It may be useful to refer to a piece of legislation prior to the reforms and that after it in order to demonstrate the difference.

The codification of law, based on European systems led to a further infiltration of European laws. More changes were brought about when in 1926 Turkey implemented a criminal code which replicated the Italian criminal law. Similar changes were also brought about in the territories which belonged to the *Ottoman* Empire. With the imposition of imperial laws and values, and the consequent decline in the *Ottoman* and *Mogul* emporiums, Muslims were submerged under the European colonialism—a subjugation that produced political and legal undercurrents of enormous magnitude. Henceforth for considerable periods, Muslim communities remained under the shadow of colonisation and alien rule; their indigenous legal and political systems being

manipulated and modified by European encroachments. The imposition of European law was evident in the application of Dutch laws in Indonesia and the enforcement of Indian Penal Code (1862) and superseding the Islamic criminal law and the Penal code (1898) in Sudan.

A useful quote to bring to the attention of the audience is by Strawson and it is advised that the lecture analyse the same in relation to the *Sharia*. In the overall scheme of things, Strawson's comment reflects a great measure of truth when he notes:

“Colonialism bequeathed to the world's states legal systems, civil law and common law stamped with race, gender and the class discriminations of the European occupying power. International law emerged as colonialism and sought to legitimise conquest, slavery, ethnic cleansing, genocide and racism. In this process other systems of law became subordinate or were excluded. The legitimacy of current world order is compromised by this past. While we should not be held hostage to it, we do need to recognise it in shaping the new contours of legal discourse. This interactive task involves relocating privileged positions gained by political and military power but dressed as law”.

(J Strawson 'Introduction: In the name of Law' in J Strawson (ed), p. xix–xx).

It would seem that much of the modern world was engineered and framed in accordance with the doctrines devised by European Colonisers; the principle of *uti possidetis* was applied in creating post-colonial States. The end of colonialism and independent Statehood for the majority of Islamic states was rarely accompanied by political cohesion and economic stability. In the post-colonial phases, political instability, economic mismanagement and policies of double-standards, have led to an enormous disillusionment not only with the governments but also with the State structures themselves. Some states have

adopted varying degrees of *Sharia* during the post-colonial eras and the lecturer may discuss this at his discretion.

Seminars

Seminar Two: Understanding the Sources of Islamic Law.

1. Discuss the misconceptions that surrounds the term '*Sharia*,' particularly in light of modern contemporary society.
2. Discuss whether the manner in which the primary texts have been interpreted by man, can in certain circumstances, be considered to be influenced for the purposes of political gain.
3. What is the purpose of *naskh* and has this purpose been successfully fulfilled?
4. Post-Imperialism, some states have either reinstated the *Sharia* or contain citizens who advocate for this reinstatement. Select a relevant state and discuss.
5. Describe how the spread of Islam transpired and the different cultural injections within the application of it.

Assessment Essay Question

1. 'The general rule on the application of the *Qur'an* and *Sunnah* as main sources of Islamic law is that in case of any irresolvable conflict between a verse of the *Qur'an* and a reported *Sunnah*, the former prevails, because of its indubitable authenticity in Islamic law'. (Baderin, *International Human Rights and Islamic Law*, 2003, at p. 36). Critically examine this statement in the light of Islamic jurisprudence

Reading

Wael Hallaq, *An introduction to Islamic law* (Cambridge, UK; New York: Cambridge University Press, 2009).

NJ Coulson, *A History of Islamic Law* (Edinburgh, University Press, 1964)

Supplementary Reading

FM Denny, *An Introduction to Islam* (New York, Macmillan Pub Co, 1994)

J Schacht, *An Introduction to Islamic Law* (Oxford, Clarendon Press, 1964)

Chapter Three

The Application and Interpretation of Sources in Jurisprudence

Sessions Five and Six (weeks 9–10)

Objectives

- Discussion of how Islamic law was formed on the basis of the *Qur'an* and *Sunna*
- Consideration of the application of sources of Islamic Jurisprudence – *Qur'an, Sunna, Ijma, Qiyas, Istihsan, Maslahah Mursalah, Urf, Istishab, Sadd al-Dhara'i, Ijtihad,*
- Discussion on the interpretation of the sources.

Law Making Based on the Qur'an

The audience should be reminded that the *Qur'an* is not law book or a kind of *Gai Institutiones* or *Manu Laws* but a spiritual book that contains some legal injunctions in so far they are relevant to the issues of community.

Kamali asserts that there are only 25 verses in the *Qur'an* that explicitly deal with rules that regulate the relations between Muslims and non-Muslims.

The majority of Muslim scholars and jurists anonymously claim that the *Qur'an* is first and foremost a source of Islamic legislation. However, close analysis of the rules derived from the major sources of Islamic law show that it is merely, as Schacht noted, “lip-service” to the Sacred Scripture. This is reinforced by Rabi' when he states: “Our doctrine is to authenticate only those traditions

that are agreed upon by the people of Medina, to the exclusion of other places”. (Kitab Ikhtilaf Malik wal-Shafii, pp. 242 cited by J. Schacht in Origins p. 23 The Origins of Muhammadan Jurisprudence, ACLS History E-Book Project (January 2001), p.23). Even though this particular jurist speaks only about Medina, he does reflect the mood of other schools who were defensive in their judgements. In this regard it is appropriate to note that there are two types of the text in *Qur’an*, namely, definitive (*qat’i*) and speculative (*zanni*). It is the *zanni* text upon which early jurists seem to differentiate since they tended to interpret them according to the circumstances related to a particular situation.

The following paragraphs demonstrate examples of law-making from the *Qur’an* based on verses that are directly relevant to the status and regulation of Muslims and non-Muslims. These verses have been particularly selected as they illustrate how rules derived from the *Qur’an* have been subsequently incorporated into mainstream Islamic legislation. They also demonstrate the difference in interpretation that existed between the various jurists and schools of law when interpreting the *Qur’an*.

1. ***Quran 9:29***

“Fight against those who (1) believe not in Allah, (2) nor in the Last Day, (3) nor forbid that which has been forbidden by Allah and His Messenger (4) and those who acknowledge not the religion of truth (i.e. Islam) among the people of the Scripture (Jews and Christians), until they pay the *Jizya* with willing submission, and feel themselves subdued”.

The students may be asked at this point to simply consider the verse and their interpretation of the same. This verse has been adduced to demonstrate that the unbelievers, including Christians and Jews are fought until they accept

Islam. Should they refuse, they shall be liable to pay *jizya*, which is a tribute. This verse provided the legal maxim that suggests that a non-believer, who refuses to accept Islam should pay the tribute.

This verse did not in fact mean anything else other than that but it gave rise to complications among commentators and jurists alike. It was unclear as to whether the line “believe not in Allah” included religions other than the Jewish and Christian faiths.

It should be noted that in particular, problems had been caused by the uncertainty of *Zoroastrians*. Umar did not know how to deal with them since they did not fit into the category of ‘People of the Book’. Students may be asked how they would have proceeded in this situation before informing them that Umar in fact, decided to rely upon a precedent that reported that the Prophet used to exert tribute from *Zoroastrians*. It is unclear as to why Umar did not apply the line “believe not in Allah” but rather opted to refer to the precedent of the Prophet. According to Khadduri, in this respect, Shafii asserted that “on the basis of the Qur’an, which states that the unbelievers should be fought until they accept Islam, and since ‘Umar never heard anything from the Prophet (regarding the *Magian (Zoroastrians)*) and thought that they were unbelievers and not the People of the Book, he accepted the tradition of ‘Abd al-Rahman b. ‘Awf and followed it.” (Muhammad ibn Idris al-Shafi’i, *Kitab al-Risala: Treatise on the Foundations of Islamic Jurisprudence*, trans. by Majid Khadduri, Islamic Texts Society (January 1993), pp. 265-266).

By way of discussion, it is clear that 9:29 is a definitive verse and not speculative, even though the lines ‘believe not in God’ possess some complexities in interpretation. However, in respect of the difficulties that arose with regards to the status of *Zoroastrians*, it was decided that this verse was applicable to the same. Abu Yusuf, for instance, qualified *Zoroastrians* based on the assumption that their book might have been revealed by God and accordingly, they were considered to be ‘People of Book’ as indicated in the *Qur’an*.

2. ***Quran 2:109***

“Quite a number of the People of the Book wish they could Turn you (people) back to infidelity after ye have believed, from selfish envy, after the Truth hath become Manifest unto them: But forgive and overlook, Till God accomplish His purpose; for God Hath power over all things”.

Students should be made aware that the above is an initial verse that facilitates tolerance towards non-believers. It propagates a tolerant attitude even though the believers fall under sharp criticism of non-believers. This verse however has been said to have been abrogated later by the following subsequent verse:

3. ***Qur’an 29:46***

“And dispute ye not with the People of the Book, except with means better (than mere disputation), unless it be with those of them who inflict wrong (and injury): but say, "We believe in the revelation which has come down to us and in that which came down to you; Our God and your God is one; and it is to Him we bow (in Islam).

Discussion should surround the fact that this particular verse warns Muslims against disputing with non-believers, unless they pose a clear danger. This should be analysed with the verse above and the analysis this should include a comparison of the differences between the two.

An interesting point to note is that the above two verses are said to have been swept away with a combination of the “*jizya*” verse, as mentioned previously and the ‘sword verse’. Details as to the latter verse are as follows:

4. ***Qur'an 9:5***

“But when the forbidden months are past, then fight and slay the Pagans wherever ye find them, and seize them, beleaguer them, and lie in wait for them in every stratagem (of war); but if they repent, and establish regular prayers and practice regular charity, then open the way for them: for God is Oft-forgiving, Most Merciful.”

The lecturer ought to try and engage the thought processes of the students as much as possible. It is hoped that detailed consideration of the following paragraphs will help to achieve this aim.

Students ought to be given the opportunity to consider the work of Burton, who has examined the theory of abrogation in the *Qur'an*. The ‘contradictions’ in the aforementioned verses have been examined by Burton, who has demonstrated that the theory of *naskh* or *Qur'anic* abrogation has been applied to these verses. He also noted that in the majority of verses where contradictions were apparent, jurists indiscriminately applied methods of abrogation.

In respect of the *Qur'anic* abrogation, or *naskh*, Burton opines that there are two theories: general and special. Interestingly, the general theory of *naskh* was called “an indispensable adjunct” to independent reasoning in Islamic jurisprudence. It has been conceded that “the techniques of extracting legal principles from the body of the documents” pose some difficulties. This is why Zuhri, a prominent jurist of the early Islamic period, is credited with the following statement: “He who does not know the *nasikh* and the *mansukh* will make errors in his religion”. (Rippin, A., *al-Zuhri, Naskh al-Qur'an*, BSOAS, XLVII, pt. 1, 1984, pp. 22-43). Yet, the knowledge of these theories does not mean that a jurist should also be knowledgeable in the art of utilisation of its rulings for mainstream jurisprudence.

For the purposes of discussion, the lecturer may consider it appropriate to refer to the discussion in *Hanafi* jurisprudence over the permissibility of the

testimony of non-Muslims against Muslims. The point of dispute was in respect of the following verse:

5. ***Qur'an 5:106***

“When death approaches any of you, (take) witnesses among yourselves when making bequests,- two just men of your own (brotherhood) or others from outside if ye are journeying through the earth, and the chance of death befalls you (thus).”

It is recommended that students be asked to think about this verse and their interpretation of the same. Abu Hanifa conceded that this verse was applicable in circumstances where the death of a Muslim was imminent and he was willing to leave a will but no other Muslim was present. It is apparent that in the absence of Muslim witnesses, the will of a person shall be invalid unless there are non-Muslims present to satisfy as witnesses. Surprisingly however, Shaybani opines that this verse has been abrogated and therefore suggests that only Muslims can bear witness to a Muslim will, irrespective of situations where this may be an impossibility.

Interestingly the general consensus is that jurists have a preference that this verse be considered abrogated, as opposed to relying upon it in the case of difficulty. This is despite the fact that Shaybani has himself admitted:

“testimony about a will on a journey when death occurs when there are no Muslims, in which case the testimony of the people of the *dhimmah* is valid in a Muslim will”. (Muhammed Ibn Al-Hasan Ash-Shaybani, *The Muwatta of Imam Muhammad al-Shaybani*, trans. by Mohammed Abourrahman and Abdassamad Clarke, Turath Publishers; Rev Ed edition (August 2004)p. 153).

Law Making Based on the *Sunna*

The lectures should have by now firmly established that Islamic jurisprudence also rotates around Prophetic Traditions and the following paragraphs consider the same.

Prior to Shafii's systematisation of jurisprudence, the only point of real reference is demonstrated in the tradition which states:

"Ibn Jurayj said: I said to 'Ata': "What is your opinion (about the following case): If a woman were to come from the polytheists (*ahl al-shirk*) to the Muslims today and convert to Islam, would her husband be entitled to compensation from her – in accordance with the word of God in (the *sura*) *al-Mumtahana*: 'wa-atuhum mithla ma anfaqu (and give them the same (amount) as what they spent)?' ('Ata') said: "No! That was just a (an arrangement) between the Prophet and the People of the Pact (*of al-Hudaybiya*), (only) between him and them".

(Abd al-Razzaq Musannaf, Vol. 7, p. 12707 cited by Harald Motzki in *The Origins of Islamic Jurisprudence: Meccan Fiqh Before the Classical Schools*, trans. by Marion H. Katz, Brill Academic Publishers (December 1, 2001), pp. 110).

A further example the lecturer may use for the purposes of illustration that early jurists would sometimes rely on a ruling given by their predecessors, not supported with traditions from the Prophet is:

"Muhammad (Shaybani) said: Abu Hanifah informed us saying, 'Hammad informed us that Ibrahim said, "Compensatory payment for a non-Muslim living under Muslim rule is the same as the compensatory payment for a free Muslim".

(Muhammad Shaybani, *The Kitab al-Athar*, Turath Publishing, 2006, p. 344).

After Shafii's systematisation of jurisprudence, the traditions became foremost and significant sources of law. Prior to this, the traditions occupied a modest position alongside the traditions of the companions of the Prophet, opinions of early jurists and the opinions and judgements of jurists whose decisions were derived from these rules.

A good example to illustrate the concept of deduction is that of Shaybani's Muwatta, where he commented in response to a Muwatta written by Malik, the founder of Maliki School:

“Malik informed us: “az-Zuhri narrated to us that the Prophet (eulogy) took the *jizyah* from the *Magians* (*Zoroastrians*) of Bahrain, and that ‘Umar took it from the *Magians* of Persia, and Uthman ibn Affan took it from the *Berbers*”. Shaybani states: “The *Sunnah* is that the *jizyah* be taken from the *Magians*, even though their woman are not to be married nor their slaughtered animals eaten (by Muslims); and that is how report has reached us from the Prophet (eulogy) ‘Umar imposed the *jizyah* on the population of *Kufa* as twelve *dirhams* on those in hardship, twenty-four *dirhams* on the main body, and forty-eight *dirhams* on rich”.

(Shaybani's Muwatta pp. Muhammed Ibn Al-Hasan Ash-Shaybani, The Muwatta of Imam Muhammad al-Shaybani , trans. by Mohammed Abourrahman and Abdassamad Clarke, Turath Publishers; Rev Ed edition (August 2004) p. 153-154).

The authors of this manual have deliberately omitted the other traditions cited by Malik, in order to show how Shaybani derived the above from the traditions of the Prophet, Companion (Umar) and his contemporary jurist (Malik). It ought to be clarified that this does not suggest that jurists were always in agreement in respect of traditions or with those who were from competing schools of law.

After the systematization undertaken by Shafii, the traditions were classified into the following two categories:

- (i) Those from the Prophet
- (ii) Those from Companions and their successors.

The traditions from the Prophet started to become qualified as primary and major sources of *Sunna*, superseding those related from the Companions and their successors as well as the opinions of early the jurists.

The consequence of such systematization was the compilation of six 'canonical' collections of Prophetic Traditions. Bukhari who compiled *Sahih* has been admitted as one of the foremost experts in the Prophetic traditions. It is noteworthy that the traditions compiled by Bukhari significantly differ from those compiled before him as they are mainly *corpus traditionem* whereas former collections were *corpus juris*.

An example to illustrate this point has been made by Khan:

“Narrated ‘Umar bin al-Khattab (eulogy) that he wrote to the residents of Basra one year before his death; and (it was read):
Cancel every marriage among the *Magians* between relatives of close kinship (marriages that are regarded illegal in Islam: a relative of this sort being called *Dhu-Mahram*) ‘Umar did not take the *Jizya* (poll-tax) from the *Magian* infidels (*Zoroastrians*) till ‘Abdur-Rahman bin ‘Auf testified that Allah’s Messenger (eulogy) had taken *jizya* from the *Magians* of *Hajar*”.

(Muhammad M. Khan, The Translation of the Meanings of Summarized Sahih Al-Bukhari: Arabic-English, Kazi Pubns Inc (January 1995), pp. 632-633).

This is indeed an indication of the ruling but with no comments on the part of compiler.

It is also noteworthy that rulings or judgements of specific schools had been shaped out of controversies and disagreements between the jurists and schools alike. An example to demonstrate this point is taken from Shaybani's *Muttawa*:

“Malik informed us: “Nafi informed us from Ibn Umar that Umar (eulogy) specified that the Christians, Jews and *Majus* (*Zoroastrians*) should be allowed residence in *Madinah* for three nights to traffic in the market and deal with their needs. None of them were allowed to reside after that.” Muhammad said: “Makkah and Madinah and their entire surroundings are part of Arabian Peninsula, and it has reached us from the Prophet (eulogy) that two *dins* (religions) are not to remain in the Arabian Peninsula. So ‘Umar (eulogy) expelled whoever was not a Muslim from the Arabian Peninsula because of this hadith (tradition)”.

(Shaybani's *Muwatta* pp. Muhammed Ibn Al-Hasan Ash-Shaybani, *The Muwatta of Imam Muhammad al-Shaybani*, trans. by Mohammed Abourrahman and Abdassamad Clarke, Turath Publishers; Rev Ed edition (August 2004) p.384).

Matters to discuss in respect of the above include the fact that in the first tradition adduced by Malik, it does specify that these minorities were allowed to reside specifically in *Medina*. The second tradition adduced by Shaybani refutes this by reference to the Prophetic Tradition and reinstates Umar by attributing to him the reinforcement of the Prophet's decision to expel non-Muslim minorities from the Arabian Peninsula.

Application of Islamic Jurisprudence

***Ijma* (consensus of Muslim jurists)**

The students should now be aware that the consensus of jurists has been long admitted as one of the major sources of Islamic law, irrespective of the fact that initially it was not meant to play such a role. Due to the overwhelming disagreement between early jurists, the rulings and opinions were grouped in separate judgements. In subsequent jurisprudence, these were expressed as 'our jurists said' or 'our jurists agreed'. This can be noted in the works of Abu Yusuf, Shafii and Malik. Malik it seems was the first to adopt this style, which was based on a particular reference to the jurists of Medina.

It was often the case that the consensus of jurists of one legal centre would disagree with the consensus of jurists of another centre of scholarship. However often jurists of differing centres of scholarship would agree with each other and confirm the consensus of each other. It will be useful for the lecturer to use the following example to illustrate this point:

“Malik informed us: “Thawr ibn Zayd ad-Dili informed us that Abdullah ibn Abbas was asked about the slaughtered animals of Arab Christians and he said, ‘There is no harm in it’ and then he recited this ayah, ‘Any of you who takes them as friends is one of them’ (*Qur’an* 5:21)” Muhammad (Shaybani) said: “We adhere to this, and it is the verdict of Abu Hanifa and our *fuqaha* in general”.

(Shaybani's Muwatta pp. Muhammed Ibn Al-Hasan Ash-Shaybani, The Muwatta of Imam Muhammad al-Shaybani , trans. by Mohammed Abourrahman and Abdassamad Clarke, Turath Publishers; Rev Ed edition (August 2004) p. 282).

Accordingly, there is agreement amongst the three centres of legal scholarship, namely, Medina (Malik), Mecca (Ibn Abbas) and Kufa (Abu Hanifa and jurists in general) in this regard.

By way of contrast, Shafii was sceptical about both the feasibility and validity of consensus amongst jurists from differing schools. He was cautious of the dangers posed by the significant differences and diversity between jurists. It is recommended that the following example, which demonstrates the dispute between Shafii and his Basran opponent, as noted by Schacht, be used:

“There were in Medina some 30 000 Companions of the Prophet, if not more. Yet you relate a given opinion from perhaps not as many as six, or only from one or two or three or four separately or unison, while the great majority (of Companions) held different views: where then is the consensus? Give an example of what you mean by majority. Opponent: If for example, five Companions hold one opinion, the majority should be followed. Shafii: This happens only rarely, and if it does happen, are you justified in considering it a consensus, see that they disagree? Opponent: Yes, in the sense that the majority agree. But he concedes that of the rest of the 30 000 nothing is known. Shafii: Do you think, then, that anyone can validly claim consensus on points of detail? And the same applies to the Successors and the generation following the Successors”.

(Joseph Schacht, *The Origins of Muhammadan Jurisprudence*, ACLS History E-Book Project (January 2001), p. 83).

Despite such opposition by of the most prominent jurists in Islamic legal history, this did not create a great hindrance to the emergence of the notion of consensus as a major source of Islamic law and jurisprudence. The lecturer might wish to expand on this and talk of the benefits and detriments of consensus.

Qiyas (The Application of Rule by Analogy)

It may be useful to initiate this section of the lecture with reference to *magnum opus*, *Kitab al-Kharaj*, Abu Yusuf, prominent jurist and supreme judge of the *Abbasid caliphs*, who adduced the following tradition: “Fitr b. Khalifa: When Farwa b. Nawfal al-Ashja’i said that it was a great mistake to accept *jizya* from the *Majus* who are not *ahl al-Kitab*, he was challenged by al-Mustawrid b. al-Ahnaq to recant or to be killed for speaking thus against the Prophet, who did accept *jizya* from the *Majus* of *Hajar*. They then referred the dispute to Ali b. Abi Talib who told them the following story about the *Majus*: “The *Majus* were a nation who possessed a religious book which they used to study... The Prophet accepted the *jizya* from them for their original religious book but did not allow intermarriage and sharing food with them”.

A rather remarkable point worthy of discussion is that by adducing the above tradition, Abu Yusuf intended to apply similar rules applicable to those of the Jewish and Christian faiths, who fall into the category of *ahl al-Kitab*, in respect of *Zoroastrians*. It was purely a case of legal analogy but in this case, the Abu Yusuf, as jurist, had to find a support from the Prophetic Tradition before the application of such an analogy.

The lecturer may consider it appropriate to demonstrate the application of analogy according to geographical location and the following tradition may accordingly be cited: “al-Hajjaj b. Artat – Amr b. Dinar – Bajala b. ‘Abda al-Anbari who was secretary to Jaz b. Mu’awiya, then governor of the *Manadhir* and *Dast Maysan* districts: ‘Umar b. al-Khattab wrote to the governor: Collect the *jizya* from the *Majus* as the Prophet collected it from the *Majus* of *Hajar*”.

The difference between the above two traditions is that former indicates an application of analogy to the *Qur’an*, whereas the latter to Prophetic Tradition, and more specifically to the tradition of the Companion itself.

Schacht characterized analogy with reference to the Bible and accordingly the following terms may be referred to:

(i) the juxtaposition of two subjects in Sacred Scripture or Traditions, “showing that they are to be treated in the same manner”

(ii) the activity of jurist who makes the comparison suggested by the text

(iii) “a conclusion by analogy, based on the occurrence of an essential common feature in the original and in the parallel case”. (J Schacht, *The Origins of Muhammadan Jurisprudence*, ACLS History E-Book Project (January 2001), p.99).

According to Ward, an example of juristic analogy has been demonstrated in the *fatwa (responsa prudentium)* of Subki, a prominent *Shafii* jurist. Subki was informed of a dispute between two persons in respect of whether impermissibility of mourning for three days equally applied to non-Muslim women as it applies to Muslim women. There it is particularly said:

“He says (a person who is in dispute with a person who asked a question from Subki): If we hold that the derived Divine Laws (*furu al-sharia*) apply to unbelievers, meaning that they are punished in the next world for not observing them, then what they observe of them in this world lightens punishment in the next”.

(Ward, Seth. "Dhimmi Women and Mourning." In *Islamic Legal Interpretation: Muftis and Their Fatwas*, ed. Masud, Messick and Powers, pp. 87-97).

It can be deduced from the above that for spiritual reasons, an application of analogy for particular Islamic rules in respect of non-Muslim subjects have been rejected. However, there is no objection if this rule is being observed by non-Muslims. Subki, *inter alia*, asserts that the rules that are obligatory for Muslim women are equally obligatory for non-Muslim women as well. He

adduces the following reasons for such analogical interpretation: “If we say that unbelievers are addressed by the derived laws, she is included in this ruling, but not, however, directly from its wording. For the subject of the ruling is qualified by the *Hadith* as “the woman who believes in God and the Last Day”; no other woman may be included in the application of the wording. But *dhimmi* woman is included in its rule according to proofs showing that the infidel woman is bound (in this case) by what is incumbent upon the believing woman”.

Discussion of the above is useful as this has attracted controversy. Subki, on the one hand asserts that Islamic law shall not apply to non-Muslim (meaning non-Muslim women) and on the other hand, he extends the application of Islamic rules to non-Muslim subjects. The lecturer might find it useful to ask the audience whether Subki used the process of analogy to come to such a conclusion. It would seem he does allow for the possibility of analogy but adopts caution about the potential consequences. Towards the end, he is seen to refute entirely the possibility of the application of Islamic rules by analogy to non-Muslim subjects.

***Istihsan* (Application of the Principle of ‘Equity’ in Jurisprudence)**

The lecturer may wish to introduce *istihsan* as being one of the non-original principles and sources of Islamic law and jurisprudence. Interestingly Kamali compared *istihsan* with an old English legal principle of equity. This comparison is proper in the sense that both appeal to the notion of justice and fairness. However the difference between them is in the origins of these concepts. The English concept of equity emerged out of the availability of the only remedy of damages, whereas in the Islamic concept of *istihsan* as Kamali put it “right and wrong are determined, not by reference to the ‘nature of things’, but because God has determined them as such”. (MH Kamali, *Principles of Islamic Jurisprudence*, Islamic Texts Society; 3 edition (September 1, 2005) p.323).

An example to illustrate this concept can be found in Marginani's *magnum opus*, *Hedaya*, where jurists ruled that poll-tax is also to be imposed on non-Arab idolaters. This was despite the fact that by virtue of *Qur'anic* rule as well as the consensus of Muslim jurists, both Arab and non-Arab idolaters are subject to either death or conversion. Marginani explains his argument in the following way:

“The arguments of our doctors (*Hanafi* jurists) is that as it is lawful to make slaves of the idolaters of *Ajim* (non-Arab), it follows that it is also lawful to impose capitation tax (poll-tax or tribute) upon them because in the same manner as by reducing them to slavery, they are deprived of power over their own persons, for also, they are deprived of power of power over their own persons by the imposition of capitation tax, since they must in this case work and pay *Mussulmans* (Muslims) the produce of their labour and their subsistence is furnished from their labour”.

(Charles Hamilton, *The Hedaya: Or Guide, a Commentary on the Mussulman Laws*, Kazi Pubns Inc (April 1988), p. 213).

The above quote is particularly useful to bring to the attention of the audience as Marginani seems to have exercised both *istihsan* and *ijtihad* simultaneously. In the interest of justice and fairness as well as public interest, he held that non-Arab non-Muslims are subject to the protection of the Islamic state since this category of non-Muslims constituted the majority of conquered areas by Muslims. To be more precise, it had been ruled in respect of Indian non-Muslims who were neither Jews nor Christians but mainly idolaters (Hindus).

***Maslahah Mursalah* (Considerations of Public Interest)**

The application of the *maslahah mursalah* principle can be described as an inevitable necessity as opposed to something that was invented or advanced by Muslim jurists. Kamali refers to it as “unrestricted public interest in the sense of its not having been regulated by the Lawgiver insofar as no textual authority can be found on its validity or otherwise”. (MH Kamali, Principles of Islamic Jurisprudence, Islamic Texts Society; 3 edition (September 1, 2005) p.351).

An example of the implementation of the *maslahah mursalah* principle is noted by Mawardi and is in respect of the establishment of Ordinances of ‘Umar that became a cornerstone of Islamic law of non-Muslim subjects. Further, this document had been incorporated in almost all Islamic *corpus juris* as well as *corpus traditionem*. Another example is an institution of *kharaj* (land-tax) on both Muslims and non-Muslim alike; Mawardi separated it from the poll-tax by asserting: “that the tribute (poll-tax) is imposed by an explicit *Qur’anic* command while the land tax (*kharaj*) is a human invention”. (Al-Mawardi, The Ordinances of Government, Garnet Publishing, Ltd.; New Ed edition (September 1, 2000), p. 158).

It is the above indication of Mawardi that demonstrates that *kharaj* was constructed on the *maslahah mursalah* principle. Such an institution did not exist either in the *Qur’an* or *Sunna* but has been developed by Muslim jurists on the basis of practice by the first *caliphs* of Islam. The audience may be asked to consider this.

Another example of this principle that has been developed by Muslim jurists is the establishment of an administration for the collection of poll-tax. This institution is seen to have been established in parallel or by analogy with the Sources of Islamic collection but does not have a textual indication in either the *Qur’an* or *Sunna* and was established in order to ease the collection of

poll-tax. The lecturer my wish to expand on this should he consider this appropriate.

***Urf* (Application of custom in jurisprudence)**

The question over the application of custom in Islamic jurisprudence is considered to be both complicated and controversial. Kamali asserts that in order to qualify for the law-making process in Islamic jurisprudence, custom should meet certain criteria such as:

- (i) it must constitute “a common and recurrent phenomenon”
- (ii) it should be in existence at that time specific case or issue had or has been resolved or decided
- (iii) it should not “contravene the clear stipulation of an agreement”
- (iv) it should not violate the definitive principle of Islamic law.

There are a number of examples where a particular custom has been utilised in relation to the status of non-Muslim subjects. However, the majority of them follow the rules derived from the primary sources of Islamic law. The defining role belongs to the primary sources and later, details have been established in reference to customs. The segregation of non-Muslim subjects into separate communities for instance, is a prior custom not established by Islamic rule but by already existing in both the *Byzantine* and *Sassanian* empires. A further point for discussion is that the categorisation of non-Muslim subjects into second class citizens seems to be a custom that had long been established in the Roman Empire when it had adopted a similar system.

***Istishab* (Presumption of Continuity)**

The lecturer is no doubt aware that *Istishab* is a difficult concept to grasp since it is both ambiguous and complicated. Kamali notes that in basic terms, it is perceived as a kind of “rational proof that may be employed in the absence of other indications; specifically, those facts or rules of law and reason, whose existence or non-existence had been proven in the past and which are presumed to remain so for lack of evidence to establish any change”. (MH Kamali, Principles of Islamic Jurisprudence, Islamic Texts Society; 3 edition (September 1, 2005) p.384).

One of the indications for the presumption of continuity may be found in an agreement of protection that has been concluded between the Islamic authority or government and non-Muslim communities in conquered areas. This agreement is presumed to last for an indefinite period of time, unless it is interrupted by other legal means or action. It is reported however that the Prophet had stipulated that such an agreement should last until the Day of Judgment. With the colonisation of Islamic states, these agreements were abolished and this act indicated the end of continuity.

***Sadd al-Dhara'i* (Blocking the Means)**

The *sadd al-dhara'i* is arguably one of most exercised and utilised principles of Islamic jurisprudence. The lecturer may note that the concept of this principle presumes that any action that in the end might lead to bad or forbidden consequences is blocked by legal ruling.

For a long period of time, the ordinances of ‘Umar were thought to be restrictive and discriminatory. Remarkably however, Noth asserts upon re-examination of these rules that they were not in fact intended to be restrictive, but rather preventive. In this regard he observed: “one may note that these regulations were conceived with a view to long-term coexistence between Muslims and non-Muslims (whereby only Christians seem to be meant), and they therefore do not envisage, nor even broach, the idea of the persecution

or expulsion of non-Muslims. At the same time, they mainly deal with the sensitivities of Muslims, not the victimization of religious minorities. These sensitivities could only exist because the Muslims, as the victorious adherents of a different religion, had not demanded the conversion of the vanquished, but permitted them the concrete cultic manifestation of their faith. Therefore, I believe it is legitimate to characterize the core of the majority of the shuru/-t/ as follows:

They stipulate rules of behaviour for situations that had to be regulated in one way or another, given that Muslims and non-Muslims lived in close contact with one another. Regulation was necessary because its absence could have been detrimental to the Muslims, who were the victorious party”.

(A Noth, Problems of differentiation between Muslims and non-Muslims: Re-reading the “Ordinances of ‘Umar” (al-shuru/-t/. al-‘umariyya), Jerusalem Studies in Arabic and Islam 9, 1987, p. 290).

On the basis of the above observation it could be asserted the purpose was to prevent non-Muslim subjects from being associated with Muslims who were new owners of the conquered lands. The application of *sadd al-dharra-i* is an obvious composition of the ordinances of ‘Umar, even though it is clear that this principle has been applied *e silentio*.

***Ijtihad* (exercise of independent reasoning)**

Ijtihad can be described as a method that has played a crucial role in the formation of the whole body of Islamic law. The jurists who had contributed towards the formation of early Islamic law had to resort to *ra'y* (independent reasoning). The presence of *ra'y* is obvious in the majority of the legal rulings in the main body of Islamic law.

Schacht has paid special attention to the role of *ra'y* in early Islamic jurisprudence. He believes that a major contribution towards the formation of Islamic law has been by the administrative practice of *Umayyad* governors and judges. A special role had been given to the *caliph* who had been authorised to rule on the basis of independent reasoning. Moreover, *ijtihad* extensively interplays with other legal methods such as *Qiyas*, *istihsan*, *maslahah mursalah*, *urf*, *istishab* and *sadd al-dhara'i*. *Ijtihad* can be characterised as a moving force behind all these legal methods of jurisprudence.

The concept has been utilised repeatedly at both the early and formation stages alike but the majority of rulings that had been developed via *ijtihad* were later attributed to authorities from different centres of emergence of ancient jurisprudence such as Mecca, Medina, Kufa, Basra and Damascus. One such example is evident in a case related to the status of *Zoroastrians*, whose status had been resolved with reference to the Prophet and 'Umar, yet one of the traditions demonstrated that it was far more complicated than it seems. Farwa b. Nawfal al-Ashja'i, *Kufan* authority when suggested that *Zoroastrians* should not be subject to protection, he was objected by other authority al-Mustawrid b. al-Ahnaf who asserted that such a ruling violated the Prophetic tradition which clearly stipulated that the Prophet used to impose the poll-tax on *Zoroastrians* of the *Hajar* area. The lecturer my wish to discuss the fact that this tradition seems to be a compromise, that should have been taken in the interests of public.

Concluding Remarks

The present manual has explored the sources of Islamic law and this has been useful for a variety of reasons. Firstly, it is of utmost importance for all interested in the study and comprehension of Islamic law to have a basic understanding of the sources of Islamic law. Secondly, the analysis in this manual has highlighted the processes and passages through which contemporary Islamic legal systems have evolved. Thirdly, it is hoped that the contents of the manual will have highlighted the flexible nature of Islamic law. As Baderin notes, a systematic historical examination not only reflects the strength of Islam as a religion, but also affirms the tenacity of the *Sharia* which continues to flourish and ‘be interpreted in the light of societal changes’. This tenacity and vibrancy of *Sharia* is also represented in the Islamic legal maxim of ‘*tatagayyar al-ahkam bi tagayaur al-zaman*’, which is translated as a ‘legal ruling may change with changes in time’. (MA Baderin, *International Human Rights and Islamic Law* (Oxford, Oxford University Press, 2003) 30) .

Seminars

Seminar Three: Application and Interpretation of Sources in Jurisprudence.

1. In light of the different sources of Islamic law, discuss how much of the law is based on the *Qur’anic* text.
2. Describe the contribution the different schools of Islamic law have made towards the evolution of Islamic jurisprudence.
3. Some rationalists as well as well as traditionalists have recognised that some *Hadiths* have questionable authenticity. In order to overcome this difficulty, describe what criteria have been devised for the purpose of establishing the authenticity of *Hadith* reports.

4. Describe concepts that have been developed to cope with the apparent contradiction of texts contained within the primary sources.
5. As early as the ninth or tenth century, it was said that the 'gate of *ijtihad*' has been closed and forward and 'independent' interpretation was forbidden. Discuss the limitations of this view.

Assessment Essay Question

1. How far would you agree with the assertion that *ijtihad*, *ijma* and *qiyas* are more in the nature of strategies (as opposed to independent, albeit secondary sources) for discovering law already established within the primary sources of the *Qur'an* and the *Sunnah*?

Reading

Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, Islamic Texts Society; 3 edition (September 1, 2005)

Joseph Schacht, *The Origins of Muhammadan Jurisprudence*, ACLS History E-Book Project (January 2001)

Supplementary reading

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BG Weiss, 'Interpretation of Islamic law: The Theory of Ijtihād' (1978) 26 *American Journal of Comparative Law* 199, at 200.

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