

Who Says *Shari'a* Demands the Stoning of Women?

A Description of Islamic Law and Constitutionalism

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It is a wonderful honor to be here. Berkeley is where I first formed my ideas about law and legal thinking, and I grew up in the Bay Area, so it is a thrill to be back. Thank you very much for inviting me.

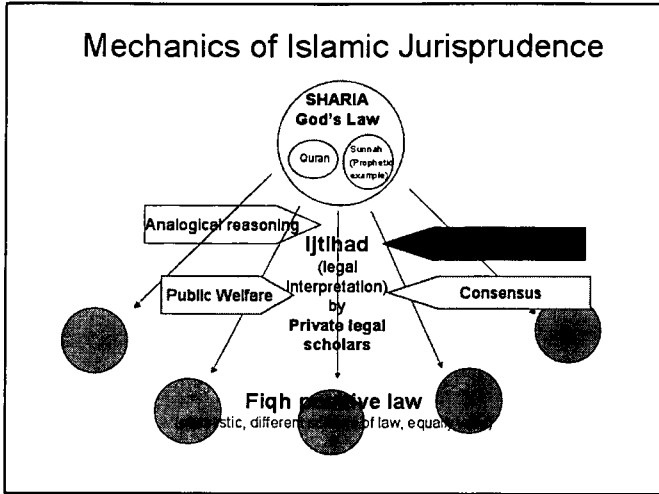
I titled this presentation "*Who Says Shari'a Demands the Stoning of Women?*" And I mean the "who says" in a couple of different ways. First, quite literally: "Who says?" "Who says that?" I think it's pretty easy to think about the question and say, well, it's in the news. In the news, a lot of Muslims around the world seem to say that about *shari'a*. And it seems to come from both lay people and those in authority and government positions. And then there are the various commentators and international women's organizations, and human rights organizations that are lobbying against various applications of Islamic law—they might say something like that about *shari'a* too.

Now, what I've felt about this for awhile is that these kinds of statements collapse a lot of nuances and layers and sophistication of legal thought, preventing a lot of potential creativity in solving some of the competing tensions for law, government, and constitutionalism in our world today. So I want to try to break this apart a little bit. And then I'll come back to the question as a legal matter, and ask the question in a more theoretical manner. Then we can ask "who says" in a different way—in the sense of "is this really true?"

I am going to use some visuals to help explain how I understand some basic Islamic law concepts, categories of authority, and where legal authority is lo-

* Assistant Professor, University of Wisconsin Law School. For the *fiqh-siyasa* articulation of the constitutional structure of classical Islamic legal systems, which forms the central conceptual premise of this presentation, I am inspired by and indebted to Frank Vogel and his important work in this area. See, e.g., FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA (2000); Frank E. Vogel, "*Siyasa shar'iyya*" in ENCYCLOPEDIA OF ISLAM. All errors are, of course, my own. Speech delivered at the JMEIL and Robbins Collection Scholar Series on Islamic Law & Society on March 18, 2008 at UC Berkeley School of Law.

cated for Muslims. I will do this first looking at the classical picture and then I'll move forward into the contemporary period, where I will merge some ideas of constitutionalism, the nation-state, and separation of powers.



I start with just the idea of *shari'a*. This is a word that many in the American public have heard by now. What does it mean? How is that word usually translated if you are reading it in a newspaper article? Usually as “Islamic law.” That is an accurate translation, but I think it’s also quite misleading because, as I’m going to lay out, it only gives you one piece of the whole overall picture. I would translate *shari'a* instead as “God’s Law,” capital “L,” capital “G.” It’s the ideal of how people should be in the world. The word *shari'a* actually means “way,” originally describing a “path to water.” So it’s the idea of the way God is asking people to behave and to live. And Muslims have information about that from two tangible sources. The first is the *Qur'an*, which Muslims believe is the revealed word of God. The second source is the *sunna*, which is the lived example of the Prophet Mohammed, who Muslims say is the last prophet in the line of all the Abrahamic prophets.

So that’s the information we have about what God’s Law—God’s way—is. But of course, the *Qur'an* and *sunna* don’t give you answers to every single life and legal question that you’re going to encounter. And so what happens is the jurists—the legal scholars within Muslim societies—developed a science (or art if you want to call it that) of interpreting those texts to come up with specific legal conclusions. And their conclusions, all together, make up the doctrinal law that we think about when we think about Islamic law in the sense of the rules governing Muslim lives.

To do their work, these jurists developed several jurisprudential tools. These include linguistic canons of construction, analogical reasoning (very similar to common law, case-precedent kind of reasoning), public welfare or *maslaha*, consensus, and so on. All together these tools make up the field of Islamic

jurisprudence, *usul al-fiqh*, or the “roots” of Islamic law. The process of doing this interpretive work is called *ijtihad*. That word comes from the root “*jahada*” which means “struggle” or “effort” or “striving hard” to do something very difficult. In the law, the word *ijtihad* is a term of art, referring to the serious effort involved in answering legal questions by analyzing and interpreting the divine sources. It is the same idea as the kind of work that happens in this building every day. You try to figure out from the existing governing legal rules what the answers should be for specific legal questions. *Ijtihad* is the work of legal reasoning.

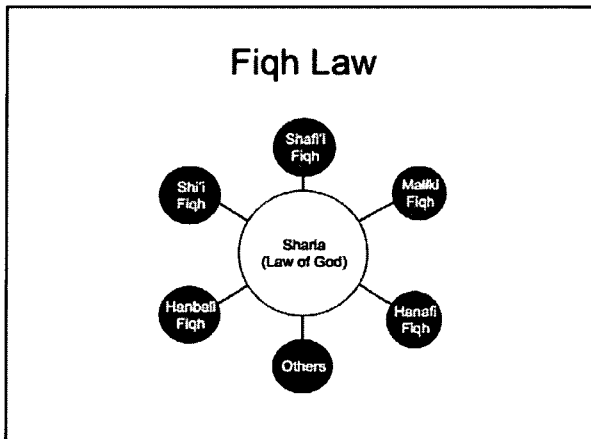
The result of *ijtihad* is *fiqh*. Not as many of you have heard that word before. *Fiqh* means “understanding.” It comes from the root “*faqiha*,” which means “to understand.” Now, the distinction between the word *fiqh* and the word *shari'a* is very significant for what I want to talk about today. *Fiqh* is “Islamic law” with a lower case “l.” It is the word used when you are referring to the actual legal rules on the ground, the positive law—rules about things like “how many witnesses do we need for a particular kind of contract?” or “what are my obligations in leaving this property to my heirs in my will?” or “is this kind of an action legitimate under the Law of God, given that it is not specifically answered in the source text of the *Qur'an* or the *sunna*?” Answers to these questions are found in the *fiqh*, the jurists’ understanding of God’s Law, based on their interpretation of the original source texts.

I think it’s important to recognize the significance of the use of the word *fiqh* for the Islamic legal doctrine. It reveals something that I believe is a basic building block of the way that Muslim jurists conceptualized what they were doing. That is, they had a core understanding that they were human and therefore fallible in the process of doing their *ijtihad*, of articulating God’s Law. So there was always this appreciation that what they were doing may actually be wrong in the ultimate sense, what God would say is the “right answer.” But even though they knew they couldn’t know with certainty that their *fiqh* conclusions were correct, these jurists went ahead and articulated legal rules that carried the *probability* of being right, while maintaining an awareness that there was a possibility that, ultimately, they might be wrong.

There is a *hadith*, a saying of the Prophet Muhammad, that I think illustrates this idea well. The Prophet said the one who does *ijtihad* (this effort of legal interpretation) and arrives at the right answer will receive two heavenly rewards, and the one who does *ijtihad* and arrives at the wrong answer will receive one reward. Notice that, first of all, no one is getting punished, even if they come up with the wrong answer. That is, there is always some amount of reward just for the effort of doing *ijtihad*—there’s something valuable about *ijtihad* work that makes it commendable in itself. In addition to that (and this is very important for Islamic legal systems), we on this earth won’t know who’s right and who’s wrong in our lifetime. We have to wait until after death to find out who is getting what amount of rewards in the end. So, for example, if I were a *mujtahid* (someone who can do *ijtihad*) and Professor Mayali right here were a

mujtahid, and I come up with an answer, and he comes up with a different answer on the same question, I have to operate always with a possibility that I'm getting one reward and he's getting two. That creates a necessary appreciation of legal pluralism—I would have to always operate with some amount of tolerance for the possibility that he's right and I'm wrong. That doesn't mean that these jurists weren't quite aggressive about arguing why one method is better and other methods really don't work. And they would write long commentaries about why this approach is better and why that approach makes no sense, and that, to continue my hypothetical, you should really follow the Quraishi school of law and not the Mayali school. But in the end, you almost always find a recognition of the concept of tolerance and legal pluralism, usually in the form of the phrase "*Allahu a'lam*," which means "God knows best." This reflects the idea that the most an *ijtihad* conclusion can ever claim is probability of truth. Not certainty.

This recognition of human fallibility is a fundamental attribute of Islamic legal discourses, and ultimately became a building block of Islamic law and legal systems in general. And here's how that happens. When there is an appreciation of human fallibility in *ijtihad*, and you have more than one person doing *ijtihad*, then, naturally, you don't just get one body of *fiqh* doctrine, you get quite a few. The more people doing this, the more likely you are to get different *fiqh* understandings of God's Law (indicated here by the small circles at the bottom of this slide). So when I think about Islamic law, I don't think of some monolithic code that is going to be imposed by a theocratic authority of some sort. Instead, I think of this:



Here, the center circle—the goal—is *shari'a*, God's Law. But we can't really as humans see that clearly, directly, with any perfect understanding of it. Rather, we see it through distinct methods of human interpretation. In Islamic legal history, several definable methodologies eventually grew into distinct schools of law—the *madhhabs*. I have shown here, basically, the dominant remaining schools of Islamic law. There were hundreds in the past, but they have sort of shaken down to about five still around today.

The existence of these many schools side by side illustrates the Islamic jurisprudential reality that each jurist had to operate with the possibility that another jurist's interpretation might ultimately be right (getting those two rewards instead of one). So they had to tolerate and respect opposing schools, and usually resisted the desire to enforce their conclusions on others. How could they, when there was a possibility (however slim) that their conclusions were wrong in the eyes of God? That's what I mean when I say that Islamic law has an inherent pluralism to it.

So, if you go and look up specific answers to Islamic legal questions, you are going to find some reference to these different schools on a lot of doctrinal matters. And they actually matter on the ground in some very specific ways. And that gets us to the topic of stoning. I've done some work on the contemporary application of the *zina* (extramarital sex) crime in Muslim-majority countries. *Zina* is one of the crimes referenced in the *Qur'an*. Countries like Pakistan and Nigeria have enacted criminal legislation covering *zina*, and as it turns out, this provides a good example of some of the doctrinal differences of these *madhhabs* that actually have real life play today.

The basic *Qur'anic* verse about *zina* establishes extramarital sex as a punishable crime, but simultaneously creates a very, very high standard of proof for establishing such a crime has occurred. Specifically, there have to be four eyewitnesses to the actual act of sexual intercourse. On top of that, if there are less than four, then those who are making the charge are themselves punished for slander. (And actually the punishment for slander is almost as bad as the *Qur'anic* punishment for *zina* itself—both are lashing). So, clearly, the likelihood of actually prosecuting *zina* cases according to these *Qur'anic* rules looks very slim. After all, how likely is it going to be that sex will take place in front of four people who are willing to testify to it, with the risk that maybe one of the other witnesses might chicken out, and then the rest end up being lashed for making an unsubstantiated accusation? Not very likely. And, actually, in historical practice, nobody was punished for *zina* during the time of the Prophet Mohammed (and some say in all of Islamic history) based on a four-witness prosecution. The only *zina* punishments carried out were based on confession—where somebody came and confessed his sin to the Prophet, wanting absolution on this earth, so he wouldn't have to pay for it in the afterlife. So, in the time of the Prophet, they didn't drag people in and prosecute them for *zina*. But this is not the impression we get about Islamic criminal law today from world news headlines. From the news, it feels like Islam demands that people's private lives—especially women's—should be closely monitored, and any sexual indiscretion should result in a criminal prosecution for consensual extramarital sex. It feels like, in other words, “*shari'a* demands the stoning of women.”

I brought up this example to illustrate the pluralistic legal doctrines of the various schools. So let's look more carefully at the evidentiary rules of *zina* in the *madhhabs*. It turns out that all but one of them says that the *Qur'anically*-decreed four eyewitnesses is the exclusive method of proving a crime of *zina*.

But one school—the Maliki school—says that circumstantial evidence can be used in addition to these eyewitnesses. So, for example, an unwed pregnancy could be circumstantial evidence of *zina*. Now, the Malikis do acknowledge that there are other ways (besides *zina*) that someone could end up pregnant outside of marriage, so they don't end the story there. Instead, they shift the burden of proof to the woman: an unwed pregnancy is *prima facie* evidence of *zina*, but it is rebuttable by counter-evidence from the woman to show that it did not result from consensual extramarital sex.

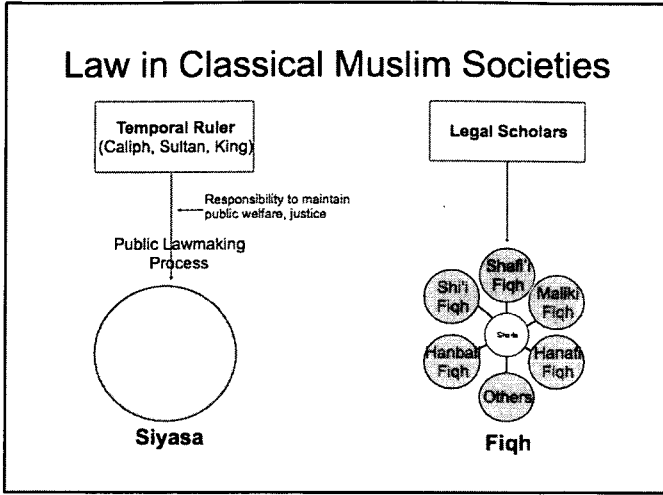
But the other schools disagree with the Malikis on this, and they say, first, that the *Qur'an* seems to be quite clear about establishing these four witnesses. But in addition to that, the crime of *zina* is a consensual act, and punishing someone based only on the external evidence of pregnancy does not give enough attention to that aspect of the crime. (This, by the way, is why rape—a crime of violence—is not *zina* and why it was a huge mistake to include rape under the category of *zina* in the Pakistani Hudood Ordinance. But that's another topic.) The schools other than the Maliki school say that using unwed pregnancy as evidence of *zina* would be like punishing somebody for the crime of wine-drinking (*khamr*, another *Qur'anic* crime) based only on observing that person walking around drunk. But people aren't punished for the crime of *khamr* for just being drunk, because it's possible that they could have become drunk in a variety of ways that didn't involve voluntary drinking. With this analogy of drunkenness and pregnancy, these non-Maliki jurists say the circumstantial evidence of unwed pregnancy cannot be used as even *prima facie* evidence of *zina*. So there you have it, a difference of opinion between the schools in the evidentiary rules in *fiqh*, namely, what is required to prove the crime of *zina*. Significant to how this all plays out in today's Muslim-majority countries, the Maliki school dominates in Africa, so the Maliki thinking on *zina* evidence is relevant in the Nigeria adultery cases in a different way than it is in Pakistan, where there is a majority Hanafi population.

Let's explore the topic of *zina* even further, taking on the punishment of stoning, the question presented in my title. It turns out that the punishment for *zina* is itself a contested question. This is true especially in the modern era, but even in the classical period, *fiqh* scholars wrestled with the fact that stoning itself is not prescribed in the *Qur'an*. Instead, as applied to *zina* cases, it comes from Prophetic *hadith*. Because of the nature of these *hadith* stories, there was considerable debate over what exactly should be the appropriate *zina* punishment. Even further, it is significant that in all the *hadith* describing someone being stoned for *zina*, they are all convictions based on confession. None of them are situations of actual prosecution against the will of a defendant. In the famous *hadith* describing the carrying out of a particular *zina* stoning, it is reported to the Prophet that the adulterer had tried to run away during the punishment, to which the Prophet replied, "Why didn't you let him go? He might have repented, and God might have forgiven him." So right there is a question of whether this is really a mandatory punishment in all cases even against someone

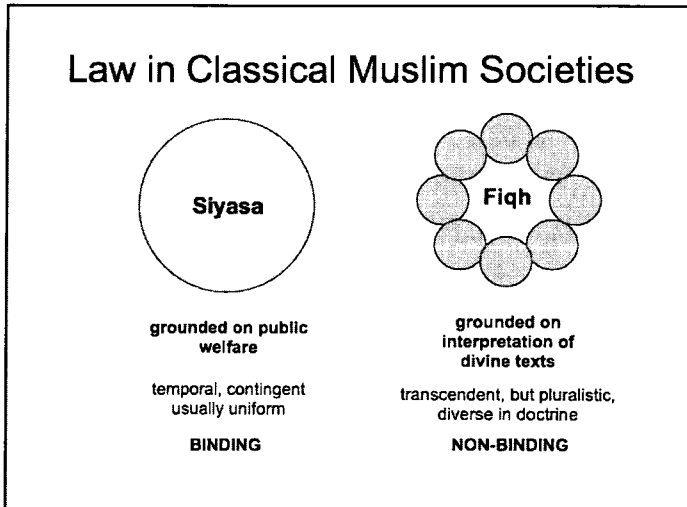
who is resisting it. I should also note here that the adulterer in that *hadith* was a man—illustrating the point that the *zina* punishments apply equally to men and women. That's an important thing to keep in mind when we get the impression today that the *shari'a* demands the stoning of women particularly. My main point here is that the *fiqh* of *zina* evidence and of the stoning punishment is all within the realm of human *fiqh* interpretation of those source texts, and there are important disagreements about the law on the ground as to how this actually should be carried out.

Now, keep that in mind as we move on to the second thing I want to talk about: the relationship of this *fiqh* to legal institutions in various empires and states. It is important to give some thought to whether and how a ruling government should give attention to this pluralistic body of *fiqh* law. So far I haven't mentioned anything about a *caliph*, a *sultan*, a king, or a president. That is significant, because Islamic legal rules—*fiqh*—have not depended upon any state structure to exist. Rather, *fiqh* emerged from the private sphere—from the literature, commentary and discourses of individual scholars. My contemporary analogy is to today's law professors. *Fiqh* literature resembles in many ways the conversations in American legal academia—where we argue over the proper way to interpret the Constitution or a statute or case precedent. So when you want to know what Islamic law says about something, you look in these more or less academic collections of commentary articles, doctrinal summaries, and things like that. And that's where the law is actually located when you are talking about Islamic law in the sense of *fiqh*. It is very like the private debates among American legal scholars documented in books and law reviews. The difference is that for Islamic law, that *is* the law. It isn't outside commentary about the law. It is actually the *fiqh* itself. I like to say, imagine what it would be like if people actually *did* read the law reviews—that's a bit what it's like.

But not everything is *fiqh*. Not everything can be answered by extrapolating meaning from the divine source texts. What about traffic laws? What about taxes? Zoning? What about all those basic things that keep society running that are really not at all directed by the divine text? Here I will truncate a much larger topic, but basically, it was acknowledged that there is a role, and in fact a very important role, for some kind of ruling temporal authority (a secular authority, to use a modern term) to keep civil society running, safe, and orderly. To support this, you can look to *Qur'anic* verses that talk about the just rulers, rulers that have been good for their people, such as Bilqis Queen of Sheba, who is praised in the *Qur'an* as one of those rulers who ruled in an honorable way. This supports the concept that rulers have a basic responsibility to keep public order. Eventually this gets to be articulated as a realm of lawmaking that can be described as "*siyasa*," meaning public administration. So if you look at law in classical Muslim societies, what you see is the operation of two separate realms where legal authority is located:



The *fiqh* side is depicted here with several different circles, because, as we've already seen, it is inherently pluralistic. There are relatively few things for which there is just one answer in the *fiqh*. Even within a school there are often dissenting opinions. So if you hear someone say "Islamic law says X," that should raise a red flag that "X" is probably not the only *fiqh* opinion on the topic. On the other side pictured here, I have indicated the *siyasa* realm of lawmaking, the laws made by the ruler. Now, what's the legitimacy of that sovereign power doing this lawmaking? To make a long story short, it is because there is a need for public order, for public welfare (*maslaha*). That's the grounding of that authority. The *fiqh* authority, on the other hand, is grounded in the need to interpret and apply the divine texts, and the *fiqh* doctrine is legitimated by the very process of *ijihad* done by the scholars. But that is not the basis of *siyasa* lawmaking. *Siyasa* authority exists because it is necessary for social order, but *siyasa* authorities were not usually doing the job of interpreting divine texts themselves. That was the province of the legal scholars.

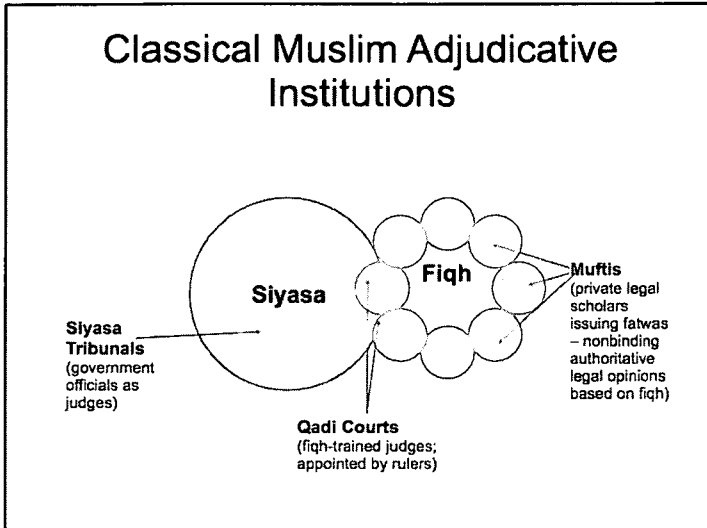


So, comparing the two, the *fiqh* is transcendent in the sense that it's high—it's trying to articulate God's Law while at the same time being very pluralistic, and diverse in its actual doctrinal rules. *Siyasa*, on the other hand, is temporal. It's usually much more uniform, because it's in the interest of the sovereign to make the same laws for everybody. But it is quite contingent on the ruler of the time. One ruler comes, another ruler goes, and the *siyasa* changes, and societies were accustomed to those transitions. Finally—and this last point is often hard for American audiences to appreciate at first—the *fiqh* is non-binding, while the *siyasa* is binding. Now, the average secular, American, Western, non-Muslim usually reacts to this by saying, “wait a second, the *fiqh* is supposed to be an articulation of God's Law—shouldn't *that* be the one that is binding? I mean, that's the one coming from God, right? And if *siyasa* is just based on public welfare, why should *that* be binding, while the law coming from God isn't?”

To make sense of this, you have to remember what I said about the two rewards and the one reward. Recall that if I were a *fiqh* scholar I can't make my *fiqh* opinion binding on anybody, because I don't ultimately know if I'm getting one reward or two. That's why it's non-binding. It can't be forced on anyone as God's Law because we don't know for sure if it is in fact God's Law. That's why a *fatwa* is not a legal directive from an infallible character like the Pope or someone like that. A *fatwa* is just a *fiqh* opinion given in response to a specific legal question. We have them here in the United States too. Imagine that your favorite constitutional law professor appears on CNN, and the reporter asks her whether a particular action is a violation of the First Amendment, and the professor answers “no,” with some explanation of why not. That's a *fatwa*. That's a reasoned legal opinion by a recognized expert in the field in response to a specific legal question. And you don't have to agree with her. There are plenty of other First Amendment scholars who might disagree with that answer, and they might give a contrary opinion. None are binding. The same is true of *fatwas*. I can go and get a *fatwa* for a legal question that I'm interested in, but I don't have to follow it.

It's also important to note that Muslims don't have a “church.” There is no single authority authorized to speak for Islam. No one has the authority to finalize an Islamic orthodoxy, or excommunicate anyone from Islam. The *Shi'a* community has a little bit of a different history on this, but effectively, after the Imam goes into occultation, *Shi'is* have essentially the same situation on the ground—we are left with fallible human interpreters of the law. And so therefore, there is no one authorized to speak with absolute truth, with any real certainty on what God's Law is in any particular case.

So returning to our picture, between the two realms of legal authority—*fiqh* and *siyasa*—there were many tensions as well as cooperation, and there is a long and interesting legal history to this, but we don't have time to go into that here. For our purposes, it's important to see that within these two realms, various institutions were established to resolve conflicts.

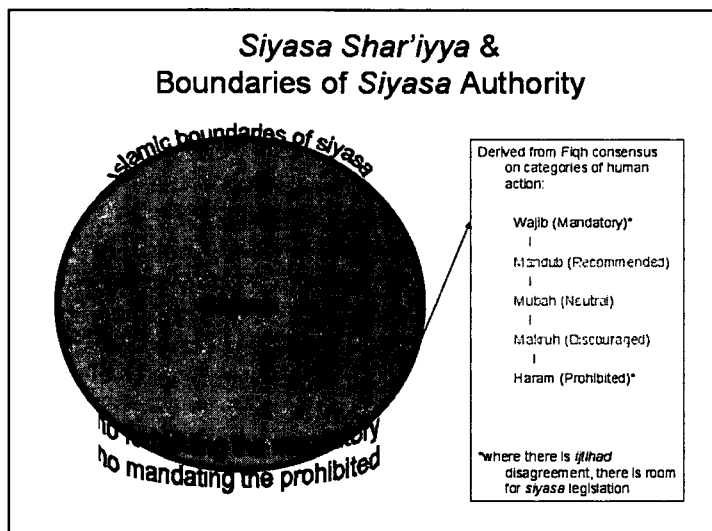


On the purely private *fiqh* side, you've got *muftis* giving *fatwas* in response to specific legal questions. On the *siyasa* side, various tribunals administered and adjudicated the *siyasa* rules. In the middle, there is an overlap, where the *qadi* courts are located. *Qadi* means "judge." But it's a specific kind of judge because the law by which a *qadi* judges is the *fiqh* (and they themselves are selected from the *fiqh* scholar community). So, for example, when a husband and wife have a marital dispute they might go to a *mufti* to resolve the conflict. And if they both agree to the authority of that *mufti* then that *fatwa* may very likely resolve the problem. I've known that to happen in real life even today. But what if one of them resists that *fatwa* and says, "No, I refuse to follow that opinion"? Well, now you need the power of the state. Now you need someone to, for example, seize the assets of the husband if he's refusing to pay for something that he promised to pay for in the marriage contract.

So sometimes, even in *fiqh* matters, you need some kind of physical power to force the parties to follow through on an obligation that the *muftis* really don't have any police power to do. That police power is an invocation of the role of the state. The state government—*caliph*, *sultan*, king, whatever—chooses individual scholars from among the *fiqh* community and then stands behind their *fatwas* with the enforcement power of the ruler. That means the *qadis* wear two hats. The first is their authority as *fiqh* scholars, people qualified to interpret and apply *fiqh* to specific questions. They are also wearing a *siyasa* hat, because they have been appointed by the ruler, and their conclusions will be enforced by that ruler, and thus the *qadi*'s judgments are limited by the boundaries of what the state will enforce. The *qadi* courtroom, by the way, is the only time that a *fatwa* is binding. A *qadi*'s judgment is a *fatwa* that is binding on the litigating parties not because all of sudden the *qadi* somehow knows the true answer of what is God's Law, but rather, because of the *siyasa* hat that the *qadi* is wearing. That

is, it is important for social order and the public good that these two litigants will not take the law into their own hands when they leave the courtroom, because they know that the state will stand behind these judgments.

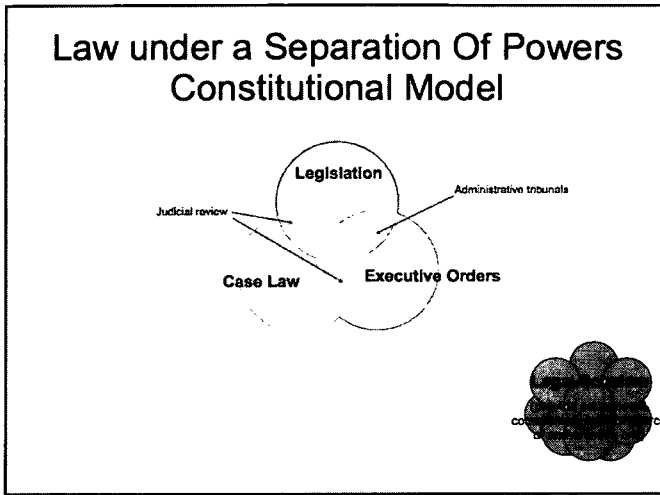
Okay, so now what about controls on the *siyasa*? Are there any restrictions on the ruler, from an Islamic perspective? This is a topic we hear a lot about today, especially in debates on Islamic states and secularism. Again, it's a very long story, but in a nutshell, the classical jurists mostly came out very deferential to state authority. When the *fiqh* scholars had sufficient social clout to really assertively articulate some *shari'a* boundaries upon the ruler, it amounted to this:



On the right are the five categories of human action defined in the *fiqh*—*wajib* (mandatory), *mandub* (recommended), *mubah* (neutral), *makruh* (discouraged), and *haram* (prohibited). At a minimum, the jurists said, the ruler cannot forbid things that are mandatory or require things that are prohibited. In other words, for example, they can't forbid prayer, since that is mandatory five times a day. They also cannot require wine-drinking, since that is prohibited. Outside of that, there are a lot of different theories about how rulers should behave and how government should be arranged and what kind of cooperative or non-cooperative arrangement there should be between the rulers and the *fiqh* scholars. You can read more about that in the genre of literature called *siyasa shar'iyya*. But the minimum idea was that rulers were legitimate as long as they did not “mandate the prohibited or prohibit the mandatory,” ultimately resulting in very little that would justify popular uprisings or rebellion. Finally, it's important to note the small star to the right here—it says that if there is *ijihad* disagreement then there is room for *siyasa* legislation. We might think of this in terms of our initial example of *zina*. As we saw, there is some *ijihad* disagreement in the schools over the use of unwed pregnancy as evidence, and on what is the appropriate

punishment for *zina*. So, based on this structure, these would be areas where *siyasa* lawmaking could happen without an objection really at the base level of it violating *shari'a*.

Now let's move on to the contemporary period. All this *fiqh-siyasa* polarity that I just described is all from the classical period. This arrangement mostly disintegrated with colonialism and post-colonialism. So there is a very different template operating in the post-colonial era:

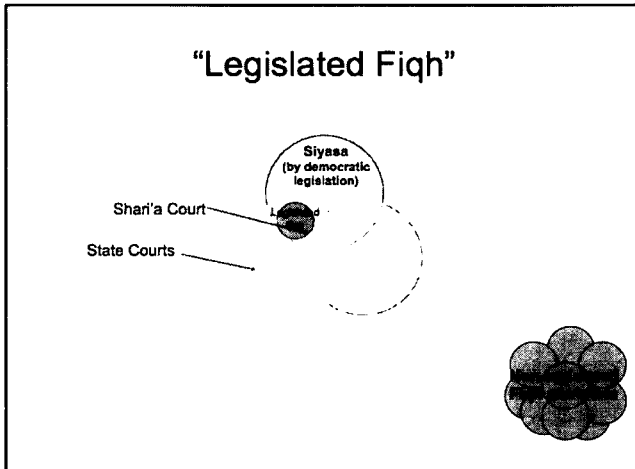


I've indicated here a familiar separation of powers model: the executive, judicial, and legislative realms. Off in the corner, I've put a bunch of overlapping smaller circles. That's people like me—law professors—legal scholars who are trained in commenting on and analyzing the meaning of our law, our statutes, our cases, and our constitutions. We American law professors provide education, analysis and commentary but we are not the *source* of authoritative law in the United States. For our thoughts to become authoritative, we have to become a part of the institutional structure in the middle—either as a judge, legislator, or executive official. Remember that this is quite different than the role of legal academics who articulate *fiqh* of Islamic law. *Fiqh* literature is not a commentary on the law; it *is* the law. It's authoritative because it is the product of scholarly *ijtihad*, not because of any official state position the scholar may or may not have held.

So now consider the socio-political dynamics in a Muslim majority country in the post-colonial period. Despite independence, most of these countries are operating with a constitutional template based on their prior colonial ruler which introduced, and often totally supplanted, the earlier structure as well as added new substantive laws from either civil or common law traditions. Some significant numbers of citizens of these newly-independent states argue for the recognition and re-introduction of Islamic law. This inspires many reform theories of Islamic law and government, and many ideas about an Islamic state. Eventually,

this brings up questions like “Is Islam compatible with democracy?” When answering this and other questions, it is important to realize that most modern Muslim-majority countries are operating with a Western nation-state model, *not* the *fiqh-siyasa* model I described earlier.

What we see around the world today are various attempts to amend that nation-state template to accommodate (and even mandate) *fiqh*. Here’s an example of a common way that this amendment attempt goes. First, on the question of the compatibility of Islam and democracy, if we abstract the notion of *siyasa* to public lawmaking (for example, law that is made by the sovereign for the public good), then I don’t think it’s hard to see democratic representation as a form of *siyasa* governance. It is true that in the past, this was done unilaterally, with a single *sultan* or *caliph* declaring the public good, but there does not seem to be any limitation in the divine texts to changing the mode of public lawmaking today to a democratic system. So if we think of public legislation as a sort of *siyasa* lawmaking, now our Muslim nation-state template looks like this:

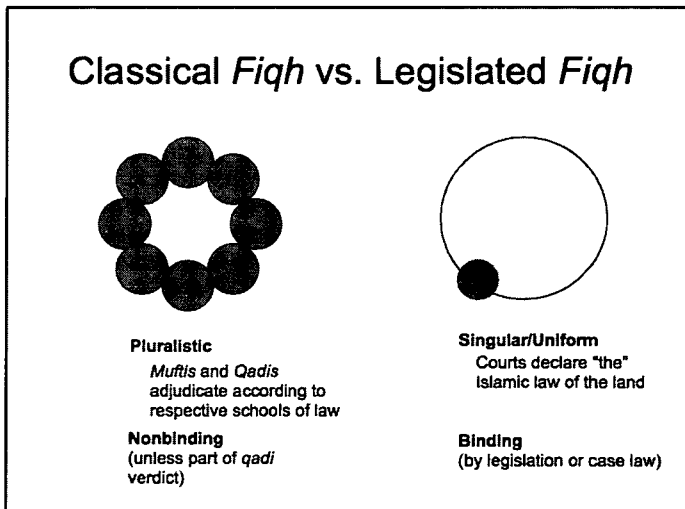


What do we do with the *fiqh*? How can that be accommodated in the modern state, and should it be? Now, in many countries in the colonial period, a certain amount of *fiqh* was allowed to remain, mostly in the field of family law. But many people wanted more than that once they were independent. Various Islamically-based movements have argued for official recognition of Islamic law. One very prominent way that this can happen is to put something in the Constitution saying that *shari'a* will be a source (sometimes “the source”) of the law of the land. I think you can see now how ambiguous a statement that is—because *shari'a* is a much bigger concept than just a set of doctrinal rules. Another method of “Islamizing” the law is to affirmatively codify a particular set of *fiqh* rules on a given topic. I’ve depicted that here with the small “*fiqh*” circle in the larger *siyasa*-legislation circle. Sometimes this codification project draws from one *fiqh* school, but more often it has become a bit of a smorgasbord of rules from many different schools of Islamic law. In either case, the codification of selected

fiqh rules is usually done under the banner of bringing *shari'a* to the country. Obviously, the pluralism of the *fiqh* itself is ignored in this process. And people—Muslim and non-Muslim—come to believe that the particular laws enacted under that banner are divinely required by *shari'a*, God's Law. Let's return again to my question. "Who says *shari'a* mandates the stoning of women?" If you are in a modern Muslim-majority country that has legislated the punishment of stoning for *zina*, then people in that country might very well say "*shari'a* demands this." But, as you have seen, that statement does collapse a lot of complex information and does not tell the whole story.

So what can we see when we look at this merging of Islamic law with the nation-state model, as a general matter? Often we see *shari'a* courts empowered to now speak for "the" Islamic law of the land. That is something that did not really happen before, because Islam does not have a "church." And the pluralistic nature of the *fiqh* is itself an illustration of the fact that no one was empowered to declare "the Islamic law" on any question. Now, in this modern context, what has happened to that pluralism? Well, it goes off to the side, looking very much like the pluralistic, academic legal commentary here in the United States—it is just commentary. It doesn't have real legal weight in society. So, for example, it doesn't actually matter that the Hanafi school does not allow unwed pregnancy to be used as evidence in a *zina* prosecution if you are in a country that has legislated the Maliki rules of evidence. There doesn't seem to be much interest in the state accommodating those kinds of pluralistic *fiqh* opinions that you saw in the classical period.

Finally, being codified has, I think, done something to the conceptualization of *fiqh* itself. This "legislated *fiqh*" has very different characteristics than the classical *fiqh*. Let's compare:



Compared to *fiqh* in the classical system, legislated *fiqh* is quite singular, quite uniform, often elaborated by one court. It is also now binding because it's part of this overall top-down state structure, where the law really wants to be uniform for everybody. Classical *fiqh*, remember, was non-binding, unless it was part of a court verdict. So we see there is a change in the way we all think about Islamic law itself, and that affects the nature of the public debates over whether and how Islamic law should be recognized in Muslim countries.

It is in this context that you hear many people saying “*shari'a* requires stoning.” And they are saying this with a vision of Islamic law that is very uniform, that is very singular, that doesn't allow for much *fiqh* pluralism. And this is true not only of those arguing for Islamic law legislation but also those, such as the international human rights organizations, who are arguing against it. And they all seem to truncate the conversation to statements like “*shari'a* demands the stoning of women.”

What happens on the ground when you have these two very strong positions both insisting on only one view of what Islamic law is, without accommodating for all the varieties of *fiqh*? You end up reducing issues and people into either pro-Islam or anti-Islam sides, and there is usually a ratcheting up of tension between them. So people think that if they want to be good Muslims, for example, they must be for the stoning of women. And if they are for women's rights, then they must be against *shari'a* and even against Islam itself. When people are faced with these kinds of opposing sides, there is little or no space in the middle. Unfortunately, hostility between these groups often increases so much that it erupts in violence.

So, in the end, my answer to the question “Who says *shari'a* demands the stoning of women?” is to ask you to ask yourselves “who says?” That is, whenever you hear a reductionist description of *shari'a*, I suggest that it is useful to ask who is making the statement and why. When we all demand more than these sorts of flat language descriptions of Islamic law, we will open up much-needed avenues for creative problem-solving in some of the world's most contentious legal and constitutional debates. It will also, I believe, help push us toward more nuanced appreciations of pluralism and diversity that will be helpful to any society.

Thank you very much for your attention.

