

## Background article: Sources, Law in practice

### What is the law?

Often the term ‘law’ in the modern western mind brings with it ideas of ‘limiting the things that I can do’ and ‘things that you get punished for if you do them’. Our thinking can be coloured by ideas of ‘how do I get round the law?’ and ‘what happens to you if you get caught breaking the law?’ This is not the way in which Islam and Muslims think of the law. Muslim law is a moral code, which works to guide human behaviour in the way that will lead to human flourishing. Law is a great blessing from God because it guides human beings on the right path that will lead them to fulfilment in this life and the reward of Paradise in the life hereafter. It is not a negative thing or something that one seeks to ‘get round’.

Law is a code of moral practice drawn from the shari'a, that is, the way of life laid down by the Qur'an and the *sunna* of Prophet Muhammad. Please look at the article on shari'a in the “Sources of Authority” section.

### How is the law worked out?

The Qur'an itself is not a book of laws, but rather ethical guidance on living a truly human life. Muhammad was the best interpreter of the Qur'an and so the way that he put it into practice is the second source to guide Muslim living, or source of law. From the time of the death of Muhammad onwards, law had to be worked out by scholars based on these two sources. Although the sources do not change, the way of life based on them may have to adapt to different circumstances, cultures, contexts and the times in which Muslims live. This demands serious intellectual work by those qualified to undertake it.

Let us clarify some terms. A scholar of Islam is called an *alim* (plural, *ulama*) and one who specialises in the study of Islamic law is called a *faqih*. The science of law in Islam is known as *fiqh*, which means originally to understand “the path”, that is, the shari'a.

If an ordinary Muslim is confronted with a question on how to live a Muslim life, then the normal thing to do would be to seek the guidance of a local *alim* or *faqih*. This can be done today via a recognised helpline or the internet. A simple query that has been dealt with by the body of scholars can be answered “off the shelf”. If the problem is something that needs original research and a “learned opinion”, then the question must be referred to a *mufti*, in the Sunni tradition, or a specialist *ayatollah*, in the Shi'a tradition: these are *ulama* of outstanding learning. A *mufti* or *ayatollah* is capable of using personal judgement to apply the principles of *fiqh* to a new question.

This personal judgement would be given in the form of a *fatwa*, which is not to be confused with the ruling of a court. This is a learned opinion and must be respected as

such, but it is not necessarily the last word. The same question can be presented to another *mufti* or *ayatollah* and that may bring forward another *fatwa* or it may reinforce the earlier opinion. All authority is based on knowledge; not on political or priestly power.

Individual Muslims usually follow a particular School of Law (*madhhab*). Each of these has its own body of scholars. These Muslim scholars examine a question put to them by making a profound study of the principles of jurisprudence (*usul al-fiqh*), before going on to study the body of knowledge within their particular school. Over the centuries, institutions, called Dar al-Ifta, have been created that specialise in developing practical guidance on new questions. Each school will have its own Dar al-Ifta in which the scholars will work out a new *fatwa* if required. In modern times, these are publicised by websites.

### **A court of law**

In an Islamic State there will be a system of Islamic courts, which will be presided over by a judge or *qadi*. Some Muslim-majority countries in the world have developed their legal systems with significant reference to Islamic law; others have a legal code that is drawn more from secular colonial principles of law with less influence from Islamic law. Some countries have a dual system, where the state courts will rule on civil and criminal law whilst Islamic courts will govern elements of Muslim personal law, such as marriage, divorce and inheritance.

Muslims are obliged by Islamic law to obey the law of the land in which they live unless, in exceptional circumstances, it required them to do something that fundamentally contradicts the law of God, i.e., something that was profoundly immoral. Let us take an extreme example: suppose that the secular law of a particular country decided that care for elderly people is too great a charge on public funds and so brought in a law to say that everyone had to be killed at the age of eighty years. Muslims, like many other citizens of this country, would regard this law as being fundamentally immoral and so would refuse to obey it, even if it meant being put into prison by the law of the land. In this case, Muslims, like many other religious communities, would respect the law of God more than the immoral law of the country in which they live. This is an extreme example!

Muslims who live as a minority in a country that is not governed by Islamic law are obliged to live according to the law of that land. In Britain, for example, marriage is regulated by the law of the land and so a Muslim couple would have to be married according to this law if they wanted the state to recognise their marriage as legal. Someone marrying according to British law, who wanted a divorce, would have to go to the state courts to have their marriage dissolved. The law of the land would govern whether or not this marriage met its criteria for a divorce to be granted. If a couple were not married according to the law of the land, but only according to Islamic law, the state would not recognise this marriage as legal and therefore would not allow a case for divorce to be brought before the civil courts.

A country like Britain has one code of law recognised by the state. This does not stop religious communities from having their own systems of law, which, as far as the state is concerned, would be voluntary and only apply if individuals decided that they wanted to abide by them. Many religious communities have their own law in such cases, which affect personal matters. Jewish communities have their own code of religious law as regards marriage: Orthodox Jewish law will not recognise the marriage of a Jewish woman to a man who is not Jewish. There is nothing to stop such a couple marrying according to civil law in Britain, but the religious community will not recognise that marriage. A Roman Catholic couple might be married according to both civil law and their religious law. They might decide to go to a civil court to seek a divorce, but this divorce will not be recognised by their church, because Roman Catholic law will only permit divorce in extremely rare circumstances. A Roman Catholic divorced according to civil law will not be allowed to re-marry according to church law, but there is nothing to stop them marrying again according to the civil law of the land, even though this will not be recognised by their church. In this way, religious communities' laws are voluntary, as far as the law of the land is concerned. Individuals decide whether or not they want to be ruled by them, provided that they do not permit something that the civil law does not allow. A Jewish couple, married according to civil and Jewish law, who have only a Jewish divorce, would not be recognised as divorced according to civil law, and so they would not be free to re-marry according to the law of the land.

Muslims in a country like Britain are in a similar position. If they are married according to civil law, they must be divorced according to civil law. What then if they are married only according to Muslim law, but did not have a civil registration of their marriage? As far as the law of the land is concerned, they are not married, but are just 'living together'. This means that they cannot have a civil divorce. If their marriage breaks up, they can seek a divorce under Muslim law only. This is where a Shari'a Council comes in; this is a body made up of men and women who are qualified in Muslim religious law. There are many of these in Britain and Muslims must decide which of them they are willing to recognise as being valid in their particular case. A Muslim man or woman can apply to a Muslim Shari'a Council to be granted a divorce according to Muslim law. As the civil law did not recognise their marriage, it obviously will not recognise their divorce.

In practice, most Muslim couples in Britain today are married according to both Muslim and civil law. This means that they must be divorced according to civil law if they want the state to recognise their divorce. The divorced parties will have to abide by the law of the land as regards the division of marital property and the custody of the children. Such a couple, granted a civil divorce, might also voluntarily decide that they want a religious divorce too. This would have religious recognition, but not be recognised by the law of the land. Complications can arise if there is a dispute between the provisions of a civil court, for example about the custody of children, and the religious law; in this case, if a civil divorce has been granted and the court has

ruled on the question of custody, this ruling can be enforced by the civil courts over against the ruling of religious law if either party wishes to resort to civil law.

In a similar way, the British legal system has provisions that govern inheritance, but religious people can agree to decide on such matters according to their religious law if they so choose. If they do not agree on the matter, then any involved party can apply to the British legal system to grant them justice according to British law. We see then that there is one legal code in force in the country, which governs everyone, but religious people are free voluntarily to follow their religious law provided that it does not contradict the law of the land, all parties agree and none of them decides to go instead to the law of the land.