

Balancing and Completing Thoughts of Islamic Jurisprudence

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Abstract

This paper reflects on the jurisprudential issue of the duty to obey the law. Several theories can be found in the secular jurisprudence on the question of why an individual has to abide by the law. One of which is utilitarianism. The paper argues that the utilitarian conception about the duty to obey the law has a gap that would be revealed using the same justification which means, if an individual obeys the law on utilitarian grounds, the same may be invoked to break the law. But beyond weighing the pros and cons of obedience over violation, there are other factors that explain the rationale behind compliance with the law. These factors entail the metaphysical understanding of justice as underlined in the theory of natural law and Islamic jurisprudence. While the utilitarian legal obligation forms part of the theory of Sharia for legal compliance, the Islamic jurisprudence provides the ultimate reason why a person could subject himself to the law, which is a liability in the afterlife. This paper reflects on this theory of Sharia and its basis in the primary sources and the intellectual tradition of the Sharia schools of thought.

Keywords: *Universal Norms, Secular Jurisprudence, Islamic Jurisprudence, Utilitarianism, Natural Law Theory.*

1. Introduction

The contribution intended to be made by this paper is to indicate a theoretical gap in secular jurisprudence when addressing the fundamental question of why an individual has to obey the law and to show how this gap can be addressed by Islamic jurisprudence. By secular jurisprudence, I mean any system of jurisprudence that has no metaphysical considerations and liability in the afterlife to its underlying conceptions and assumptions. To this definition falls western systems of jurisprudence that are based on Roman civil law and English common law traditions. We find that most systems of jurisprudence have adhered to one of these legal

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traditions which have a secular basis and whose norms are enforced through secular government institutions.

The issue of the obligation to obey the law becomes important when the law that has to be obeyed has the objective of serving the cardinal values of justice and protection of individual rights and freedoms. It has to be noted that the question takes an individual perspective of why a person has to adhere to the rules that may be enacted by the government as positive laws, or ordained by society in the form of culture or religion. The gap articulated above is identified after examining the most important theory in secular jurisprudence which is utilitarianism. This theory holds that a person adheres to law because that would accrue him/her greatest benefit and happiness as compared to being not compliant, and it would be necessary for him/her to avoid harm and inconvenience by not complying with the law. The problem with the utilitarian approach to the understanding of legal obligation is the fact that the thesis can be deconstructed following the same lines of the utilitarian argument. If an individual obeys the law for reasons related to happiness, wellbeing, harmony, punishment, etc., the same reasons could be advanced to break the law or not to abide by it. As indicated earlier, the law may hold rules which aim at upholding fundamental universal norms or it may contain rules lower in purpose. A person may abandon killing another person for fear of punishment. The individual could reasonably advance the same instrumentalist approach of killing a person who accrues benefit to him/her after weighing the possible harm or loss that might befall him. This theoretical gap has not been addressed by any of the theories of jurisprudence as found out and concluded by M.B.E. Smith.¹

This paper shows how this gap can be addressed in the theory of Islamic jurisprudence which is founded on the metaphysical and theological concepts of creation of the universe and universal human values by God and the accountability of human beings in the life after death.

2. Universal Norms as Foundations for the Regulation of Human Interactions

Before reflecting on the foundational nature of universal norms for the regulation of human relationships, it shall be noted that there are two opposite views on the universal natures of

¹M. B. E. Smith, Is There A Prima Facie Obligation To Obey The Law? *The Yale Law Journal*, Vol. 82, No. 5. pp. 975-976.

norms that are considered fundamental for the wellbeing of human society; these are moral universalism and moral relativism.

Moral universalism advocates for the universality of certain ethical and moral principles and standards, which do not change across cultures, religions, or time. These values are very generic in their nature and they prohibit harm to others, preserve and encourage good and virtue in the world. Such values are naturally endowed to human beings irrespective of time and place. In Islamic jurisprudence, the concept of moral universalism finds its support in the primary sources of Sharia law i.e. the Quran and the *Sunnah* (Prophetic tradition). The Sharia affirms moral values and calls for their respect and enforcement at all times. Among the cardinal universal values invoked and affirmed by the Quran are justice, fairness, respect and sanctity of human life, property rights, human freedom, and liberty.²

Theorists of ethical universalism argue that universal values are unchangeable and immutable. This is true to the extent these values remain generic and not specific that would require adaptability and flexibility of moral norms. In other words, specific norms and rules are deduced from general universal values and the immutability of these values remains only to the level where they are broad. That distinguishes specific circumstances in which case specific governing values can be adopted which have to be relative to the prevailing realities across various societies and cultures.

A different view is advanced by theorists of moral relativism who argue that moral norms are not universal; instead, they are relative to cultures and situations. This view of relativists can be considered valid to the extent that norms and rules of conduct are amenable to the changing circumstances of societies. The counter-argument against relativism is empirical in the same way in which universalism is asserted based on reality. This reality is that we see norms such as justice, fairness, fundamental rights, and liberty being upheld by all human civilizations. Relativism would only be valid at the rules level, not at the morals level, as a law is relative to dynamic situations.

² See: Qur'an 5:8, 5:42, 4:58, 14:48 and other many countless verses of the Quran and the prophetic narrations.

In the endeavor to develop specific rules to regulate human interaction, the role reason plays as a source of knowledge in general, and laws, in particular, have been the subject of debate among theological sects of the early Muslim communities. The sect that could be mentioned to have developed in the early community after the *Khilafah* period³ is the Mu'tazilla sect. This school is identified for its emphasis on reason as a source of knowledge for factors related to the nature of reason itself and the place it has in the Quran and other factors related to the weakness of other sources such as prophetic traditions as the authentic source of knowledge in Islam.

According to the Mu'tazilites, based on the universal legal values recognized and protected in the Quran, the logical faculty of humans would serve as the source of knowledge and law that could empirically interpret and reach conclusions in a way adaptable to the changing realities of societies. They believe that divine revelation is necessary for rational thought to identify what is good and bad. The role of revelation, or the Quran specifically, would be to affirm the general values of humanity and be a reminder as the Quran itself refers to these ideas.

On the other side, the Asharite school of thought has later adopted a more traditionalist approach on the epistemic issue of the source of knowledge. As opposed to the earlier Mu'tazilites, the Asharites argue that human reasoning is open for error and it needs fundamental guidance from God's revelations. Hence, human reasoning cannot reach a certain knowledge about what is good or bad, or right and wrong.⁴

In between these polar positions about the epistemic status of reason as a discursive source of knowledge, contemporary Muslim thinkers and reformists lean towards the Mu'tazilla approach in light of the support their views have from the scriptures and the reality. On the one hand, The Quran states norms such as justice and mercy as natural human values in the neutral tone that they are inherent to the nature of man, not as divine prescriptions or guidance. On the other the Quran elevates human thought to be a pathway to divine and spiritual truths, let alone to deduce rules of law for human interactions as individuals and society both from the universal moral premises and empirical realities. Thus, reformists such as the Jamaluddin al Afaghani and Muhammad Abduh, and more recently Taha Jabir Alwani, Abdulhamid Abu Sulayman, and

³ Succeeding periods of rule after the death of Prophet Muhammad.

⁴ Juan E. Campo, encyclopedia of Islam, New York: Facts On File, Inc 2009, p. 144.

Muhammad Hashim Kamali have argued for rational thought and the flexible and adaptable nature of Sharia law by way of independent reasoning (*Ijtihad*).⁵ This means while the moral ideals remain in place eternally, *Ijtihad* (reasoning) is capable to be a source of knowledge and law.

3. Epistemic Thoughts in the Sharia and Their Implication

From the ontological point of view, Maturidi asserts that universal principles and fundamental laws exist separate from divine prescriptions or revelations.⁶ From an epistemological angle, this means such values and principles can be asserted through human conscience without divine guidance. In other words, the independent ontological existence of universal human values has predicated for cognitivity of such values by virtue of being a human being. As opposed to this understanding of the Maturidi School, the Asharite School has held a position that strictly attaches human norms to the divine revelation and asserts that humans cannot reach certain knowledge of the fundamental values.⁷ But this position of the Asharite is utterly unrealistic for a reason that human civilizations and societies have existed in the past and in the present who held a secular view and live with no or less importance to divine or prophetic guidance have upheld universal values as equal as or more so to religious societies. In short, an individual who does not accept the concept of divine revelation could affirm and believe in human ideals. This means universal values are eternally natural to the nature of the human being not so with what is held as faith. It is to be noted that this view of the Maturidis and contemporary Muslim reform thinkers is expressed as the religious position of Islam and the Sharia. Meaning that, though divine revelation is central to the theological beliefs in Islam, its relation with fundamental human values is not a source or foundation.

To put forward some reflections on the relationship between divine revelation and fundamental norms (first/axiomatic principles), it is one of confirmation. Meaning that divine revelation as set

⁵ See: Taha J. Alwani, *The Crisis of Thought And Ijtihad*, *The American Journal Of Islamic Social Sciences*, 10, No. (2) (1993), p, 234. For Amharic explanation on the nature and methodologies of *Ijtihad*, see: አልዩ አባተ፣ ሦስተኛው የሽሪላ ምንጭ፣ ሊጅቲሊድ፣ Jimma University Journal of Law, Vol. 11, 2019.

⁶ Richard C. Martin, *Encyclopedia of Islam and the Muslim World*, Maturidi, Al-, Macmillan Reference USA (2004).P. 443.

⁷ M. Abdul Hye, Ash'arism, <http://www.muslimphilosophy.com/hmp/14.htm> (Accessed: 13 Aug 20).

out in many Quranic verses has the purpose of reminding humanity and calling to the original and uncorrupted human nature (*Fitra*) whenever human beings go away from natural values. If society upholds them well, the revelation will have a confirmation role and encourage individual members to be steadfast and maintain a balanced society where natural principles and virtues such as justice, equality, fairness, piety are maintained. In other words, the role of revelation in respect of such universal objective values is not of instilling them to be the fabric of communities, but to maintain and uphold them as a reminder. This does not rule out the area in which divine revelation has a full value-instilling role, which is manifest mainly in theological and spiritual areas in which human *Fitra* and rational ability have limited or no normative role.⁸

4. The Naturalistic and Positivistic Aspects of the Sharia

The positivistic aspect of sharia is manifest in its juristic reasoning framework as rightly noted by contemporary Islamic thinkers like Tarik Ramadan that sharia is a set of principles and general norms that aims to recognize and protect universal human values.⁹ It is not in the intention of the primary sources to provide detailed specific regulation for every individual and societal interaction. The function of promulgating specific rules considering the prevailing circumstances on the ground is left to the human intellectual endeavor. In other words, besides the divine prescription of the overarching principles and objectives of the law, detailed substantive and procedural rules are left for people of knowledge and insight to put forth suitable law amenable to the changing circumstances of societies. This task of intellectual endeavor is referred to as *Ijtihad* (Independent Reasoning) in the Islamic civilization.¹⁰ This opens the potential for the enactment of laws that in reality are repugnant or contrary to the norms of justice and objective human values within the juristic framework of *Ijtihad*. Or less seriously, the

⁸ See: Yasien Mohamed, *The Ethical Worldview of the Qur'an*, Yaqeen Institute for Islamic Research (2019), p.1. In matters related the existence and nature of the divine/supernatural being, *Fitra* has strong cognitive role, whereas in metaphysical matters, which look for physical description, *Fitra* and reason have no role at all. Only revelation will provide the information in this regard whatever the authenticity or reliability of the description or narration is.

⁹Tariq Ramadan, *Western Muslims and the Future of Islam*, Oxford University Press, Inc., (2004), pp. 31-32. Watch Also: Tariq Ramadan, Has Political Islam Failed, Head To Head, Aljazeera Head To Head Al Jazeera: "Has Political Islam Failed?" <https://www.youtube.com/watch?v=Ucwgs0iuyce> (Accessed On: 13, Aug, 2020).

¹⁰Mohamed Abdel-Khalek Omar, Reasoning In Islamic Law: Part One, *Arab Law Quarterly*, Vol. 12, No. 2 (1997), p. 148.

rules promulgated through *Ijtihad* may not serve the purpose in question in light of the prevailing circumstances which in long run may not contribute to the realization of moral values.

The greater part of legal regulation of human interaction in sharia reflects the positivistic nature of sharia jurisprudence. Legal positivism has given primary importance to empirical reality to define law. Whatever route it may take to come to a rule what is governing the behavior of society is what is defined to be law according to positivistic legal theory. When Islam attaches great importance to *Ijtihad* (rationalization) as a source of knowledge and law, in particular, it means what would be laid down as law a *Mujtahid* (jurist) either individually or in a group (council – *Ijtihad Jama'i*) is the law will govern the conduct individuals and society.¹¹ What makes the law of *Mujtahid* (jurist, councils, parliaments, etc.) in the definition of positivism is that it is possible for legal rules deduced from the exercise of *Ijtihad* to be against the universal moral standards inherent in the nature of humans and recognized and protected by the primary source of sharia i.e. Quran and Sunnah. Despite the non-compatibility of juristic laws to moral values does not automatically invalidate the legislation based on *Ijtihad* for all practical purposes. The change to the rules has to go through the process of *Ijtihad* again. In other words, the fact that the rules enacted through *Ijtihad* are contrary to moral values or do not serve the purpose of moral objectives has to be appreciated/acknowledged by *Ijtihad* itself. Until then the law or rules laid down will serve as binding as those moral laws. The 'what is' understanding of the law of positivists, rather than "what ought to be" is reflected in this aspect of sharia.

The main drawback of a positivistic understanding of the law is the lack of a normative approach to law, which means it does not provide standards or values the law should uphold or should not disregard or violate. It (positivism) simply reads the existing legal order that rules the conduct of society and state. The problem with this approach is that it is open for what is known as a rule by law whereby law is used as an instrument to do all kinds of injustice and oppression against society. It impliedly endorses situations where a sovereign can create any law and enforce it and avoids the sense that unjust law has to be challenged for lack of substance expected from the law. Positivism in its empiricist approach to law reinforces one of the negative implications of the concept of rule of law. Rule of law as a constitutional value instills common understanding and

¹¹See: Aznan Hasan, An Introduction to Collective *Ijtihad* (*Ijtihad Jama'i*): Concept and Applications, *The American Journal of Islamic Social Sciences*, Vol. 20 No. 2, p. 1.

conception (feeling) that everyone should obey the law including those who are in authority. Whatever the content of the law might be, the value-free definition of law without attaching it with justice, freedom, and liberty, public interest has no purpose to serve. Further, the empirical approach to law has a negative impact of weakening civic initiative to challenge unjust laws and governance. It impliedly forces citizens to submit to unjust laws of a sovereign, societal culture, and religion. Natural law features of Islamic jurisprudence cure this drawback of positivism.

The naturalistic nature of Sharia is manifested in the recognition and protection of fundamental principles of justice and human freedom in the source of sharia. The naturalistic position of the sharia provides normative guidance to the intellectual effort of *Mujtahids* to rule society by law. Thus, the legislative exercise and the resulting substantive and procedural laws would not be arbitrary and in violation of the first principles. Despite the embodiment of fundamental universal values in the nature of humans, they need to be somehow recognized and protected by the kind of liability that Islam asserts in its theological worldview. This is a next life liability that brings human beings into account for what they have done or earned in their earthly life. This shows how sharia, as a religious legal system is underlined by the theological worldview of Islam. Meaning that the theological outlook of Islam provides personal accountability in the life after death. Rational arguments have been put forth by the Quran for the inevitable existence of the afterlife one of which is the quest for complete and ultimate justice.¹² As clarified earlier, justice might not be served for two main reasons. One is the laws that are supposed to fulfill the requirements of justice might not achieve this purpose. The other scenario is when laws are not respected and enforced by individuals and institutions despite being just and beneficial in their substance. In such circumstances, the universal human values articulated in the Quran will serve as the returning point to which society and government should strive to make the cornerstone of their existence. Generally, the Sharia having the two approaches of positivism and natural law theory and by instilling the sense of liability not compromised by the failures of worldly law enforcement mechanisms has far better potential increasing a balanced society.

Besides improving respect for human values, Islamic jurisprudence instills other positive norms or virtues that will make humanity better. This will be realized not only through the retaliation of

¹² See: Quran 45:22.

other fundamental virtues of humanity that operate beyond the bounds of legal relationships. These include the virtues of altruism and mercy. Societal life will be much more conducive, harmonious and peaceful when one cares for others, not simply as part of one's pursuit of pleasure, but also takes virtues to be bliss in the next life. A world becomes a better place for living, not just a place where justice is established but also mercy and love are prevalent in societies and across the global community. To sum up, two broad advantages/principles be discerned in the ultimate source/origin of objective norms of humanity. From creator God and the resulting accountability for worldly activities make the obligation to uphold justice and obey law an ultimately justified human value. Hence, it immensely improves the respect to law realization of justice in a society.

5. Conclusion

The Sharia fills the gap of secular jurisprudence by identifying the ultimate source of the duty to respect fundamental norms of humanity, and it instills the sense of accountability for the respect and protection of such values at the individual, societal, state, and interstate levels.

The challenge facing secular legal systems today is the absence of these completing thoughts of Sharia i.e. affirmation of the ultimate initiator and maintainer of the ideals and ultimate accountability of individuals in the hereafter. This has resulted in a relatively weak rule of law and law enforcement at the national and international levels. The fact that citizens, state administrations, and governments in international relations obey laws on utilitarian grounds is exposed to compromises in favor of individual selfish interests and emotions.

The idea of ultimate human liability not only advances the respect to law at the individual citizens' level but also at the corporate and state administration levels where direct individual accountability is weak. This problem becomes bigger in international relationships where accountability is very loose due to the weak enforcement regime of international law. Systemic breaches of universal values have less chance to be checked in interstate relationships as the perpetrators (states) have a much stronger authority and power stemming from sovereignty as compared to the law enforcement capacity of the international legal system.

We have witnessed in the recent history of international relations that states have broken universal values for national interest and political superiority despite the solemn promise and commitment of sovereign countries to respect and protect human rights after the Second World War. Countries including those that are forerunners in bringing world states into a pact to respect and protect human values have been involved in the most heinous and mass violation of human rights under the guise of fighting terrorism and preventing future nuclear wars. This can successfully be attributed to the development of a selfish and materialistic political state where individual accountability and God-consciousness have been eroded through time.