The Logic of Law Making in Islam

This pioneering study examines the process of reasoning in Islamic law. Some of the key questions addressed here include whether sacred law operates differently from secular law, why laws change or stay the same, how changing laws are reconciled with fixed foundational texts, and how different cultural and historical settings impact the development of legal rulings. In order to explore these questions, the author examines the decisions of thirty jurists from the largest legal tradition in Islam: the Ḥanafī school of law. He traces their rulings on the question of women and communal prayer across a very broad period of time – from the eighth century to the eighteenth century – to demonstrate how jurists interpreted the law and reconciled their decisions with the scripture and the sayings of the Prophet. The result is a fascinating overview of how Islamic law has evolved and the thinking behind individual rulings.

Behnam Sadeghi has been an assistant professor of religious studies at Stanford University since 2006. His research spans Islamic thought and law in the early and postformative periods. In addition, he has made groundbreaking contributions to the history of the Qur'ān and the *ḥadīth* literature in a series of published essays.

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Women and Prayer in the Legal Tradition

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Preface

What makes laws endure or change? When a law changes, how does a tradition of legal interpretation justify the innovation in light of its legal precedents and foundational texts? What is the function of the reasons given for laws? What relationship does law bear to social values? These interrelated questions fall under the heading of philosophy of law, yet it is mainly through the study of history that they can be probed. Answering these questions in different cultural and historical settings is a prerequisite for developing a general theory of law, for it makes distinguishing universal elements from culturally specific parameters possible. In particular, a culturally specific feature of Islamic law is its religious character. One may ask, therefore, whether the fact that Muslim legal traditions invoke sacred authority makes an essential difference to the way the questions posed above are answered. In other words, does sacred law operate in a fundamentally different way from secular law? This book explores these questions through a study of the largest legal tradition in Islam, namely the Ḥanafī school of law.

The book begins by creating a general model of juristic decision making that describes any legal tradition, Islamic or not, in terms of a number of parameters. It does not presuppose that all legal traditions are identical, for the parameters in the model may vary from one tradition to another. A central task of the book is to determine those parameters in the Ḥanafī case. This is achieved through diachronic historical case studies related to laws on women and prayer. The book examines how certain Ḥanafī laws, and the reasons Ḥanafī jurists gave for those laws, evolved from the eighth century to the eighteenth century as reflected in the opinions of some thirty jurists.

Premodern Islamic law as formulated in the four Sunnī legal traditions is sometimes described as the end product of the process of interpreting the foundational texts, namely the Qur'ān and the *ḥadīth*s (sayings of the Prophet). Jurists are said to have attempted to *derive* the laws from these sources. This impression owes to the fact that a legal reason (i.e., the reason a jurist gives for a law) often takes the form of a specific interpretation of the Qur'ān and *ḥadīth*s, suggesting that the process of interpreting these sources is what generated the law. On this view, these texts represented the starting point of jurisprudence, and the laws its outcome. The transformation of the textual raw material into the laws is said to have taken place through the application of established, recognized methods of interpretation, methods that are described in the classical Islamic genre of legal theory, the *uṣūl al-fiqh*.

The book shows that in fact, at least in the Ḥanafī case, this image must be turned on its head. What is thought to be the outcome of jurisprudence, namely the laws, are actually the starting point for the jurist. The end product, on the other hand, is an interpretation that reconciles the law with the textual "sources," the Qur'ān and the Prophet's sayings. The role of the methods of interpretation, therefore, is not to generate the laws, but rather to reconcile them with the textual sources. The hermeneutic standards governing the process of interpretation can be seen to be so loose as to be inherently incapable of generating laws. They are so flexible that they can be used to reconcile just about any conceivable candidate for the law with the textual sources. Providing maximal indeterminacy, these standards do not constrain the jurist to adopt one possibility (as to what the legal outcome should be in a given matter) to the exclusion of another.

If the binding texts (the Qur'ān and the *ḥadīth*s) and the standards of textual interpretation did not determine the laws, the question arises, what did? If the hermeneutic methods imposed no constraint on the laws, does this mean, then, that jurists had a free hand in fashioning the laws as they wished? No, in fact there were severe constraints on the laws. The primary constraint was imposed by the need for legal continuity: normally a law would not change, even if it failed to mirror new social values, as long as it did not become intolerable or highly undesirable. If a person living in the premodern period asked, "Why is this the law?" the correct answer would have been simply, "because this used to be the law," unless this was a new law, in which case the answer would have been, "because the old one became intolerable or highly undesirable due to new social conditions." On this account, present law was a function only

of the interaction between past law and new social realities; the reading of foundational sources played no causal role in the evolution of law although it may have played a role in its genesis. This account happens to be a good approximation of the dynamics of secular law, which have been delineated by the legal historian Alan Watson based on his studies in a variety of legal traditions. Thus, at least as far as the fundamental question of how present law relates to past law is concerned, the Ḥanafī legal tradition is similar to secular law notwithstanding its otherwise religious character.

The indeterminacy of the exegetical bridge that linked the laws with the textual sources had important historical ramifications for Ḥanafī jurisprudence. This bridge was constructed of *exegetic rationales*, that is, statements of the type, "this verse abrogates (or qualifies) that one." The flexibility with which exegetical rationales were deployed ensured that any conceivable candidate for the law could be reconciled with the binding texts, and, conversely, that changes in what counted as a binding text did not destabilize the laws. The exegetical bridge did not collapse when the ground shifted on either side of it. When the ground shifted on the side of the laws, for example, when the Ḥanafīs were compelled to change a law due to new social values or circumstances, hermeneutic flexibility allowed them to reconcile the new law with the textual sources, thus enabling legal change. On the other hand, when the ground shifted on the side of the textual foundations, hermeneutic flexibility served the interests of legal continuity by helping to protect the laws from the impact of the changing texts. This happened in the aftermath of the triumph of the Ḥadīth-Folk ideology in the ninth century, when many a *ḥadīth* that at face value contradicted established Ḥanafī laws came to be regarded as binding. This did not force jurists to give up the laws, for hermeneutic flexibility allowed them to neutralize the newly binding texts through interpretation. This episode represented an expansion of the textual basis, but in later centuries there were also contractions. The textual foundations diminished when the Prophetic sayings that had been cited in support of certain laws were disqualified for having been found inauthentic. This did not spell the end of the laws seemingly resting on the disqualified texts. Rather, the laws were furnished new justifications. Hermeneutic flexibility allowed jurists to devise new exegetic rationales to replace those based on the now-lost texts.

The metaphor of a pliable bridge stands for the malleability and revisability of legal reasons and, in particular, of exegetic rationales. Legal reasons (i.e., the reasons jurists gave for the laws) surrounded the laws,

forming a protective cushion that absorbed the impact of contrary evidence. The dispensability of legal reasons manifested itself in the historical pattern of the relative stability of laws compared to the reasons given for them. This historical pattern, combined with logical analysis, shows that even though legal reasons logically precede laws, there is an important sense in which they are secondary to the laws: reasons are actually devised to explain existing or newly desired laws. More often than not, they neither cause nor motivate the laws.

The Contribution Made by This Book

Academics are sometimes asked by their colleagues to enumerate concisely the ways in which their contributions differ from those of other researchers. I will do so briefly in the hope that it will be useful for some readers.

First, the broad characterization of juristic thought that I just sketched out and that I will flesh out in this book is largely original, though it certainly resonates with the works of other researchers in some of its particulars. To accept this new picture as a whole is to experience a gestalt shift in which familiar concepts are seen in a new light. For example, techniques such as abrogation, qualification, and analogy that are almost universally described in the academic literature as methods for generating the laws are now seen to operate in the reverse direction, with the laws as their starting point.

Second, the existing academic literature describes premodern methods of scriptural exegesis, but in doing so it normally relies on Muslim works of legal theory, the *uṣūl al-fiqh* genre, a field that was devoted to determining the proper methods of interpreting the Qur'ān and *Ḥadīth*. Scholars usually do not take into account that the principles that premodern legal thinkers expounded in this genre were not always applied in practice. To investigate hermeneutics in practice, one should examine the genres in which the laws were developed and justified, namely those of positive law (*fūrū'*) and legal opinions (*fatāwā*). To my knowledge, this is the first book-length and diachronic study of scriptural hermeneutics in postformative positive law.

Third, as a contribution to Islamic legal studies, this book is methodologically distinct. It is an explicitly framework-driven study. My intention is not to say all that is important about the Ḥanafīs or the legal case studies, nor to engage with every important result reached in recent scholarship. Rather, the study narrowly pursues specific objectives: I approach

the legal case studies to investigate the questions generated by the framework devised in Chapter 1, a schema that is well suited to comparative study and the investigation of the causes of continuity and change.

Fourth, in relation to its objectives, not only does the study characterize mainstream methodology in the Ḥanafī school, but also it identifies and describes the few Ḥanafī jurists who did not follow this typical Ḥanafī approach.

Fifth, the framework-driven case studies lead to conclusions elaborated in the final three chapters that enrich some of the ways in which Islamic legal thought is normally understood. These address questions such as the relationship between laws and values, the dynamics and mechanics of legal change and continuity, the concrete ways such dynamics were manifested in Ḥanafī thought over the centuries, and the specific justificatory strategies that made continuity or change possible.

No contribution is without limitations. This book's results could be tested and refined by additional case studies. The conclusions about the role of social values could be further tested and enriched by research into extralegal literature. Important questions related to the case studies other than those treated in this work could certainly be investigated.

Outline of the Book

The first two chapters are introductory in nature. Chapter 1 introduces a general framework for the study of any legal tradition, Islamic or not. This framework underpins the subsequent historical case studies. Chapter 2 introduces, briefly, the Ḥanafī school of law and the legal subject matter of the case studies.

The next three chapters, Chapters 3 to 5, comprise the diachronic case studies at the heart of the book, treating certain laws concerning women and group prayer. They focus on legal reasons, their relationship to laws, and the question of continuity and change.

On the basis of these case studies the last three chapters, Chapters 6 to 8, address broad questions of philosophical and historical interest.

Chapter 6, "The Historical Development of Ḥanafī Reasoning," gives a brief description of the historical trajectory of Ḥanafī legal interpretation in light of the case studies. It describes how the expansion and shrinking of the corpus of binding texts impacted the laws – expansion in the aftermath of the rise of Ḥadīth-Folk ideology, and contraction in later centuries as some *ḥadīth*s that jurists had formerly relied upon were disqualified.

Chapter 7, "From Laws to Values," attempts to explain what one can learn about a society from its laws and legal literature. It emerges that one can learn less than is commonly thought. I argue that law has dynamics of its own that distinguish it from other elements of social reality, and that law is not reducible to the values of a community, essential cultural or religious tenets, or the ideologies of ruling elites.

Chapter 8, "The Logic of Law Making," offers an analysis of the structure of legal reasoning, discussing how legal reasons change in order to accommodate changes in laws. It also characterizes the ways in which exegetic rationales involving qualification, abrogation, and analogy are used to ensure hermeneutic flexibility.

The Appendix establishes the authenticity of the earliest Ḥanafī texts that are used in Chapters 3 to 6.

A Skimmer's Guide

Those who would like to read the conclusions about the nature of legal reasoning without the detailed arguments for them are urged to read the preface, Chapters 1, 7, and 8 and Sections 6.2 and 6.3. (They ought to withhold judgment, however, unless they give the case studies in Chapters 3, 4, and 5 a careful reading.)

Readers who are primarily interested in the laws themselves, for example, because of their interest in gender norms, should read Chapters 2, 3, 4, and 5. For a discussion of what the laws imply about the social values bearing on women and gender, they can read Chapter 7.

Those who are interested in the historical development of the Ḥanafī school of law but not in philosophical questions may read Chapters 2 and 6 and the Appendix.

Readers who are interested only in the first century of Islam will find that Chapters 3, 4, and 5 begin with the formative backgrounds of the legal case studies and that the Appendix concerns the dating of traditions and texts.

Miscellanea

Two authors may use the same word and mean different things by it. And two authors may use different words and by them mean the same thing. Obviously, a word is often used in more than one sense. Since no sense is inherently better than any other, one need not argue over the "right" definition. But authors can minimize confusion by specifying the sense in

which they use a key term. When an author does so, it becomes incumbent upon readers to substitute the given definition for every occurrence of the term. I use some terms in technical senses. To make it easier for readers to keep track of them and their definitions, I bring most of them together in the list "Key Technical Definitions."

A note on dates: a *hijrī* year overlaps two consecutive years in the Gregorian calendar. For simplicity, I often give only one of these years.

The lowercase *ḥadīth* refers to an individual report about the Prophet while the uppercase *Ḥadīth* refers to the corpus of such reports.

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Key Technical Definitions