

THE GREEN BAG

AN ENTERTAINING JOURNAL OF LAW

SUMMER 1999
2D SERIES • VOLUME 2 • NUMBER 4

*For every wrong there is a remedy.
Things happen according to the ordinary course of nature
and the ordinary habits of life.
The law never requires impossibilities.*

*Private transactions are fair and regular.
A thing continues to exist as long as is usual with
things of that nature.
The law disregards trifles.*

Calif. Civ. Code §§ 3523, 3546, 3531, 3545, 3547, 3533.





The Spirit of the Ghost of Islamic Law?

BERNARD WEISS
THE SPIRIT OF ISLAMIC LAW
UNIVERSITY OF GEORGIA PRESS 1998

Abdullahi A. An-Na'im

BERNARD WEISS' BOOK, *The Spirit of Islamic Law*,¹ is a learned, insightful and empathetic exposition of the "spirit" of the so-called classical Islamic Law during its formative period more than a thousand years ago. Drawing on his masterful and profound knowledge of Islamic intellectual history in its original Arabic sources, Weiss explains the formation of Islamic Law, and examines its main underlying themes and controversies. He clearly and eloquently explains some of the key debates, and emphasizes the sophistication of the founding Muslim jurists. For example, he explains in precise and informative terms the ways in which they negotiated the paradox of belief in the discoverability of divine intent, on the one hand, and the impediments to effective communication that language itself created in the foundational texts, on the other.²

Weiss' analysis is accurate, comprehensive and profoundly perceptive, given the premise of taking Islamic Law as an historical phenomenon, instead of seeing it as integral to the current experience of Islamic societies and communities around the world. As he puts it in the Epilogue: "Generally speaking, I have employed the past tense but not without considerable misgiving ... Why should I write as though it [Islamic Law] were a thing of the past?"³ Weiss does not conclude that one should necessarily speak of Islamic Law in the past tense, but merely notes factors on both sides of the issue. Perhaps he felt constrained by the nature of the series for which he was writing in this regard.

In my view, that question is too important for any conception of the spirit of Islamic Law to be left undecided. Whether Islamic Law is

Abdullahi A. An-Na'im is a Professor of Law and Fellow of the Law and Religion Program of Emory University. He was formerly an Associate Professor of Law at the University of Khartoum, Sudan.

¹ Titles in this series (*The Spirit of the Laws*) are said to be concerned less with the rules of the law and more with the relationships of the laws in each system with religion and moral perspectives; the degree of complexity and abstraction; classifications; attitudes to possible sources of law; authority; and values enshrined in law.

² *Ibid.* 53-54.

³ *Ibid.* 186.

seen as an historical phenomenon or continuing tradition will profoundly affect the understanding of its spirit by all readers of this book, whether Muslims or not. It is inconceivable that one could write about the spirit of the Common Law today without reference to what that means in England, the United States, Canada, Australia, South Asia and most of sub-Saharan Africa. Why is it conceivable, then, to write about the spirit of the "Ghost" of Islamic Law?

An author like Weiss, I imagine, may refrain from taking the present time into account in order to be able to present a credibly "positive" view of the spirit of Islamic Law. It is clear even to the casual observer that anything to do with Islam and Islamic societies today is viewed with either indifference or hostility among Western intellectuals and scholars, and more so by policy makers, media and the public at large. In this context, an author who is appreciative of the pre-modern Islamic civilization or sympathetic to present Islamic societies will probably try to find ways of presenting the spirit of Islamic Law in the best possible light. But such motivations, it seems to me, should indicate writing about the spirit of Islamic Law from a contemporary as well as an historical perspective, in order to explore the normative and institutional implications of the latter for the former. That book would have been more interesting and worthwhile, whether as a scholarly project or with a view to supporting Islamic societies in their present predicament. From this perspective, I will take his analysis of the spirit of classical Islamic Law as my point of departure in attempting to outline elements of a possible approach to understanding that spirit if Islamic Law is to remain alive and relevant in the present context of Islamic societies.

For my purposes here, I would emphasize the basic paradox of taking Islamic Law to be divinely predetermined, on the one hand, while accepting the unavoidable role of human agency in interpreting and applying it in practice, on the other. One aspect of this paradox is explained by Weiss in his discussion of such notions as human subordination to divine sovereignty, and of the textualist/intentionalist approach of many of the founding jurists of Islamic Law. He also notes the distinction between Shari'a Law and fiqh law: "Shari'a Law is the product of legislation (*shar'*), of which God is the ultimate subject (*shari'*). Fiqh law consists of legal understanding, of which the human being is the subject (*faqih*)."⁴ This distinction is commonly made by present day scholars of Islam, and certainly has its basis, for example, in verses 1 to 4 of chapter 43 of the Qur'an. The problem is that Muslims today tend to take fiqh to mean Shari'a, thereby making any criticism of, or attempt to reformulate, the former appear to be an attack on the divine source of Islamic Law. It is important to note this here because the confusion between Shari'a and fiqh among the vast majority of Muslims tends to create a formidable psychological barrier to serious reform of Islamic law in the modern context.⁵

Regarding another aspect of the paradox, Weiss emphasizes in various parts of his book (especially in chapter 5) how the founding jurists of Islamic Law openly acknowledged the unavoidability of human agency, while recognizing its inherent limitations in the elaboration of divine law. While those jurists were independent from political power of their time, their authority to declare and elaborate the law was not personal. "It is, in other words, an authority that depends upon the methodology that the jurist employs and the

⁴ Ibid. 120.

⁵ See Abdullahi A. An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law*. Syracuse, NY: Syracuse University Press, 1990, chapter 3.

The Spirit of the Ghost of Islamic Law?

skills that he possesses."⁶ Yet, the law they developed was always seen by them and their communities as representing the jurists' understanding of the law.

Although 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 [literally meaning understanding] – that must be normative for society.⁷

Such acknowledgment of the possibility of human error meant profound acceptance of diversity of opinion among all jurists who applied vigorous methodology to the best of their ability, since it is impossible to know which opinion is correct and which is false.⁸

It seems to me that this paradox raises several sets of issues for the spirit of Islamic Law in the present context, such as the question of the continuing authority of the specific conception and general formulations of the law by those jurists: To what extent should that conception and those formulations remain valid and binding? Should that be with regard to their conception of the basic nature of Islamic Law, determination of its exclusive sources, the particular methodology they devised for interpreting those sources, or the main principles and rules of the system as a whole? Moreover, there is the question of the relationship between Shari'a, fiqh and positive law today. If Shari'a is the permanent and divine manifestation of the will of God, how is it to be discovered for the purposes of positive law formulations in the context of the present nation state, as discussed below? Should the law be simply pronounced by jurists, whether individually or as constituted in some institu-

tionalized form, or does it have to be formally enacted by a human legislature? If it is the former, should the state play any role in regulating who is qualified to pronounce the law, whether individually or institutionally, or can the matter be left to the independent judgment of each Muslim as a matter of religious conscience? In the final analysis, since whatever approach is adopted has to be implemented by human beings, how can one select among competing or conflicting views of what the law is on any given matter?

In attempting to resolve these questions, after long and complex debates, the founding jurists of Islamic Law found refuge in the principle of consensual infallibility: the notion that whatever all jurists (and the wider Muslim communities) accepted as valid is deemed to be permanently binding on subsequent generations. This principle was used to limit the diversity of opinion among jurists and schools of thought. But the many serious problems with the application of this principle noted by Weiss regarding past experiences are even more difficult to resolve in the present context.⁹ These problems include, for example, difficulties of applying agreed criteria for selecting those jurists whose opinion should constitute consensus (*ijma'*), and how those opinions are to be identified and verified.

But the key point I wish to emphasize here is that whatever concepts and methodology the early jurists developed and implemented among themselves to limit and mediate differences of opinion regarding the interpretation of what Weiss calls "foundational texts" of Islamic Law (the Qur'an and traditions of the Prophet, known as Sunna) were themselves the product of their human judgement. Accordingly, I submit, there is no final resolution for the

⁶ The Spirit of Islamic Law, 115.

⁷ Ibid. 116. Emphasis in original.

⁸ Ibid. 120-122.

⁹ Ibid. 122-126.

above-mentioned paradox: While all Muslims agree that the Qur'an and Sunna are the divinely ordained sources of Islamic Law, there is no way for deriving positive principles and rules of Islamic Law except through human understanding which should not logically exclude the possibility of serious differences of opinion, whether in the past, present or future.

Therefore, the crucial point for the spirit of Islamic Law today is how and by whom will such differences of opinion be properly and legitimately mediated in practice in order to determine what is the positive law to be applied in specific cases. In other words, how can the community know what the law is in ways that acknowledge the divine origin of its sources without suppressing some views in order to uphold others? How can there be sufficient certainty in knowing the law for day to day application, without excluding possibilities of disagreement which are the only way for further growth and development of the law itself? Seeking answers to these and related questions will lead to consideration of the nature of political power and manner of its exercise in Islamic societies at any given point in time. In other words, for Islamic Law to remain relevant and applicable, it has to be negotiated through the political process and sustainable legal institutions of the society in question. This is unavoidable because the need to know the law is constant and increasing, and the consequences of discovering and applying the law will affect people's vital interests.

The key to the analysis I propose, which Weiss accepts without sufficiently emphasizing, is the role of historical context in shaping the spirit of any legal tradition, whether so-called religious or secular. For example, he does not discuss how the nature of the state that emerged out of a series of civil wars from the late Medina period, through the Umayyad dynasty into the early Abbasid period (from the middle of the seventh to the end of the

eight centuries) may have prompted the extremely significant shift from founding the law on the personal authority of the jurists of the first century of Islam, to the textualism of the end of the second century. By understanding that context, I suggest, one can appreciate why Islamic Law evolved the way it did, and had only a limited and uneven impact on Islamic societies in the past as noted by Weiss in his Epilogue. An understanding of such transformation should inform our understanding of the spirit of Islamic Law in the present context by indicating which aspects of the formative dynamics of that tradition are likely to survive or re-emerge.

In my view, the nature of the state today, and of the global system of which it is part, condition the spirit of Islamic Law more than ever before. It is true that there is growing evidence of the diminishing role of the state in this age of globalization. But it is equally clear that societies are subjects (makers) of globalization as strong states, not as indeterminate international entities. To paraphrase Marx, the "withering away of the state" can only be achieved through sustainable statehood. In any case, while the diminishing role of the state may be accepted as a conceptual possibility, the realities of national and global political, economic, security and other relations remain firmly embedded in the existence of sovereign states that have exclusive jurisdiction over their citizens and territories. For Islamic societies, this point has recently been painfully and traumatically emphasized by the eight years of the Iran/Iraq war of the 1980s, and the composition of the international alliance of Muslim and non-Muslim countries which forced Iraq out of Kuwait in 1991. The governments of Islamic countries on both sides of those conflicts were acting (and continue to act) as nation states rather than an indeterminate global Islamic community, traditionally called the *Umma*, or totality of Muslims at large.

The Spirit of the Ghost of Islamic Law?

In light of these present realities, the spirit of Islamic Law today should be understood in relation to the role of the state in the determination and implementation of public policy in general, especially the enactment and enforcement of the law in daily life. I am not suggesting here that the nature of the state is identical for all societies because the processes of state formation and consolidation vary from one country to another. What I am suggesting is that there are certain common characteristics that all states need to have in order to be part of the present international system because membership is conditional upon recognition by other members. It is meaningless for a people to claim that they have constituted themselves into a state unless and until that claim is accepted by other states. It is true that not all the criteria for state recognition are either categorical in theory or consistently applied in practice. Nevertheless, there is a recognizable minimum that can be called the "universal" features of statehood in the present sense of the term. In particular, the ability to determine and enforce the law in everyday life is central to the existence of any state, whatever its philosophical or ideological orientation may be.

Moreover, I am suggesting that the universal nature of the state and its global context today preclude the possibility of the application of Islamic Law as historically conceived. In current Muslim discourse, there is frequent reference to the notion of an "Islamic state" which is supposed to implement Islamic Law in a comprehensive and systematic manner. However, while this term may serve as a shorthand way of referring to states where Muslims constitute a clear majority of the population,

the adjective "Islamic" logically applies to a people, rather than to a state as a political institution.¹⁰ Moreover, I suggest an Islamic state as a political institution is conceptually impossible, historically inaccurate, and practically not viable today.

An Islamic state is conceptually impossible because for a political authority to claim to implement the totality of the precepts of Islamic Law in the everyday life of a society is a contradiction in terms: enforcement through the will of the state is the negation of the religious rationale of the binding force of Islamic Law in the first place. Enforcement by the state is also inconsistent with the extensive diversity of Islamic Law, as clearly explained by Weiss. Since enforcement by the state today requires formal enactment as the law of the land or adoption of clear policies specifying certain action by organs of the state, the legislature and government of the day (whatever their form may be) will have to choose among equally authoritative but different interpretations of the various jurists and their schools of thought. Yet, all those jurists insist that such choices are to be made by the believers according to their own conscience.¹¹ In other words, Islamic Law ceases to be a religious law once it is formally enacted and enforced by the organs of the modern state. What the state applies is its own political will, not that of God.

The historical fallacy of the claim is clearly demonstrated in the fact, commonly accepted among Muslims today, that there has never been an Islamic state that has consistently and systematically enforced Islamic Law since the Prophet's state of Madina (622-632 AD), or at most that of the first four Caliphs of Medina

¹⁰ Some scholars have used the term "Islamic state" to refer to those countries which have officially proclaimed Islam to be the state religion, or where Islamic Law is a formal source of legislation. However, I find such features problematic in that they do not accurately reflect an "Islamic" quality of the state.

¹¹ N.J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence*. Chicago & London: The University of Chicago Press, 1969, pp. 35-36.

according to the Sunni majority of Muslims. However, there is no basis for comparison between that early city-state and subsequent Muslim imperial states of the past, let alone the present-day complex states with their diverse populations and global context. The lack of historical precedent for an Islamic state is even more true for Shi'a Muslims, according to their own conceptions of the state and political authority.

This is not surprising, however, in view of the immense difficulties such a state will face in fulfilling its essential domestic and international functions in the present context, as I have elaborated elsewhere.¹² Problems that will arise from this prospect include the profound ambivalence of jurists to political authority which they neither sought to control nor knew how to make those who hold it accountable to the Islamic Law itself. Moreover, economic activities would be crippled by the prohibition of a fixed rate of interest on loans (*riba*), and of insurance as based on speculative contracts (*qharar*); enforcement of corporal punishments for certain specified offenses face serious unresolved procedural and evidentiary objections, let alone human rights concerns about cruel, inhuman or degrading treatment or punishment. Another type of problem is that the denial of basic citizenship rights for women and non-Muslims will face serious challenge by these groups internally, and by the international community at large. It is true that some Muslims may still claim that their state can operate despite all these difficulties. But the fact of the matter is that such a state does not exist anywhere in the world today, notwithstanding the claims of regimes like those in power in Afghanistan, Iran, Saudi Arabia or Sudan.

I realize that this line of thinking is commonly referred to as secularism, which is

supposed to be alien to Islamic thought since Islam and the state or politics are supposed to be united. In response, I say that it is misleading to speak of complete separation or union of any religion and the state. In my view, the issue is *the type of relationship* the two have, not that they are unrelated in any human society. In other words, I am not only saying that Islam does not require unity between religion and the state, but also that the issue itself is misconceived. The authority of religion and power of the state are two sides of the same coin, rather than being opposing paradigms.

It may also be queried what makes what I am proposing Islamic Law at all? What claim would such a system have to being a continuation of a historical tradition? In response, I say that such continuity has to be the product of an organic process whereby the legal tradition maintains its ability to respond to the needs and aspirations of its followers. Given the radical transformation of the world in which Muslims live today, continuity with the past can only be promoted through a drastic intellectual and psychological re-orientation, a *paradigm shift*, among Muslims. The ability to achieve a paradigm shift is the essence of all successful social movements, including that initiated and sustained by Muslim jurists and scholars from the seventh to the ninth centuries. In other words, the continuity of the Islamic legal tradition is to be achieved today through the drastic reconceptualization of Islamic Law, rather than futile efforts to resurrect the past. This is not to suggest that every innovation in this regard will necessarily be valid or sustainable, but rather to emphasize that the implementation of historical formulations of Islamic Law are neither viable nor desirable today. In my view, only by conceiving and implementing the necessary paradigm shift will present day Muslim scholars and policy makers be consistent with

¹² See generally, An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law*. Syracuse University Press, 1990.

The Spirit of the Ghost of Islamic Law?

the true heritage of the founding jurists of the Islamic legal tradition.

Many Muslim political activists claim, and western observers agree, that there is a sustained drive for the rejuvenation of Islamic Law. Some argue that this is indeed desirable in the present post-colonial age of political and cultural self-determination. If such predictions and assertions are to materialize at all, a new paradigm shift is needed because the earlier one has exhausted its ability to direct the development of Islamic societies in their present global context. Despite its historical focus, Weiss' analysis is

a very important and useful contribution to understanding the spirit of Islamic Law. But if this tradition is to remain alive and relevant, the present context of its theory and practice must be integrated into the analysis. In particular, I suggest that the realization that the way law was "Islamic" in the past is unlikely to be the way it can be "Islamic" today, is integral to the spirit of Islamic Law into the new century. Conversely, holding Islamic Law hostage to romantic notions of its idealized past is certain to progressively diminish its relevance and utility in present Islamic societies. *gb*