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Ijtihād Holds Supremacy in Islamic Law: Muslim Communities and the Evolution of Law

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Abstract: While the traditional view of Islamic law (*sharīah*) and jurisprudence is to consider the Qur'an as the starting point for legal matters, followed by the prophetic tradition, and then resorting to various forms of "ijtihād", it is argued here that the Qur'an was not really held in a position of legal supremacy. Since the time of the earliest Muslim community, it is "ijtihād" that has created the criteria by which Qur'anic and even prophetic rules are to be kept, suspended, and contradicted. Therefore, the Qur'an is not viewed historically as having legal supremacy for Islamic law and is not considered similar to some constitutions, against which laws are measured. Hence, in modern-day Islamic legal discourse, it would not be unreasonable to argue that "ijtihād" has supremacy in Islamic law, giving some flexibility to Muslim communities in the evolution of such laws.

Keywords: constitution; jurisprudence; legal supremacy; legal theory; Qur'an; shari'ah



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1. Introduction

Ahmed (2018), in *Sharia Compliant*, focuses on how Muslims are to take Islamic law into their own hands, which means that the community may reform Islamic law. Moreover, just as Ahmed seeks the democratization of "ijtihād" (independent interpretive jurisprudence), such calls have emerged in various Muslim communities (Moore 2010, pp. 17–25). Ahmed (2018) asserts that this is hardly a new phenomenon but is instead one that has existed throughout the history of Muslim tradition. His argument has direct implications for the way Muslim communities and societies would apply Islamic law. While Ahmed mentions many provocative examples, the argument he advances as to why Islamic laws are changeable contrasts with the Muslim tradition's understanding of the Qur'an as an unchangeable text. While this understanding may be true, there is a distinction between Qur'anic law and Islamic law, which means that Islamic law may be changed because the Qur'an, although understood by Muslims to be unchangeable, is not and was not recognized historically as an inviolable constitution by Muslim jurists throughout history. While this notion may not be explicitly mentioned in the judicial systems of contemporary Muslim-majority countries, it is practically the case. For example, Moustafa (2018, pp. 13–14) argues that legislative and judicial bodies institute a political struggle over religion in some Muslim-majority nations, although Massoud (2018) highlights the importance of understanding the colonial legal legacy of some of those nations. However, integrating various legal systems, and even the political struggle between the courts and religion, are themselves forms of "ijtihād" sanctioned by Islamic law. Meanwhile, even though family law in some Muslim-majority countries retained its Islamic law flavor, it continued to evolve with the times through reforms from within traditional Islamic law (Stilt et al. 2018).

While Islamic law followed a different trajectory from Qur'anic law, this is not unique. The Jewish tradition within the Qur'anic milieu had already taken a different path from its own sacred scripture, the Torah (Newby 1988; Mazuz 2014). Just as rabbinic jurisprudence evolved after the Torah was written and collated, in an attempt to interpret the laws laid down (Kanarek 2014), Islamic law (*sharīah*) also evolved after the Qur'an (Hallaq 1993,

1997, 2004). With all the rabbinic deliberations regarding rabbinic law, one might question whether or not Moses was the lawgiver, or if the law is more accurately attributable to the rabbis. In fact, the rabbinic adage states that while the Torah is *from* heaven, the Torah is *not in* heaven; meaning that the Torah is on the earth and the rabbis have the right to deliberate concerning it. Similarly, Muslim scholars can attribute Islamic law, which has been deliberated throughout the centuries by jurists (*fuqahā*) performing “*ijtihād*”, not to the Qur’an but instead to a post-Qur’anic environment.

The very basis of how Islamic law evolved is tradition. To traditionalists, the sayings and actions of Muḥammad, his companions, or the *imāms* (in the case of Shīī jurisprudence) allow jurists to interpret, deduce, interpolate, and extrapolate laws. However, if the authenticity of the tradition is disputed, then so is Islamic law. Diverse Muslim traditions have interpreted the law differently (Hasan 2012, pp. 23–42), from those who took solely the exoteric approach to those who took solely the esoteric approach and all who were in between.

This article is intended to compare Islamic law (*sharīah*) with Qur’anic law (*ahkām al-Qur’an*) to see how they sometimes diverge from one another. The purpose of this study is to distinguish Islamic law from Qur’anic law and, consequently, demonstrate that the Qur’an has not been understood historically by Muslims as occupying a position of legal supremacy. Thus, the calls by some contemporary scholars for the further evolution of Islamic law by Muslim communities are not at all radical and stem from within the Islamic tradition. Throughout this article, the words “supreme” and “supremacy” are used specifically in their legal definition, in which a supreme law or constitution would always take precedence. In other words, while many Muslims may give the Qur’an a “supreme” position theologically, it has not usually been “supreme” in the legal definition of the term regarding legal matters, as this article will attempt to show.

The main hypothesis of this study is that while Islamic law considers the Qur’an to be its primary source of laws, many Muslims have not held the Qur’an to be supreme from a legal standpoint, even though they might think it is. A supreme primary source, by definition, is analogous to some constitutions within a legal system (Limbach 2001). No laws are allowed to contradict such constitutions that are given supremacy unless the constitution itself is amended or a new constitution is made and put into effect. Sometimes, a new constitution might be necessary to avoid limitations on the nature of a constitutional amendment, as there have been even debates on whether constitutional amendments are themselves unconstitutional (Roznai 2017). However, I argue here that many Muslims did not consider the Qur’an to be a supreme constitution during the earliest formative years of Islam. “*Ijtihād*” became the basis of law instead. Subsequently, the earliest basis of Islamic law was customary law as well as common law, as described by Shabana (2010), wherein precedence became a primary source of law. While traditional Islamic jurisprudence places sources within a hierarchy, with the Qur’an and the prophetic tradition at the top, Shabana (2010) convincingly argues that custom was not simply incorporated into Islamic jurisprudence as a source of law, but that custom fully permeates throughout all the stages of the legal process, including the interpretation of the Qur’an. As Shabana (2010, p. 10) states, “the role of custom is crucial to the interpretation of the textual sources, the determination of their significance, and their scope of application.” Since customary and common law set precedence in early Muslim history, at times, it contradicted the Qur’an; some examples of this are discussed in the current article, showing that the Qur’an was not necessarily considered supreme from a legal perspective. Souaiaia (2006) argues that while legal precedents based on “*ijtihād*” were orally transmitted in the first Muslim generations, as the Muslim communities started to become more literature-based, those precedents became codified as part of the tradition.

Regarding Islamic jurisprudence, Dutton (1999) discusses two main views: the traditional and the revisionist. The traditionalists consider Islamic law to be derived from two main textual sources, the Qur’an and the prophetic tradition (*Sunnah*), based on a post-Shāfiī approach to jurisprudence after it started to become more systemized. The

revisionists doubt the authenticity of some of the prophetic tradition, as recorded in the “*ḥadīth*” genre; several Muslim modernists fall into this category, such as Muhammad Shahrour. Nonetheless, Dutton argues for a third view, which is best understood through Mālik’s (d. 179/795) *Muwattaʿa*, one of the first traditional texts. According to Dutton, Mālik’s jurisprudence in the *Muwattaʿa* describes tradition as work (*amal*), which defines the Sunnah as not only the sayings of Muḥammad (prophetic *ḥadīth*) but also including the “*ijtihād*” of later authorities. Accordingly, this article shows that this third view is perhaps the most likely source of Islamic law in the earliest Muslim community, in which “*ijtihād*”, and not the Qur’an, held legal supremacy over all other primary sources of Islamic law.

After all, even the Constitution (Charter) of Madinah (*Ṣaḥīfah al-Madīnah*), which is traditionally considered to have been developed soon after Muḥammad migrated to Madinah (Ibn Hishām 1955, d. 218/833, vol. 1, pp. 501–4), does not explicitly mention the Qur’an as a basis of law. It does state, however, that in matters of dispute, things are to be returned to God and Muḥammad. How disputes are returned to God and Muḥammad is subject to differences in interpretation regarding the status of the Qur’an. For example, Qur’an 5:43 is explicit that Muḥammad was not to judge among the Jews and that the judgment was to be returned to the Torah, which the Qur’an claims to contain God’s rules. Similarly, Qur’an 5:47 states that the people of the Gospel (i.e., Christians) need to adhere to God’s rules in the Gospel. Qur’an 5:48 also makes it clear that different rules were given to different people; nothing in the whole passage suggests that any text should take precedence over any other. This does not necessarily suggest that the Qur’an does not view itself as a constitution; even if it did, it opens the doors to using rules beyond itself for different communities. It is very possible to interpret the Constitution of Madinah as viewing the Qur’an as a starting point for legal disputes in the Muslim community, even if that was not made explicit. Nonetheless, as this article argues, the Qur’an was still not understood as having legal supremacy by the earliest Muslim community anyway.

Traditionally, it is conceived that Islamic law’s starting point is the Qur’an, and whenever the Qur’an gives no guidance on a matter, then it comes from prophetic tradition, and whenever the prophetic tradition gives no guidance on a matter, then it is to be based on “*ijtihād*.” However, some classical Muslim jurists have already disagreed with such a notion, suggesting that the starting point of Islamic law is not necessarily the Qur’an. When discussing the evaluation between edicts in the Qur’an and the Sunnah, al-Khaṭīb al-Baghdādī (d. 463/1071) reported, “The Qur’an is in more need [of] the Sunnah than the Sunnah is [of] the Qur’an”, and that “The Sunnah judges over the Book [the Qur’an], but the Book [the Qur’an] does not judge over the Sunnah” (Al-Khaṭīb al-Baghdādī n.d., d.463/1071, p. 14). Souaiaia (2006) argued that, historically, the text of the Qur’an was superseded as a primary source by the “*ijtihād*” of jurists, as Islamic law evolved through the centuries. This article goes a bit further, arguing that Islamic law’s starting point, since the formative years of Islam, is “*ijtihād*” itself; it is “*ijtihād*” that makes a jurist follow the rules of the Qur’an, suspend the rules of the Qur’an, or even contradict the rules of the Qur’an, as will be described later. In other words, Islamic law and Qur’anic law do not always need to overlap. After all, it is “*ijtihād*” that interprets the Qur’an anyway.

Even if we do accept the notion of some of the classical Muslim jurists that the Sunnah judges over the Qur’an and not the other way round, is it not the “*ijtihād*” of the jurists that allow them to determine which reports from the Sunnah are considered authentic and, when weighed on a balance, which reports to follow and which not to follow in matters of jurisprudence? Thus, the proposed hypothesis is not at all radical, as it only attempts to elucidate semantically what is already implied and accepted by many classical jurists.

2. Islamic Law

If we look at the history of Islamic law, the first legislator was Muḥammad, who attributed such rules to God. Behzadi (1971) states that Muḥammad’s unique position as legislator and judge paved the way for caliphs (in the Sunnī traditions) and *imāms* (in the Shīʿī traditions) to hold similar roles. During Muḥammad’s lifetime, all matters pertaining

to his community were under his authority. He was both the lawmaker (or, arguably, God was) and the judge. As the Qur'an states,

O you who believe! Obey God and obey the Messenger and those in authority among you. And if you differ among yourselves concerning any matter, refer it to God and the Messenger, if you believe in God and the Last Day. That is better and fairer in outcome.
[Qur'an 4:59]¹

Even though Muḥammad was the lawmaker, this does not imply that others did not recommend any laws. According to Muslim tradition, there were instances in which others in his community made recommendations, and he provided them with a seal of approval or, as perhaps it may be called in legal terms, prophetic assent. An example of that is the judgment against the Jewish tribe of Banū Qurayza (Al-Bukhārī 2002, d. 256/870, vol. 4, p. 67 [#3043]). Muḥammad asked Sa'd b. Mu'adh (d. 5/627) to recite a judgment against the tribe after their alleged betrayal, since they would supposedly accept his judgment. Sa'd judged against them, and Muḥammad allegedly gave his assent.

According to tradition, Muḥammad did not consider himself a non-erring judge and, arguably, he did perform "ijtihād." According to some Muslim traditions, he said, "I am but human and you come to me with a dispute, and perhaps some of you are more eloquent than others. To whomever I judged something that is the right of his brother, it is but a piece of fire that I cut, so he should not take it" (Al-Bukhārī (2002), d. 256/870, vol. 3, p. 180 [#2680], vol. 9, p. 25 [#6967], vol. 9, p. 69 [#7168]).² Therefore, while Muḥammad was a legislator and a judge, he was still aware that his judgments might be flawed, according to this tradition.

Muslim tradition does not suggest that Muḥammad delegated his job as a judge. After the death of Muḥammad, matters for judgment were brought before the first Caliph, Abu Bakr (d. 13/634). Hyder and Iraqi (2019) surveyed various traditions to exhibit that Abu Bakr appointed governors in different provinces, and each of those governors assumed the role of judges within their respective jurisdictions. However, those governors were mainly chosen for their qualifications as governors and not as judges. This meant that Abu Bakr did not consider that a judge needed to have any special skills beyond the skills of a governor. It was only during the time of the second Caliph, 'Umar, that he appointed specialized judges who were separate from the governors.³ This was the first time in Muslim history that the judicial system separated itself from the executive body, although in some provinces, governors retained their tasks as judges (Bsoul (2016) gives a good account of the history of this issue). It has been reported that the qualification that 'Umar had set for one judge, who became known as Shurayḥ al-Qāḍī (d. 78/699), was to judge according to whatever the Qur'an stated; if it was not found in the Qur'an, then he is to judge according to the tradition of the Prophet, and if not found in the tradition, then it should be according to sound opinion (Ibn al-Qayyim 1992, d. 751/1350, vol. 1, pp. 66–67).

This brings us to a juncture in understanding how Islamic law started to divert from Qur'anic law. The judges' judgments subsumed their opinions. It is important to note that, at the time, the tradition of Muḥammad was not yet collated. Accordingly, not all judges had good references for what the prophetic tradition would have been. As a matter of disputed history, 'Umar himself opposed the writing down or even narrating of the prophetic tradition (Al-Bayhaqī n.d., d. 458/1066, p. 407 [#731]). He is reported to have said, "I remember people before you who wrote books and delved in them and left the Book of God" (ibid). After all, it is reported that Muḥammad himself refused to have his utterances written down, except for the Qur'an (Al-Bayhaqī n.d., d. 458/1066, p. 405 [#724]). Accordingly, Zayd b. Thābit (d. 45/665), one of Muḥammad's scribes, has been reported as stating that Muḥammad ordered them not to write down any of his sayings besides the Qur'an (Al-Bayhaqī n.d., d. 458/1066, p. 406 [#729]). It is noteworthy that the main reason the early Muslim community refused to write prophetic tradition is that they perhaps feared that the community would use the tradition as they use the Qur'an. Accordingly, the early judges had little access to prophetic traditions on which they could

rely. If 'Umar asked judges to judge according to the Qur'an and if an answer was not found in the Qur'an, then in accordance with the tradition of Muḥammad, but if 'Umar refused the tradition of Muḥammad to be narrated, let alone written down, how did he expect the judges to know what the tradition of Muḥammad is?

Cook (1997) argues that while there was an attempt to suppress tradition from being written down in the earliest years, the cause for why it was later written is that the Muslim society wanted to move away from an oralist community to a more literature-based one, in a way that is somehow analogous to rabbinic Judaism. Duderija (2012) demonstrated that the Muslim communities in the first four generations did not always consider the term for the prophetic "sunnah" to be equivalent to the prophetic sayings (*ḥadīth*). This is vital because even when the prophetic sayings (*ḥadīth*) or the sayings of his companions, such as 'Umar, in the aforementioned example, do use the term "sunnah", it should not be confused with the idea of authentic "ḥadīth", an equivalency that only evolved in later centuries.

Independent opinion (*ijtihād*) took precedence in many cases. For example, while Abu Bakr punished alcohol consumption with forty lashes (Al-Bukhārī (2002), d. 256/870, vol. 8, p. 157 [#6773], vol. 8, p. 158 [#6776]), 'Umar later increased the penalty to eighty lashes, apparently because violations increased (Al-Bukhārī 2002, d. 256/870, vol. 8, p. 158 [#6779]). Therefore, one can assess that these judgments were based on opinions. The Qur'an does not impose any penalty on someone who consumes alcohol. Though tradition suggests that Muḥammad did impose a penalty, 'Umar took it upon himself to increase the penalty. Accordingly, the early Muslim community did not find the Qur'an to be the sole prescriber of legal judgments, nor did they even consider the prophetic tradition as something set in stone, perhaps because they felt that they had the liberty to change it according to circumstances. However, not only did 'Umar feel free to change penalties that were not specifically from the Qur'an but he also suspended Qur'anic injunctions. For example, during a famine, it is arguably reported that 'Umar suspended the law practice of cutting off the hands of thieves,⁴ although this has a Qur'anic basis (i.e., Qur'an 5:38) (Al-Zarqānī 2003, d. 1122/1710, vol. 4, p. 75 [#1468]). As Al-Khaṭīb al-Baghḍādī (n.d., p. 14) reported, while the Qur'an had certain rules, it was left to tradition to determine the definition, evidence, and motives for a crime before punishment could be applied. This method of jurisprudence by the earliest Muslim community is the basis of what is known as the "objectives of *sharīah*" (*maqāṣid al-sharīah*), of which Imām al-Ḥaramayn Al-Juwaynī (d. 478/1085) was one of the pioneers, discussing this issue in his works, especially *al-Burhān fī uṣūl al-fiqh*, where he makes arguments about those distinguishing between the letter of the law and the spirit of the law (e.g., Al-Juwaynī 1997, d. 478/1085, vol. 2, pp. 128–29). These objectives take into account public interest or welfare (*maṣlaḥah*), which becomes the basis of jurisprudence and of investigating the spirit, not only the letter, of the law, a concept that was further developed during the medieval period by al-Ghazālī (d. 505/1111), especially in his *Shifā al-ghalīl* (Al-Ghazālī 1971, d. 505/1111, pp. 159–72). In modern Muslim communities, this concept holds great importance regarding the method of "*ijtihād*" performed by contemporary jurists (Zakariyah 2015).

The aforementioned examples were not the only instances in which 'Umar chose judgments based on his opinion (*ijtihād*);⁵ the stoning of an adulterer was another. The penalty for adultery in the Qur'an is one hundred lashes, and the Qur'an does not differentiate between a fornicator and an adulterer (i.e., Qur'an 24:2); as Noor and Ghazali (2008) argue, the Sunnī jurisprudence has looked into the tradition by 'Umar as the basis for the law on adultery. However, according to Muslim tradition, 'Umar noted that there used to be a stoning verse in the Qur'an and that he feared future Muslims would not find this verse anymore and, therefore, would not impose this penalty (Al-Bukhārī 2002, d. 256/870, vol. 8, p. 168 [#6829]). He asserted that Muḥammad had stoned adulterers and that adulterers should continue to be stoned, even though such a practice is in contradiction to the penalty prescribed in the Qur'an.

Even if one does not question the authenticity of this Islamic tradition, one must ask: if 'Umar is correct that there used to be a verse about stoning in the Qur'an and that

Muḥammad applied such a penalty, and if this verse had been removed from the Qur'an, is there any evidence that Muḥammad continued to apply it after its removal from the Qur'an? There is no way to tell with certainty if Muḥammad continued to apply the rule after it was taken out of the Qur'an, assuming it was even in the Qur'an in the first place.

If we are to trust these reported traditions, then it seems that there are some contradictions and some unanswered questions. Sometimes, the Qur'an is a source of legal authority, and sometimes the Qur'an is overruled by prophetic tradition (e.g., stoning adulterers). Sometimes, the prophetic tradition is accepted, even though it was not yet collated, while at other times, it was also overruled by the judge's opinion (e.g., the penalty for consuming alcohol). When it comes to jurisprudence, contradiction and differing opinions are rampant. The Talmud, in comparison, is filled with the opposing opinions of different rabbis, and, indeed, it often overrules the Torah, which Halvini (2013, pp. 65–85) demonstrates, as it sometimes completely reinterprets the laws prescribed therein, such that it becomes distinct (Werman 2006, pp. 175–97). The Talmud may be seen as outlining the logical flows of arguments through jurisprudence. Wegner (1982) argued that many of the methods of Islamic jurisprudence are similar to rabbinic laws; that is, the laws are different, but the methodologies bear a resemblance. Principles of Islamic jurisprudence (*uṣūl al-fiqh*) also follow logical flows through a process known as "*ijtihād*." However, the foundation of these principles only garnered so much prominence after the time of al-Shāfi'ī (d. 204/820) through his work on *al-Risālah* in the second century after Muḥammad's death (Hallaq 1993, 1997, p. 30; 2004; Vishanoff 2011).

Although it can be seen that Qur'anic law and Islamic law did not always coincide, while much of the Muslim community attempted to resort to "*ijtihād*", the process of "*ijtihād*" only started to become systemized by the second century and evolved by those seeking to imitate the process (Hallaq 1993, 1997, p. 30; 2004). In other words, as described previously, during the time of the early Muslim community, judges did not have any special legal qualifications beyond being governors. Additionally, even when the judges were first made independent from the executive branch of the government during the time of 'Umar, they did not have access to the prophetic tradition. Not only had the prophetic tradition not yet been collated but also, more importantly, the earliest community, including 'Umar himself, were opposed to its collection and even narration. The sciences of the Qur'an and the prophetic tradition (*ulūm al-Qur'ān* and *ḥadīth*) had not been developed during the time of the early community.⁶ However, by the second and third centuries, jurists systemized the jurisprudence models; to even become a jurist, one had to fulfill the terms of new qualifications that did not exist in the earlier community. Accordingly, these jurists in the second and third centuries of Islam further changed and formulated the development of Islamic law in subsequent years.⁷

There seems to be an oxymoron in that, as the principles of jurisprudence were put in place by early jurists, such as al-Shāfi'ī, these principles were being imitated by others in later generations. In other words, to perform "*ijtihād*", one needs to imitate the methodology of "*ijtihād*" established by earlier jurists. Hence, even if the legal dictums are new, the method to arrive at them was systematically put in place by earlier jurists. Therefore, this method cannot accurately be called "*ijtihād*" but instead the "imitation" (*taqlīd*) of "*ijtihād*" (Galadari 2015). Arguably, one might also question whether Islamic law diverged from Qur'anic law during the time of Muḥammad. If the traditions are true about Muḥammad's application of stoning as the penalty for adultery, then this appears to contradict Qur'anic law. There are different explanations as to why such a contradiction exists: (1) the Qur'anic penalty of one hundred lashes came after Muḥammad imposed the stoning penalty; (2) the verse about stoning was removed and Muḥammad never had to judge a similar case after its removal, or subsequent cases were unreported; (3) the traditional account of Muḥammad's imposition of the penalty is inaccurate; (4) Muḥammad was indeed not the best of judges, as he was traditionally alleged to have said; or (5) Muḥammad did, indeed, contradict the Qur'an, either because he did not consider the Qur'an as a supreme source of law or because it required re-interpretation beyond the obvious exoteric text. If Muḥammad

considered his tradition to be something that later Muslims should always follow, why did he generally reject having it written down? It has been argued that the main reason is so that people would not confuse it with the Qur'an, or, as Umar suggested, so that people would not delve into it and forget the Book of God. If that is the case, then why did later jurists consider it to take precedence in terms of how to interpret the Qur'an or Islamic law, as al-Khaṭīb al-Baghdādī reported?

3. The Qur'an and Law

This section investigates what the Qur'an considers itself to be. Does the Qur'an consider itself to be a book with laws, and should it be interpreted exoterically or esoterically? The Qur'an appears to prescribe some laws, things to do, and things not to do (e.g., Qur'an 4:23, 5:1–6). In many cases, the Qur'anic commandments come in an imperative form, by requesting people to do or not to do certain things (e.g., Qur'an 2:104, 2:183). Sometimes, these commandments are referred to as "*ḥukm*" (e.g., Qur'an 5:1) and, arguably, sometimes "*ḥaqq*" (e.g., Qur'an 2:213) (Galadari 2013). Indeed, the Qur'an is aware that it contains commandments. By describing these commandments as "*ḥukm*" (pl. *aḥkām*), it considers them to be explanations, understandings, or wisdom, which is the root meaning of the term (Botterweck et al. 2011, vol. 4, pp. 364–68).

However, not every imperative commandment in the Qur'an was considered legally binding. For example, Qur'an 24:3 clearly states that a male or female fornicator/adulterer can only marry another fornicator/adulterer or a non-believer who associates others with God (*mushrik*), and that they are forbidden to marry the believers. From the outset, this verse clearly gives some kind of a commandment, presenting it no differently than other parts of the Qur'an, and there is nothing in its language or context that would suggest that this is not a commandment to be taken in accordance with its plain text. However, the plain text of this verse was almost never adhered to in Muslim communities throughout history. In fact, jurists highly debated it. Al-Shāfi'i (2006, d. 204/820, vol. 2, p. 551), for example, considered it to have been abrogated. The main reason is that it would contradict the marriage law, which states that Muslims are not allowed to marry non-believers who associate others with God. This further demonstrates the argument that even if we are to accept that the Qur'an is the primary source of Islamic law, it can only be applied through interpretation, and, as with any interpretation, it is dependent on "*ijtihād*." Therefore, since Qur'anic interpretation is itself based on "*ijtihād*", then "*ijtihād*" has always been the real, primary source of Islamic law.

Besides "*ḥakīm*", the term used by the Qur'an to describe itself and its commandments, the Qur'an also refers to such commandments as "*āyāt*" (e.g., Qur'an 2:221) and "*bayyināt*" (e.g., Qur'an 2:159), which may be considered synonymous with the meaning of giving signs (Botterweck et al. 2011, vol. 1, pp. 167–71) or explanations (Botterweck et al. 2011, vol. 2, pp. 99–107), respectively. Accordingly, the Qur'an views its commandments as ways to explain or to make things known. The things that it makes known are signs or symbols (*āyāt*), which perhaps do not always have plain meanings (Galadari 2021). This is where many schools of Islamic thought provide different interpretations of exactly what that means: either exoteric or esoteric interpretations. Nonetheless, while the Qur'an appears to be aware of containing some sort of commandments, these rules in the Qur'an are in a small minority compared to the total verses, constituting fewer than 10% of the total Qur'an.

Among the meanings of the root "*ḥ-k-m*" in Akkadian is "to make things known or to explain things", and it is used to mean either ritual or a medical prescription (Botterweck et al. 2011, vol. 4, pp. 364–68). Rituals are a form of expression. Typically, they do not denote reality but are instead expressions of an inner reality. The origin of rituals is still debated among theorists (Bell 1992; Rappaport 1999; Graybiel 2008). Perhaps the Qur'an uses the terms "*āyāt*" and "*ḥukm*" to mean signs that are giving knowledge and wisdom or signs that are being explained. The Qur'an does describe its verses (or signs) as being in

two forms, “*muḥkam*” and “*mutashābih*.” The verses with commandments are traditionally referred to as the “*muḥkam*”, while the symbolic verses are referred to as the “*mutashābih*”:

He it is Who has sent down the Book upon you; therein are signs determined (muḥkamāt); they are the Mother of the Book, and others symbolic (mutashābihāt). As for those whose hearts are given to swerving, they follow that of it which is symbolic (tashābah), seeking temptation and seeking its interpretation (ta wīluh). And none know its interpretation (ta wīluh) except God and those firmly rooted in knowledge. They say, “We believe in it; all is from our Lord.” And none remember, except those who possess intellect. [Qur’an 3:7]

Some schools of Islamic thought consider the Qur’an to have both exoteric and esoteric meanings. The esoteric meanings could be based on analogies, metaphors, or allegories (Abdul-Raof 2010, 2012). However, deciding which verses are allegorical and which are to be taken according to their actual text has been fiercely debated throughout Muslim intellectual history.

For example, Qur’an 2:282, the verse of loan, appears to be a clear, commanding verse with exoteric meanings concerning business transactions. However, contrary to the view that its outer meaning is the “*muḥkam*”, it has been argued that the Qur’an is depicting the outer meaning of how people are to deal with each other in certain business transactions as an allegory (*mutashābih*) for how God deals with people’s souls (Galadari 2018, pp. 137–45). Qur’an 2:282 requires people to write down a loan transaction for a loan that is loaned for a set period of time so that people would not later get into doubts or debate concerning it; thus, it needs to be written by someone who is just as God had taught him how to write. When this verse is intratextualized with other Qur’anic passages, it can be seen to depict that God has loaned people their souls for a period of time and that the Qur’an itself is viewed as the business transaction between God and people’s souls. This is especially significant since the Qur’an is described as a book with which there is no doubt, and the messenger is described as someone who is just. Furthermore, in the Qur’an’s first assumed revelation by some Muslim traditions (Sūrah al- Alaq) (Al-Ṭabarī (n.d.) d. 310/923, vol. 24, pp. 519–22), which describes God teaching the Qur’an, it also states that it is God who taught by the pen. Given the intricate web of intratextualities between Qur’an 2:282 and other Qur’anic passages, it becomes apparent that the portrayal of how people are to deal with each other concerning certain business transactions is an allegory (*mutashābih*) for how God deals with people’s souls (Galadari 2018, pp. 137–45).

Therefore, would the Qur’an consider how God deals with people’s souls as the allegory (*mutashābih*) for how people deal with each other, which would be the “*muḥkam*”, or is it more plausible that how people deal with each other is the allegory (*mutashābih*) for how God deals with people’s souls? If the latter were more plausible, then it would mean that the outer meaning of the verse is actually the allegory (*mutashābih*) for its inner reality, which becomes the “*muḥkam*.” In other words, the Qur’an would represent how God deals with people’s souls as the “*muḥkam*.” Therefore, this reverses the more prominent Sunnī assumption that the outer meanings of the commanding verses are the “*muḥkam*.”

Al-Ghazālī, who espoused the Shāfiī Sunnī school of jurisprudence but also courted mysticism through Sufism, took a moderate stance in which he emphasized both the exoteric and esoteric interpretations of the Qur’an.⁸ Nonetheless, in matters of legal practicality, when judging between people or disbursing inheritance, this did not mean that the esoteric schools turned a completely blind eye to the exoteric interpretations of legal rulings in the Qur’an. For example, even the Ismā’īlī school, which emphasized esoteric interpretations, did not have a distinct legal theory in its early foundational years for practical reasons, when it flourished during the Fatimid rule (Poonawala 1996, pp. 117–43). Ismā’īlīs were taught the exoteric forms of rituals and jurisprudence and, at higher grades, they were taught the essence behind them (Qutbuddin 2011).

As the Qur’an is aware that it does provide some sort of commandments, which are sometimes called signs (*āyāt*) or explanations (*ḥukm/bayyināt*), it is imperative to know how the Qur’an views itself. There are many clues in the Qur’an in which it refers to itself

as something hidden or something that is not easily understood: “⁷⁷ Truly it is a Noble Quran ⁷⁸ in a Book concealed (*maknūn*). ⁷⁹ None touch it, except those made pure” [Qur’an 56:77–79]. Although many traditional exegetes, such as al-Ṭabarī (d. 310/923), explain that the hidden book here is a reference to the heavenly tablet containing the Qur’an, the term “*maknūn*” is used many times in the form of “*akinnah*”, describing how God places veils in people’s hearts such that they would not understand the Qur’an (e.g., Qur’an 6:25, 17:46, 18:57, 41:5) (Al-Ṭabarī n.d., d. 310/923, vol. 23, pp. 149–50). It has been argued that according to the Qur’an’s own self-referentiality, it might consider itself to have been revealed in a code that itself needs decoding (Galadari 2021).

Accordingly, the Shī‘ah assign importance to the interpretation of the Qur’an by the *imāms*, because, otherwise, people can have different interpretations, as Al-Qāḍī al-Nu‘mān (d. 363/974), a prominent Ismā‘īlī jurist during the Fatimid period, argued in his *Ikhtilāf uṣūl al-madhāhib*. He stated that different schools of thought follow various interpretations that are not sanctioned by the living Imam, who is considered to be the designated heir of the knowledge of the Qur’an (Al-Qāḍī al-Nu‘mān 1983, d. 363/974, pp. 31–35). This attitude, by the way, is not unique to the Shī‘ī tradition. While the terminology and mechanism might be worded differently, ‘Umar, the second Muslim Caliph, also took it upon himself to amend some rules of the Qur’an and prophetic tradition, as described earlier. While the Sunnī school might not give the authority of such a mechanism to an *imām*, it does give it to a “*walyy al-amr*” (the guardian of authority), which was historically associated with the station of the Caliph or a designated governor, or, in modern political theory, perhaps even a political body can take such a role. The semantics might differ, but the outcome and conclusions are similar.

Since the Qur’an views itself as providing commandments through signs (*āyāt*) and explanations (*ḥukm/bayyināt*), and since it hints that there is more to it than the mere exoteric interpretation, then does Islamic law, as it has evolved, truly reflect Qur’anic law? This may provide support for the conclusion that Islamic law is not Qur’anic law. Not only did Islamic law evolve independently from Qur’anic law in the later Muslim generations but it also evolved independently during the very formative years of Islam. By the time of ‘Umar, Islamic law was not fully compatible with Qur’anic law, enough that ‘Umar felt that his opinion could either add legislation that is not in the Qur’an or even suspend legislation that is in the Qur’an. Just as ‘Umar felt the freedom to do this with Qur’anic legislation, he also felt the freedom to do so with the prophetic tradition. This can only mean that ‘Umar did not feel that Qur’anic laws or even laws extracted from prophetic tradition were set in stone and unchangeable. His own opinions (*ijtihād*) superseded them, either by making some punishments more lenient, such as suspending a Qur’anic law of cutting off the hands of thieves, or by making other punishments more stringent, such as stoning adulterers.

Musa (2015) demonstrated how the concept of the prophetic tradition that evolved within the Muslim communities in the early centuries of Islam was primarily motivated by the requirements for Islamic jurisprudence, in which the prophetic tradition was codified for legal purposes. Therefore, if one concedes that the prophetic tradition might take precedence over the Qur’an, as al-Khaṭīb al-Baghḍādī reported that some classical jurists accepted, then, by extension, it depends on “*ijtihād*”, which categorized the prophetic tradition according to various ranking schemes as to which reports from the tradition have authority over another. In fact, even if one argues that the Qur’an continues to be the primary source, it is itself dependent on how each Qur’anic rule is to be interpreted, and interpretation, by definition, is based on “*ijtihād*.” Therefore, however one is to look at this issue, whether accepting the idea that Islamic law is primarily derived from the Qur’an or the Muslim tradition, the conclusion would remain the same: that, in reality, “*ijtihād*” is the medium to interpret either of them.

While Islamic jurisprudence claims the Qur’an is its primary source for enacting laws, it is not equivalent to some constitutions that hold supremacy in the ranking order of legal

norms in the modern period. This is not only the view of later generations of jurists but also the case since the earliest Muslim community, as has been showcased above.

Similarly, for the earliest Muslim community, while the Qur'an was called the primary source for law even by 'Umar, it was not understood to hold supremacy as an unalterable primary source for law, from which legislation and legal maxims were to be extracted. In fact, in our modern definition of legal supremacy, against which all laws need to be measured, the Qur'an was never understood as a supreme constitution.

4. Conclusions

Islamic law evolved through Muslim history, and it diverged very early from Qur'anic law. Many opinions of the early Muslim caliphs and judges, as well as early Muslim jurists, found their way into shaping Islamic law, creating precedence. Even if the early Muslim community considered the Qur'an's status as a primary source for laws, jurists sometimes overruled it, either by prophetic tradition or through their own opinions. As Islamic law diverged from Qur'anic law, there would occasionally be some overlap but, in general, the differences are vastly dissimilar, such as the interpretation of what criteria are used to evaluate a crime, what the penalty should be, and how the penalty is to be applied. The gap between Islamic law and Qur'anic law is wide, even back to the earliest Muslim community, so one can suggest that the Qur'an was perhaps not given legal supremacy. While some constitutions are the litmus test with which new legislation is evaluated, the Qur'an was not considered as such by the earliest Muslim community. By definition, the supreme primary source would have to have been "*ijtihād*", which allowed Qur'anic laws to be either suspended or contradicted. Such a criterion is how a supreme primary source is defined. Thus, while Ahmed's (2018) argument is provocative, and while one might disagree with some of his examples, his overarching argument cannot entirely be dismissed as it is not wholly without precedent or merit. It can be said that the earliest Muslim society did not have a legal elite; there were no special qualifications in the application of law that are considered to be set in stone without the use of "*ijtihād*", which allowed for the amendment of Qur'anic law and prophetic tradition. Moreover, the later legal consensus in Islamic law used the formative years as a precedent.

At the very minimum, even if one is to claim that the Qur'an is, indeed, the primary source of Islamic law, it is "*ijtihād*" that allows one to interpret the Qur'an. Additionally, even if one is to argue that the Sunnah is the main basis for elucidating, interpolating, and extrapolating Islamic laws, it is still "*ijtihād*" that allows one to weigh which parts of the Sunnah are more authentic than others and decide in what circumstances certain rules should apply through the interpretation of the Sunnah. This is undeniable; therefore, the proposed hypothesis is only putting into explicit words that which has *always* been implied and accepted throughout Muslim intellectual history. It is only a matter of semantics. Consequently, if "*ijtihād*" is considered to have legal supremacy in Islamic law over the Qur'an, then there is little that can stand against the inherent flexibility that allows for the evolution and re-interpretation of Islamic law in Muslim communities and societies.

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¹ All Qur'anic translations in this article are taken from Nasr et al. (2015) unless otherwise noted. I do not necessarily agree with all word preferences in the translation, and I do modernize some archaic English terms in the translations. However, I will only critically assess the words that are important and related to this article and change them if necessary.

² My translation.

- ³ For more on the judicial system during the time of 'Umar, see [Guraya \(1972\)](#).
- ⁴ It is arguable because the authenticity of the reports that 'Umar had suspended the rule for cutting the hand of thieves during the year of famine had been brought into question within the Muslim tradition.
- ⁵ For some more examples, see [Goolam \(2006, pp. 1446–67\)](#).
- ⁶ For more on the history of the earliest Muslim jurists up until the second century of Islam, see [Motzki \(1991\)](#).
- ⁷ For further details of the development of Islamic law by jurists during the formative years of Islam, see [Bsoul \(2016\)](#).
- ⁸ For a general approach of al-Ghazālī to the Qur'an, see [Whittingham \(2007\)](#).

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