

Islamic Law and Legal Positivism

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Abstract. The object of this paper is to elaborate an understanding of Islamic law and legal theory in terms of the conceptual framework provided by Legal Positivism. The study is not based on denying or contesting the claim of Islamic law to being of divine origin; rather, it is based on the historical reality of Islamic law as part of a (once) living legal tradition, with structure, method, and theory, regardless of claims of origin. It will be suggested that Ash'arism may be taken as providing an Islamic version of Legal Positivism, and that the objections which Mu'tazilism raised in the face of Ash'arism were not different in substance from some of the objections that have been directed at contemporary Legal Positivism. It will also be suggested that the Ash'arites and the Mu'tazilites were not opposed to each other in the way they are commonly supposed to have been. Rather, they were preoccupied with different notions of what it is to be obliged (to have an obligation) to do something.

Keywords: Divine Law, Positive Law, Obligation, Morality, Legal Positivism, Ash'arism, Mu'tazilism.

1. Introduction

By its own lights, Islamic law is of divine origin. Owing to its (self-proclaimed) divinity, it may be thought inappropriate to view Islamic law in terms of the conceptual framework of Legal Positivism. According to this latter, law is to be understood in terms of social rules, conventions, and norms, "posited" and enforced by human beings, with no reference to Nature, Morality, or Divine Will.

Yet it is our intention in this paper to look at Islamic law in terms of Legal Positivism. This does not mean that the present study is based on contesting, or denying the claim of Islamic law to being divine. A theological stand of this kind would be out of place here, for our goal is purely analytical and descriptive. There is no need to take a position on matters of theological truth or falsehood, and it hardly needs to be said that Islamic law has been

studied by historians and legal scholars who maintained an attitude of complete neutrality about theological issues. What matters is that Islamic law was historically promulgated by a recognized authority; it was applied for a time (however long or short) and to some extent (however wide or narrow); and it was elaborated (and developed) by jurists who came to belong to different legal schools.

No system of law is independent of what the people who apply it, interpret it, and theorize about it in the context of a legal tradition take themselves to be doing. Hence in our examination we shall not only be concerned with the content and form of Islamic law, but also with what Muslim theorists had to say about it. Thus we have a two-fold thesis to explain and defend. 1) Islamic law can be comprehended by reference to conceptual categories and propositions provided by Legal Positivism. 2) Among competing views of Muslim theorists, the one that was destined to predominate may justifiably be claimed to be a kind of Legal Positivism – an Islamic Legal Positivism, it can be said.

In section 2, we firstly explain what we take Legal Positivism to stand for – its main tenets, and some of its important concepts. Then we proceed to employ these to look at Islamic law – its origins, some of its structural features, and statements of theorists who discussed and debated about obligation and proscription in the context of divine law.

In section 3, we do two things: firstly, we outline some of the criticisms that Legal Positivism has been subjected to in modern times. Secondly, we discuss the debate that took place between Ash‘arism and Mu‘tazilism about morality and obligation in relation to divine commands. A comparison between the ideas and lines of thought followed by the Mu‘tazilites and contemporary critics of Legal Positivism shows that the targets of criticism were similar.

In section 4, we draw a distinction between two different ways of understanding questions about “grounds” of obligation. The distinction, it is hoped, serves to make the disagreement between legal positivists and their critics (both Islamic and modern) intelligible, and thus more amenable to resolution.

2. The Positivity of Islamic Law

Speaking of the notions of “legal right” and “legal obligation” Ronald Dworkin says that our understanding of these notions is “remarkably fragile”. The same could be said of the notion of “law” itself, for, as Dworkin ([1977] 1978, 14) goes on to say, “we are used to summing up our troubles in the classic question of jurisprudence: what is ‘the law’?”. In answer to

this question Legal Positivism (henceforth “LP”) provides a general theory of what the law is – “general in the sense that it is not tied to any particular legal system or legal culture, but seeks to give an explanatory and clarifying account of law” (Hart 1961, 239).

What does Legal Positivism have to say about the law, then? To go by the characterization given by Dworkin, LP asserts, firstly, that laws are rules, backed by the use of public force, that are used by a community of people, to regulate their affairs in the various areas of social life. But more interestingly, “these [...] rules can be identified and distinguished by specific criteria, by tests having to do not with their content but with their *pedigree* or the manner in which they were adopted or developed” (Dworkin [1977] 1978, 17). “Every legal system has a fundamental test for law in the form of a rule of recognition” (59).

Secondly, “the set of these valid legal rules is exhaustive of ‘the law’, so that if someone’s case is not clearly covered by such a rule [...] then that case cannot be decided by ‘applying the law’. It must be decided by some official, like a judge, ‘exercising his discretion’, which means reaching beyond the law for some other sort of standard to guide him in manufacturing a fresh legal rule or supplementing an old one” (17).

Thirdly, “to say that someone has a ‘legal obligation’ is to say that his case falls under a valid legal rule that requires him to do or to forbear from doing something. [...] In the absence of such a valid legal rule there is no legal obligation” (17).

With this brief explanation of what Legal Positivism has to say about the law, we can proceed to look at Islamic law and legal tradition. It is commonly known that Islamic jurisprudence recognizes four “sources of law”: the Qur’an (which is literally the very words of the Divine Legislator), the recorded sayings and practices of the Prophet Muhammad (*the Sunna*), consensus of the Muslim community (or at least that of its jurists), and, finally, the use of analogy, a reasoning method employed to extend legislation to cases not covered by laws derived from the first three sources.

Laws which are explicitly and directly based on the Qur’an and the Sayings of the Prophet were from the start recognized as having greater authority than the third and fourth sources. For consensus proved to be a debatable concept, whose practicality was challenged by Averroes (1198), himself a jurist of great repute (Gracia 1996, 245 ff.). As to the method of analogy, it was denied the status of being a source of law by the Zahirite jurist, Ibn Hazm (Hourani 1985, 186). For these reasons it may be appropriate for us to focus initially on the Qur’an itself (and the *Sunna*) for purposes of examining the character of Islamic law.

In the Qur’an we find a sizable number of verses that formulate rules (the so-called *Ayat al-Abkam*) that are designed to govern the life of the Muslim

community under the leadership of the Prophet. These verses, which have been variously estimated to number between 500 and 1000 (Anzi 2004, 8-9), were divided according to subject matter by early jurists. There are as many as 30 different subject matters on some counts. The subjects are not neatly separated from each other,¹ but putting aside rules of ritual and worship, one finds that areas subject to divine legislation include: alms-tax, war, sale (and interest), contract, testimony, (manumission of) slaves, spoils of war, public expenditure, crimes and punishments, adjudication of disputes, marriage and personal status, inheritance, safe conduct, and administrative regulation among others.²

Consider verses such as the following, to give but a few examples:

Whatever booty you take, the fifth of it is God's, and the Messenger's, and the near kinsman's, and the orphans', and for the needy, and the traveler. (8:40)³

And the thief, male and female: cut off the hands of both, as a recompense for what they have earned, and a punishment exemplary from God. (5:40)

[When contracting a debt:] And call in to witness two witnesses, men; or if the two be not men, then one man and two women, such witnesses as you approve of. (2:80)

These verses and others like them are not examples of familiar kinds of laws which legal theory commonly deals with, namely, natural law, customary law, statutory law, common law, or plain man-made positive law. Viewing such verses by their own lights, there is nothing for us to call them but "divine laws". But this may not be the most accurate description that we can offer. For there are uses of "divine law" where it is said that rational human knowledge of the dictates of morality and natural law count as a "promulgation of God's Law to human beings". According to P. T. Geach (1969, 123), "the rational recognition that a practice is generally undesirable [...] is thus *in fact* a promulgation to a man of the Divine law forbidding the practice, even if he does not realize that this is a promulgation of the Divine Law".

Yet "laws" such as "All human beings are equal", or "All humans have a right to live in peace and freedom", which we can (let us assume) know by Reason, are not of the type which our examples are meant to illustrate. A more accurate description of the divine laws we have mentioned would be

¹ On the matter of distinction between subject matters, Joseph Schacht (1964, 206) had this to say: "One important criterion of the sociology of law is the degree to which the legal subject-matters are distinguished and differentiated from one another. There is no such distinction in Islamic law".

² A more thorough enumeration of subjects of legislation can be found in Starkovsky 2004, 381-459.

³ All translations are from Arberry 1964.

to call them “divine *positive* laws”, for they bear many of the marks that are commonly taken to characterize positive law, as normally understood. These marks include deliberate enactment (being “laid down”, or posited), and imposition by identifiable authority. This distinguishes both *divine* positive law and what we may now call “*human* positive law” from both customary law and natural law (Murphy 2005, 3; 18). Furthermore, divine positive law resembles human positive law in terms of specificity to legal systems. For each human legal system may be said to have its specific laws, while (we suppose) all such systems may share the same natural law precepts. In a similar fashion, Islamic law recognizes that it is specific to Muslims, in accordance with the well-known Qur’anic verse, commonly taken to refer to Christians, Jews and Muslims: “To every one of you We have appointed a right way (*shir‘a*) and an open road. If God had willed, He would have made you one nation; but that He may try you in what has come to you” (5:48).

Finally, divine positive law, like the legal rules of human positive law, but unlike natural and/or moral law, is able to “provide more specific guidance to human conduct than do moral precepts”. This is important, and also relevant to our being able to call something a “law”: “law must provide clear and determinate guidelines if it is to coordinate myriad human endeavors” (Murphy 2005, 4).

In choosing to think about Islamic law in terms of divine positive law, we follow the practice of St. Thomas Aquinas who distinguished, within Mosaic Law, between universal moral precepts which he called “Natural Law” (applicable to Jews, Christians and others) and ritual, or ceremonial commands which he called “positive law” (20). But we do not assimilate the positivity of Islamic law its ceremonial or ritualistic features, for Islamic laws of ritual constitute only a small part of the “practical guidance” which Revelation provides.

With these considerations in mind, let us proceed to discuss how Islamic law can be comprehended in legal positivist terms. The first tenet of LP which says that “every legal system has a fundamental test for law in the form of a rule of recognition” (Dworkin [1977] 1978, 59) is met by Islamic law in a straightforward manner: the rule of recognition is simply inclusion in the Book of God, or counting among the canonical sayings of the Prophet. We can, following the terminology of *The Concept of Law*, refer to the legal rules based on the Qur’an, (such as “Contracts must be witnessed by two men, or one man and two women”) as *primary rules*. But the rule (or rules) which “validate” such primary rules (allow them to be considered part of law) can be called *secondary rules* (Hart 1961, 79-100).

Let us now see how Islamic law stands with regard to the second tenet of LP, which requires that the cases where the law is not clearly applicable must be decided by a judge, using discretion, and “reaching beyond the law for

some other sort of standard to guide him in manufacturing a fresh legal rule or supplementing an old one” (Dworkin [1977] 1978, 17).

The possibility of incomplete coverage contemplated in the second tenet is bound to be encountered in legal practice sooner or later. In the case of Islamic law the possibility arose during the life-time of the Prophet, and afterwards, as Muslim armies brought more and more peoples and territories under Islamic rule (and law). A well known tradition relates the story of a conversation which took place between the Prophet and the Companion Mu'ath ibn Jabal, who was to be sent to Yemen in order to represent the Prophet there. The Prophet asks Mu'ath about the method he intends to follow in judging between disputants. Mu'ath answers by saying that he would judge by what is in the Book of God, the Qur'an. "What if the Qur'an does not give an answer?" the Prophet asks. Mu'ath would then have recourse to the Sayings of the Prophet. But what if the Sayings of the Prophet do not provide an answer either? "I will exercise my judgment without fail", says the Companion. Upon hearing this, the tradition relates, the Prophet thanked God and expressed pleasure at the Companion's plan (Abu Dawud 1997, 3592).

After the death of the Prophet, one of earliest school of jurisprudence to arise was that of Hanafism, whose eponym, Abu Hanifah (767), was famous for his advocacy of the *ra'y*, or exercise of personal judgment (Arrabi 1999, 58-62). But the many differences of opinions and disagreements between jurists, amid concerns about the abuses and vagaries of private judgment, eventually gave rise to a jurisprudential method for deriving "new" legal rules. This method, which came to be known as "the use of analogy" was added to the sources of Islamic law by Imam al-Shafi'i (820), and became accepted afterwards by other schools. This method depends on finding relevant similarities between a novel situation requiring a legal decision, and the occasions on which an old-established rule applied. The standard example which is used to illustrate this method is the prohibition of a newly concocted intoxicating drink (never mentioned in the Qur'an, of course) on the basis of the prohibition of one specifically named in the Qur'an.

To all intents and purposes, the role of "analogy" is not very dissimilar to the role of "discretion" in the second tenet of LP. For analogy functioned as a kind of "controlled discretion", on account of its being a limited way of using one's reason within the bounds of existing rules. The question of how analogy is to be used raised (and continues to raise) problems, including determination of relevant similarities, and the possibility of disagreement between results arrived at by different jurists or judges. In these ways it is similar to the use of discretion.

To complete this account of how Islamic law can be understood within the conceptual framework provided by LP, we turn now to third tenet, ac-

ording to which an obligation for one to do or to forbear is created by the application of valid legal rules, in whose absence no claim of obligation can be made (Dworkin [1977] 1978, 17).

In some ways the treatment of the concept of the obligatory, the forbidden, proscribed, and other concepts that lie between these, is the most definitive mark which suggests that Islamic legal philosophy may be viewed as a kind of legal positivism. As Schacht says, these classifications serve a unifying function as far as Islamic law is concerned: "The central feature that makes Islamic religious law what it is, that guarantees its unity in all its diversity, is the assessing of all human acts and relationships, including those which we call legal, from the point of view of the concepts obligatory/recommended/indifferent/reprehensible/forbidden" (Schacht 1964, 200).

The obligatory/forbidden scheme is not remarkable on account of its unifying function, because a legal system by its nature aspires to be encompassing and unified. What is remarkable is the range of notions that were brought to bear on the semantics of these legal terms from early on in the history of Islamic jurisprudence.

If we are to go by what Kevin Reinhart says, it seems that as early as the late first century of Islam, reflective Muslims were asking questions about the status of actions which people engaged in before the advent of Revelation, that is, before God revealed His judgment (*hukm*). Were actions such as lying, thanking a benefactor, killing, eating or drinking permitted, obligatory, or proscribed, or with no value at all? According to Reinhart (1995, 14), "we see this question as inchoate before the development of the science of principles of jurisprudence (*usul al-fiqh*) in its classic form". Those who followed the "Permitted" position said that "in the absence of revelational knowledge to the contrary, useful acts are permitted" (38). Those who followed the "Proscribed" position said they were forbidden. There were also those who chose to say that "No Assessment" was possible.

To say that no assignment of value is possible before the advent of Revelation implies that the assignment of value is a function of revelation itself. This is not the same as saying that obligation must be defined in terms of "being commanded by God". But it certainly paves the way for this claim, for what changes with the advent of revelation is that divine commands and prohibitions are addressed to us, obligations are created, and then it is up to us to violate or obey them. By analogy, to say that useful acts are permitted in the absence of revelation implies that unaided human reason is able to pass value judgments on actions with regard to their "permissibility" or lack thereof. And while this does not imply that obligation is to be defined by reference to what Reason dictates, it surely can be seen as giving Reason a role in the knowledge of value, even if only to give independent confirmation of the deliverances of Revelation.

During the formative period of Islamic jurisprudence there was much intellectual fluidity and diversity in the positions of the different schools. The “Permitted” position had many adherents among Shafi‘ites, even the Hanbalites, not to mention the Mu‘tazilites (who seem to have had some “Proscribers” of their own). But gradually, as orthodoxy began to set in, the Shafi‘ites and Hanbalites and others chose to follow the “No Assessment” position, in preference to the “Permitted” position. In this way, jurisprudence settled for itself the question of what role, if any, reason could play in the assignment of value to action. It could be at best subsidiary, the major role being reserved for canonical texts of the Qur’an and Sayings of the Prophet.

But it remained for al-Ash‘ari (935) and his spiritual heirs to formulate and defend a theoretical notion of obligation in accordance with the positivist spirit implicit in the “No Assessment” position. In essence, the Ash‘arite idea was that God, who rules over the universe, is King and Owner of everything. He lays down rules for what to do and what not to do. These laws define what is obligatory and what is forbidden. This can be best illustrated by reference to the writings of al-Juwaini (1085), because his explanation of the notion of obligation is clear and to the point. According to al-Juwaini (1950, 259 [emphasis added]):

If we describe an action as obligatory or forbidden we do not mean there is an intrinsic distinguishing quality which distinguishes it from that which is not obligatory. *Rather we call obligatory that action which has been commanded by the Shar‘ [divine law], and we mean by forbidden that action which the Shar‘ has made forbidden and haram [illicit].*

Obligation, in general, is a matter of being subject to law, so there are limits which one is not allowed to transgress. This is what al-Juwaini’s teacher al-Ash‘ari (935) (1955, 117) said before him:

It can be shown that God is entitled to do whatever He does. For He is the Commander, and above Him there is none that can command, permit, or prohibit, or draw boundaries for action. This being so, it follows that nothing which God does can be evil. For what makes an action on our part evil is that we transgress boundaries that have been drawn for us, and we do that which we are not entitled to do. Since the Exalted is not under order, it follows that nothing which he does can be evil.

A confirmation of the idea that obligation is defined by reference to an obliging law is found in the idea that there are no obligations which God has to fulfill. According to al-Juwaini (1950, 272), again,

God is not subject to obligation [...]. We ask one who disagrees with us, what does it mean for there to be obligation on God to do something? If you mean a command

is directed at God, this is impossible. For He is the Commander, and there is no commander above Him. If you mean that He obliged to do on account of wanting avoiding harm, then this, too, is impossible. Finally, if you mean that an action is made obligatory on account of its inherent goodness, and the evil of its omission, then this is false too, because good and evil are not intrinsic qualities.

In defining obligation and other moral notions in these terms, it seems that al-Ash‘ari and his heirs, who came to stand for Muslim orthodoxy, do no more than draw the logical conclusions implicit in the ideas of the previous generations of jurists who tended to favor Revelation over Reason.

From all of this it is possible to conclude that the type of legal philosophy which al-Ash‘ari and his heirs subscribed to was a kind of legal positivism, an Islamic Legal Positivism, if you will. For al-Ash‘ari’s explanation of the notion of the obligatory is not at all different from that of LP, as we have just explained. And, of course, he cannot pose any objection to the idea that legality, or the validity of rules is recognized by reference to the accepted authority of the Qur’an and the Sayings of the Prophet. As for the tenet of discretion, he could not have denied this, having accepted a role for consensus and the use of analogy in his philosophy of law.

3. Positivism, Obligation, and Moral Principles

The aim of the preceding section was to justify the twin claims that (1) Islamic Law can be comprehended in terms of LP, and (2) Islamic legal philosophy, as theorized by the dominant school of Ash‘arism, could be viewed as a kind of legal positivism – an Islamic Legal Positivism.

This claim can be further substantiated by reference to problems and criticisms. Neither LP, nor what we suppose to be the Islamic version of it, has been without its critics. It will be argued in the present section that similar lines of criticism can be, and have been, pursued in these two areas. This stands to provide additional support for the idea that this way of comprehending Islamic law and legal thought is not without foundation.

3.1. Dworkin's Critique of LP

Dworkin begins his criticism by reflecting on the “hard cases” of the law, that is, cases which may appear to fall under the jurisdiction of a clear legal rule, but which are “hard” in that lawyers, judges, and even ordinary people, may judge that the rule should not be applied. Under regular circumstances, a son who is named in his grandfather’s will has a right to inherit in accordance with the will. But what is the law to say in “the hard case” where the

son kills his grandfather in order to hasten the prospect of inheriting? When we argue about such cases, says Dworkin, we find ourselves appealing to principles, policies and standards that are not legal rules in any ordinary sense of the term. In the present example we may invoke a maxim such as “No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime” (Dworkin [1977] 1978, 23). This maxim is not similar to a law which defines and prescribes a punishment for exceeding a precisely defined speed limit.

Dworkin claims that LP cannot accommodate these “non-rules”. If Legal Positivism were to include them in the law, then the rule of recognition tenet goes by the board, for there is no rule of recognition that can be associated with these non-rules. At the same time we cannot say that judges have unlimited discretion to apply these principle or not. For we are inclined to take such principles as binding, in the sense that a judge who fails to apply them is thought of as failing in his duty. Thus the second tenet fails (35).

Tenet 3 does not fair any better. For if there are principles that are not the same as the regular “primary” rules of the legal system, and if they may be viewed as “binding” and determinative of obligation, then we can no longer define obligation by reference to falling under the purview of legal rules. According to this line of thought, the murderer does not have a right to inherit by his grandfather’s will. Had the possession of such a right depended on merely falling within the purview of the legal rule, an obligation would have existed for him to inherit. But as no such obligation exists, it follows that obligation is not a matter of falling under a legal rule. Tenet 3 has to be abandoned (44).

One way of focusing on the substance of Dworkin’s critique of LP is to say that it highlights the relevance of morality to the law by saying that obligation, rights, and duties cannot be reduced to an outcome of the application of legal rules. This is stated clearly in Dworkin’s reply to his critics – he now asserts that “no ultimate distinction can be made between legal and moral standards, as positivism insists” (47).

The idea then is that moral principles must be considered when thinking about what the law is. The existence of rules and their enforcement by sanction creates a situation of people being *obliged* to do or to forebear. This is different from situations where *obligations*, rather than *obligings* obtain. The idea that force is not the same as right nor capable of creating one is an old idea, of course. Hart recognizes it, and a main objective of his *The Concept of Law* is to accommodate this idea within a legal positivist conceptual framework. He attempts to do this by reference to the notion of “accepted social practice” (Hart 1961, 79-88). But this difficulty may not be solved

even if we were to stipulate that the rules are willingly accepted and complied with, in the absence of force and social pressure. As Dworkin argues, at one time a generally accepted rule required men to pay certain courtesies to women. If that meant the existence of obligations on the part of men to (for example) take off their hats when greeting women, then what could it possibly have meant for someone back then to deny the existence of such an obligation on the ground that it was an insulting kind of condescension? One would have expected an obligation that was constituted by social rules to be as real as the social rules themselves. But whereas the existence of the rules could not be denied, the obligation could (and has been, in fact) denied (Dworkin [1977] 1978, 57).

How are we to understand the obligatoriness of the law, then? According to Priel (2013, 10), the content (substance) of the law must be considered, not just its formal feature of being a law:

One answer that as a historical matter many philosophers found persuasive is that law is, at least potentially, committed to justice. [...] A putative legal system flourishes when it succeeds in promoting justice; when it utterly fails in doing so, or worse, when it subverts it, it no longer counts as a legal system at all: it becomes something that bears some superficial semblance to law, but really is not different from the acts of the gunman, only writ large.

Much the same idea, stated in less radical terms, is behind the claim of the relevance of natural law to legal rules. By “positive law” Cotta (1983, 267) understands “an Ought that has a factual existence”, but “it is exactly to this positive (i.e. factually enacted) form that natural law is opposed (or proposed) as indicating what the former *ought* to be”. Were we to specify what positive law *ought* to be, we would have to bring in morality.

3.2. Mu‘tazilism and Islamic Legal Positivism

According to Fazlur Rahman (1982, 26), Ash‘arism “came to claim for itself the exalted function of being the ‘defender of the bases of Islamic law’”. This is undoubtedly related to the position of eminence which Ash‘arism attained in the field of legal thinking in Islam. Given this, it stands to reason to think that a look at the extended criticism of Ash‘arism by the Mu‘tazilah may expose some of the problems of Islamic Legal Positivism.

Following the example of Dworkin, we may begin by focusing on “the hard cases” where our ideas about obligation are tested. Here is one. In the Qur’an it is stated: “And the thief, male and female: cut off the hands of both, as a recompense for what they have earned, and a punishment exemplary from God” (5:40). But a few years after the death of the Prophet, Mus-

lim lands were afflicted with famine, which led to many cases of theft. Under these circumstances, the Caliph ‘Umar I was led to order the suspension of the limb amputation punishment.

Other hard cases can be imagined in connection with the legal rule that requires that a man’s testimony carry more weight than that of a woman. According to Rahman (1982, 19), “to say that, no matter how much women may develop intellectually, their evidence must on principle carry less value than that of a man is an outrageous affront to the Quran’s purposes of social evolution”.

If we think about such “hard cases”, real or imagined, and the way they can be dealt with under Islamic law, we will inevitably be led to consider the place of principles, policies and standards in such a system. But at this point it will be asked: aren’t these principles, policies and standards to be found in the sources of Islamic law itself, namely (and mainly), the Qur’an and the Sayings of the Prophet? It may be true, as Rahman himself says, that the Qur’an mostly deals with concrete situations and offers practical solutions, but it also “provides, either explicitly or implicitly, the rationales behind these solutions and rulings, from which one *can deduce general principles*” (20 [emphasis added]). Moreover, according to the same author, the Qur’an has a basic moral message:

The basic *élan* of the Qur’an – the stress on socioeconomic justice and essential human egalitarianism – is quite clear from its very early passages. Now all that follows by way of Qur’anic legislation in the field of private and public life [...] has social justice and the building of an egalitarian community as its end. (19)

Many Qur’anic verses can be cited which express judgment on matters that fall within the realm of the moral, such as privacy, freedom of religion, individual responsibility, equality, honesty, and elements of the virtuous life generally, as noted by Abu al-A‘la al-Mawdudi (1978) in his enumeration of “Islamic human rights” in his *Caliphate and Kingship*. One can also find legal precepts and allowances that ought to govern legal proceedings, such as the Saying attributed to the Prophet, which enjoins judges to “ward off the fixed punishments [...] on the strength of *shubhat* [where there is a “shadow of doubt”] as much as you can” (Peters 2005, 25).

If these considerations can be accepted, then it would appear that Islamic Legal Positivism differs from the kind of legal positivism which Dworkin criticizes. As far as Islamic theory of law is concerned, there can be no question of what to do with “principles, policies and standards”, because they are included in the system of law itself.

Despite the availability of moral principles for use in the elaboration of divine law, it can be said that Islamic jurisprudence, historically speaking,

was for the most part rule-driven, rather than morality-driven. It is an historical fact that at no point was it considered possible to strike any legal rule off the book, on the strength of changed circumstances, or moral principles of the kind that Rahman refers to in connection with the value of woman's testimony. This is not hard to understand in view of the fact that legal rules of Islamic law are taken to be statements of Divine commands that cannot be revoked by humans.

Without denying the existence of morals principles, policies and standard in the Qur'an, one can still wonder about the influence they were destined to exert on the development of Islamic law. Joseph Schacht (1964, 204) estimates the matter thus:

The opposite tendency, taking material facts into account, diverging from the formally correct decision for reasons of fairness or appropriateness, is not unknown in Islamic law; it appears in *istihsan* [consideration of goodness] and *istislah* [consideration of utility]. But this principle, both in theory and in its actual application, occupies too subordinate a position for it to be able to influence positive law to any considerable degree.

What this suggests is that general moral principles tended to carry less weight than the clear-cut rules which we refer to as "divine positive law". Despite the efforts of the Mu'tazilites and other rationalists, no doctrine of natural law ever took root in Islam deep enough to have to have an impact on Islamic legislation, or to pose a serious challenge to Ash'arism, which became the official doctrine of morality surrounding jurisprudence.⁴

The tendency towards seeing the law in terms of divine positive laws, rather than in terms of moral concepts and principles is part and parcel of how the dominant view came to understand moral discourse *in general*. According to Ash'arism, not only are the (legal) notions of *obligation* and *proscription* to be defined in terms of divine commands and prohibitions (as we saw in the last section), the same applies to the (moral) notions of *good* and *evil* as well. Thus according to al-Ash'ari, "a thing is evil on our part only because we transgress the limit and boundary set for us and do what we have no right to do. [...] Lying is evil because God has made it evil [by proscribing it]. Had he commanded it, it would not have been objectionable" (al-Ash'ari 1955, 117).

⁴ Patricia Crone (2004, 263-224) denies the existence of a natural law doctrine in Islam. Avner Emon (2010) disagrees, attributing a "soft" natural law doctrine to those who accepted a subordinate role for reason. Undoubtedly, the use of analogy, and the invocation of *maslaha* (utility) in legislation all require the use of reason, even belief in objective standards on some level. The question will always be one of what impact moral considerations based on natural law and morality had in practice, and how much official recognition they received.

Al-Juwaini (1950, 259) is even more emphatic, because he seems to imply an identity between good and evil on the one hand, and divine command on the other:

Goodness is not a quality which is additional to “being commanded by the scripture”. Being good and being commanded by the scripture are not different. Thus the meaning of “good” is that for which scripture reveals praise for its agent, and the meaning of “evil” is that for which scripture reveals blame for its agent.

Thus moral principles, standards and policies are themselves the product of divine decision. This creates a difficulty. We are inclined to assume that ‘Umar I suspended the amputation punishment because he thought it would not be morally right for people to starve to death, when they could save their lives by a little stealing. Perhaps, we think, he was guided by a moral principle to be found in the Qur’an – e.g., the one that says “You ought not to take your own life” (2: 195) But according to the Ash‘arite view, God was under no obligation to command this; He could have just as easily commanded the opposite, in which case ‘Umar I would have been under an obligation *not* to suspend the rule of amputation. No necessity attaches to moral principles. This does not set well with our firm intuition that, e.g., lying *cannot* be prescribed.

To the Mu‘tazilites, who offered the most sustained and carefully worked out criticism of Ash‘arism over many centuries, all of this ran counter to commonsense, and made mockery of the idea of an all-good God. The Mu‘tazilites, at least as we know them through the *Mughni* of Qadi ‘Abd-al-Jabbar, presented many arguments against the Ash‘arite position.⁵ Here we shall consider only the ideas that are closely relevant to the concept of obligation.

The Mu‘tazilite criticism of the Ash‘arite concept of obligation turns out to be not vastly different from criticisms of contemporary LP. In both cases what is found objectionable is the idea of considering law (and legality) in abstraction from morality. In particular, they thought that commands and prohibitions (divine or other) could not be the ground of obligation. *A fortiori*, a command that was not in accordance with what is morally required could not ground any obligation whatsoever. The role of Revelation is merely to reveal the existence of an obligation, but without creating, or constituting it in any way. In the words of ‘Abd al-Jabbar (1958-1965, 64):

Revelation only uncovers in the character of these acts aspects whose evilness or goodness we should recognize if we knew them by reason; for if we had known by reason that prayer is of great benefit to us, [...] and that we will be rewarded for in

⁵ For an overview of the Mu‘tazilite arguments, see al-Attar 2010.

the afterlife, we should have known its obligatory character [also] by reason. Therefore we say that revelation does not necessitate (*la yujib*) the evilness or goodness of anything, it only uncovers the character of the act by way of indication.

Here an alternative view of obligation is illustrated by means of the example of prayer. The Ash‘arites, of course, will say that what makes prayer obligatory is divine command, and nothing else. But ‘Abd al-Jabbar claims that what makes prayer obligatory is the goodness of its consequence in this life and the next. Had we been able to know these consequences by reason, “we should have known its obligatory character [also] by reason”. Obligation, thus, is grounded in goodness, not in divine command.

In a much later statement of the Mu‘tazilite understanding of important legal concepts, we read the following:

Wajib [prescribed, obligatory] is the judgment (*buḥm*) of an act which, if not performed, entails or leads to corruption or harm (*mafsada*).

Haram [forbidden] is the judgment of an act which, if performed, entails corruption.

Mandub [recommended] is the judgment of an act, which, if performed, entails some benefit (*maslaha*).

Makruh [reprehensible] is the judgment of an act, which, if not performed, entails benefit.

Mubah [permitted] is the judgment of an act, which does not entail any corruption or benefit.

(Al-Tahanawi 1996, 668)

Now if the Mu‘tazilites in fact equated good with utility, and evil with harm, then we can replace the phrase “entails benefit” in the above definition with the phrase “entails good”, and the phrase “entails harm” with the phrase “entails evil”. But it is not universally accepted that the Mu‘tazilites were utilitarian. According to Hourani (1985, 153),

The Mu‘tazilites chose to define the main terms of ethics in ways which avoid teleology. Mu‘tazilite ethics is deontological, because it explains *wajib* [obligatory] *hasan* [good] and *qabih* [bad] not entirely by relations to ends, but sometimes at least as characters of acts themselves.

This seems to be Richard M. Frank’s (1983, 207) view too, for although, according to him, “[doing] what is right can [...] be rationalized on purely utilitarian grounds”, nevertheless, “that we ought to do so, however, that is, to fulfill the moral obligation to seek one’s own good and to avoid grave or irremediable harm, is absolute and irreducible”.

Perhaps what Hourani and Frank are saying can be illustrated by ‘Abd al-Jabbar’s (1958-1965, 223-225) treatment of the case of someone who gives directions to the lost traveller.

We know by experience that one will sometimes give directions to one who has lost his way [...] without there being any benefit for him personally – no reward for commission or punishment for omission, [...] no expectation of thanks, fear of blame or desire for praise [...] nor because he is soft-hearted (otherwise most everybody in the world would be soft-hearted).

We can infer from this that providing guidance for the lost is good (*hasan*), and that its goodness is sufficient to motivate action. By itself, this does not prove that goodness bears no relation to consequences. What it shows is that some of our actions can be *other-regarding*, that we do not always act for *self-regarding* reasons. But it remains true to say that the goodness of the action is not independent of the consequences *for the person whose good we have in view*. Acting with no end in view (personal or other) is the same acting purposelessly, something which Mu‘tazilites are well-known for opposing vehemently.

Be the case as it may with regard to the Mu‘tazilite stand on utilitarianism and deontology, what matters essentially is fact that their critique of the legal positivism of Ash‘arite doctrine was based on the idea that obligation cannot be divorced from the moral considerations of goodness, and that the law is answerable to the standards of morality. Obligation is never a matter of being commanded to do this or that. In spirit, their criticism was not really different from that of Dworkin ([1977] 1978, 47), according to whom “no ultimate distinction can be made between legal and moral standards as positivism insists”.

From a certain perspective, it is to the credit of the Mu‘tazilites that they were able to maintain a distinction between divine commands and moral grounds, between the obligatory and the good. But as we shall see in the next section, the Ash‘arite position may have had a logic of its own, a logic embedded in the concrete life of a community of Faith, where no distinction was made between leading a good life and obeying divine commands.

4. A Reassessment of the Ash‘arite-Mu‘tazilite Debate

The claim which Dworkin makes of there being no ultimate distinction between legal rules and moral standards is precisely what John Austin ([1832] 1995, 157) denies in these famous words:

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it may vary from the text by which we regulate our approbation and disapprobation.

In the remainder of this paper an attempt will be made to determine whether there is a way to make sense of the positivist view of obligation after due allowance is made for the moral considerations which critics adduce. This will pave the way for looking at the Ash'arite-Mu'tazilite debate in a new light.

The following examples may serve to illustrate how consonant it is with ordinary understanding of legal terms to make a distinction between morality, rights and obligations on the one hand, and the law as such on the other. Suppose someone makes a lie in the presence of other people, so there is no doubt about its being a lie. We can say: "he ought not to have lied", or "he had a moral obligation not to lie". In many cases, this is the end of the matter. But suppose, on the other hand that the same lie was made under oath, in a court of law. The lie is the same, but the situation is vastly different. Here the person clearly acts under a *legal* obligation to tell the truth. Lying is called "perjury" and it is subject to sanction. By comparison, telling the truth, outside of a law-governed context, seems more like something which is morally desirable. We can speak as much awe as we want, especially if we are Kantians, of "the moral law within," and our obligation to obey "the moral law". But this "moral law" does not have the reality, the bite, which legal obligation has.

The same applies to breaking promises. You promise someone you will sell him your car; later, you change your mind, and break your promise. This is morally wrong, we say. You may or may not be able to find an explanation for what you did, and your explanation may or may not be convincing to this or that person. As long as the matter remains in the realm of the moral, no definite decision may be reached. On the other hand, had your promise been legally witnessed, signed and attested, your obligation to sell the car assumes a different shape. Now it is a legal obligation, whose breaking may incur sanction.

We can add a final illustration of a different kind. A historian, even an ordinary person, reflecting on life in ancient Greece may say the following: "in ancient Greece, people owned slaves, and had a right to buy and sell as many slaves as they wanted. A slave, on the other hand, did not have a right to leave the service of his master". Some may say that we must not talk like this; that we should place the words "rights" and "obligations" between scare-quotes to indicate that, in reality, the slave owners did *not* have a right to sell slaves, and that the slaves did *not* have an obligation to obey their masters. But then we may as well place scare-quotes around 'owned', because, after all, what does ownership mean, if it does not mean that you have right to sell that which you own?

But clearly, there is no call for us to sprinkle a historical discourse about ancient Greece with scare quotes in order to reveal our moral standpoint on

slavery. Talk of slave ownership, and the rights and obligations that go with owning slaves is perfectly understandable as it stands. As Austin's statement suggests, we may have all kinds of objections to the laws, but to think that we are not dealing with rights and obligations "under the law" is simply not true.

According to G. E. M. Anscombe's (1958) famous essay "Modern Moral Philosophy", the idea of there being an obligation not to lie, or kill, or do any number of things which we consider immoral, was once, and for a long time, at home within the framework a divine *law conception of ethics*. Such a conception of ethics is explained thus: "To have a *law* conception of ethics is to hold that what is needed for conformity with the virtues failure in which is the mark of being bad *qua* man [...] that what is needed for *this*, is required by divine law" (30).

Anscombe's examples of the law conception of ethics are Judaism and Christianity. But, of course, one must add Islam. The law conception of ethics was evident in the Ash'arites' willingness, nay, their anxiety, one may say, to put good and evil, the right and wrong, the forbidden and the obligatory, all in one basket: the basket of divine law. They did this by one simple move: they said that all these notions are definable by reference to divine law. In plainer, less theological (therefore less contentious) language they could have said: "to live a good life, where one always does right, and fulfills one's obligations is simply to live in accordance with divine law".

According to Anscombe, obligation, in the context of a society whose life is organized by application of divine law, had a clear meaning. In such a context, "it really does add something to the description 'unjust' to say there is an obligation not to do it; *for what obliges is the divine law-as rules oblige in a game*" (15 [emphasis added]).

By saying that divine law obliges "as rules oblige in a game", Anscombe does not imply that the rules of divine law are the same as the rules of a game. Divine rules and moral laws differ from the rules of a game (such as chess) in that they are

instrument[s] whose use is part and parcel of an enormous amount of human activity and hence of human good; of the supplying both of human needs and of human wants so far as the satisfactions of these are compossible. It is scarcely possible to live in a society without encountering [them] and even actually being involved in [them]. (Anscombe 1969, 74)

This, of course, cannot be said for the laws of a game, such as chess. It cannot be said that an enormous amount of human good hangs on it. So it does not attain the status of being a moral rule. *But insofar as it is a rule*, the chess rule which says "You cannot make two moves in a row" is *not* different from the rule which says "You cannot kill innocent persons". A command,

rule, or law, be it of the religious-divine type, or the game type, has meaning *precisely* because it can be *complied* with. The cynical saying that “laws are made to be broken” has a grain of truth in it, *precisely* because it is also true to say that rules are made to be obeyed. If no obeying ever took place, no rules would exist either.

These considerations enable us to make sense of a further similarity between divine/legal rules on the one hand, and those of chess, on the other. In all these cases, final answers to a certain type of question can be given. To the question of why I, a driver, *had an obligation to* stop I can say: “because the traffic light was red, and the law says to stop at a red light”. To the question of why I *had to* move a chess piece, I can say: “my King was in check, and the rule says to move or resign”. To the question of why I *had to* reject this drink I, a Muslim, can say: “it is an intoxicating drink, and divine law prohibit this”. In all these cases justification comes to an end by reference to a rule. In many cases of this type, this is a perfectly acceptable stopping-point and explanation of obligation.

In many cases, yes, but the “conversations” of the last paragraph can be continued. One can be challenged to say why one *ought* to obey the (divine) law. But to see what is at stake in such a challenge consider a similar challenge to say why one should obey the laws of chess. A question such as this last one can only mean “what good is to be found in this activity of obeying chess laws?” Perhaps one should not engage in chess-playing at all, because it invariably causes headaches. The challenge can then be construed as a call for abandoning the game of chess altogether. Or perhaps the challenger could be satisfied with an answer such as: “because chess playing develops mental skills”.

The important thing to realize is that what is stake in the “ought” involved in these challenges is not the same as the “ought” involved in “You ought to move your King”, or “Thou shalt not kill”. Rather, it is the same as the “ought” we employ in statements such as “the plant is dry; it ought to be watered”, or “He is an athlete; he ought to be exercising more”. Here the “ought” refers to what is needed for the good of the plant and the athlete to be achieved – watering in one case, exercising in the other. Anscombe refers to this as “Aristotelian necessity” (Teichman 2008, 96), in reference to Aristotle’s (1984, 1015a20-5) definition of the necessary as that “without which the good cannot be or come to be”. It is not the “ought” of obligation which the Ash‘arites and legal positivists are interested in.

Now the Mu‘tazilites regularly bring in considerations of “the good” to bear on the question of what is obligatory and what is forbidden. As said before, they ultimately define the obligatory act as one whose omission leads to corruption or harm. On the other hand, the tradition to which the Mu‘tazilites were opposed was at no point prepared to think about the divine

law in term of Aristotelian necessity. For in defining the obligatory and the forbidden, *as well as* good and evil in terms of divine law, it ruled out the possibility of there being any notion that could be used to pass value judgment on laws and legal norms. Human reason, which could be counted on to know something about good and evil, was rendered useless, at least as far as some basic issues of legal philosophy were concerned.

Nevertheless, it could be said the Mu‘tazilites, at least in one important respect, were simple-minded in comparison with the Ash‘arites. At one point ‘Abd al-Jabbar makes a rather implausible claim that “the divine prohibition of something in effect says: “such and such is evil”. In reality, there is no distinction between someone saying “this is evil” and saying “Do not do this” (‘Abd al-Jabbar 1958-1965, 105).

But to think that a (divine) command such as e.g. “Thou shalt not kill” is equivalent to statement such as “Killing is evil” is tantamount to abolishing the whole category of “rule”, or “law” altogether. For saying that killing is evil may be no more than a moral truth, or a *report* of moral fact. In no way can it play the role which it is the nature of laws and rules to play: to make it possible for there to be acts of obedience, (compliance) and disobedience. The Ash‘arites, for their part, were aware of this. For there to be such thing as obligation, there has to be “obliger”, and an “obligee”, and something which one is obliged to do. This holds *regardless* of the prescribed content, and why it is prescribed.

The Ash‘arites were not willing (or able) to think philosophically about the prescribed content of divine law. What figured prominently in their thinking was the existence of rules that were laid down by the recognized authority of the All-mighty God. Pressed to say why one should not lie, they could say: “because God says not to”, which is a good answer in the framework of a way of life that accepts Divine government, just as it a good answer to say, in the context of a game of chess, “because the laws of chess say to”. What the Ash‘arites omitted to do is raise the question of why it was worth one’s while to engage in the whole practice of obeying divine law. The Mu‘tazilites implicitly raised the question and answered by saying, in effect, “because it is good (objectively good) to do so”.⁶ But then we must remember that this questioning attitude of the Mu‘tazilites behooves people who choose to follow the path of Reason rather than Faith. The latter may lump the notion of the good with the obligatory, and thus fail, as the Ash‘arites apparently did, to distinguish between the legal and the moral.

⁶ It would not make a difference if the Mu‘tazilites were to be taken as saying that keeping promises, returning deposits, etc. are good in themselves, and not because of their consequences. For the notion of “Aristotelian necessity” makes no reference to the nature of the good, i.e. whether it defined in a consequentialist-utilitarian or a deontological manner.

Implicit in have said in this section is a suggestion that that the Mu‘tazilites and the Ash‘arites are not opposed to each other in the way it has hitherto been supposed. If we are right, then it would appear the former were on the whole preoccupied with a rule-theoretic notion of what one “must” do: there are rules, and rules must be obeyed. As to the latter, it would then appear that they were mostly preoccupied with goodness-theoretic notion of what one “must” do: one must do that without which the good cannot be or come to be.

There is no conflict between these two types of preoccupation. On the contrary, they draw attention to two complementary aspects of law-making, or law-giving: *law* (not mere moral advice) is needed, but we would like the law to serve what is *good* and what is *right*. Perhaps something along these lines can be developed in order to reconcile Legal Positivism and Natural Law Theory. But this undertaking is beyond the scope of this paper.

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