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ABSTRACT

Islamic law is often said to be very pluralistic due to its interpretational variations. At the level of sources, however, accounts of Islamic law have generally emphasized the reliance on a set of major 'roots' of law, with other lesser sources. This paper discusses on the case of Nizari Ismaili law in historical as well as contemporary terms, elaborating its authority structure, especially the concept of Imamate and role of the Imam, as well as using it to strengthen the case that plurality in Islamic law can and should be extended to a plurality of sources as well as of rules.

Key words: Ismaili, Islam, Imamate, plurality, authority, Muslim

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INTRODUCTION

Thoughtful commentators about Islamic law often point out that, historically as well as in the contemporary period, Islamic law exhibits great interpretational diversity. Indeed, Wael Hallaq, a leading Islamic law scholar particularly of the history of the tradition, has characterized Islamic law as exhibiting ‘ubiquitous plurality’.¹ Typically, this plurality is evidenced by the range of opinions or articulations of the rule in the face of any question or issue, whether these are questions of ritual law or ‘secular’ issues (commercial law, for example).² At the level of sources, accounts of Islamic law have often emphasized the reliance on a set of major sources or roots of law, with other lesser sources. Scholarly works have acknowledged that matters are more complex than this and that different Muslim traditions may employ a different range of sources. Nonetheless, source plurality and in particular how this source plurality is expressed in minority traditions is underexplored. Focusing on the case of contemporary Nizari Ismaili law (hereinafter ‘Ismaili’ law), this paper will help to demonstrate the expression of source plurality in Islamic law. In so doing, this discussion aims to enrich the understanding of plurality in Islamic law to include not only the plurality of answers or rules on different issues but also the plurality of sources.

I. THE PLURALITY OF MUSLIM LEGAL TRADITIONS

The complex of Islamic law – or perhaps better Muslim legal traditions – might be viewed, at first blush, as a poignant example of the acceptance of interpretational diversity. At one level, such an assessment would be accurate since it is undeniable that Muslim legal traditions have known, and continue to know, many different opinions. The indicia of this plurality are abundant. One example is in the well-known diversity of the schools of law (*madhhab* (sing.); *madhhahib* or sometimes *madhhabs* (pl.)). The very existence of different, legitimate schools of law (four, five or more depending on how this is counted)³ itself testifies to the fact that Islamic law has expressed itself in several voices. Indeed, at a major gathering of representatives and scholars from different Muslim traditions and from various parts of the world, which took place in Jordan, a declaration called the ‘Amman Message’ was issued. This message in its ‘Three points of the Amman Message’

1. WAEL B. HALLAQ, *AUTHORITY, CONTINUITY AND CHANGE IN ISLAMIC LAW* 61 (2001). Hallaq’s comments were made in light of the emergence of the four major schools (*madhhabib*) of Sunni Islam – Hanafi, Maliki, Shafii and Hanbali – which developed into a collective, authoritative doctrinal loyalty associated with their founders, acquiring distinct characteristics as schools of law.

2. There is a general distinction in Islamic law between rules pertaining to *ibadat* (acts of worship and ritual norms) and *mu’amalat* (norms pertaining to societal relations). M. Cherif Bassiouni & Gamal M. Badr, *The Shari’ah: Sources, Interpretation, and Rule-Making*, 1 *UCLA J. ISLAMIC & NEAR E.L.* 135, 135 (2001–2002). There is marked plurality with respect to both categories of rules, although there is a general view that *ibadat* is immutable whilst *mu’amalat* may be more open to development and change.

3. Scholars typically refer at a minimum to the four Sunni schools: Hanafi, Maliki, Shafii and Hanbali as noted above in note 1. See, e.g., Bassiouni & Badr, *supra* note 2, at 142; WAEL B. HALLAQ, *SHARI’A: THEORY, PRACTICE, TRANSFORMATIONS* 62 (2009), but see the discussion *infra* for more elaboration.

(which was adopted from 2005 to 2006 in different fora)⁴ acknowledged the diversity of the schools of law that have developed in Muslim history by declaring:

Whosoever is an adherent to one of the four *Sunni* schools (*Mathahib*) of Islamic jurisprudence (*Hanafi*, *Maliki*, *Shafi'i* and *Hanbali*), the two *Shi'i* schools of Islamic jurisprudence (*Ja'fari* and *Zaydi*), the *Ibadi* school of Islamic jurisprudence and the *Thahiri* school of Islamic jurisprudence, is a Muslim. Declaring that person an apostate is impossible and impermissible. Verily his (or her) blood, honour, and property are inviolable. Moreover, in accordance with the Shaykh Al-Azhar's *fatwa*, it is neither possible nor permissible to declare whosoever subscribes to the *Ash'ari* creed or whoever practices real *Tasawwuf* (Sufism) an apostate. Likewise, it is neither possible nor permissible to declare whosoever subscribes to true *Salafi* thought an apostate.⁵

This is wide acknowledgment of the range of different interpretations of Islam (and Islamic law) that are part of Muslim experience. Moreover, in a manner, this statement validates these differences as legitimate at least inasmuch as it precludes charges of apostasy and so might be seen as more than a mere description of plurality towards (something close to) pluralism.⁶ This will be further discussed below.

More subtly, one can add that the schools of law are themselves internally diverse, with a well-known tradition of having majority and minority opinions and of variations within the schools in different locations and at different times. Indeed, whether as a part of a school tradition or otherwise, on any issue, Muslim legal traditions have expressed a wide array of different views.⁷ Thus, a Hanafi in Pakistan may have a different interpretation of a point of law to a Hanafi in India, and a Shafi'i in Egypt in the 18th century may have expressed a different position to a 21st century Egyptian Shafi'i. As Hallaq has said: "Each case had two, three, or even a dozen opinions, each espoused by a different jurist and each was located on a spectrum ranging from the norm of permission to that of prohibition, with several grades of each in between."⁸ This range of different expressions and articulations in the law is captured by the voluminous *fiqh* literature of Islamic law, which one might see as representing the work product of different learned scholars in different schools of law over the centuries. Within this body of work there has always been much diversity.⁹ Thus, Rudolf Peters has said:

4. A total of 552 signatories from 84 countries have endorsed the Amman Message between July 2005 and July 2006. See THE AMMAN MESSAGE, 23 (The Royal Aal Al-Bayt Institute for Islamic Thought 2009).

5. THE THREE POINTS OF THE AMMAN MESSAGE, <http://ammanmessage.com/the-three-points-of-the-amman-message-v-1> (last visited Jan. 26, 2017). See also SUMMARY OF THE AMMAN MESSAGE, http://ammanmessage.com/index.php?option=com_content&task=view&id=16&Itemid=30&limit=1&limit_start=3 (last visited Jan. 26, 2017) ("They [the scholars and representatives] specifically recognized the validity of all 8 *Mathhabs* (legal schools) of *Sunni*, *Shi'a* and *Ibadhi* Islam; of traditional Islamic Theology (*Ash'arism*); of Islamic Mysticism (Sufism), and of true *Salafi* thought, and came to a precise definition of who is a Muslim.").

6. In fact, it has been said that the schools of law "are not contradictory to one another, but different in a way that is not inconsistent with the Qur'an and the *sunnah*." Bassiouni & Badr, *supra* note 2 at 142, n.18.

7. See, e.g., HALLAQ, *supra* note 3, at 61 (differences in the definition of misappropriation by the Hanafites and Hanbalites contributing to significant differences in their positions on the recovery of damages).

8. Wael B. Hallaq, *What is Shari'a?*, 12 Y.B. ISLAMIC & MIDDLE EASTERN L. 151, 159 (2005).

9. Central to this is the idea that there are five "predicates" for every instance of human behaviour, and that it is the jurists' role to derive from the sources of law the most likely predicate for every act. An act may either be "forbidden" (*haram*), "disapproved" (*makruh*), "neutral" (*mubah*), "recommended" (*mandub*), or

[*Mujtahids* [legal scholars] often derive different opinions from the same source texts. The jurists accepted this diversity as they were fully aware of the fact that *fiqh* was human understanding of the divine Shariah and that scholars could differ in their interpretations of Qur'ān and hadith. This resulted, already early in Islamic history, in the emergence of the *madhhabs*, which, as it were, institutionalized difference of opinion. Doctrinal diversity, I would argue, is part of the spirit of Islamic law.¹⁰

That such differences are present is more to be expected than not and, as Peters asserts, it has certainly been an immutable fact. Indeed, there is a whole genre of literature on *ikhtilaf*, or disagreements in legal opinions.¹¹ A well-known example of *ikhtilaf* literature is Ibn Rushd's (Averroes) *Bidayat al-Mujtahid* (title translated in English as *The Distinguished Jurist's Primer*).¹² A short excerpt from this work coming from the 'Book of *Kafala* (Surety)' illustrates the point about the existence of interpretational plurality in Muslim legal traditions in the *fiqh* literature and also its recording in the *ikhtilaf* literature:

They [the jurists] disagreed about the *hukm* [rule] of the surety for the person in the absence of the principal, maintaining three options. First, that it is binding on him to deliver him, otherwise he bears the loss. This is the opinion of Malik, his disciples and the jurists of Medina. The second opinion is the surety is to be imprisoned till he arranges to deliver him or till the death of the principal becomes known. This is Abu Hanifa's opinion and that of the jurists of Iraq. The third opinion is that he is not to bear the burden if he knows his whereabouts. This implies that he is not to bear the burden of delivering the principal, except with the condition of knowing his whereabouts and having the ability to deliver him This opinion is related by Abu Ubayd al-Qasim ibn Sallam, in his book on *fiqh*, attributing it to a number of jurists, and he preferred it.¹³

Ikhtilaf materials were also developed in the Ismaili context. Qadi al-Nu'man's *Kitab Ikhtilaf Usul al-Madhahib* (roughly translated as 'Book on Disagreement in the (Legal) Sources among the Schools of Law') is a case in point.¹⁴ What Ibn Rushd's work and the genre to which it belongs testify to is the fact that there has been much debate and diversity with respect to legal conclusions or positions on a particular issue in Muslim legal traditions, and that this has been captured in a whole genre of legal literature such that the

"obligatory" (*wajib*). Roy Parviz Mottahedeh, *Introduction to MUHAMMAD BAQIR AS-SADR, LESSONS IN ISLAMIC JURISPRUDENCE [DURUS FI 'ILM AL-USUL] 2-3* (Roy Parviz Mottahedeh trans., Oneworld Publications 2003). See also BERNARD G. WEISS, *THE SPIRIT OF ISLAMIC LAW* 18 (1998); HALLAQ, *supra* note 3, at 84-85.

10. Rudolf Peters, *Body and Spirit of Islamic Law: Madhhab Diversity in Ottoman Documents from the Dakhla Oasis, Egypt*, in *ISLAMIC LAW IN THEORY: STUDIES ON JURISPRUDENCE IN HONOR OF BERNARD WEISS* 317 (A. Kevin Reinhart & Robert Gleave eds., 2014).

11. It can be said that *ikhtilaf*, as a "strategy" for dealing with disagreements in opinions, is precisely what allowed the schools of law to flourish. See HALLAQ, *supra* note 3, at 77 ("The efficiency of the schools would have been greatly (if not totally) diminished had they been unable to develop this "strategy" for coping with multiplicity of opinion . . .").

12. 2 IBN RUSHD, *BIDAYAT AL-MUJTAHID WA NIHAYAT AL-MUQTASID [THE DISTINGUISHED JURIST'S PRIMER]* (Imran Ahsan Khan Nyazee trans., Garnet Publishing 2003).

13. *Id.* at 356.

14. QADI AL-NU'MAN, *THE DISAGREEMENT OF THE JURISTS: A MANUAL OF ISLAMIC LEGAL THEORY* (Devin J. Stewart ed. & trans., New York University Press 2015).

works of *ikhtilaf* express the differences between and with the *madhahib*. This is at the level of *fiqh* or as one might say, for greater clarity and precision, at the level of the *furu al-fiqh*, viz., the positive rules derived from the sources of legal knowledge.¹⁵

Be that as it may, at the level of the methodology of *fiqh*, or the roots of *fiqh*, which is expressed in the science of *usul al-fiqh*, the situation appears different. As Robert Gleave notes, *usul al-fiqh* was born out of “[t]he drive to bring [Islamic] laws into a single, consistent framework of understanding Consistency was not proposed merely for intellectual satisfaction. It was crucial for the law’s continued authority that contradictions between rules were kept to a minimum.”¹⁶ Gleave goes on to note that *usul al-fiqh* was the expression of the jurist’s understanding of the divinely-inspired rules for the derivation of positive law such that these rules “were, by the eleventh century, set out in works of *usul al-fiqh* in which the sources of law and their authoritative interpretation were described”.¹⁷ The development of *usul al-fiqh* thus resulted in the proposition of a methodology for deriving the rules of Islamic law that premiated certain major sources (or roots) of law. According to this narrative, the major sources of Sunni Islamic law are four: the Qur’an, the Sunna (as articulated in the hadith), *ijma* (scholarly consensus) and *qiyas* (analogical reasoning).¹⁸

Of course, any more detailed account of the process of legal development will mention that there have been and there are a number of other juristic devices that have been employed to determine the law. Such devices include, *inter alia*, the consideration of public welfare (*maslaha*), the demands of necessity (*darura*), a consideration of the aims or intentions of the Shari’a (*maqasid al-shari’a*), or the use of juristic preference (*istihsan*) or eclectic choice (*takhayyur*) in selecting positive rules from a range of opinions.¹⁹ Nonetheless, the reliance on the four major sources for determining legal rules is generally taken as the core of *usul al-fiqh*.²⁰

It is also important to note that when one considers the Shia Jafari school, instead of *qiyas*, ‘*aql* (the use of reasoning) is given as the fourth source of law. ‘*Aql* in this context must not be understood as unbridled human reason but rather as reasoning linked to divine understanding.²¹ The oft-cited Shi’i hadith: “I am the house of wisdom and ‘Alī is its gate; so whoever desires wisdom, let him approach the gate”,²² for example, is understood by the Shia as affirming ‘Ali b. Abi Talib’s (cousin and son-in-law of the Prophet Muhammad and first Imam in the Shia tradition) access to extraordinary knowledge distinct from that of any other of the Prophet’s companions and which persists in the line of Imams after

15. *Furū’ Definition*, ENCYCLOPAEDIA OF ISLAM: GLOSSARY AND INDEX OF TERMS (P.J. Bearman et al. eds., 2d ed. 2006), available at http://dx.doi.org/10.1163/1573-3912_ei2glos_DUM_gi_00405.

16. Robert Gleave, *Deriving Rules of Law*, in THE ASHGATE RESEARCH COMPANION TO ISLAMIC LAW 57 (Rudolph Peters & Peri Bearman eds., 2014).

17. *Id.*

18. Standard though this account is, some have put it differently. See, e.g., Bernard Weiss, *Interpretation in Islamic Law: The Theory of Ijtihad*, 26 AM. J. COMP. L. 199, 200 (1977–1978) (mentioning only three sources: “The substantive sources from which all rules of law in Islam must be derived are the *Koran*, the *Sunna*, or Tradition of the Prophet, and the Consensus of the Muslim Community.”).

19. Bassiouni & Badr, *supra* note 2, at 136, 138–159. See also HALLAQ, *supra* note 3, at 100–110.

20. See HALLAQ, *supra* note 3, at 75.

21. Such reasoning is “intelligible to the jurist who has mastered the art of interpretation and whose hermeneutical tools permit sound analysis”. HALLAQ, *supra* note 3, at 119.

22. ABŪ NU‘AYM AL-IṢFAHĀNĪ, ḤĪLYAT AL-AWLIYĀ’ 1:64 (1932–1938).

‘Ali.²³ ‘*Aql* in this context is not ordinary and can be used to derive a legal rule, unlike the position that is attributed to in Sunni Islam.²⁴ This therefore represents a different and distinctive legal source – an indicator of source plurality. In the case of Twelver Shi’ism, however, ‘*aql* is more theoretical than practical²⁵ because the Twelver Imam is not accessible so direct appeals to his authority are not possible.²⁶

There has developed a considerable scholarly discussion on the practical import of *usul al-fiqh* in developing legal rules, especially in the contemporary period and Gleave’s work, as mentioned above, canvasses the various roles that scholars opine that *usul al-fiqh* may have played. One view is that *usul al-fiqh* neither envisaged providing (or was even designed to provide) a guide to positive law; rather, it served as a legal expression of theology in creative tension with the positive law, thereby spurring its development. Others view *usul al-fiqh* as a form of literary and artistic expression that has an aesthetic value rather than a legal source value *per se*. The upshot of these analyses casts some doubt on the *usul* as the real basis for the positive legal norms of Islamic law (*furu*). Instead, other sources such as the legal handbooks (*mukhtasar*) have been suggested as more generative of positive law.²⁷

As a result, the actual historical and intellectual conditions of the development of Islamic law suggest that the process was dialectic and complex, drawing from a variety of influences. Indeed, as Joseph Lowry has stated:

On its surface, premodern Islamic legal theory can appear surprisingly postmodern: its recognition of interpretation as central to the legal enterprise (interpretivism); its unembarrassed invocation of and reliance on Arabic literary theory and even poetics (law and literature); its careful assessment of the linguistic limits of communication (perhaps an implicit critique of linguistic formalism); its insistence on the provisional nature of legal interpretation (indeterminacy); and especially its theorizing of doctrinal diversity (pluralism).²⁸

Within this narrative of Muslim legal traditions there are sources shared by all Muslim communities, especially the Qur’anic text and reference to the hadith material. However, differing methodologies with respect to these sources have developed in different traditions. The case of Ismaili law is a crucial example of how these sources have been used in foundationally different ways from other Muslim traditions. Thus, on the one

23. Asma Afsaruddin, *Authority, religious*, in *ENCYCLOPAEDIA OF ISLAM, THREE* (Kate Fleet et al. eds., 3d ed. 2011), available at http://dx.doi.org/10.1163/1573-3912_ei3_COM_23445.

24. Shia Islam also rejects *qiyas* as a source where such analogical reasoning is inferential, involving a transition from one premise to another without stipulation in the Quranic texts. See HALLAQ, *supra* note 3, at 121.

25. The Twelver Shi’ites adopt the maxim “there is nothing in sound rational valuation that can run against authentic revelation”, hence acknowledging ‘*aql* in the form of human reason as divine understanding. HALLAQ, *supra* note 3, at 120.

26. In Twelver Shia thought the last Imam, Muhammad al-Mahdi went into occultation – *ghayba* – in 874CE and will return in a messianic role in eschatological time. See D.B. MacDonald and M.G.S. Hodgson, *Ghayba*, in *ENCYCLOPAEDIA OF ISLAM* (P.J. Bearman et al. eds., 2d ed. 1960–2007), available at http://dx.doi.org/10.1163/1573-3912_islam_SIM_2479.

27. See Gleave, *supra* note 16, at 67 for a discussion of the scholarly debates about the nature of *usul al-fiqh* and its role (or lack thereof) in developing positive provisions of Islamic law.

28. Joseph Lowry, *Is There Something Postmodern about Uṣūl Al-Fiqh? Ijmā‘, Constraint, and Interpretive Communities*, in *ISLAMIC LAW IN THEORY* 285–286 (2014).

hand, the case of Ismaili law reinforces a sense of source plurality in Islamic law; on the other hand it presents an oft-overlooked chapter of this plurality.

II. THE CASE OF ISMAILI LAW

Before elaborating on the Ismaili case, it is important to make some distinctions between different communities and be clear about what we will be discussing. There are different traditions and communities that have developed over time, which can be referred to as 'Ismaili'. Taking its name from its acceptance of Ismail b. Ja'far (d. 755CE) and his descendants as the rightful successors to Ja'far as-Sadiq (d. 765CE), the Ismaili tradition thus parts company with Twelver Shi'ism, which held that Musa al-Kadhim (d. 799CE), Ismaili's younger brother, was the proper successor to Ja'far as-Sadiq. All the adherents of Ismail are thus Ismailis. Subsequently, within Ismaili communities, there emerged further disagreements about rightful succession from one Imam (a concept elaborated below) to the next. A major division emerged between the Musta'lian and Nizari Ismaili communities. Abu'l-Qasim Ahmad al-Musta'li bil-lah (al-Musta'li; d. 1101CE) was accepted in the Musta'li tradition as the rightful successor to his father al-Mustansir bi-llah (d. 1094CE), while the Nizari tradition held that al-Mustansir bi-llah's other son, Nizar (d. 1095/7CE), who was deposed by al-Musta'li, was the legitimate Imam. This essay is about the Nizari Ismailis who today are often called simply 'the Ismailis' (though of course they are more technically known as 'Nizari Ismailis' as was mentioned above), and will be referred to as such hereinafter, while the Musta'lis are often called Bohras (of which there are different communities as well). In the case of one of the Bohra communities – the Daudi Bohras, whose Imam is not physically present – the leadership of the community rests with the Da'i, a religious leader who does not technically hold the office of Imam (something to be explained below), but who has effectively assumed the 'authority' of the Imam in legal as well as theological terms.²⁹

In consonance with other Muslim communities, the Ismailis declare that they affirm the *shahada* (declaration of faith) *La ilaha illah, Muhammad ar-Rasul Allah* ('There is no God but God and Muhammad is the Messenger of God'). They also affirm that, as a prophet, Muhammad received revelation that has become the text of the Qur'an. As a result, both the Qur'an and the traditions of the Prophet are foundational for Ismaili law, as they are for all Muslims. As a Shia community, the Ismailis also adhere to the concept of Imamate. Imamate is not only a central concept but is also critical to the legal methodology of the Ismailis and so merits some exposition here.

Imamate is not a uniquely Ismaili concept. In a generic sense an 'imam' is simply a leader (or more literally, someone who 'stands in front'), but it imports also the sense of legitimate authority of a religious, political or legal kind. In the Sunni tradition, over time, the term imam has been used in different contexts. The first four caliphs (termed in later history as the 'The Rightly Guided' or *Rashidun* caliphs) were latterly referred to as Imams; the eponymous founders of the major legal schools like al-Shafi'i, Malik b. Annas and Abu Hanifa are also often called Imams. In both of these cases, it is the recognition of the legitimate authority, and due to it legitimate leadership, that attracts the use of the term Imam.³⁰ In current Sunni practice, the term is also applied to less august authority such

29. See FARHAD DAFTARY, *THE ISMAILIS: THEIR HISTORY AND DOCTRINES* (2d ed. 2007) for a discussion of the Ismaili tradition more generally.

30. AZIM NANJI, *Imam/Imama*, in *THE PENGUIN DICTIONARY OF ISLAM* 75 (2008).

that the leader of the congregational prayer (*salat*) at any masjid is commonly styled an imam.

But in the Shi'i context, matters are different: "To the Shi'ites, the term *imam* has a different signification altogether. It refers to a member of the family of the Prophet (*ahl al-bayt*), and usually to a member of 'the family' as descended from Muhammad's daughter Fatima"³¹ and, in this context, to "the infallible guide of the community."³² Azim Nanji notes that, thus, the Imamatus was developed as an office of authority, guidance and interpretation of the faith and practice as revealed in the Qur'an, continuing the authority, guidance and interpretation provided by the Prophet.³³ He further noted that, "[o]ver time, this belief came to include the idea of a continuing line of imams from among the immediate male descendants to fulfil the goal of the institution, each having been specifically designated for the role by his predecessor."³⁴ As will be elaborated upon below, the Ismailis recognize the office and institution of the Imamatus in a form consistent with Nanji's elaboration in their Constitution.

As Najam Haider argues, the idea of Imamatus is thus one of *legitimate leadership*.³⁵ The basis of this leadership was grounded in Qur'anic verses (Haider cites Qur'an 2:124³⁶ and Qur'an 21:72-73)³⁷ as well as in the Shi'i-affirmed tradition that Muhammad had designated 'Ali Ibn Abi Talib as the first Imam and leader of the Muslim community at the oasis of Ghadir-i-Khumm during his last pilgrimage.³⁸ The above-noted hadith ('I am the house of wisdom and 'Ali is its gate')³⁹ adds a further aspect to the authority of Imamatus. This leadership has different dimensions – spiritual, political, religious and legal. For our purposes, there are a couple of important facets of this leadership to note. First, in its spiritual dimension, because of the Qur'anic grounding and Prophetic designation, as noted above, the Imam has been held by the Shia to provide divinely inspired leadership. While distinct from conceptions of divinity and from prophetic authority, the Imam's leadership is not simply temporal but is divinely informed. This at least is the case for the Twelver (or Ithnashari) Shia and the Ismailis, the two largest groups of the Shia, though it may not be so for the Zaydis (or Fivers as they are sometimes called), who are often classified as Shia, though their understanding of Imamatus is profoundly different in theological terms to the Ithnasharis and Ismailis and does not encompass divine inspiration.⁴⁰ For the Ismailis,

31. Muhammad Qasim Zaman, *Imam*, in 1 ENCYCLOPEDIA OF ISLAM AND THE MUSLIM WORLD 502–503 (Richard C. Martin ed., 2d ed. 2016).

32. *Id.*

33. NANJI, *supra* note 30, at 75.

34. *Id.*

35. NAJAM HAIDER, SHI'I ISLAM: AN INTRODUCTION 31 (2014).

36. *Qur'an* 2:124:

And mention, O Muhammad, when Abraham was tried by his Lord with commands and he fulfilled them. Allah said, "Indeed, I will make you a leader for the people." Abraham said, "And of my descendants?" Allah said, "My covenant does not include the wrongdoers."

37. *Qur'an* 21:72-73:

And We gave him Isaac and Jacob in addition, and all of them We made righteous. And We made them leaders guiding by Our command. And We inspired to them the doing of good deeds, establishment of prayer, and giving of *zakah*; and they were worshippers of Us.

38. HAIDER, *supra* note 35, at 31.

39. *See supra* note 22.

40. *See* WILFERD MADELUNG, *Zaydiyya*, in 11 ENCYCLOPAEDIA OF ISLAM 477–478 (P.J. Bearman et al. eds., 2d ed. 2002).

however, the Imam is the exclusive holder of legitimate leadership and of singular spiritual authority, which endows him with inerrant scriptural and religious interpretation.⁴¹ Second, and as a result of the above, the implications of this conceptualization and understanding of the Imamate for Ismaili law are profound. In Sunni law, legal authority can legitimately reside in scholars (*muftis*, *alims*, *maulvis* etc.) in the absence of any other superior authority. Thus, it is the scholars who delineate – albeit not in an inerrant manner – the requirements of the law. In the Shia case, however, matters are different. In addition to the Prophet one can look to the Imams as holding Qur'anically-affirmed, divinely-inspired authority. Twelver and Ismaili Shia sources hold that the Qur'anic reference (Qur'an 4:59) 'O you who believe, obey Allah, and obey the Prophet and the holders of authority from amongst you' (*u'lil amr minkum*) refers to the Imams.⁴² Thus, there is a source of legal normativity in these theories that goes beyond the 'standard sources'. In the case of the Ithnashari community today (who share much of the theory of the Imamate with the Ismailis but whose Imam is not physically accessible at present), matters are not so different in practice from the Sunni approach. In the absence of the Twelver Imam, it is the Ithnashari clerics (i.e., grand ayatollahs, ayatollahs, hujjat al-Islam etc.) who act as the accessible legal authorities and who thus also delineate the law for their community, within the limitations of scholars and, of course, without direct divine inspiration.

The situation for the Ismailis is different, however, due primarily to the physical presence and accessibility of the Ismaili Imam, His Highness Prince Karim Aga Khan, who is held to be the 49th hereditary Imam of the (Nizari) Ismailis. This is reflected in the current Constitution of the Ismailis.⁴³ Referring to the Imam as 'Mawlana Hazar Imam',⁴⁴ which is nomenclature that the community uses to refer to him, the constitutional articles stipulate the Imam's general (Article 1) and more specifically legal (Article 15) authority as follows:

Art 1.1:

Mawlana Hazar Imam has inherent right and absolute and unfettered power and authority over and in respect of all religious and Jamati matters of the Ismailis.

Art 1.2:

41. HAIDER, *supra* note 35, at 41–47.

42. The major Twelver Shi'i hadith collection the Al-Kafi is one such source. See AL-KAFI, H 1039, Ch. 100, h 1, Vol. 1 of 8 (Muhammad Sarwar trans., 1999), available at <http://www.holybooks.com/al-kafi-shia-divine-text>:

A number of our people has narrated from Ahmad ibn Muhammad from ibn Mahbub who has said that Yahya ibn 'Abdallah abu al-Hassan the companion of al-Daylam narrated to us and who has said the following. "Once I heard [the Imam] Ja'far ibn Muhammad (a.s.) say while a group of people of Kufa was present before him, "It is very strange of the people. They have received their knowledge from the Messenger of Allah. They have followed such knowledge and found guidance but they think that his Ahl al-Bayt (members of his family) have not received his knowledge. We are his Ahl al-Bayt (members of his family) and his descendants. In our house Divine inspiration came down and from us knowledge came out to them. Do they think that they have learned and found guidance but we remained ignorant and lost? This, certainly, is not possible.""

See also QADIAL-NU'MAN, *The Book of Walaya*, in DA'A'IM AL-ISLAM [THE PILLARS OF ISLAM] 28 (Ismail K.H. Poonawala ed., Asaf A.A. Fyze trans., Oxford University Press 2004) (acknowledging that the Imamate are the people referred to in *Qur'an* 4:59).

43. THE CONSTITUTION OF THE SHIA IMAMI ISMAILI MUSLIMS 1998 [hereinafter CONSTITUTION].

44. This is language both used in the text of the Constitution and more generally. See, for example, the use of this terminology in the Ismaili community's official website: <http://www.theismaili.org>.

Mawlana Hazar Imam has the sole authority to:

- (a) determine all questions that may arise as regards the meaning and interpretation of any religious or Jamati tradition or custom of the Ismailis and amend or discontinue it at any time;
- (b) confer a constitution on the Jamat and amend or discontinue any such constitution or any provision thereof;
- (c) determine all questions that may arise as regards the meaning and interpretation of any such constitution and grant dispensation therefrom;
- (d) constitute or discontinue any body or organization under any such constitution and define or change its composition, functions, jurisdiction or powers;
- (e) constitute or discontinue offices under any such constitution, make appointments to any such office and terminate such appointments which shall all be held at Mawlana Hazar Imam's pleasure; and
- (f) prescribe the Rules and Regulations to be made under this Constitution.

Art 15.3:

Mawlana Hazar Imam has the sole right to interpret the personal law evolved within the Shia Imami Ismaili School of Thought of Islam.⁴⁵

As is clear from these constitutional provisions, the Ismaili Imam has broad authority over and within the community and that in particular the Imam has primacy in the interpretation and articulation of legal norms relating to personal law for the Ismailis. In this sense, the Ismaili Constitution provides for the community a contemporary articulation of the concept of Imamate, which concept as we have seen has old and deep roots in Shi'i thought. At one level, therefore, this articulation of the role of the Imam is entirely unremarkable inasmuch as it is simply consistent with a theory of Imamate and of the authority and function of the Imam that would be shared and understandable, *mutatis mutandis*, by different Shi'i communities, particularly as this is expressed in Articles 1.1, 1.2(a) and 15.3. However, what makes the Ismaili situation unique is that it is the only community that currently has its Imam accessible. Indeed, the word 'Hazar' in the community's nomenclature for the Imam indicates that the Imam is 'present'. 'Hazar Imam' is thus the present Imam or the Imam of the present, and the nomenclature derives from the Arabic '*al-imam al-hadhir*' and Persian '*imam-e-hazar*', which phrases convey the same basic meaning. The idea of the Imam being present is highly significant for Ismaili law because the presence of the Imam provides direct access to an inerrant source of legal normativity and interpretation for the community. Thus, the need to seek alternative sources of legal normativity, such as a reliance on jurist-scholars (*mujtahids*), does not arise for the Ismailis. Nor, in a fundamental sense, would it be legitimate to turn to other figures because in the face of the authority of the Imam other authorities would lack sufficient legitimacy to endow their opinions with proper legal weight. One historical representation of this outlook comes from the work of the famous Ismaili jurist Qadi al-Nu'man, who served as Chief Qadi (Chief Judge or in contemporary parlance even Chief Justice) during part of the Fatimid Ismaili dynasty that ruled from Cairo in the 10th and 11th centuries CE. Al-Nu'man is well known for his legal works and in particular for his

45. CONSTITUTION, *supra* note 43.

compendium of Ismaili law the *Da'a'im al-Islam (The Pillars of Islam)*,⁴⁶ which continues to be regarded as a major source of Ismaili *fiqh*. Our concern here is not with the substance of al-Nu'man's work but with the way in which it was written and what this says about the methodology of Ismaili law. As Agostino Cilardo has noted, Nu'man's work followed the premises of Shi'i and Ismaili law which located authority, including legal authority, in the hereditary Imams.⁴⁷

This is a point well made by Dachraoui's study of Nu'man (cited by Cilardo), which says:

Since the Imam was the depository of all learning . . . it was in close collaboration with him that the supreme *kāḍī* [i.e., al-Nu'man], in his function as official *fakīh* [jurist] of the dynasty, wrote treatises of *fiqh* Thus al-Nu'man consulted al-Mu'izz [the then Ismaili Imam and simultaneously Fatimid Caliph] regularly whilst composing his main theological works⁴⁸

Thus, Fatimid theory gave special importance to the Imam as a legally generative authority. This special position of the Imam continues to be manifested today in the Preamble to the Ismaili Constitution. Thus, Recital B of the Constitution reads:

In accordance with Shia doctrine, tradition and interpretation of history, the Holy Prophet (S.A.S.) designated and appointed his cousin and son-in-law Hazrat Mawlana Ali *Amiru-l-Mu'minin* to be the first Imam and to continue the *Ta'wil* and *Ta'alim* of Allah's final message and to guide the murids, and proclaimed that the Imam should continue by heredity through Hazrat Mawlana Ali and his daughter Hazrat Bibi Fatima *Khatun-i-Jannat*.⁴⁹

The significance of this recital lies in several of its aspects. First, it establishes the special lineage of the Imams in the general family of the Prophet (via Ali) and even more in his direct bloodline (via his daughter Fatima). Second, and relatedly, it establishes the heredity of all future Imams, linking them in lineal descent to the Prophet. These aspects alone would provide the 'authority of descent' or 'authority of lineage' to all Imams. In addition, however, the recital also speaks of the Imam's role in continuing *Ta'wil* and *Ta'alim*, and what this entails merits some elaboration. *Ta'wil* may be understood as interpretation or esoteric/allegorical interpretation and implies the capacity to understand and articulate the non-apparent or non-obvious meaning of the Qur'anic text. The capacity

46. For an English translation see QADI AL-NU'MAN, *supra* note 42. In a separate work – the *Ikhtilaf Usul al-Madhahib*, al-Nu'man recognizes the Qur'an, the *sunna* and the teachings of the imams as the only authoritative sources of law. See Wilferd Madelung, *The Sources of Ismaili Law*, 35 J. NEAR EASTERN STUD. 29, 32 (1976).

47. AGOSTINO CILARDO, THE EARLY HISTORY OF ISMAILI JURISPRUDENCE: LAW UNDER THE FATIMIDS (A CRITICAL EDITION OF THE ARABIC TEXT AND ENGLISH TRANSLATION OF AL-QADI AL-NU'MAN'S MINHAJ AL-FARA'ID) 21 (2012). Cilardo writes:

Al-Nu'man's method of juridical reasoning in his *Da'a'im* is based on the practical application of the Ismaili doctrine regarding the *usul al-fiqh*. Shi'ism in general believed that the imams transmitted and explained a number of allegorical books, one imam to another. The Fatimids, too, believed that such knowledge should be hereditary among the imams.

48. Farhat Dachraoui, *al-Nu'man*, in ENCYCLOPAEDIA OF ISLAM, *supra* note 26, available at http://dx.doi.org/10.1163/1573-3912_islam_SIM_5977.

49. CONSTITUTION, *supra* note 43.

for *Ta'wil* is therefore the capacity to draw from the 'hidden' meaning of the Qur'an and explain this aspect of its message. *Ta'alim* is a complementary capacity but its focus is on teaching, in particular teaching on aspects of law or theology. In the Ismaili context *Ta'alim*, like *Ta'wil*, is thus a capacity linked to the special position and knowledge of the Imams derived from descent from the Prophet. Hence, *Ta'alim*, in this context, is not a capacity available to ordinary teachers.

The *Oxford Islamic Studies Online* defines *Ta'alim* (transliterated as 'Talim') as:

- (1) Instruction in *Quran* and hadith and sometimes Islamic law, typically provided in the mosque
- (2) *In Nizari Ismaili Shiism, divinely inspired teaching through the imam.*⁵⁰

Ta'wil (transliterated as 'Tawil') is defined as follows:

Interpretation or allegorical interpretation. The term occurs in *Quran* 3:5–7 in the context of distinguishing between those verses of the *Quran* that are precise in meaning (*muhkamat*) and those that are ambiguous (*mutashabihat*). Subsequent verses assert, according to one reading, that "only God and those well-grounded in knowledge" know the interpretation of the ambiguous parts of the text, whereas according to another, more popular reading, only God knows the interpretation or hidden meaning of those parts⁵¹

While this definition does not mention any Ismaili-specific elements (as in the case of *Ta'alim*), the use of the term *Ta'wil* in the Ismaili Constitution makes clear that, in the Ismaili context, *Ta'wil* resides in the authority of the Imam. Thus, there is an Ismaili-specific, Imam-linked, understanding of the *Ta'wil*.

As the above definitions make clear, the Ismaili understanding utilizes shared concepts like *Ta'wil* and *Ta'alim*, but aligns the understanding of these ideas to the Ismaili context of Imam and the authority of the present and living Imam. When combined with the earlier-noted references to the importance of the Qur'anic text and the role of the Prophet Muhammad, this approach might be seen therefore not to represent a fundamentally different legal theory but rather a different *basis* of legal authority. In other words, while the Ismailis, in common with other Muslims, draw upon *Ta'wil* and *Ta'alim*, and the Qur'an and Prophetic authority, their understanding and conceptualisation of these ideas are different because of the accessible authority of the Imam.

One of the important implications of this understanding concerns the format of contemporary Ismaili law. As mentioned above, during the Fatimid period the Qadi al-Nu'man under the oversight of the Fatimid Imam-Caliph al-Mu'izz composed, among other works, the major compendium of Ismaili *fiqh*, the *D'a'im al-Islam*. The question often arises about contemporary *fiqh* – where is contemporary Ismaili *fiqh*? There are three responses that may be offered to this query. First, it is the case that certain aspects of ritual

50. *Talim Definition*, THE OXFORD DICTIONARY OF ISLAM (John L. Esposito ed.), <http://www.oxfordislamicstudies.com/article/opr/t125/e2326> (last visited Nov. 13, 2016) (emphasis added).

51. *Tawil Definition*, THE OXFORD DICTIONARY OF ISLAM, *supra* note 50, at <http://www.oxfordislamicstudies.com/article/opr/t125/e2358> (last visited Nov. 7, 2016).

law (*ibadat*) have indeed received contemporary articulations. For instance, a new Ismaili *Nikkah* (marriage text) was issued under the Imam's authority in the early 2000s. The current Imam had also earlier issued texts for ritual prayers such as the *Namaz* (or *salat*) to be recited for the *Eid* (festival) celebrations. The issuance of texts for these ceremonies and rituals is an expression of the Imam's contemporary legal authority, here in the context of ritual law. Second, through Article 3.2 of the Ismaili Constitution, the current Imam has also authorised a general provision with respect to the law that should govern Ismailis. Article 3.2 of the Constitution says: "This Constitution shall apply to Ismailis worldwide, subject only to the overriding effect of any applicable laws of the land of abode of any Ismaili to the extent of any inconsistency."⁵² By virtue of this Article the Imam has, of course, addressed the question of conflict or inconsistency between any aspect of Ismaili law and the law of the state in which an Ismaili resides and this too is part of the Imam's legal authority, but now in the context of 'secular' or worldly law. Third, and most importantly, the way the question of contemporary (Nizari) Ismaili *fiqh* is posed may have to be rethought. In the ordinary understanding, *fiqh* is the work product of the *fuqaha*. That is to say, it is the output of the scholarly work of jurists who undertake the exercise to provide an articulation of the Shari'a to the community. These scholarly exercises are always acknowledged to be contingent or imperfect since the scholars do not possess perfect insight or absolute authority. As mentioned above, the *fiqh* has also been plural inasmuch as there may be a number of different works of *fiqh* resulting from these processes discussing the same topic in the same school of law, with different articulations and positions expressed. *Fiqh* literature becomes practically very important when the scholars, by dint of their learning and study, represent the best form of accessible authority and legal insight. However, having a corpus of *fiqh* becomes much less necessary when one holds that there is an infallible legal authority that one can access, which is the case of contemporary Ismaili law. It is too simplistic therefore to say that the Imam is the *fiqh* but at the same time the presence of the Imam means that having a body of scholarly output that 'discerns' the law⁵³ becomes relatively unnecessary or even irrelevant. Now one might say that the Fatimids also had a present Imam and also a work of *fiqh*. In this sense, the *D'a'im* serves as a precedent of having *fiqh* in the context of an accessible, present Imam. The *D'a'im*, however, also emerged in the context of an Ismaili empire and may therefore, at least in part, have been designed to serve the political and administrative needs of the state to have a compendium of law. The Fatimid example, therefore, shows that there may be a work of *fiqh* in the presence of the Imam, but it does not show that there must be one to provide for the legal guidance of the community. Thus, the paradigm of *fiqh* texts as sources of legal authority and to articulate the law should be reconsidered in the context of the role of the Imam in contemporary Ismaili law. Indeed, the preeminent legal source today may be the Ismaili Constitution, since this was ordained by the Ismaili Imam and under his seal and signature.

Taking the above into account, we can see, therefore, that Ismaili law shares many of the sources of general, mainstream Islamic law but that the manner in which these are interpreted and used is unique. Some of the differences between Ismaili law and Sunni law stem from the basic distinctions between Sunni and Shi'i concepts of authority. In this respect, it is important to note that in his letter to the Amman Conference (from which emerged the Amman Message) the Aga Khan noted the shared bases of the Ismaili tradition with other Muslim traditions and, in particular, the affiliation between Ismaili law and Shia

52. CONSTITUTION, *supra* note 43.

53. Mottahedeh suggests that *fiqh* should be translated literally as 'discernment' (of the sacred law). See Mottahedeh, *supra* note 9, at 17.

law of the Jafari *madhhab*, which is the main Twelver Shia school. The Aga Khan's letter says:

In my presidential address [at the Seerat Conference in Karachi in 1976], I appealed to our ulama not to delay the search for the answers to the issues of a rapidly evolving modernity which Muslims of the world face because we have the knowledge that Islam is Allah's final message to mankind, the Holy Qur'an His final Book, and Muhammad, may peace be upon him, His last and final Prophet.

These are the fundamental principles of faith enshrined in the Shahada and the Tawhid therein, which bind the Ummah in an eternal bond of unity. With other Muslims, they are continuously reaffirmed by the Shia Ismaili Muslims of whom I am the 49th hereditary Imam in direct lineal descent from the first Shia Imam, Hazrat Ali ibn Abi Talib through his marriage to Bibi Fatimat-az-Zahra, our beloved Prophet's daughter.

....

Our [i.e., the Ismailis] historic adherence is to the Jafari Madhhab and other Madhahib of close affinity, and it continues, under the leadership of the hereditary Ismaili Imam of the time. This adherence is in harmony also with our acceptance of Sufi principles of personal search and balance between the zahir and the spirit or the intellect which the zahir signifies.⁵⁴

Notwithstanding the affinity to the Jafari *madhhab* as noted above, Ismaili law is also distinctive from other Shi'i traditions as well. The substantive difference here arises because, as the Aga Khan's letter states, Ismaili affinity to the Jafari *madhhab* arises in the context of 'the leadership of the hereditary Ismaili Imam of the time.'⁵⁵ This is consistent with what Haider has noted about how the Ismailis and Ithnasharis "place a far greater emphasis on the knowledge-based duties of the Imam than do the Zaydis Recall that rational divine justice necessitates that God send an Imam out of his kindness (*lutf*) to provide correct interpretation of revelation."⁵⁶ This observation is consistent with the articulation of the role of the Imam in the Book of *Walaya* (broadly, authority) in the *D'a'im al-Islam*. In the opening of the Book, Qadi al-Nu'man cites a hadith (saying or tradition) of the Shia Imam Muhammad al-Baqir (full name: Muhammad bin 'Ali bin al-Husayn bin Ali bin Abi Talib; also known as Abu Ja'far; d. 733CE) in which the Imam says:

Verily, in His Book God commanded the faithful to pray, but they did not know what prayer was, nor how to pray. God therefore ordered His Prophet Muhammad to explain how prayers are to be said

Then God commanded the alms tax and the people did not know what that was, so the Messenger of God explained it in detail

54. LETTER FROM H. H. THE AGA KHAN, <http://ammanmessage.com/letter-from-h-h-the-aga-khan> (last visited Nov. 8, 2016).

55. *Id.*

56. HAIDER, *supra* note 35, at 42.

Then he ordained fasting but the people did not know what it was nor how they should fast. The Messenger of God therefore explained it to them fully

And [similarly] God ordered [the community to accept] the *walaya* [of Ali]⁵⁷

This emphasis on *walaya* accords with another of Qadi al-Nu'man's works, the *Kitab al-Himmah*, which similarly emphasizes the centrality of the authority of the Imam. He says:

It is incumbent upon the one who recognizes the imams that he fears them just as he fears his Lord (*rabba-hu*), and he dreads them just as he dreads God, for if God the Mighty and Exalted has joined obedience to them (*ta'ata-hum*) to obedience to Him and has made them intermediaries (*al-wasa'it*) in what is between Him and His creation, and witnesses (*al-shuhada'*) for His servants (*'ibadi-hi*), then their contentment (*rida'*) is bound to the contentment of God, and their displeasure is tied (*ma'qud*) to His displeasure, and to them He gives rewards and the others He punishes. Ja'far b. Muhammad stated: "Our Shi'ah are from us and the remainder of the people are in the Fire; through us he follows God, through us he obeys God and through us God renounces, due to our being obedient, as it was submission to God, and the one who renounces us, has renounced God." Our obedience resolutely preceded from God before His creation, so that He does not accept one deed except through us, for we are the "gate" (*bab*) of God and His proof (*hujjah*), and we are his safe-guarders (*umana'u-hu*) over His creation, the custodians of His secret and the repositories of His knowledge, for it is the duty of all servants to approach (*al-taqarrub*) through obedience (*al-ta'ah*) the friends of God (*awliya' Allah*) and to adorn them with sound deeds (*bi al-a'mal al-salihah*).⁵⁸

Of course, today the direct leadership of the Imam is absent for Ithnashari and other Shia communities. But because the Ismaili Imam is present and accessible, the concept of *walaya* and the direct authority of the Imam can be, and is, operative. As a result, for the Ismailis, even the above-noted *madhhab* affinity is understood, interpreted and applied by and through the institution and the authority of the Imam as an expression of *walaya*. This is distinctive and represents a different structure in practice, even if not in theory (on the assumption that if the Ithnashari or other Shi'i communities thought that their Imam was physically present, that Imam would have a similar role of authoritative interpretation and application of their law).

III. PLURALITY AND AUTHORITY

The case of Ismaili law is significant because, even amongst Shia communities, due to the physical and accessible presence of their Imam, the Ismailis have a distinctive

57. QADI AL-NU'MAN, *supra* note 42, at 18–19.

58. See KITAB AL-HIMMAH (M. Kemil-Husayn ed.) as cited in Elizabeth R. Alexandrin, The "Sphere of Walayah": Isma'ili Ta'wil in Practice according to al-Mu'ayyad (d.ca. 1078 C.E.) 59–60 (Apr 2006) (unpublished Ph.D. thesis, McGill University), available at http://digitool.library.mcgill.ca/R/-?func=dbin-jump-full&object_id=108805&silolibrary=GEN01.

legal position. The Ismaili example thus shows that within Muslim legal traditions there exist fundamentally distinct conceptions of legal authority and normativity.

To reiterate, the Ismaili position shares much by way of sources with other traditions of Islamic law. In particular, the centrality of the Qur'anic text and the role of the Prophet – the two most salient of the 'roots' of Islamic law and widely shared by all traditions of Islamic law – are recognized and affirmed in the Ismaili Constitution. As part of the wider Shia tradition the Ismaili position also shares important grounds in common with other Shia communities in the concept of Imamate and of the legal authority of the Imams.

On these bases, Ismaili law, whether of the classical or contemporary variety, may simply reflect the plurality of opinions that have been part and parcel of Muslim legal traditions for centuries and are well documented. Indeed, Agustino Cilardo's *The Early History of Ismaili Jurisprudence: Law under the Fatimids*⁵⁹ essentially catalogs the differences between Ismaili inheritance law as articulated in a series of works of Qadi al-Nu'man and Imami (that is Twelver Shia/Ithnashari) and Sunni law. At this level, Ismaili law is one expression of the diversity of substantive legal rules or positions (*akham*) within Islamic law and reflects Hallaq's observation of ubiquitous plurality.⁶⁰ This, however, I suggest, is not all that there is to understand of this story.

While Ismaili law shares a lot of the schema of Islamic law, it crucially adds the role of the Imam, which is not only fundamental to the Ismaili interpretation of the faith but conditions its whole legal outlook. The capacity of the Imam to interpret authoritatively governs how the Qur'an and the Prophetic example (as well as, of course, the examples of previous Imams) are understood. This alone would mark a major difference with Sunni law, even though it shares conceptual ground with Shia legal traditions. However, the access to the present Imam distinguishes the Ismaili case even further, and especially from other Shia traditions, because the access to the Imam makes him a living fountainhead for the law. Recall that the Ismaili Constitution states that the Imam has "inherent right and absolute and unfettered power and authority over and in respect of all religious . . . matters of the Ismailis"⁶¹ and "the sole right to interpret the personal law evolved within the Shia Imami Ismaili School of Thought of Islam".⁶² The role of the Imam is, therefore, defining for Ismaili law. Not only does the Imam's interpretive authority do the work that in other Muslim traditions – including in other Shia traditions where the Imam is not accessible – would otherwise be done by the *ulama* and thus substantially obviates the need for the *ulama* but additionally, unlike the *ulama*, the Imam is endowed with the capacity for authoritative (as opposed to speculative or contingent) legal and theological interpretation. The capacity for authoritative interpretation in the Imam therefore represents a unique and normatively different basis for the law. The Imam is not just a 'super-*alim*' (*alim* (sing.); *ulama* (pl.)); he possesses a qualitatively distinctive legal authority. What adds practical effect to this distinctive authority is the fact that the Ismaili Imam is present and accessible.

This understanding of authority is significant because when the bases of Islamic law are defined, and in particular when, even in the contemporary context, the methodology of Islamic law generally is elaborated upon, the references made are often to

59. CILARDO, *supra* note 47.

60. HALLAQ, *supra* note 1, at 61.

61. CONSTITUTION, *supra* note 43.

62. *Id.*

the classical *usul al-fiqh* schema and the concomitant role of the *ulama*. Indeed while a range of sources may have been used in Sunni traditions and while other Shia traditions also have the concept of Imam, the Ismaili position represents a distinctive understanding and application of legal authority. The Ismaili case thus highlights and makes evident the source plurality within Muslim legal traditions, through an example that is not very widely known.

IV. PLURALITY AND UNITY

The conventional understanding of legal pluralism emphasizes the presence of different legal orders or sources within a given jurisdiction.⁶³ To the extent that within the traditions of Islamic law, there has, broadly speaking, been the acceptance of different schools of law and, both within and amongst the schools, different substantive legal opinions (i.e., different answers to specific legal questions), Islamic law could be seen as a good, living, example of legal pluralism, understood on these terms.

The case of Ismaili law adds another dimension to this analysis, however. Ismaili law's distinctive framework and grounding in the role and authority of the Imam represents and highlights the additional normative diversity of Islamic law. Indeed, even amongst Shia Muslim traditions, the Ismaili situation is distinguished because of the accessibility of the physical Imam.

The legal role of the Imam is not a new concept; it has been present in Shia Islam for centuries. Nor is the current mainstream articulation of the sources of Islamic law the only possibility. As Norman Calder has stated, the traditions of Islamic law have exhibited

63. For definitions of legal pluralism, see Margaret Davies, *Legal Pluralism*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 805 (Peter Cane and Herbert M. Kritzer ed., 2010) ("Legal pluralism refers to the idea that in any one geographical space defined by the conventional boundaries of a nation state, there is more than one law or legal system."); BRIAN Z. TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY 116 (2001):

[T]here are many 'legal' orders operative in society, of which state law is just one, and often not the most powerful one It was openly apparent . . . that the reach and influence of state law was limited, that the state legal norms were alien to and often inconsistent with the norms people actually followed, and that state law had a relatively minor role in maintaining social order According to new legal pluralism, non-state legal orders range from the interstices within, or areas beyond the reach of, state legal systems where custom-based norms and institutions continue to exert social control, to the rule-making and enforcing power of institutions like corporations and universities, to the normative order that exists within small social groups, from unions, to sports leagues, community associations, business associations, clubs, and even the family.

See also Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375, 375 (2008):

Legal pluralism is everywhere. There is, in every social arena one examines, a seeming multiplicity of legal orders, from the lowest local level to the most expansive global level. There are village, town, or municipal laws of various types; there are state, district or regional laws of various types; there are national, transnational and international laws of various types. In addition to these familiar bodies of law, in many societies there are more exotic forms of law, like customary law, indigenous law, religious law, or law connected to distinct ethnic or cultural groups within a society.

See also J. Griffiths, *What is Legal Pluralism?*, 24 JOURNAL OF LEGAL PLURALISM 1, 3 (1986):

A descriptive theory of legal pluralism deals with the fact that within any given field, law of various provenance may be operative. It is when in a social field more than one source of 'law' more than one 'legal order' is observable that the social order of that field can be said to exhibit legal pluralism.

dynamism from their early days and have had to deal with contrasting ideas “through discursive and consensual experience of local community members” as part of “a dynamic process, a dialectic one, and one which may safely be assumed to have come into existence long before written texts.”⁶⁴

The case of Ismaili law, on the one hand, elaborates upon the illustration of the diversity of legal bases that exist within Muslim legal traditions. In part, and in a manner that is not oxymoronic, it expresses the unity of these bases. As we have seen, Ismaili law shares important tenets with other traditions of Islamic law, both Sunni and Shia. The centrality of the Qur'an is axiomatic. The respect for the traditions of the Prophet is common. So, too, is the respect for the work of jurists, in a certain respect. Even contemporary Ismaili law, as noted above, acknowledges its affiliation to the Jafari *madhhab*. In common with other Shi'i (and particularly Ithnashari) traditions, Ismaili law exhibits certain other characteristics as well. First and foremost is the assertion of the authority of the Imams as the rightful successors to the Prophet. This is a theological position but one also grounded in an understanding of history as well as a reading of the Qur'anic text.⁶⁵ It is also full of legal meaning. Second, the presence of the Imam mitigates or even obviates the need to rely upon legal exegetes to discover the law. The Shi'i Imam can articulate the law himself and so if the Imam is accessible there is a direct source of legal guidance. Thus, in several respects Ismaili law rests on similar, even if not identically understood or framed, bases to other Muslim legal traditions and this highlights the unity of these traditions.

Mohammad Hashim Kamali has said, “human reason has always played an important part in the development of Shari'ah”⁶⁶ and that the Shari'ah itself is “primarily founded on divine revelation.”⁶⁷ Roy Mottahedeh has also commented that in the case of Islam “[j]urisprudence was the threshold between law and theology.”⁶⁸ Within the Sunni tradition what this has meant, in the words of Bernard Weiss, is that: “In principle, the Muslim jurist never invents rules; he formulates, or attempts to formulate, rules which God has already decreed and which are concealed in the sources. These rules, which constitute the ideal Law of God, exist objectively above and beyond all juristic endeavor”⁶⁹ and moreover that it is “especially the *Sunni* jurist [who] is bound more to formal sources, to texts. His authority depends more upon his skills than upon any inherent wisdom. The *Sunni* jurist declares the will of God as revealed in the sacred texts; he does not proclaim the dictates of his own intuition.”⁷⁰

64. NORMAN CALDER, *STUDIES IN EARLY MUSLIM JURISPRUDENCE* 195 (1993).

65. See ARZINA R. LALANI, *EARLY SHI'I THOUGHT: THE TEACHINGS OF IMAM MUHAMMAD AL-BAQIR* (2000).

66. MOHAMMAD HASHMI KAMALI, *PRINCIPLES IN ISLAMIC JURISPRUDENCE*, at xix (3d ed. 2003).

67. *Id.*

68. Mottahedeh, *supra* note 9, at 18. See also at 22 (“Jurisprudence was a threshold which led not only from theology to law but from law to theology”).

69. Weiss, *supra* note 18, at 200.

70. *Id.* at 201-202. Hallaq makes a similar observation, noting:

Islamic law is not a law enacted by Muslims; rather, it is enacted by God, for Muslims. Human reason cannot make law; it only functions as the means by which law is discovered. Thus, instead of being organically tied to social exigencies, Islamic law is rooted in divine volition and authority, whether or not this authority takes cognizance of social reality In Islamic law, on the other hand, the jurist is bound only by those premises which are prescribed by the religious sources, and, unless a certain ambiguity in the premises allows the inclusion or exclusion of certain material facts, nothing that does not follow from the premises can or should be joined to the conclusion.

While this is not exactly the same case for Ismaili law since the Ismaili Imam has greater legal agency than a 'mere' jurist, the sense of the weight of the sources and texts is still an evident phenomenon. And of course this makes sense when the relevant texts are either, in the case of the Qur'an, considered to be the revealed word of God or, in the case of the traditions (hadith), linked to the Prophet as God's messenger. Mottahedeh cites a maxim used by jurists to capture this dynamic: "In the presence of God there is a ruling or classification (*hukm*) for every instance of human behaviour".⁷¹ In this sense, there is an answer to be derived from the sources or in the case of Shia and especially Ismaili law from the authority of the Imam.

As we have seen, all Muslim legal traditions ground themselves in the Qur'an and the hadith and have developed juristic schools. Shia law and Ismaili law share these characteristics with Sunni traditions but add the role of the Imams. This feature is most legally salient in contemporary Ismaili law since access to the present Imam makes the Imam especially significant in practical terms when the Ismaili tradition is compared even to other Shia communities.

The role of the religious/divine bases centered on the Qur'an and authority grounded in the Qur'an – whether of the Prophet or, in the Shia tradition, of the Imams – provides Islamic law with a certain unity. The spectrum of Muslim legal traditions, both as a matter of theology and in institutional terms, shows us that within this unity there is also plurality. The case of Ismaili law illustrates this plurality especially poignantly because it demonstrates in practical, effective terms how the authority bases of law can be differently understood and articulated, *within* a Muslim framework.

CONCLUSION

All serious accounts of Islamic law⁷² will mention that the basic sources of the law are the Qur'an, Sunna or traditions of the Prophet and the reliance on consensus and analogy.⁷³ More nuanced accounts will elaborate other sources which have also been constitutive of Muslim legal traditions. In so doing, these accounts mainly describe the major sources of Islamic law in the Sunni tradition. The Shia tradition is often less well-discussed and even when it is the focus tends to be on Twelver or Imami Shia Islam (sometimes referred to simply as 'Shia Islam'). The role of the Imams in Shia Islam generally marks an important and well-known theological and conceptual difference between the Shia and Sunni traditions. However, where the Imam is not present, Twelver Shia Islam has had to rely on institutional structures that are similar to those present in Sunni communities. In particular, the role of the jurist-scholars (collectively, the *ulama*) is very important in legal terms because it is the Shi'i *ulama* who articulate legal norms. Ismaili Islam and Ismaili law is covered less well than (Imami) Shia law and when it is the focus is mainly historical. As we have seen, however, Ismaili law also has contemporary

Wael B. Hallaq, *The Logic of Legal Reasoning in Religious and Non-Religious Cultures: The Case of Islamic Law and the Common Law*, 34 CLEV. ST. L. REV. 79, 82 (1985–1986).

71. Mottahedeh, *supra* note 9, at 2.

72. Good general references include KNUT S. VIKØR, BETWEEN GOD AND THE SULTAN: A HISTORY OF ISLAMIC LAW 31–88 (2005); HALLAQ, *supra* note 3; Bassiouni & Badr, *supra* note 2, at 136, 138–159.

73. In general, the Qur'an and the Sunna of the Prophet comprise the two divine sources of Islamic law, whereas the reliance on consensus (*ijma*) and analogy (*qiyas*) are supplementary sources of law which apply where the divine sources do not contemplate a particular situation or require interpretation.

expression as a living legal tradition. In this respect, one of the goals of this paper has been to bring the Ismaili case study into wider discussion. In addition, examining Ismaili law helps us to better understand the terrain of Muslim legal traditions. It is widely acknowledged that Muslim legal traditions exhibit great plurality in terms of the opinions they express on different particular issues such that on any one question there may be a range of views varying not only over school-affiliation but also over time or geography. What we have seen in our discussion, however, is that the plurality inherent within Muslim legal traditions can and should be understood not just in terms of its opinions but also in terms of its authority bases or sources of law. The case of Ismaili law demonstrates that the tapestry of Islamic law is and has been rich enough to incorporate diversity not just of substantive rules but also of normative bases and authority. In so doing, it adds richness to the story of plurality in Islamic law.

The role of the Imam in Ismaili law exists as a distinct source of productive legal authority within Islamic law. This is not a newly conceived source; neither does this reject the other sources such as the Qur'an and the hadith, nor other schools of law like the Jafari *madhhab*. Moreover, Ismaili law shares a conceptual grounding with other Muslim traditions, especially other Shia traditions. What makes the Ismaili situation unique, though, is the access to the Imam and the capacity of the Imam to provide direct guidance to the community.