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PRACTITIONER'S GUIDE

Islamic Law

July 2013

Written by:
Hamid Khan, J.D.
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Note:
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Preface and Acknowledgments

At the request of the U.S. State Department's Bureau of International Narcotics and Law Enforcement Affairs, the International Network to Promote the Rule of Law has sought to create a reliable, thorough, and yet concise Practitioner's Guide to Islamic law. Producing such a book is no easy task, considering that the Practitioner's Guide seeks to explain a fourteenth-century legal tradition to twenty-first-century practitioners deploying to post-conflict or developing countries. Any effort to summarize or synthesize Islamic law is likely to be beset with shortcomings and omissions. Even so, I have tried to describe this legal tradition accurately and faithfully.

I wish to acknowledge the unwavering support of the State Department's Bureau of International Narcotics and Law Enforcement Affairs, especially Ms. Karen Hall, Esq. Special thanks also go to Dr. Vivienne O'Connor of the International Network to Promote the Rule of Law and the United States Institute of Peace and Mr. Scott Worden, Esq., of the U.S. Agency for International Development. This book could not have been completed without the help and persistence of my editor, Dr. Nigel Quinney.

Finally, I wish to pay homage to my wife, Arzoo, for her endless support and to my children, Maryam, Illyas, Asiyah, and Khadija, for bearing with me in the process of writing this Practitioner's Guide.

About the Author

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I. Glossary of Selected Terms

The following definitions of these terms are not necessarily the only definitions but they are the ones most commonly used in the field of Islamic law.

Ahl al-Hadith: Arabic term meaning "The People of Tradition" or "The Traditionalists." The Traditionalists articulated the notion that the law was only to be found in the Qur'an and authentic *ahadith*.

Ahl al-Ra'y: Arabic term meaning "The People of Reason" or "The Rationalists." The Rationalists articulated the notion that the law, while inspired by Qur'an, must be derived from human reason as guided by social and worldly experience.

akhlaq: Arabic term meaning "disposition." The practice of ethics under Islam.

'aqidah: Term derived from the Arabic verb "to tie" or "to know." The theology of Islam.

'aql: Arabic term meaning "intellect." Associated with using reason as a source of law and particularly embraced by Shi'i jurisprudence.

as-Sahabah: Arabic term referring to "The Companions" of the Prophet Muhammad who were defined as "someone who saw the Prophet Muhammad, believed in him, and died a Muslim."

asl (pl. ***usul***): Arabic term meaning "origin," "source," or "root." The original situation outlined in the Qur'an and the Sunnah where a prescriptive rule is set forth in the step-by-step approach of analogical reasoning in Islamic law.

ayah or ***ayat***: Arabic term meaning "sign." A verse of the Qur'an.

ayatollah: Arabic term meaning "sign of God." A high-ranking Shi'i jurists. Ayatollahs are sometimes given the title of "source to be imitated" (*marja al-taqlid*).

caliph: Derived from the Arabic term "successor" (*khalifah*). The ruler of the Muslim community (*ummah*), principally among the Sunnis.

classical Islamic law: The body of jurisprudence produced by jurists and scholars during what is arguably the height of Islamic civilization (known as "Islam's Golden Age"), which occurred between the ninth and late thirteenth centuries and which largely began with the reign of the Abbasid dynasty.

dar al-harb. The abode of war; those regions where Islam does not prevail.

dar al-islam. The abode of peace; that part of the world where Islam prevails.

diyya (pl. ***diyyat***): Financial compensation paid to the heirs of a victim of intentional or unintentional bodily injury. According to the Qur'an, *diyya* is preferable to retribution (*qisas*) as a recourse for a victim or a victim's heirs.

fatwa (pl. ***fatawa***): Islamic term meaning "response." An authoritative but nonbinding legal opinion issued by a *mujtihad* or a binding legal opinion issued by a *mufti* in a trial proceeding.

fiqh: Arabic term meaning "understanding" or "full comprehension." Refers to the body of Islamic jurisprudence historically extracted by legal jurists (*fuquha*) and from sources of Islamic law: the Qur'an and the Sunnah, through the step-by-step methodology known as the *usul al-fiqh*. Various strains of Islamic jurisprudence were among various schools (*madhab*).

fuqaha (sing. ***faqih***): A jurist or expert of Islamic law.

hadd (pl. ***hudud***): Arabic term meaning "limit" or "restriction." Usually refers to the class of punishments that are fixed for certain crimes that are considered to be "claims of God," as reflected within the Qur'an and Sunnah.

hadith (pl. ***ahadith***): Arabic term for a "narrative" or "report" of the life of the Prophet Muhammad. *Ahadith* are normally composed of a series of oral narrators (*isnad*) and include a substance of a narrative (*matn*). *Ahadith* are compiled in various collections by various collectors and are generally viewed as the building blocks of the Prophetic Sunnah.

hawza: Shi'i seminary of traditional Islamic knowledge.

hirabah. The crime of causing corruption upon the earth.

hukm: Arabic term meaning "decree" or "injunction" within the sources of Islamic law

ibadat: Arabic term derived from the term "worship." The area of Islamic law dedicated to rituals related to worship such as purity and prayer.

ijazah: A certificate used primarily among Sunni Muslims to indicate that one has been authorized by a higher authority to transmit a certain subject or text of Islamic knowledge (*'ilm*); it is believed to be the basis for the origin of the doctorate degree in Europe.

ijma: Arabic term meaning "consensus." The consensus of opinion among the most learned jurists or the consensus of opinion of the entire community of believers (*ummah*).

ijtihad. Independent interpretation of the sources of Islamic law.

ikhtilaf: Arabic term meaning "disagreement." A doctrine that permits a Muslim to choose the interpretation of jurisprudence (*fiqh*) that best suits his own circumstances and causes the least harm. *Ikhtilaf* is the functional opposite of consensus (*ijma*).

illah: Effective cause or legal reason for a situation (*asl*) within the step-by-step approach of analogical reasoning in Islamic law.

'ilm: Knowledge of Islam.

imam (capitalized when used to refer to Shi'i Imams): A leadership position, often used to refer to the worship leader of a mosque. In Shi'i Islam, an Imam is a guide and leader chosen by God to be a perfect example for the faithful and to lead all humanity in all aspects of life. In Shi'i Islam, the Imams are infallible (*ismah*) and are owed the allegiance of the *ummah*.

imamah (from the Arabic plural for Imam). According to Shi'i doctrines regarding governance, the Imams provide continuous guidance to the *ummah*.

Islamic law: Term used to describe not only the specific commands contained within the Qur'an and Sunnah, but also the broad array of interpretations of those legal commands by jurists (known as *fiqh*), and rulers (known as *siyasa al-shari'a*). In other words, "Islamic law" refers to the totality of laws under the Islamic legal umbrella.

ismah: Arabic term meaning "infallibility." Divinely bestowed freedom from error and sin conferred on the Prophet Muhammad and, according to most branches of Shi'i Islam, the Imams.

isnad: Part of a *hadith* that lists a series of oral narrators. A mechanism used to verify the authenticity of a *hadith*.

istihsan: Arabic term meaning "to consider something good." Juristic preference or equity—a term of art used to express the notion of equity whereby a jurist declares a preference for particular judgments within Islamic law over other possibilities.

istislah: Arabic term meaning "to seek the best public interest." Ensuring that Islamic law reflects the public interest (*masalah*).

khul: Divorce by a wife in Islamic law.

madhab: An Islamic school of jurisprudence (*fiqh*).

madrassa: Arabic term meaning "school." Islamic religious school of higher religious learning.

Majalla, also known as the **Mecelle**: The civil code of the Ottoman Empire in the late nineteenth and early twentieth centuries. It was the first attempt to codify Islamic law.

maqasid al-shari'a: Arabic term meaning the "the goals (or objectives) of Islamic Law." An interpretative paradigm used to ensure that Islamic legal rulings remain consistent with Islam's overarching goals and objectives.

marja al-taliq: Persian term mean "source to be imitated." The highest order of the Shi'i *ulama* and capable of conducting *ijtihad*.

maslahah: Arabic term for "public interest." A doctrine used to prohibit or permit something on the basis of whether or not it serves the public's benefit or welfare. The concept is related to that of *istislah*.

mufti: A member of the Sunni *ulama* and juris-consultant of a particular school of jurisprudence to a sitting *qadi*. A *mufti* issues *fatawa* that are binding upon the parties before the court and based upon *fiqh*. *Muftis* came to be appointed by governments

mujtihad (pl. ***mujtihidin***): An Islamic scholar deemed competent to conduct *ijtihad*.

muqallid: (pl. ***mugallidun***): Arabic term meaning "imitator." A disciple of a particular *mujtihad*. A *muqallid* is a jurist who conducts *taqlid*, imitating and replicating a *mujtihad*'s previous interpretations of the law.

nikah: The marriage contract in Islamic law.

qadhf. Unfounded accusation of unlawful sexual intercourse.

qadi: Arabic term meaning "judge." A judge who rules in accordance with Islamic law and typically appointed by the caliphate or the leader of Islamic country.

qanun (pl. ***qawanin***): Arabic term meaning "law" or "rule." The law or rules conferred by the caliphate or leader of a Muslim country.

qisas: An Arabic term meaning "retaliation." Under Islamic law, *qisas* permits retaliation in which the punishment corresponds in kind and degree to the injury but only in the case of intentional homicide or intentional bodily injury. The victim also has the right to seek monetary compensation or forgive the convicted offender.

qiyas: Arabic term meaning "measuring" or "ascertaining" the length, weight, or quality of something. The step-by-step approach of analogical reasoning in Islamic law.

Qur'an: "The Recital" or "The Recitation" is the primary source of Islamic law and is considered by Muslims to be God's ultimate revelation to humanity brought by the Prophet Muhammad in the seventh century.

ridda or ***iritiad***. Apostasy.

Salaf: Arabic term meaning "the Pious Predecessors." The first generation of Muslims. The *Salaf* included three groups: the "Companions" of the Prophet (*as-Sahabah*), the "Followers" (*Tabi'un*), and the "Followers of the Followers" (*Tabi' al-Tabi'in*).

sarida. Theft.

Shari'a: Arabic term meaning "a path to the source of water." The certain or straight path within religion. Most scholars of Islamic law define the Shari'a as the clear and specific commands attributed to God and laid out within the Qur'an and the Sunnah.

shubha: Arabic term meaning "doubt"; to make an illicit act like a licit one. A doctrine used by jurists to obviate or reduce the severity of punishment in criminal cases.

shurb al-khamr. The crime of drinking wine.

siyasa al-shari'a: Islamic term meaning "governance in the name of the sacred law." A paradigm that deals with the caliph's authority to make law in pursuit of enforcing juristic law as well as those nonreligious laws which touch on his or her ability to properly govern the caliphate.

sunnah (pl. ***sunan***): An Arabic term that predated Islam and referred to any set of customs, precedents, or practices by a particular person or persons, but often used to refer to the collective practices of a tribe.

Sunnah (cap.). The Prophetic Sunnah is the spoken and acted example of the Prophet Muhammad.

sura: A chapter of the Qur'an.

takhayyur: The practice of choosing which rules to follow from among various schools of thought.

talaq: Divorce by a husband in Islamic law.

Tanzimat: Turkish term meaning "reorganization." The period of reformation that began in 1839 and ended with the adoption of the First Constitution in 1876 aimed at modernizing the Ottoman Empire.

taqlid: Arabic term meaning "to imitate." A doctrine obligating a jurist to act as an imitator of a *mujtahid* in the interpretation of religious laws without necessarily examining the scriptural basis or reasoning behind the *mujtahid*'s interpretation. The opposite of the term *ijtihad*.

tawba: Arabic word meaning "chastisement." To turn or to retreat from past sinful and evil activities, and to firmly resolve to abstain from them in future.

taz'ir: Arabic word meaning "chastisement." Punishment that can be administered at the discretion of an Islamic judge; a contrast to fixed punishments for certain crimes (*hadd*).

ulama (sing. ***alim***): The body of scholars possessing religious knowledge (*'ilm*). Scholars who have attained several years of training and study of Islamic disciplines, such as Islamic judges (*qadi*), jurists (*faqih*), juris-consultants (*mufti*), and scholars of *hadith* (*muhaddith*).

usul al-fiqh: Arabic term meaning "the origins [or Roots] of jurisprudence." The study of the origins, sources, and underlying principles of Islamic law. In an extended sense, it includes the study of the philosophical rationale of the law and the procedures by which the law applicable to particular cases is derived from the sources.

ummah: The entire community of Muslim believers.

wilayat al-faqih: Persian for "guardianship of the jurist." A post-Occultation theory within Shi'i Islamic law that gives the jurist custodianship over people. The extent of that guardianship remains controversial, and can range from ministerial religious duties to complete authority as conferred on the Prophet and Shi'i Imams.

zina. Unlawful sexual intercourse.

II. Introduction and Overview

Rule of law practitioners around the world often come across Islamic law in their work or where they reside. In over fifty nations, Muslims are the majority religious community and number some 1.6 billion people worldwide, making Islam the world's second-largest religion and, as a consequence, one of the most widely subscribed legal systems in the world (see tables 2-1 and 2-2). Despite encountering Islamic legal concepts and precepts, however, many rule of law practitioners remain unfamiliar with both the substance of Islamic law and its practical application. Much of what practitioners know, or think they know, is derived from media accounts that equate discrimination against women, forced marriages, honor killings, and suicide bombings with Islamic law. As a consequence, the term "Islamic law" is often conflated with the Shari'a, which itself has been turned into an ugly word, used to describe an irrational system of barbaric laws laid down in the distant past. An endless array of popular books has further distorted Islamic law beyond recognition. As Israeli scholar Shlomo Avineri has noted, "The underlying assumption has always been that Islam—as a culture and not only a religious creed—was primitive, underdeveloped, retrograde, at best stuck in the memory hole of a medieval splendor out of which it could not disentangle itself."[1]

This Practitioner's Guide seeks to correct some of these misconceptions. It provides a primer on Islamic law, explaining its sources, principal doctrines, institutions, and terminology, and discussing how it operates both as a separate legal system and within existing legal systems.

Table 2-1. The World's Muslim Population by Region

	ESTIMATED 2010 MUSLIM POPULATION	ESTIMATED 2010 TOTAL POPULATION	PERCENTAGE OF POPULATION THAT IS MUSLIM
Asia-Pacific	985,530,000	4,054,990,000	24.3%
Middle East-North Africa	317,070,000	341,020,000	93.0
Sub-Saharan Africa	248,110,000	822,720,000	30.2
Europe	43,490,000	742,550,000	5.9
North America	3,480,000	344,530,000	1.0
Latin America-Caribbean	840,000	590,080,000	0.1
World Total	**1,598,510,000**	**6,895,890,000**	**23.2**

Table 2-2. The Most Populous Muslim-Majority States

	ESTIMATED 2010 MUSLIM POPULATION	PERCENTAGE OF POPULATION THAT IS MUSLIM	PERCENTAGE OF WORLD MUSLIM POPULATION
Indonesia	209,120,000	87.2%	13.1%
India	176,190,000	14.4	11.0
Pakistan	167,410,000	96.4	10.5
Bangladesh	133,540,000	89.8	8.4
Nigeria	77,300,000	48.8	4.8
Egypt	76,990,000	94.9	4.8
Iran	73,570,000	99.5	4.6
Turkey	71,330,000	98.0	4.5
Algeria	34,730,000	97.9	2.2
Morocco	31,940,000	99.9	2.0
Subtotal for the 10 Countries	1,052,120,000	47.0	65.8
Subtotal for Rest of World	546,400,000	11.7	34.2
World Total	**1,598,510,000**	**23.2**	**100.0**

Source: Pew Forum on Religion and Public Life, "Global Religious Landscape," December 18, 2012, http://www.pewforum.org/global-religious-landscape-muslim.aspx.

A. A Time-Honored System of Law

Like the system of common law originally developed in medieval England or the system of civil law that first evolved in ancient Rome, Islamic law should be regarded as a body of law, or a system of law, rooted in history but very much alive today. Islamic law is one of the oldest systems of law, having emerged more than fourteen centuries ago.

Like other legal systems, most of Islamic law is the product of rational thought and, despite popular misconception, is subject to change. Unlike its more worldly counterparts, however, Islamic law is grounded in more than just societal idealism. Its primary foundation is revealed knowledge, and it seeks no less than to bring about "the Kingdom of God" on Earth.[2] Furthermore, the benefits and burdens of adhering to Islamic law are not confined to the present world: Islamic law focuses on how a Muslim's day-to-day conduct affects his or her fate in the Afterlife.[3] As a consequence, the scope of Islamic law is remarkably broad. It not only regulates one's relationship with neighbors and the state, which is the limit of most other legal systems, but also affects one's conscience and, perhaps more importantly, one's relationship with God.[4] Islamic law generally sees less need than other legal systems to distinguish between the religious and the secular; between legal, ethical, and moral questions; and between the public and private aspects of a believer's life.[5]

This Practitioner's Guide does not delve into Islamic laws as they relate to personal ritual practices (*ibadat*), such as ritual prayer, fasting, and pilgrimage, because they are not only specific to believers, but also devotional in nature and, therefore, typically outside the bounds of the state's enforcement mechanisms.[6] Instead, this guide focuses on giving practitioners an understanding of how Islamic law shapes behavior among individuals and within the social and public spheres; that is, conduct that may fall under the powers of the state or for which the state's authority is sought to enforce such laws. The following chapters examine the sources and doctrines of Islamic law and the approach and various interpretative methodologies to Islamic law, as well as various strains of Islamic jurisprudence, including distinctions between Sunni and Shi'i Islamic law. This guide also covers Islamic family and personal-status laws, Islamic criminal law, the reinstitution of Islamic law, and Islamic law as compared with contemporary international law. The final chapter examines land and property issues under classical Islamic law.

B. The Difference between Islamic Law and Shari'a

Before turning attention to the sources and principal doctrines of Islamic law, it is important to first distinguish between the terms "Islamic law" and "Shari'a." These are often treated as synonyms but are in fact quite distinct. "Shari'a" is an Arabic term that literally means "a path to the source of water." The term appears only once in the Qur'an, where it is used to distinguish between a completely whimsical path of lawlessness and a straight path bound by certitude.[7] Thus, according to the Qur'an, the Shari'a is the certain or straight path within religion.[8] Of course, what constitutes that "certain path" is open for debate. Most Islamic legal scholars attempt to define the Shari'a as the clear and specific commands attributed to God as laid out within the Qur'an and the Sunnah (the spoken and acted customs of the Prophet Muhammad, discussed in further detail below).[9] And while this definition is broadly accepted, it still fails to take into account that even specific commands from the Qur'an and the Sunnah are bound by time and context, shaped by the transmission of revealed knowledge, and subject to the inherent ambiguity within any written language. Consequently, the Shari'a cannot readily be deciphered simply by repeating a command from the the Qur'an and the Sunnah. Scholars caution that because the Shari'a is the law as laid out by God, but understood and interpreted by humans, all that results from its interpretation is a human—and therefore fallible—understanding of Divine law, which, in effect, is *not* the Shari'a.[10]

"Islamic law" is a broader and more appropriate term than the "Shari'a." "Islamic law" not only describes the specific commands contained within the Qur'an and the Sunnah but also encompasses the broad array of legal interpretations articulated by scholarly jurists, (known as jurisprudence, or *fiqh*), political rulers (known as *siyasa al-shari'a*), and philosophers and theologians. In short, "Islamic law" refers to the *totality* of the commands and interpretations found under the Islamic legal umbrella.

It is also important to define a commonly used but often undefined term: "classical Islamic law." "Classical Islamic law" refers to the institutions and body of jurisprudence produced during what is arguably the height of Islamic civilization (commonly known as Islam's Golden Age), which occurred between the ninth and late fifteenth centuries and began during the reign of the Abbasid Caliphate.[11] Classical Islamic law not only encapsulated the creation of the fundamental concepts of Islamic law but also the development of legal institutions and represents the "high tide" of intellectual creativity that together produced an "original understanding" of Islamic law seen today. This Practitioner's Guide therefore identifies and explains the influence of the classical period upon contemporary Islamic law—with "contemporary Islamic law" understood to refer to the nineteenth and twentieth centuries.

III. The Sources and Principal Doctrines of Islamic Law

> Islamic teachings have left great traditions for equitable and gentle dealings and behavior, and inspire people with nobility and tolerance. These are human teachings of the highest order and at the same time practicable. These teachings brought into existence a society in which hard-heartedness and collective oppression and injustice were the least as compared with all other societies preceding it. . . . Islam is replete with gentleness, courtesy, and fraternity.
>
> — H. G. Wells, *A Short History of the World*

A. The Revealed Sources of Islamic Law

The sources of Islamic Law classified as "revealed sources" include, first, the Qur'an, which is regarded as the literal word of God, and, second, the Sunnah, which bestows on Muslims the examples set by the Prophet Muhammad, who is regarded as God's last messenger.

The Qur'an: The Word of God

The Qur'an is the primary source of Islamic law and is considered by Muslims to be God's ultimate revelation to humanity. The Qur'an says of itself, "Truly, this Qur'an has been sent down by the Lord of the Worlds" (26:192) and "Nor could this Qur'an be devised by anyone other than God" (10:37).[12] (References to the Qur'anic consist of two numbers separated by a colon: the first number refers to the chapter, or *sura*, the second to the verse, or *ayah* [pl. *ayat*].)

The Qur'an (which literally means "The Recital" or "The Recitation") is about the same length as the New Testament. But in contrast to the New Testament and the Hebrew Bible, which are collections of books written by a number of different persons over centuries, the Qur'an is regarded to have a single source, God. The content of the Qur'an is believed by Muslims to have been transmitted from the Archangel Gabriel to the Prophet Muhammad over the course of twenty-three years (609–32).[13] According to tradition and contemporary understanding, each revelation involved instruction from God, allegories, and metaphors and threw light upon a situation, occasion, or circumstance during the Prophet's life.[14]

The Qur'an is divided into 114 *suras* of unequal length, and about 6,235 *ayat*. The shortest *sura* has ten words, while the longest, which is placed second in the text, has more than six thousand. Generally, *suras* are classified by where the revelations occurred. In the case of 85 of the 114 *suras*, the revelations occurred in Mecca, the place of the Prophet's birth, where he received the

first revelations and where Islam first developed. In the case of 29 *suras*, the revelations took place in Medina, the city-state whose citizens openly accepted Islam and abided by the dictates of their ruler, the Prophet. Medina was originally called Yathrib, but its name was changed to Medinat al-Nabi ("City of the Prophet"), or Medina, in 622. Verses dedicated to God, His attributes, the Day of Judgment, and basic religious matters are mostly covered in the Meccan *suras*, which are typically shorter in length than the Medinan *suras*. The Medinan *suras*, by contrast, are expository and deal with matters particular to the Muslim polity in Medina. The overwhelming majority of "legal" verses of the Qur'an, however, were revealed during the Medina period, where the Prophet reigned as both its religious and political leader.

Despite common assumptions, the Qur'an is by no means primarily a legal text. Less than 7 percent of the Qur'an's total verses relate to legal matters. And of those "legal" verses, nearly half of them relate to *ibadat*, such as the requirements for fasting during the month of Ramadan, how often one is obliged to conduct prayers, and proscriptions about almsgiving. The other half deal with marriage, inheritance, commercial transactions and other economic matters, crimes and punishment, and evidence, but these verses often do so in broad terms and are conveyed through generalized statements.[15]

Some of the Qur'an's legal sentiments are very straightforward; others are very ambiguous. Scholars divide such verses (and even phrases within verses) into "definitive elements" and "tentative elements."[16] A definitive element is one in which the meaning is considered to be so clear and specific that there can be only one interpretation. Take, for instance, Qur'an 24:2, which states: "Strike the adulteress and the adulterer one hundred times." The Qur'anic text clearly and precisely states the *number* of strikes to be administered, and thus, that number cannot be changed. But ambiguity resides elsewhere in this apparently clear-cut statement—namely, concerning how one should strike the convicted individuals. Scholars, jurists, and institutions have come up with, and continue to come up with, very different ways to administer the punishment for adultery. They have differed on the kinds of instruments that should be used, the materials from which the instruments should be made, the velocity with which the strike should be inflicted, and whether males and females should be punished in the same method.[17] They have also noted that while a hundred strikes could be administered individually, one after another, they could also be administered simultaneously, for example, by using one hundred reeds tied together in a bundle and used just once. In short, even a verse with a seemingly clear command remains open to interpretation.

A tentative verse is open to interpretation not only as to its administration but also as to its very meaning. For instance, consider Qur'an 5:33, which states that a person found guilty of "causing corruption upon the Earth be banished from the Earth." Some contend that "banishment" could mean exile from the place where the crime was committed, but others argue that it means imprisonment, not exile. Others argue that the only way to properly banish people from the Earth is to kill them. Thus, while tentative verses have scope for wider interpretation than do definitive verses, it is important to recognize that both types invite and permit a variety of interpretations.

As a believer, while one must accept the Qur'an as God's word, nothing binds a Muslim to a particular interpretation of the Qur'an, as is explored in more detail below.

More broadly, a number of structural challenges also confront any reader of the Qur'an. First, the Qur'an has no narrative framework. Unlike the Bible, for example, the Qur'an is not organized chronologically, but rather places the longest *suras* before the shortest.[18] And even within *suras*, topic and tone can fluctuate dramatically. Moreover, novices to the Qur'an lack the familiarity with the life of the Prophet and the particulars of Arab customary law needed to contemplate adequately the context of the Qur'an's content. They may also be unlikely to understand many Biblical and pagan references made throughout the text. Moreover, without a chronological order, readers are left to contemplate the precise meaning of each verse as it relates to other verses that address the same topic. The challenge of chronology becomes increasingly evident when a reader (or a jurist) must decide whether a verse carries an imperative command, whether that same verse abrogates a verse that precedes it, or whether a verse is allegorical or simply a mysterious allusion, subject to a number of interpretations or review at a later time.[19] Such considerations make it unwise to jump to casual conclusions about any particular passage within the text. "The Qur'an, in other words, is a book which cries out for interpretation."[20]

For these and other reasons, Islamic legal scholars have always had to resort to another source to obtain fuller meaning from the Qur'an, which has led them back to the Qur'an's transmitter, expounder, judge, and human exemplar: the Prophet Muhammad. This in turn has led them to the Sunnah, or "the example," "way," or "precedent set forth" by the Prophet Muhammad. But what constitutes the Sunnah remains a debated point.[21]

The Sunnah: The Tradition of the Prophet Muhammad

As mentioned previously, the Sunnah, as a primary source of law, is generally defined as the spoken and acted examples of the Prophet Muhammad, but the source itself was an evolving concept whose precise scope remains debated to this day.[22] Specifically *sunnah* (pl. *sunan*) is an Arabic term that predated Islam and refers to any set of customs, precedents, or practices by a particular person or persons; albeit it was often used to refer to the collective practices of a tribe and generally did not imply positive or negative behavior.[23]

Consistent with pre-Islamic understanding, as the new faith emerged, *sunan* were articulated not only for the Prophet Muhammad, but also for each of his immediate political successors; and consistent with its pre-Islamic usage, there even was a collective *sunnah* for the first forty to sixty followers of the Prophet, called *as-Sabahah* ("The Companions"), who were defined as "someone who saw the Prophet Muhammad, believed in him and died a Muslim." [24]

In the seventh and eighth centuries, Islamic scholars sought to clarify matters by focusing on the development of a Prophetic Sunnah, which a growing number of jurists came to believe should serve as a source of law alongside the Qur'an. One of these proponents, Muhammad Idris al-Shafi'i (d. 820), one of the most influential legal minds in Islamic history, for instance, asserted

that the Prophetic Sunnah serve as a source of law by invoking various Qur'anic commandments urging believers to follow the Prophet: "You who believe, obey God and the Messenger, and those in authority among you," (4:59); and "Whoever obeys the Messenger obeys God" (4:80). Shafi'i also argued that a Prophetic Sunnah was an essential element to understanding the Qur'an itself, because it clarified matters contained in the Divine text.[25] Over time, and due in large part to Shafi'i and other legal scholars' arguments, what was once a pre-Islamic concept describing a broad-based narrative structure became confined to a single person, the Prophet Muhammad, and in particular, his acts, sayings, and matters for which he gave tacit approval, but also his physical attributes, as well as his overall character.[26] But this *sunnah* was even more. By virtue of the Qur'anic injunctions mentioned above and elsewhere, it was elevated from a continuum of precedents to a narrative of prescribing the normative conduct of believers; namely, the Sunnah (capitalized to reflect its normative understanding as being solely the Prophet's Sunnah).

Shafi'i, however, was keenly aware that linking the concept of the Sunnah with the Qur'an itself would make it imperative both to define the precise contours of the Sunnah and perhaps more importantly to establish an authentic body of knowledge about the conduct of the Prophet from which to construct the Sunnah. To achieve this goal, Shafi'i and other jurists came to rely upon a novel religious literature composed of series of "narratives," "reports," or "news consisting of the factual account of an event" known as a *hadith* (pl. *ahadith*).[27] To be clear, *ahadith* are what compose the Sunnah, but as we shall see, not all *ahadith* are regarded as belonging to the Sunnah. The early search for an authentic record of the Prophet's life was complicated by the fact that many accounts of his actions (and inactions) were constructed from oral narratives passed from one person to another over time. Moreover, the search for such narratives did not begin in earnest until the ninth century—some two centuries after the Prophet's death. To address concerns regarding authenticity, each *hadith* included an *isnad*, or a chain of reliable and credible oral transmitters, and had to be traced to the Prophet himself.[28] If the *isnad* failed on either count, a *hadith*'s authenticity was, at best, questionable. Hundreds of thousands, and possibly more than a million, *ahadith* circulated during this formative time. And when tested for authenticity, the overwhelming majority were adjudged to be fabrications.[29]

Ahadith excited debate over not only their chain of transmission, but also their content. Many were disregarded as illogical or exaggerated; others were seen as politically inspired.[30] Out of these debates of authenticity emerged several major compilations. The most well-known and well-respected compilations among Sunni Muslims are the collections of Muhammad ibn Ismail al-Bukhari (d. 870) and Muslim al-Hajjaj (d. 874), whose compilations are popularly known as *Sahih Bukhari* and *Sahih Muslim*, respectively). Both of these compilations are regarded as "sound" (*sahih*) because they only include *ahadith* which could be traced directly to the Prophet Muhammad.[31] But unlike other compilations or sources of understanding about the Prophet's life, both of these "sahih" collections, reflect a clear legal tenor.[32] Said another way, both compilations were compiled in a way to reflect the Prophet's life and ministry in terms of a series of injunctions and commands, as opposed to a variety of other ways in which to present the Prophetic life.[33]

Numerous others *hadith* compilations, however, still exist. Some of the notable collections include those put together by Abu Abdillah Muhammad ibn Ishaq ibn Khuzaymah (d. 923), Abu Dawud Sulayman ibn al-Ash'ath al-Azdi as-Sijistani (d. 889), Abu `Isa Muhammad ibn `Isa at-Tirmidhi (d. 892) and Ahmad ibn Shu'ayb Nasa'i (d. 915).[34] As discussed in detail below, Shi'i Muslims regard different collections of Prophetic *ahadith* as authentic, and also include various *ahadith* of their respected Imams.[35] Consequently, there were a number of distinct—even contradictory—compilations of *ahadith* by which to construct the Sunnah.

As previously mentioned, from a religious and legal standpoint, only some *ahadith* constitute the Sunnah. The fundamental definition of what constitutes the Sunnah as a source of Islamic law is Prophetic custom or precedent as it pertains to matters of religion, for which it is commonly regarded—albeit never explicitly mentioned in the Qur'an—that the Prophet was an infallible transmitter of the Qur'an and purified of wrongdoing, a doctrine known as *ismah*, (Arabic for "infallibility" but best understood as "divinely bestowed freedom from error and sin.")[36] And like other matters within Islamic law, acceptance of the Prophet's infallibility is controversial. Scholarly critics, for example, point to Qur'an 48:2 as proof, which states that God will "forgive you [the Prophet] of your past and *future* sins" (emphasis added). Even the Prophet himself, however, acknowledged he was only to be followed in matters of religion. According to one *hadith*, the Prophet once recommended to farmers that they harvest dates in a particular way. When his advice turned out not to have worked, the Prophet remarked, "I am but a man, if I give you a command regarding religion, then take it. But if I make a statement of my own judgment, then I am but a man. . . . [Y]ou are more knowledgeable about the matters of your world."[37] The scope of religion within Islam is fairly broad, however, so deciding whether a particular *hadith* or set of *ahadith* should be part of the Sunnah remains a matter of considerable debate. For example, the fact that the Prophet wore long robes is recorded in the *hadith* but not generally regarded as part of the Sunnah. By contrast, the Prophet's conduct as a statesmen or his conduct during times of war is unquestionably authoritative and considered part of the Sunnah. But should the Prophet's comments encouraging men to grow beards be regarded as part of the Sunnah? Some jurists consider the growth of a beard as laudable, but optional, while others deem it required behavior, because they regard the Prophet's religious knowledge as encompassing matters of personal hygiene.[38]

Even distinguishing between a religious and a nonreligious *hadith* did not, in the eyes of most jurists under classical Islamic law, always clarify whether it should be regarded as part of the Sunnah. Some jurists insisted that for a *hadith* to be part of the Sunnah there had to be multiple *ahadith* from different chains of transmitters justifying its inclusion within the Sunnah. Others argued that no *hadith* could be considered authentic unless it conformed to the community practices of Medina, the city the Prophet governed. Yet others took a totally different tack by arguing if one *hadith*, traceable to the Prophet, even if it appeared to contradict a sentiment with the Qur'an, could still be considered part of the Sunnah since there could be no contradiction between the Prophet and the Divine text.

One ostensible way to deal with such distinctions was to divide the Sunnah into three categories: one related to the Prophet's role as the messenger of God; one related to the Prophet's role as head of the Medina city-state; and one related to the Prophet's role as an arbiter of legal disputes.[39] As mentioned above, in his capacity as a religious prophet, Muhammad expounded upon the Qur'an and made additional pronouncements about religion, either complementing the Qur'an or establishing rules for subjects on which the Qur'an was silent. These pronouncements are considered legally binding. The Prophet's actions as either head of state or as arbiter of disputes, while legally instructive, are not always considered binding, because his actions were confined to a specific time, manner, and place.[40] Yet, whether treated as binding or not, Muslims always remain free to choose to emulate the Prophet's behavior (for instance, how he slept or tied his sandals) in such contexts, keeping in mind that there is often no legal obligation to do so.

Before considering the principal doctrines of Islamic law, it should be noted that Muslims still debate whether the knowledge revealed to the Prophet (through the Qur'an and Sunnah) was intended to guide Muslims in whatever circumstance they might find themselves, or whether there is an expectation that humans could venture beyond the revealed sources, armed with their own reason and experience, to decide how to deal with new situations. For a variety of reasons explained in part in chapter 4, thinkers such as Shafi'i downplayed the role of human reason in constructing the law in favor of Prophetic tradition because it was viewed as part of God's larger guidance. At the same time it became evident that no matter how detailed the revealed sources might prove on a variety of matters, reason would play an increasingly vital role in extending the reach of Islamic law beyond its original time and place.

B. The Principal Doctrines of Islamic Law

If Muslims had populated only middle Arabia and had always lived as Arabs did during the time of the Prophet, perhaps the revealed sources of the Qur'an and the Sunnah might still be sufficient for the purposes of determining the scope of Islamic law. History, however, led Muslims on a different course. Within a decade of the Prophet's death, Islam expanded beyond the reaches of Arabia, and within a quarter century, Islam's reach would rival that of the Roman Empire. Today, one in four of the world's 1.6 billion Muslims live outside what is considered the traditional Islamic world. Consequently, from the time of the Prophet's death until the present, scholars have been forced to consider questions not directly addressed in the Qur'an and the *hadith* collections. With the revealed sources regarded as "closed," Islamic scholars have had to resort to particular doctrines to help extend the law's reach and reasonability. Three of these principal doctrines warrant mention because of their universal acceptance under Islamic law: *qiyas*, or analogical reasoning; *ijma*, or consensus; and *ikhtilaf*, or disagreement. Other doctrines, such as *maslahah* (public interest) and *istihsan* (equity), are dealt with in detail in chapter 4, because they are not accepted within all Islamic legal circles.

Qiyas: *The Doctrine of Analogical Reasoning*

One of the principal doctrines of Islamic law is *qiyas*, or analogical reasoning. *Qiyas* literally means "measuring" or "ascertaining" the length, weight, or quality of something.[41] The doctrine of *qiyas* is based on the idea that while God had His reasons for commanding or forbidding a particular activity in the Qur'an, believers are obligated to consider "What would God say?" in dealing with problem for which there is no clear solution either within the Qur'an or within the Sunnah.[42] The rules of interpretation dictated (as described in further detail in chapter 4); that if the matter in question had already *explicitly* been addressed within the Qur'an or Sunnah or resolved by the unanimous consensus of jurists who have already considered the very same question, one could not engage in *qiyas*. Absent this condition, the doctrine of *qiyas* tests whether an injunction or position held within the Qur'an or Sunnah can be extended from its original case (*asl*) to a new case. Under the rules regulating the use of *qiyas*, if both the case found within the Qur'an and the new case have the same legal reason (*illah*), the Qur'an's injunction or decree (*hukm*) may be extended to a new situation.[43]

A few examples testing the Qur'an's prohibition against the consumption of *khamr* (an ancient potable derived from fermented grapes and understood by Islamic legal scholars as wine) shed light on how *qiyas* works. What if a believer had consumed not wine but whiskey, a type of distilled alcoholic beverage made from fermented grain mash? According to some Islamic legal scholars, although the term *khamr* does not include other intoxicating liquors, there are various *ahadith* mentioning prohibitions against intoxicants, and, arguably, there is no real need to use *qiyas* to determine if a believer may consume whiskey, because the matter is "settled." The majority of scholars, however, take a different approach, and instead focus their attention to the explicit prohibition of *khamr* within the Qur'an as the basis for a rule regarding consuming whiskey, even if in its literal meaning other types of intoxicating liquors are not mentioned. Their reasoning takes the following form: First, jurists decide that the legal reason for the rule proscribing *khamr* is its *intoxicating* quality. Second, jurists conclude that other liquors, such as whiskey, are intoxicating because they share the same intoxicating element as *khamr*: ethyl alcohol. Third, jurists with an understanding of *khamr* and whiskey extend the prohibition of *khamr* to all other intoxicating liquors, *including* whiskey.

The whiskey example demonstrates that *qiyas* involves more than mere guesswork. Legal scholars treat the Qur'an as a "code" for God's reasoning, which arguably one can decipher if one has an intimate understanding of the language and context of the Qur'an. Language, however, can be rather oblique.[44] And as already demonstrated, even the seemingly clearest of commands contained within the Qur'an may be subject to multiple, equally faithful, interpretations. Moreover, and controversially, undertaking *qiyas* also means placing a human being in the position of trying to comprehend God's mind. Consequently, jurists are often very careful that any analogy they draw is not completely untethered from what they believe is God's thinking; otherwise they run the "risk" of producing what might be just the speculative product of human reason, rather than of Divine origin and therefore outside the "bounds" of Islamic law.[45]

Yet despite such challenges, *qiyas* remains a vital tool for interpreting revealed laws. Over the centuries, whenever a school of jurisprudence has tried to eliminate the place of *qiyas*, they almost invariably have failed. Suffice it to say, *qiyas* remains an integral part of Islamic law. *Qiyas* has helped tackle a variety of contemporary issues, ranging from the extent to which democracy comports with Islam to determining how Muslim astronauts should conduct their prayers in orbit. Moreover, while critics claim that Islamic law is inherently irrational, the enduring usage of *qiyas* helps demonstrate how human reason has profoundly shaped what is often described as an immutable body of religious law.

Ijma: *The Doctrine of Consensus*

Although *qiyas* allows scholars to analogize legal precepts not thoroughly addressed in the Qur'an and contained within *ahadith*, legal scholars sought further to cement agreement upon matters that left no room for debate. Bolstered by Qur'anic sentiments about need for unity, especially in following Prophetic guidance and the Prophetic declaration that "[m]y community [of believers] will never agree on an error," jurists established the doctrine of consensus known as *ijma* (which means "agreement").[46] *Ijma* originates from the fact that an individual jurist's opinion is accorded little weight by the entire community of believers, largely because jurists are entitled to offer their own learned opinion of what God's law should be in a given situation.[47] If, however, a consensus can be reached about a particular matter, that consensus is regarded as conclusive and therefore as a binding law upon the community of believers. While the Qur'an and the Sunnah were considered revelation-based law, *ijma* was considered a rational proof of law. Indeed, in terms of its legal authority, *ijma* is regarded as second only to the Qur'an and the Sunnah.[48]

The predominant view within classical Islamic law defined *ijma* as a consensus reached by the highest order of Islamic jurists (the *mujtihidin*—discussed in detail below) concerning a rule or law for a given time—typically, a generation.[49] This definition takes its cue from the Qur'anic verse, "Believers, obey the Messenger and those in authority over you" (4:59). Classical jurists, out of self-interest, appointed themselves as being "those in authority" and reserved to themselves the power to try to find legal consensus. Other definitions of *ijma*, however, have been less restrictive. For instance, one definition embraced by a minority of classical jurists held that *ijma* was the consensus of the entire community of believers, or *ummah*.[50]

In the early twentieth century, Islamic scholars such as Muhammad Abduh (d. 1905) argued for reconceptualizing the *ijma* doctrine so that "those in authority over you" would be understood to mean those in positions of governance (broadly defined) who have the best interests of the community at heart.[51] Moreover, as will be discussed in chapter 5, some contemporary scholars, such as Muhammad Abduh and Muhammad Rashid Rida (d. 1935) asserted that matters of public policy and social morality should be regulated by members of elected or representative governments, who are best placed to address contemporary needs.[52] The concept of *ijma*, therefore, could be extended to cover not only legal matters but also other concerns of the population. This position is controversial, however, because many Muslim-majority states still adhere to the notion that *ijma* remains the province of jurists rather than the masses.

Ikhtilaf: *The Doctrine of Disagreement*

The doctrine of disagreement or *ikhtilaf* (which literally means "disagreement" in Arabic) is the opposite of the doctrine of *ijma*.[53] Specifically, *ikhtilaf* permits a Muslim to choose the interpretation of religious law that best suits his or her own circumstances and causes the least harm. According to one *hadith*, the Prophet Muhammad asserted that God Himself favored disagreement: "Difference of opinion in the Muslim community is a sign of divine favor."[54] Ikhtilaf thus gives believers the freedom to choose from among a variety of views but also from divergent views. This embrace of diversity is not unfettered, however, because no ruling may violate Islam's most basic principles, such as Muhammad as Prophet, or any matter that has reached the status of *ijma*. Even so, *ikhtilaf* remains an essential element in understanding—and, indeed, in expanding—the scope of Islamic law.

IV. Islamic Law's Interpretative Paradigms and Their Institutions

> Islamic law is founded on the logic of a Principal Who guides through instructions. Those instructions are issued to the agents who have inherited the earth and who are bound to the Principal by a covenant. . . . [T]he point of the covenant is not to live according to the instructions, but to attempt to do so. Searching the instructions is a core value in itself—regardless of the results, searching the instruction is a moral virtue. This is not because the instructions are pointless, but because the instructions must remain vibrant, dynamic, open, and relevant. . . . [I]t is impossible for a human being to represent God's Truth—a human being can only represent his or her own efforts in search of this truth. The ultimate and unwavering value in the relationship between human beings and God is summarized in the Islamic statement, "And, God knows best."
>
> — Khaled Abou El Fadl, *Speaking in God's Name*

Chapter 4 builds on the basic introduction to the sources and principal doctrines of Islamic law presented in the first chapter by examining the paradigms of interpreting Islamic law and the institutions associated with those paradigms. To that end, this chapter is divided into four sections, each dedicated to a particular paradigm.

The first section discusses the paradigm used by Sunni jurists known as the *usul al-fiqh*, and the institutions associated with this particular approach to the law: the broader *ulama* and the particular Sunni schools of jurisprudence. The second section turns to the paradigm of the Sunni caliphate, known as the *siyasa al-shari'a*, and examines how the caliphate used it to govern and how it has endured to the present. A brief explanation of the important interplay between these two Sunni paradigms follows, treating *fiqh* and *siyasa* as complementary halves—a type of "*yin* and *yang*"[55]—best understood as the constitutional theory of Islamic law. The third section looks at the paradigm called *imamah*, or continuous guidance, adopted by the Shi'i, the largest single minority among Muslims. The fourth section examines *maqasid al-shari'a* (goals of Islamic law), which originally began as a classical-era paradigm but which has gained increasing attention as a means for reframing current Islamic law so as to ensure conformity to a series of goals that contemporary Muslims might readily embrace without the ostensible difficulties posed by a jurist-made Islamic law.

A. Method I: Interpretation According to the Sunni Jurists—The *Usul al-Fiqh*

The Usul al-Fiqh *Explained*

To convey a sense of Islamic law's most enduring theory of jurisprudence, the *usul al-fiqh*, it is helpful to first provide a historical perspective. In the immediate aftermath of the Prophet's death in 632, his political successors, the caliphs, attempted both to govern and to guide the growing the community of Muslim faithful, or *ummah*, in accordance with the Qur'an and religious rules laid down during the Prophet's lifetime.[56]

Within two decades of the Prophet's demise, however, Islam was beset by its first civil war, a war fueled in large part by religious zealots known as the Kharijites, a group who took a very literalist approach to the Qur'an and concluded that any departure from the strict letter of the Divine text put one outside the bounds of Islam and was to be considered an unbeliever. The Kharijites' thinking was opposed by the Mu'tazilites, followers of a rationalist school of legal thinking influenced by Greek Hellenism, who argued that even committing major sins did not make one an unbeliever. The Kharijites, in claiming the right to purge unbelievers even through violence, if necessary, murdered Ali—the Prophet's cousin, son-in-law, and, later, caliph of the nascent Muslim community—in 661. Caliph Ali, claimed the Kharijites, had violated Islam by attempting to negotiate with insurgents who opposed him rather than marching against them. Ali's assassination not only marked a widening gap between what would become the Sunni and Shi'i sects of Islam but also signaled the need for a more nuanced, tolerant approach to the rules laid out within the Qur'an.[57]

In response to the Kharijites' black-and-white literalism and their readiness to commit violence against those seen as violating the law, both the Umayyad (661–750) and the early the Abbasid dynasties (750–1519) embraced the Mu'tazilite approach to the law.[58] The advocates of this rationalist approach to law were known as the *Ahl al-Ra'y*, literally, "the People of Reason," but best known as "the Rationalists." To them, the law, while inspired by Qur'an, must be predicated upon human reason as guided by social and worldly experience.[59]

As time went on, a competing school of thought, known as the *Ahl al-Hadith*, or literally, "the People of Tradition" but best known as "the Traditionalists," began to question the Mu'tazilites' unwavering devotion to human reason, arguing that such rationalism amounted to "conjuring" the law and untethering it from Islam by taking it too far from its divine origins.[60] To the Traditionalists, the Prophet's example was part and parcel of God's guidance, which, while taking a concrete form in the Qur'an, was arguably best understood by the Prophet's example. Therefore, to the Traditionalists, whose starting point for the law was undoubtedly the Qur'an, Islamic lawgivers, too, should strictly adhere to Prophetic tradition as opposed to leaping to unfettered human reason. Motivated by perceptions that the Umayyad dynasty's failure to properly govern was due in no small measure to what Traditionalists asserted was the Mu'tazilites' willingness to ignore the Prophet's example in favor of their own personal sense of reason, the early Abbasids

came under increasing pressure by the more devotional arguments posed by the Traditionalists. One Traditionalist sought to directly challenge both the Rationalists as well as the Abbasid caliphate, Ahmad ibn Hanbal, (d. 855). Hanbal was noted for his devotion to the idea that proper conduct and governance was found in the Prophet's example, which could be best understood from various narratives or *hadith*.[61]

In the ninth century, Shafi'i sought to bring together the Rationalists and the Traditionalists by proposing an interpretative approach to Islamic law that survives to this day: the *usul al-fiqh* (it literally means the "origins," "roots," or "fundamentals" of jurisprudence; in a more figurative sense, it could be rendered as the "science" of Islamic jurisprudence). At the most basic level, the *usul al-fiqh* offered a procedure in which the law could be derived from the appropriate sources and made applicable to a particular case. Shafi'i's formulation began with the one thing the Rationalists and Traditionalists could agree on: the Qur'an was the primary source of law since it was regarded as the *literal* word of God. But in an obvious nod toward the Traditionalists, Shafi'i proposed elevating the Prophetic Sunnah to the status of being a discrete source of law, and in some ways accorded them the same rank as the Qur'an because, according to Shafi'i and the Traditionalists, a Prophetic Sunnah would help to explain and clarify the ambiguous language of the Qur'an. And in Shafi'i's view, not only was no one else in a better position to articulate the precise meaning of the Qur'an but Muslims were bound to follow the Prophet's understanding of the Qur'an.[62]

Although the *usul al-fiqh* relegated the unfettered human reason in law below the explanatory power of the Sunnah, Shafi'i's formulation was ultimately embraced by the Rationalists insofar as it reserved an important place for human reason by explicitly sanctioning the use of *qiyas* to extend the law beyond the sources. Also, Shafi'i's inclusion of the doctrines of *ijma* and *ikhtilaf* offered further, more religiously based, protections in which human reason could be used to extend the scope of the law. For example, *ikhtilaf* not only allowed but arguably encouraged divergent opinions of the law, because there were to be no moral or religious repercussions for suggesting an unpopular, albeit reasonable, legal view. Moreover, *ijma* required that only a consensus of opinion on a legal matter could become binding upon all the faithful, and thus no one understanding of the law (beyond what was specifically addressed in the sources) was inherently preferable to another.

Put into practice, the *usul al-fiqh* articulated a precise, step-by-step approach that utilized both the sources and the principal doctrines to Islamic jurisprudence. Specifically, when one is confronted with a legal query, particularly regarding proper conduct, the *usul al-fiqh* dictates looking first to the Qur'an as the primary source of law and then to the Sunnah, as reflected in the *hadith* collections, to determine if either source could decide the outcome of the query.[63] If no clear answer is apparent from either revealed source, one is obligated to examine whether the particular matter in question has been previously addressed in the form of a consensus of opinion in the form of an *ijma*. Barring a clear answer from either a revealed source or a rational consensus of opinion as to how to address the query, one is then permitted to analogize based

upon the revealed sources or *qiyas* to reach a result, keeping in mind that one is generally permitted to offer a solution that did not have to conform to a majority viewpoint, that is, *ikhtilaf*.

The result of this process took the form of a *fatwa* (pl. *fatawa*), which in Arabic literally means "response," because most law is made by way of legal queries.[64] In classical Islamic law, a *fatwa* could only be issued by a *faqih* (jurist) because the dictates of the *usul al-fiqh* required an intimate knowledge of the sources and doctrines of Islamic law.[65] Moreover, while a *fatwa* is specific to the individual, Sunni Muslims were free to be bound by the *fatwa* of a jurist of their choosing, but typically were restricted to jurists of a particular the school (discussed in further detail below).[66] Generally, a *fatwa* contains a pronouncement about whether the conduct in question falls into one of five categories of conduct: the *obligatory* (*fard*), the *recommended*, the *indifferent*, the *repugnant*, and the *prohibited* (*haram*).[67] The "obligatory" category includes acts whose performance entails a reward, but whose failure to perform requires punishment. The "recommended" category includes acts whose performance entails a reward, but whose failure to perform does not require punishment. The performance of an "indifferent" act involves neither reward nor punishment. This category is intended to deal with matters for which the sources are either silent or neutral. An act falling into the "repugnant" category may be rewarded when omitted, but is not punishable when committed. The commission of a "prohibited" act, however, entails punishment.[68]

It probably has become evident there were significant consequences to the adoption of the *usul al-fiqh*. It offered a step-by-step process for producing an interpretation of Islamic law, by limiting its sources to the Qur'an and Sunnah, but only those intimately familiar with those sources, and the language contained therein, could decipher their meaning in order to render an opinion. Consequently, the establishment the *usul al-fiqh*, gave rise to a body of scholars (the *ulama*) familiar with the language of the sources and, more importantly, those elite scholars charged with interpreting the law, the jurists.[69]

The Ulama*: The Scholarly Interpreters of the Law*

The *ulama* ("scholars"; the singular is *alim*) is a broad term that encompasses anyone who possesses intimate knowledge (*'ilm*) of Islam. The *ulama* include theologians; religious teachers at madrassas (literally "schools" but best understood as Islamic religious schools); prayer leaders (called *imams* and *mullahs* among Sunnis), who often preside over various religious functions; but the most prestigious members of the *ulama* are the jurists, or *fuqaha* (the singular is *faqih*).[70]

Broadly speaking, jurists are viewed as possessing an intimate understanding of the sources, particularly their language.[71] In addition, jurists were expected to understand various doctrines of law and abide by the rules of the *usul al-fiqh*. During the classical period, an aspiring member of the *fuqaha* had to earn an *ijazah*, a degree certificate attesting that one was authorized by a higher authority to transmit a certain subject or text of Islamic knowledge.[72] An *ijazah* was the equivalent of a doctorate of laws; indeed, it is believed that modern doctorates trace their origin to the *ijazah* conferred by the madrassas of a particular Sunni school of jurisprudence. The

minimum period of study for a jurist was four years; an advanced degree required from ten to fourteen years of study.

Atop the *fuquha* (and therefore, the entire *ulama*) stood the *mujtihad* (pl. *mujtihidin*). Technically speaking, a *mujtihad* was a jurist endowed with the ability to conduct *ijtihad*, (which is rooted in the Arabic "to strive," but is best understood as independently exerting effort to derive the law).[73] Under the paradigm of the *usul al-fiqh*, however, the definition of *ijtihad* came to be understood as abiding by the step-by-step process articulated in the *usul al-fiqh* itself (and described previously) in order to render a jurist's "understanding" of the law, known as *fiqh*, or jurisprudence, which was reflected in a *fatwa*. It should be remembered, though, that a jurist's views amounted to no more than "persuasive authorities—ideals, aspirations, and normative statements of God's law derived from the sacred texts through analysis and reasoning."[74]

In the classical era, one had to possess a litany of attributes to qualify as a *mujtihad*: strength of scholarship, an upright character, competence in classical Arabic, understanding of the various doctrines of Islamic law, and expert knowledge of the Qur'an and the Sunnah as reflected by the various *hadith* collections. It should be noted that, few jurists regarded themselves as a *mujtihad*; they often were bestowed the title posthumously, especially as their opinions gained prominence. On the other hand, a jurist who had not been elevated to the status of a *mujtihad* was termed a *muqallid* (pl. *mugallidun*, literally, an "imitator," but the term was understood to mean a "disciple"). And rather than be considered sufficiently qualified to conduct *ijtihad*, they engaged in a process called *taqlid* wherein they embarked on a process of imitating and replicating a *mujtihad*'s previous interpretations of the law when possible.

In sum, under Shafi'i's *usul al-fiqh*, only a jurist and particularly a *mujtihad*, was considered qualified to render interpretations of the law and issue *fatawa*. As a consequence to confining the role of interpretation to the *fuqaha*, doctrines such as *ijma* were meant to include only the consensus of jurists' opinions on a legal matter. One jurist's understanding of the law, however, was never considered as the Shari'a, because while the Shari'a was God's law, *fiqh* represented a human being's understanding of the Shari'a. And, despite Shafi'i theory conferring almost exclusive interpretive authority to a body of educated scholars to render an understanding of Islamic law, jurists have always understood the limits of their own knowledge. Thus, jurists have always accepted the notion that the interpretation of the law will likely be subject to disagreement.

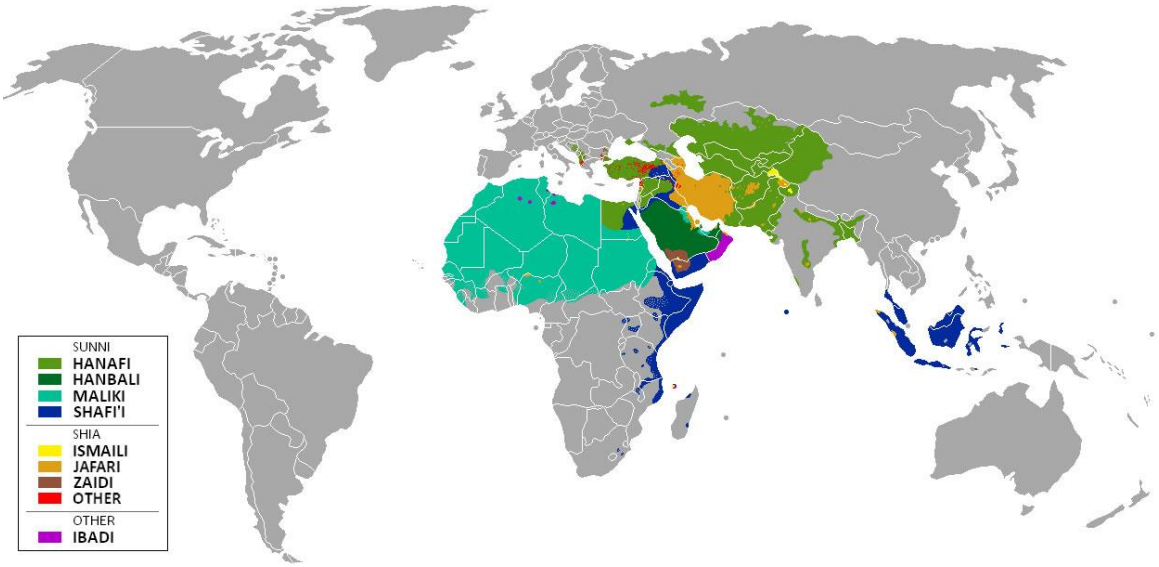
This summation underlines an important but often overlooked fact: when employing the *usul al-fiqh*, Islamic law has always been open-ended and anti-authoritarian in character. Islamic jurists have participated in an evolutionary process of exploration, investigation, and adjudication that has resisted both definitive settlement and the inertia of change.[75] At the same time, because religious law-making authority was placed in the hands of quasi-academic jurists, the law was inherently conservative and slow to change. Consequently, the *ulama* was often accused of being too slow to change and, because of their highly guarded privilege to expound the law, too slow to adapt to a changing world, a problem that still confronts jurists today. Perhaps nothing better

demonstrates the extent of the differences encountered in interpreting Islamic law than an analysis of the major Sunni of schools of jurisprudence.

The Madhab*: The Sunni Schools of Jurisprudence*

Within decades of the Prophet's death in the seventh century, and amid the astonishing expansion of the *ummah*, the process of establishing a system of Islamic law was well under way.[76] Within a century of the Prophet's death, doctrines of law began to form, as did schools of jurisprudential thought, or *madhahib* (the singular is *madhab*).[77] Each *madhab* comprised a federation of jurists bound by a particular legal paradigm and was often led by one or more *mujtihidin*. Schools of jurisprudence were numerous (there were perhaps as many as five hundred by the ninth century), often loosely organized, and most received no official recognition. Today's Sunni schools of jurisprudence can be traced to the two strains of legal thought mentioned previously: the Rationalists and the Traditionalists. (Figure 4-1 shows the distribution of Islamic schools of jurisprudence today.)

Figure 4-1. Current Distribution of Islamic Schools of Jurisprudence



Source: http://en.wikipedia.org/wiki/File:Madhhab_Map2.png.

Specifically, the Traditionalist strain was founded in the mountainous area of western Arabia known as the Hijaz and dominated by the cities of Mecca and Medina, the two sacred cities of Islam where the Prophet settled. The Hijaz-based jurists adopted an approach to the law whereby Prophetic tradition would decide matters, which is what earned them the title "Traditionalists."

The Rationalists emerged in an area dominated by the cities of Basra and Kufa (in what is now southern Iraq), where many of the Prophet's direct descendants, including Caliph Ali, lived and reigned. These Iraqi-based jurists approached the law through reasoning and the use of abstract, hypothetical scenarios, immersing their opinions in technical subtlety, which is why they became known as the Rationalists.

While these two strains of thought merged under the aegis of Shafi'i's grand theory, the *usul al-fiqh*, and still embrace it as their central legal methodology, remnants of their ideological origins are still reflected in their respective jurisprudence. Out of the hundreds that once existed, only four Sunni schools of jurisprudence remain: the Hanafi, Maliki, Shafi'i, and Hanbali.

Among the four Sunni schools, the Hanafi school is the oldest and by far the most widely subscribed. A product of the Iraqi-based center of legal thought and successor to the Rationalists, the Hanafi school of jurisprudence places perhaps the greatest emphasis on rational thought, particularly in the liberal use of *qiyas*. While the Hanafi school embraced the *usul al-fiqh*, it also adopted other important qualifying doctrines.

One prominent doctrine articulated by the Hanafi school (and later followed by the Hanbali school) is the doctrine of *istihsan* (Arabic term meaning "to consider something good"). *Istihsan* is often understood as "juristic preference," but modern-day practitioners describe it as "equity." In any case, *istihsan* allows jurists to depart from the strict rules within the sources to produce a more just and fair result. The premise behind *istihsan* is that a literal application of the rules from the Qur'an and Sunnah should not be used to defeat two overarching goals of Islamic law: justice and fairness (described in fuller detail below concerning the *maqasid al-shari'a*). For instance, application of *istihsan* would mean that in the case of theft, amputation of the hand would be the punishment, not only for the person who actually stole the item but also for any conspirators or accomplices involved, even though they did not literally steal the object.

Another set of closely related qualifying doctrines, (born of the Maliki school, but embraced by the Hanafis as well) are *maslahah* and *istislah*. *Maslahah* means "public interest," and *istislah* means "to seek the best public interest." In essence, both doctrines allow jurists flexibility to look beyond literal applications of the rules contained within the sources and the *usul al-fiqh*, to consider whether their decisions are appropriate and reflect the public good, and to take into account any discrete community interests in adjudicating disputes.

More specifically, Hanafi jurisprudence enjoys a reputation for placing greater emphasis on the role of reason and for being more liberal than the other major three schools in most substantive areas of law. The Hanafi school, for example, emphasizes personal freedom, including the freedom to contract. Hanafis allowed women the right to marry without need of a custodian or guardian (usually a close male relative), gave women equal property rights in marriage, and allocated judgeships (or *qadi*s) for women. Today, the Hanafi school has more followers than the other schools, largely because of the recognition it received as the official school of jurisprudence of the early Abbasid Caliphate (the Abbasids would later endorse the Shafi'i school), and later, as the official school of jurisprudence for the Ottoman Empire (1299–1923) as well as the Mughal

Empire (1526–1764). The influence of the Hanafi school is still widespread in the former lands of these empires. Currently, the Hanafi school is predominant in Pakistan, Afghanistan, Bangladesh, India, China, Mauritius, Turkey, Albania, and Bosnia and Herzegovina. It also has many followers in Lebanon, Syria, Jordan, and portions of Iraq.

The Shafi'i school of jurisprudence is the second-largest among Sunnis. One of the schools of jurisprudence borne of the Traditionalists, it is known chiefly for the legal methodology—the *usul al-fiqh*—created by the school's founder. Besides the Qur'an and Sunnah, however, the Shafi'i school adopted the legal rulings of the first four caliphs—Abu Bakr (d. 634), Umar (d. 644), Uthman (d. 656), and Ali (d. 661)—as sources of law. An interesting distinction between the Shafi'i school and the others was the school's broad deference to the *hadith*. Shafi'i himself was particularly adamant in his defense of the *hadith* as the being the ultimate source of the Sunnah, contending that a *hadith* did not need the approval of the community of Medina to be valid (as the Maliki school believed) or require multiple validators (as the Hanafi school believed). So strong was Shafi'i's faith in the *hadith* that, unlike the other Sunni schools, his school asserted that, even if a contradiction existed between a sentiment expressed in the Qur'an and one within the *hadith*, Shafi'i jurisprudence would not defer to the Qur'an (on the assumption that there are no contradictions between the two sources). Shafi'i rejected the doctrines of *istislah* and *maslahah* as means to validate a law, but took an expansive view of *ijma*, arguing that consensus should not be limited to the consensus of the *ulama*—the position taken by the other schools—but required the consensus of the entire Muslim community. Given the difficulty of securing a consensus within the entire community, Shafi'i allowed jurists significant freedom to offer divergent opinions. After Shafi'i's death, his followers reverted to the position of other schools and adopted the view that only the consensus of the *ulama* was required to create *ijma*. Contemporary Muslims, especially liberals, however, still invoke Shafi'i's original position on *ijma* to justify greater freedom of thought within Islamic law.

Shafi'i jurisprudence is still prevalent among Muslims in Yemen, lower Egypt, Syria, the Palestinian Territories, Jordan, Indonesia, Brunei, Malaysia, the Horn of Africa (which includes Ethiopia, Somalia, and Djibouti), the northern Caucasus, and Kurdistan (which includes eastern Turkey, northwestern Iran, northern Iraq, and northern Syria), and has significant followings in Kuwait, Saudi Arabia, the United Arab Emirates, South Africa, Thailand, Vietnam, Cambodia, the Philippines, Singapore, Sri Lanka, Chechnya, and the Maldives.

Born of the Traditionalist school of legal thought, the Maliki school of jurisprudence is the third-largest of the four Sunni schools, claiming the allegiance of approximately one in four Muslims. While the Maliki school regards the Qur'an and Sunnah as sources of law, it takes a narrow view of what constitutes the Sunnah. In the Maliki view, the Sunnah is drawn from the *hadith* collections and the legal rulings of the first four caliphs, but the *hadith* can constitute part of the Sunnah only if it was validated by the practices of the first three generations of Muslims living in Medina. The Malikis claim they are justified in considering the post-Prophetic practices of the first three generations of Medina's residents because they acted as a "living *sunnah*," accurately reflecting how the Prophet conducted himself as a lawgiver more than a single *hadith* or even multiple *ahadith*. Moreover, the Malikis, emphasizing the centrality of Medina in their

jurisprudence, also assert that the doctrine of *ijma* was confined to the consensus of jurists living in Medina. Maliki jurisprudence also places a heavy emphasis upon the doctrine of *masalah* as a way in which to properly implement the *ethos* of Islamic law without confining matters to the sources of law.

Today, Maliki jurisprudence remains predominant in Egypt, Morocco, Algeria, Libya, Tunisia, North Sudan, Bahrain, the United Arab Emirates, and Kuwait. In the past, it was prevalent in Islamic Spain and Sicily.

The Hanbali school of jurisprudence also emerged from the Traditionalists. In fact, pupils of the Hanbali school during its early years were so devoted to the tradition of the Prophet that rather than be considered "jurists," they preferred to be described as "Traditionalists." Hanbali jurisprudence minimized use of *qiyas*, but did not fully eliminate analogical reasoning. The Hanbali school might have gone extinct if not for the sacking of Baghdad by the Mongols in 1258 and the rise of the celebrated jurist Taqi ad-Din Ahmad ibn Taymiyyah (d. 1328), who, like other scholars, asserted the need for a stronger adherence to tradition in the wake of challenges to Islam's reign and (perhaps paradoxically) encouraged other Hanbalis to utilize *qiyas* more freely. Hanbali beliefs were given a further boost centuries later by Muhammad ibn ʿAbd al-Wahhab (d. 1792), who also advocated for a strict adherence to traditionalism, known as Wahhabist-Salafism (discussed in detail below).

Hanbali jurisprudence remains predominant in Saudi Arabia and has significant followers in Oman, Qatar, Bahrain, and Kuwait. Thanks to Saudi Arabia's efforts to propagate it, Hanbali jurisprudence has broadened its influence since the late 1970s.

It should be emphasized that the Sunni schools of jurisprudence maintained certain ground rules for legal change. Change was permissible only in the following instances: when geographical and/or circumstantial changes occurred over a period of time; when changes in the law were required to avoid catastrophic harm to human interests; when previous principles were based on a cause that had disappeared; or when change or alteration served the common interest of the community. As a consequence of broad-based tolerance in the law, early Muslims lived in "an intellectually dynamic milieu, characterized by a multiplicity of communities, schools of thought and stances on major religio-political issues of the time."[78] In the fluid and intellectually effervescent atmosphere in which ordinary individuals, as well as scholars and theorists, often moved freely among different communities, Muslims engaged in lively discourse revolving around a host of issues that were of vital significance to the emerging *ummah*. Muslims could not have lived such vigorous intellectual lives and still formed what one author called "communities of interpretation" had they been a mass of unquestioning people.[79] Consequently, Islam, as a faith, could not have expanded religiously or politically had it not permitted differences of opinion and interpretation within faith's fundamental confines.

The Closing of the Gates of Ijtihad

Toward the end of the tenth century, some within the broader Sunni *ulama* wrote about the need to stop what was considered endless interpretation by asserting that the process *ijtihad* had been exhausted.[80] After the Mongols' sacking of Baghdad, some Sunni jurists even declared the "closing of the gates of *ijtihad*." This controversial notion was based on the idea that closing or severely restricting the ability to conduct *ijtihad* was necessary to prevent a repeat of a period of legal discord that had dominated the previous three centuries of Islamic jurisprudence.[81] It was argued that, if left unrestricted, *ijtihad* would erode Islamic law entirely from its "original" essence. Limiting the right to conduct *ijtihad* paved the way for the widespread adoption of the doctrine of *taqlid*.

As mentioned previously, *taqlid*, which originally functioned as a way to distinguish a *mujtihad* from a *muqallid*, became a code word for an increasingly conservative trend in which jurists were urged to follow the decisions of their predecessors without necessarily examining the bases for those decisions within the sources of law, understanding the reasoning behind them, or demanding an explanation of the processes by which they were reached.[82] In essence, reducing the value of *ijtihad*, or forbidding it altogether, reflected the need to preserve rather than to innovate Islamic law. As Islam entered a period of political decline and Muslims began to endure numerous social and economic changes, proponents of *taqlid* sought to ensure that Islamic law remain static.[83]

Some assert that the adherence to *taqlid* (and the consequent discounting of *ijtihad* and legal reform) extends to the present day, citing the fierce resistance by religious conservatives who reject "innovations" to the law. In its most extreme form, this conservatism is embodied by a particularly puritanical form of Salafism known as Wahhabism. Wahhabis, like most Salafists, treat anything not practiced by the Prophet and the earliest generations of believers as an irreligious innovation subject either to being ignored as outside the scope of Islam or declared heretical.[84] Despite avowed conservative sentiment, the momentum to reopen the gates of *ijtihad* has acquired growing force, especially as Muslims have experienced the tectonic political shift from living within a collective caliphate (governed by a caliph and guided by the *ulama*) to living among a variety of nation-states.

As will be explained in further detail below, this desire to revive ijithad is strongest among those most vocally reasserting their Islamic (as opposed to national or ethnic) identity. They recognize that today's *ulama* is neither independent nor able to check the authority of national governments. They are also keenly aware that ordinary Muslims, as citizens of nation-states, possess more individual political authority than at any other time in Islamic history. Considering these realities, contemporary scholars have suggested a redefinition of *ijtihad* as the *collective* and *comprehensive* interpretation of the Qur'an and the Sunnah, taking into account prevailing conditions within society.[85] This revised definition not only takes into account the prevailing conditions of society but also allows expanding the scope of interpretation beyond a class of jurists, or in other words, a "democratization" of *ijtihad*.

B. Method II: Interpretation According to the Sunni Caliphate—*Siyasa al-Shari'a*

Siyasa al-Shari'a *Explained*

As seen earlier, typical analyses of Islamic law focused on the *usul al-fiqh* and were produced solely by the *fuqaha*. To grasp the full scope of Sunni Islamic law, however, the role of the caliph in interpreting those vital and largely secular areas of Islamic law not addressed by *fuqaha*, known as *siyasa al-shari'a*, merits attention.

The caliph (derived from the Arabic term *khalifah*, meaning "successor," "representative," or "vice regent") was regarded as the political successor to the Prophet Muhammad and the head of the Islamic state, or caliphate—a form of government that after its first generation of leaders came to resemble a hereditary monarchy—which lasted throughout the Islamic world from the seventh century through the Ottoman period. The caliph ruled over the *ummah*, commanded the military, oversaw the bureaucracy, and served as the state's chief diplomat.[86] The caliph's many responsibilities also included a not-insignificant role in the interpretation of Islamic law known as *siyasa al-shari'a*.

The origins of the term *siyasa al-shari'a* can be traced back to the sacking of Baghdad in 1258, one of the most catastrophic events in Islamic history. It began as a technical term that reflected customary practices of the time but that came to mean, in Islamic legal parlance, the art of governance or "governance in the name of the sacred law."[87] To understand the scope of the *siyasa al-shari'a*, one needs to keep in mind that the *usul al-fiqh* was already well established as the means by which the Qur'an and Sunnah were interpreted by jurists. However, the paradigm of the *siyasa al-shari'a* was generally predicated on the broader doctrine of *maslahah*, or public policy, and allowed an individual caliph, as political heir to the Prophet, to issue a law (or *qanun*; pl. *qawanin*) aimed at maintaining public welfare and justice within the caliphate. In other words, the paradigm of *siyasa al-shari'a* allowed the caliph to legally fill in the gaps of both law and its administration.[88] And rather than operate along the lines of a legal theory such as Shafi'i's *usul al-fiqh*, the caliph maintained discretion in prescribing nonreligious laws aimed at ensuring the rule of law within the caliphate. Specifically, while *fiqh* involves juridical understanding of the Qur'an and Sunnah's rules pertaining to due process, property, family, and rules of worship, *siyasa* involves laws that govern issues such as marketplace regulation, taxes, and security.[89] Moreover, while a *fatwa* issued by a jurist was generally directed to the believer posing the query, *qawanin* issued by the caliph were generally applicable to every citizen of the caliphate.

As with the debates concerning the *usul al-fiqh*, the precise contours of *siyasa* were a matter of considerable debate among classical jurists. The scope of *siyasa* influenced the scope of Islamic law generally, but more importantly, it delineated the extent to which governments were empowered to *enforce* Islamic law. Thus, while such an overview of governance in Islamic law might seem best suited as a subject of academic debate, in reality it deserves the careful attention of practitioners, especially in the contemporary context in which a number of Muslim-majority

states are claiming the mantle of both Islam and Islamic law. The study of *siyasa* thus sheds light on how Islamic law was wielded by governments and, more importantly, why those who understood the concept of the Divine Law were reluctant to allow it to become a tool for potential political abuse and manipulation.

The initial theory on the scope of *siyasa* was developed primarily by Abu al-Hasan Ali Ibn Muhammad Ibn Habib al-Mawardi (d. 1058). Mawardi envisioned the caliph as an ideal ruler who exercised unlimited power in the realm of governance, immune from removal, even when he failed to uphold God's law, *provided* that he himself was a *mujtahid*, which, as discussed previously, was a standard very few could meet.[90] This stipulation was of course self-serving for the *ulama*. Mawardi and other legal scholars believed that only those who thoroughly understood the *usul al-fiqh* and its propensity for diversity were adequately positioned to lead the Muslim *ummah*. In other words, Mawardi and other classical jurists essentially constructed a *theory* of *siyasa* that preserved the elite position of the *ulama* as sole interpreters of Divine Law; from this theoretical position they could critique the government and determine who was best qualified to become leaders. As discussed below, while Mawardi's theory of governance proved difficult to implement given the practicalities of rule, especially among Sunnis, the Shi'i concept of governance—both in its early formulation and in Iran today—embraced the concept that *mujtihad* was best-positioned to lead the *ummah*.

The Hanbali scholar Ibn Taymiyya in his treatise *Governance According to Shari'a Law in Reforming Both the Ruler and the Ruled* challenged and refined the position held by Mawardi.[91] Calling for a cooperative government involving the caliph and the *ulama*, he rejected the view that jurists should leave the worldly realm of politics to the unlimited discretion of the state; instead of strengthening Islamic law by denouncing a sinful caliph, jurists should participate in governance by granting the rulers greater legitimacy. To this end, he advanced a more realistic image of a caliph, unencumbered by the formal requirements advocated by Mawardi. For Ibn Taymiyya, a caliph need only uphold *fiqh*. Furthermore, the caliph's lawmaking authority—*siyasa*—was to be considered part of Islamic law itself. Hence, within the bounds of Islamic law, *siyasa* and *fiqh* should never conflict, and political leadership should draw upon both. Ibn Taymiyya's interpretation of the Qur'an's command to obey God, the Prophet, and "those in authority" over the *ummah* reflects this harmonization; the phrase "those in authority" meant *both* the *ulama* and the caliph. And although Ibn Taymiyya argued that the *siyasa* was part of Islamic law, he did not require that the caliph be a *mujtahid* capable of deriving laws according to the *usul al-fiqh*. Instead, a caliph's laws and practices were valid provided they met two conditions: that they did not contravene a revealed text, or *ijma*, and that they generally contributed to the public interest (*maslahah*). In other words, as long as the ruler did not compel people to sin, he possessed the discretion to enact whatever legislation he thought would benefit society.[92] Ibn Taymiyya's is also credited with framing the doctrine that allowed violence against unworthy rulers who failed the above-mentioned conditions. In the contemporary era, political activists such as Sayyid Qutb (d.1966) and political parties such as the Muslim Brotherhood have expounded and expanded on Ibn Taymiyya's position on domestic regime change.

Shihab al-Din al-Qarafi (d.1285), a notable Maliki jurist, expressed concern about the expansive nature of Ibn Taymiyya's approach to *siyasa*.[93] In particular, if rulers were conferred with the authority to enforce Islamic law without the burden of understanding it, Qarafi worried, political considerations could reduce, or even eliminate, tolerance for diversity within Islamic law (e.g., *ikhtilaf*). He was ultimately concerned that placing Islamic law in the hands of politicians had the potential to erase its character of a Divine body of law untainted by whimsical human self-interest. Consequently, Qarafi proposed that *siyasa* be applied only to laws dealing with civil and criminal matters; it should not encroach on ritual issues. Furthermore, *siyasa* should be limited to certain *fiqh* categories of rules: the reach of political elites should extend only as far as the obligatory, indifferent or permissible, and prohibited categories of conduct; gray areas of behavior, such as those subsumed under the "recommended" and "repugnant" categories of *fiqh*, were off limits. More importantly, Qarafi believed that government intervention—for example, acting as the enforcer of Islamic law—should be the exception rather than the rule; state mediation is unneeded when accessing individual legal rights and obligations.

To understand *fiqh* and *siyasa* more fully, the next section discusses how they functioned in the establishment of the rule of law under Islamic law and how they affect Muslims today.

The Constitutional Theory of Sunni Islamic Law

From the tenth to the late nineteenth century, a "constitutional theory" (to use a term coined by modern scholars) dictated how Sunni Islamic law functioned as a system that coexisted with the rule of law.[94] Albeit unwritten, this theory of governance and legitimacy essentially divided authority between the *ulama*, who determined *fiqh*, and the caliphs (or sultans), who governed via *siyasa al-shari'a* and applied *fiqh* when necessary. This system of governance was symbiotic, replete with checks and balances; it was not a system that featured separate branches *within* government (e.g., executive, legislative, and judiciary branches). Instead, it was a system that involved the government, the caliph, and a body that operated *outside* government, the *ulama*.

As mentioned previously, the *ulama* derived their authority as sole interpreters of the sources of Islamic law through their fidelity to God and through an adherence to the *usul al-fiqh* as their means of interpretation. And because of doctrines such as *ijma*, which required consensus of all jurists to reach a binding precedent, and *ikhtilaf*, which allowed, and even encouraged, freedom of opinion, members of the *ulama* examined each matter separately and often without feeling bound by interpretations of other jurists. The *ulama*'s authority, however, was channeled through the auspices of the caliph, who executed the *ulama*'s interpretations of Islamic law, specifically within the caliphate's courts or through his execution of *siyasa al-shari'a*. In addition, until the nineteenth century, the Islamic state's bureaucracy employed members of the *ulama* as tax collectors, scribes, secretaries, and market inspectors. Even so, the *ulama* often avoided forming too cozy a relationship with the caliph so as not to dilute their primary obligation of faithfully interpreting God's law and becoming too political. Over time and through their near monopoly on legal affairs in a state where God's law was accepted as paramount, the *ulama*—especially the *fuquha*—built themselves into a powerful, independent, effective check on the caliph.

As mentioned previously, the caliph was viewed as the political heir to the Prophet Muhammad, a status underlined by such self-proclaimed titles as "Commander of the Faithful" (the Arabic phrase is *amir al-mu'minin*). From the ninth century, and with the rise of the *usul al-fiqh* and the linguistic tasks that such an interpretative paradigm involved, the caliph's authority became closely linked with his ability to enforce and faithfully follow the dictates of Islamic law as interpreted by the *ulama*. Specifically, the caliph, thanks to his role as "successor" to the Prophet, derived legitimacy by enforcing the *ulama*'s interpretations of Islamic law. At the same time, only the caliph could give the *ulama* the authority to enact their particular interpretations of Islamic law. Put simply, this interplay between apolitical but religiously dedicated jurists acting as interpreters of Divine Law and a caliph acting through the dictates of *fiqh* and filling the gaps for its administration, by way of *siyasa*, produced a system of government in which human beings do not have unfettered authority over other human beings.[95]

Perhaps the best illustration of the interplay between the *ulama* and the caliph in the governance of the caliphate can be found by examining the role of Islamic judges, or *qadis*, and *muftis*, or Islamic jurist-consultants. A *qadi* is a judge responsible for the application of Islamic jurisprudence. The office of *qadi* emerged during the life of the Prophet Muhammad, when judges were dispatched far and wide to adjudicate disputes within an ever-expanding empire. Early *qadi*s tended to dispense law according to prevailing custom, complemented by their own understanding of Islamic law. But as Islamic jurisprudence developed, shaped by the *usul al-fiqh* and the rise of the *ulama*, the *qadi*'s role in the interpretation of the law diminished as they came more to serve as executors of law.

Judicial roles, however, were hardly insignificant under Islamic law. Serving as a *qadi* was equated with the role of God on Judgment Day, especially when one considers that jurists were often unabashed about the fact that their legal interpretations, which often amounted to mere understandings, could be made permanent by the ruling of a *qadi*, effectively turning private *fiqh* into *the* Shari'a. For this reason, jurists were known to go out of their way to avoid the role of judging litigants before them. Some would openly weep to avoid being elevated to the position of *qadi*, in fear that their judgments under Islamic law would be wrong, resulting in eternal punishment. In contrast, today *qadis* are considered mere functionaries of governments. But as officials of the caliphate, their job was to apply *fiqh* and, when necessary, *qanun*, under the auspices of the caliph.

The job of aiding *qadis* in the particulars of *fiqh* fell to *muftis*. A *mufti* is a member of the *ulama* who is intimately familiar with the precepts and doctrines of Islamic jurisprudence but who is appointed by the *ulama* to aid a *qadi* in deliberations that touch upon *fiqh*. Perhaps they could be best termed as juris-consults; that is, a specialized consultant on Islamic legal matters. *Muftis* typically have to attain at least ten years of legal study to serve in their role as juris-consults. During the classical period, *muftis* were viewed as the *ulama*'s highest representatives to the caliphate's courts of law, and worked alongside the *qadi*, who represented the caliph. A *mufti*'s opinion, like the opinion of any *faqih*, was known as a *fatwa*. But in contrast to other *fatawa*, a *fatwa* issued by a *mufti* and accepted by a *qadi* as the judgment of a court within in an adversarial proceeding was binding on the parties and could not be reversed.

By the late sixteenth century, *muftis* had begun to come under state authority; for most, independence from the government had been diminished, and for some it had been eliminated. By the nineteenth century, the symbiotic relationship between the caliphate and the *ulama* had all but given way to executive power, which came to serve as the sole source of authority within and among nation-states, a trend that has largely remained unchanged.

During the nineteenth century the Islamic world, and particularly the Ottoman Empire, faced with increasingly frequent calls for modernization and an ascendant West at its doorstep, began to make changes to its legal system, resulting in a series of reforms collectively called the Tanzimat (Turkish for "reorganization") and the empire's first parliament.[96] Although it initially had few powers, this new legislative body served to further weaken the relationship between the caliph and the *ulama*. This setback to the *ulama* was compounded by a more devastating blow delivered in 1877, when the Ottoman Empire enacted the Majalla (also known as the Mecelle), the first attempt to codify Islamic law in statutory form.

The effects of the Majalla's implementation were profound. It set the tone for how Islamic law was understood within the Ottoman Empire, and remains in partial effect throughout vast portions of the Middle East. The Majalla's most powerful effect was the codification itself, which involved committing to paper a comprehensive compendium of law, placing the power of lawmaking in the hands of a politically oriented legislature, thereby striking a severe—if not fatal—blow to the *ulama*'s authority. Observers, particularly supporters of a return to the *ulama*, have long asserted that the Majalla's implementation diluted or even eviscerated "God's law" by placing interpretation in the hands of legislators and diminishing the *ulama*'s role as the faithful and sole interpreters of the law. Moreover, codified law, as manifested in the Majalla or through statutory language generally, limited the *ulama*'s discretion to interpret and apply the law on a case-by-case basis, as had been their prerogative for centuries. Judges were now forced to abide by a particular and very specific interpretation of Islamic law. The Ottoman Empire and its successor states no longer needed scholars as consultants to sitting judges. Islamic law became one-dimensional, which meant there was no need for a body of jurists to pontificate on variations of the law. Moreover, because the *ulama* had been divested of their authority to interpret the law, they essentially became agents of the state, paid to articulate and support the state's version of the law. The net effect of these changes was to alter the *ulama*'s role as an effective check on the state to one of serving as functionaries within the state.[97]

Since the Majalla was implemented, scholars have wrestled with the question of whether codified Islamic law is still Islamic law. Before codification, legal scholars had always seen their task as one of trying to understand the Divine mind. They recognized, however, that such understanding could never be perfect, and indeed might be deeply flawed, and thus Islamic law had always permitted and even invited variant understandings of the law. In contrast, codified law implies a degree of certainty about the Divine law that was unprecedented in Islamic history and appeared to contradict the fundamental nature of Islamic law.

The demise of the unified Islamic polity (the caliphate that had begun in the sixteenth century) reached a milestone in 1923, when the Ottoman caliphate was formally abolished in favor of the

Turkish Republic. From that point on, Muslim identity was no longer tied to religion; nationality and ethnicity became the dominant markers of identity. The emergence of the nation-state also heralded a major shift in the role of Islamic law in governing Islamic societies: the underlying constitutional theory of governance through Islamic law had fundamentally changed; statutory law had superseded jurist-made law.

As much as some observers might be inclined to shut the door on the aforementioned constitutional theory of Islamic law, the 2012 Constitution of Egypt (discussed in further detail below) appears to be the first Muslim-majority Sunni state to attempt to reorient its constitutional structure to reserve a place for the *ulama*, with Al Azhar playing the constitutional role of interpreting Islamic law. This move raises the classical-era concerns over placing legal interpretation in the hands of a body that might not be sufficiently agile suited to respond to the changes that occur in a rapidly changing world.[98] It should be noted, however, that the President of Egypt retains the authority to appoint the head of Al Azhar.

C. Method III: Interpretation According to the Shi'i—*Imamah* and *Wilayat al-Faqih*

Imamah: *Continuity of Guidance*

Shi'i jurisprudence (also known as *Imamiyya* jurisprudence), while bearing a resemblance to Sunni Islamic law, contains important differences worth exploring. To understand those legal differences, it is essential to examine first the political and theological differences between to the major branches of Islam.

As alluded to previously, the theological differences between the Sunni and the Shi'i began to emerge immediately after the death of the Prophet, and revolved around the question of who was empowered to lead the *ummah*. Specifically, immediately upon the Prophet's demise, the *Shi'atu 'Ali* ("Partisans of Ali") asserted that Ali, as the Prophet's cousin and son-in-law, but also as the first male convert to Islam, should lead the nascent Muslim community.[99] This stance was predicated on the controversial *ahadith* that had designated Ali as the Prophet's successor. Despite these assertions, the first three caliphs—Abu Bakr, Umar, and Uthman—were not related to the Prophet, and Ali's advocates had to wait for the death of Uthman in 656 for Ali became caliph and thereby assume leadership of the Muslim community.

When Ali was murdered five years later, the question of who would succeed him as caliph reemerged, with many in favor of placing leadership in the hands of the Prophet's grandsons: Hasan and Husain. Hasan briefly took the reins of authority, but he resigned in the face of stiff opposition and was subsequently poisoned.[100] Husain's subsequent martyrdom, however, was considered even more tragic; he died resisting the dictates of a deranged Sunni governor in the Battle of Karbala in 680. Leadership of the *ummah* then migrated beyond the Prophet's family.

Keeping this backdrop in mind, it should be understood that Shi'i Islamic jurisprudence principally operates on the interpretative paradigm known as *imamah* (Arabic for guidance). According to *imamah*, God's guidance did not stop at the Prophet and the Qur'an; it continued through the Prophet's bloodline, like that of Abraham and his descendants, and is known as *Ahl al-Bayt* (literally, "the People of the House"). *Imamah*, therefore, prescribes that the "Imams" (or *A'immah*), or "Guides," are the only legitimate successors to the Prophet Muhammad. The Sunni often use the term "imam" to refer to a nominal prayer leader or as an honorific title bestowed on the most learned members of the *ulama*; for the Shi'i, however, "Imam" (always capitalized) means something entirely different. For them, Imams are not only vested with the right to rule over the *ummah* but also empowered by God to interpret the Qur'an's esoteric meanings. Like the Prophet, Imams are conferred with *ismah* (infallibility) and therefore considered free from error and sin.[101] They are not bestowed with the power of revelation, as was the Prophet, but their interpretations of the law are irrefutable and of equal if not greater standing than those of the Prophet.[102] Moreover, the Shi'i assert that Imams have a complete knowledge of God's will and possess all knowledge brought by the angels to the prophets.[103] The Shi'i, then, believe that Muhammad was the last Prophet of God and that Ali was the first Imam. Also, because the Imam served as both the political and the religious leader of the *ummah*, there was no separate caliphate among Shi'i, as was the case for the Sunnis. And although the original Shi'i hierarchy was led by the *ulama*, it later changed, such that the Imam became the sole leader, resulting in a system that unified religious and political authority.[104]

Wilayat al-Faqih: *Guardianship of the Jurist*

Given that Shi'i jurisprudence is predicated on the doctrine of *imamah*, what might be the fate of Shi'i Islamic jurisprudence without the Imam? In fact, an interpretive void emerged after the disappearance of the Imam Muhammad al-Madhi (b. 869), also known as "the Madhi." The Twelvers (meaning Shi'i Muslims who the follow the tradition that there were eleven Imams before the return of the Madhi) believe that the Madhi did not die and instead went into hiding, or "Occultation" (the Arabic word is *ghaybah*).[105] The Occultation, moreover, is divided temporally into two periods: the Minor Occultation and the Major Occultation. During the former, which lasted from 874 to 941, the Madhi communicated to his followers through various deputies, but he himself was never seen. In 941, the Madhi went into complete hiding (the Major Occultation), this time without deputies, but he remains alive and will return before the Day of Judgment.

Accepting the Madhi's occultation, however, flew in the face of the doctrine of God's continuous guidance. Shi'i jurists articulated a bridging doctrine known as the "Guardianship of the Jurist," or *wilayat al-faqih*. Under this doctrine, jurists are allowed to rule and take positions on legal questions in the absence of the Madhi, with the caveat that their understanding of Islamic law is temporary and subject to approval by the Madhi before the end of time.[106] Although jurisprudence in the absence of the Madhi is regarded as tentative, Shi'i jurists operate in much the same way as those within the Sunni tradition: both are vested with the right to interpret the law.

The unique theological role of Imams, combined with the doctrine of *wilayat al-faqih*, seemingly puts Shi'i jurists on an equal level with their Sunni counterparts in terms of articulating jurisprudence. There are, however, several notable differences between the *usul al-fiqh* and the Shi'i *ulama*. For example, the Shi'i, like the Sunnis, regard the Qur'an and the Sunnah as the two principal sources of law, but with important distinctions for the Shi'i Sunnah. Foremost, the Shi'i have their own unique *hadith* collections.[107] These separate works *reject* the rulings of certain individuals, such as those of Abu Bakr, Umar, and the Prophet's wife, Aisha, but explicitly include the narratives of Fatima, the Prophet's daughter and wife of Ali.[108]

Second, the Shi'i look not only to Prophetic *hadith* but also to the *hadith* of the Imams, who, as mentioned previously, are considered to have perfect knowledge of God and Creation, and consequently a perfect sense of Divine law. Thus, the scope of the Sunnah for the Shi'i includes not just the Prophetic portion but also portions articulated by the Imams as perfect expositors of the law.[109]

Third, Shi'i do not embrace the concept of *ijma*, as do the Sunni, primarily because of the presence of the Imams, but also because, in the post-occultation period all rulings of *fiqh* are regarded as subject to the ultimate dictate of the Madhi.[110]

Fourth, Shi'i reject the Sunni doctrine of *qiyas* in favor of *'aql*, or the "doctrine of intellect." *'Aql* involves the process of using intellect or logic to deduce law and allows for unfettered rationality. Sunni *qiyas*, however, focus on the literal words of the sources to examine a ruling's legal reasoning and, if possible, extend it to a new situation, The Shi'i justify their more liberal reliance on rationality on the grounds that intellect is a God-given capacity that reflects on God's signs and creation, and that perceives the divine mind.

While each of the major sects possesses a scholarly class in the form of the *ulama*, the Shi'i *ulama* are more hierarchical. Due to their rejection of *qiyas* in favor of *'aql*, and their adherence to the idea of God's continuously guidance over humanity, members of the Shi'i were obligated to revisit older interpretations and to tackle contemporary issues such as *in vitro* fertilization.[111] Just as members of the Sunni *ulama* are rigorously schooled in madrassas, members of the Shi'i *ulama* undergo years of legal education, typically within an institution known as a *hawza*. But unlike Sunni madrasas, Shi'i legal education includes an emphasis on philosophy. Some *hawzas* are dedicated to women jurists (known as *hawza 'ilmiyya khawharan*).[112]

The Shi'i rank of *marja al-taliq* (Persian, meaning "source to be imitated") is similar to that of *mujtihad* within the Sunni *ulama*. A *marja* (pl. *maraji*) is deemed qualified to conduct *ijtihad*, but with the caveat that he or she serves in the absence of the Madhi. To become a *marja*, which often but not always meant attaining the office of ayatollah (Persian, meaning "sign of God"), a high-ranking Shi'i scholar must become a teacher and celebrated figure within a *hawza*, including possessing a following of students, and must publish a risalah (a theological and legal treatise) that includes the *marja's fatawa* on a range of topics dealing with ritual purity, worship, social issues, business, and political affairs. The title of *marja*, however, cannot be awarded

posthumously, as the title of *mujtihad* among Sunni often is; a *marja* must be living, in accordance with the Shi'i doctrine of *imamah*, in order to address contemporary issues.[113]

Thanks to the doctrine of *'aql*, Shi'i jurists have even more room for interpretation than do Sunni jurists. But Shi'i jurists remain divided over the extent of their authority in light of the doctrine of *wilayat al-faqih*.[114] For some, jurists are only allowed to rule on laws that touch on ministerial duties (e.g., the leading of prayers, presenting sermons, and offering *fatawa* on individual matters). Some jurists are collectively empowered to rule as if they were in the position of the Madhi; they not only assume a variety of religious duties but also assert complete political control over the *ummah*, as if he were the Imam himself—a position later amplified and converted into a coherent political movement by Ayatollah Ruhollah Khomeini during the 1979 Islamic revolution in Iran.[115]

The Shi'I Schools of Jurisprudence

Shi'i are divided into three main branches: the Twelvers, who follow the Jafari school of jurisprudence and who constitute the overwhelming majority of all Shi'i Muslims worldwide; the Ismaili (also known as the Seveners); and the Zaidi. The Jafari school of jurisprudence has been officially adopted in Iran and has significant followings in Iraq, Lebanon, and Syria.[116] The Ismaili and Zaidi schools are not regarded as fundamentally distinct from other Shi'i schools in terms of their jurisprudence, but rather have distinct views about the number and identity of the Imams.[117]

Shi'i jurisprudence differs from the Sunni schools on a variety of specific issues, including inheritance, the giving of alms, commerce, and personal status. Unlike the Sunni, the Shi'i allow temporary marriage for pleasure, termed *mut'ah*, (an Arabic word meaning literally "joy," "pleasure," "compliance," "fulfillment" or "enjoyment"). Despite these differences, many Sunni religious bodies, including Al Azhar, the most prominent contemporary institution of Sunni Islamic thought, have issued *fatawa* declaring Jafari jurisprudence to be largely acceptable law for Sunnis as well as Shi'i.[118]

D. Method IV: A Contemporary Approach to Interpretation—The *Maqasid al-Shari'a*

One of the principal strengths of the Sunni *usul al-fiqh*, its adherence to the language of the revealed sources of Islamic law, is also one of its weaknesses. Inasmuch as the *usul al-fiqh* requires a precise and highly technical approach to the specific language of the sources, it fails to take into account broader philosophical goals not explicitly spelled out by the language of the texts.[119] Such a broader, more holistic approach includes examining the philosophy of the law and its outlook, and perhaps most importantly, ensuring that the rulings of Islamic law remain consistent with its overriding objectives or purposes (its *maqasid*). Thus, the *maqasid al-shari'a* is best understood as an interpretative paradigm used to ensure that Islamic legal rulings remain consistent.

As early as the twelfth century, proponents of the *maqasid al-shari'a* began asserting that it should complement the already widely accepted *usul al-fiqh*. They argued that the Qur'an and Sunnah did not merely manifest a series of specific rules but also articulated a philosophical value system in which specific rules should be seen as tangible manifestations of overriding (albeit sometimes unstated) purposes or goals that the law seeks to achieve. Advocates of this approach included the venerated Islamic scholar Muhammad al-Ghazali (d.1111) and even Ibn Taymiyyah. The *maqasid* approach, however, has risen to even further prominence in the twentieth century.

The first foray into discerning the objectives of Islamic law derived from one of the interpretative doctrines contained within the *usul al-fiqh*: *qiyas*. As discussed earlier, one of the essential steps (and arguably the most controversial) in the process of *qiyas* is positing a legal reason why a matter is prohibited or permitted within the Qur'an. For early *maqasid* proponents, the process of discerning God's reasons for either prohibiting or permitting a matter gave insights into the law's broader goals and philosophy. Early *maqasid* proponents argued that, based on a close inspection of the sources, Islamic law had five general goals: the protection of faith, intellect, lineage, property, and, perhaps most fundamental, the protection of life. Later, a sixth would be added: the protection of honor.

By the thirteenth century, scholars began to consider an even broader set of goals than these six. Instead of deriving goals based on legal reasoning found within the sources and dictated by *qiyas*, scholars began with the assumption that every law laid out within the Qur'an and the Sunnah was inherently rational and, more importantly, aimed at the public good, that is, at benefiting society, a concept in Islamic law known as *maslahah* (Arabic, "public good"). The *maqasid* approach also required a careful examination of the causes and circumstances of revelation itself. The rationale for doing so was that the sources, while divine in origin, were intrinsically responsive to the plight of the people for whom the knowledge was revealed; inspection of the circumstances surrounding the revelation—and not just of the text itself—would help reveal the intent of the Divine Author. One consequence of making and applying these assumptions was that the number of overarching goals rose significantly. By the early twentieth century, *maqasid* proponents argued that the sources reflected a broad array of goals, including fulfilling contracts, sincerity, moral trustworthiness, social welfare support, human dignity, freedom, fundamental rights, economic development, and research and development in science and technology.

At this point, it may be instructive to compare approaches from *usul al-fiqh* and *maqasid al-shari'a* in producing Islamic jurisprudence within a particularly controversial area of Islamic law: the amputation of the hand for theft. An *usul*-based approach, which is chiefly concerned with textual nuances within the Qur'an and the Sunnah, offers little or nothing in terms of a rationale for why a thief would have his or her hand amputated as opposed to, say, being imprisoned or whipped. Under an *usul*-based approach, *qiyas* or analogical reasoning might yield a conclusion that because the hand was the instrument of theft, amputation of the hand would be an appropriate punishment. But if that were the legal reason, then amputation of the offending organ might be the appropriate punishment for adultery, but it is not in accordance with the Qur'an. Under the *maqasid* approach, which is intent on examining the circumstances and purposes of the revelation to understand the reasons God chose to include the particular injunctions within

the Qur'an, one would understand that the practice of hand amputation for theft predates the advent of Islam, and, more importantly, evolved within a nomadic culture that made long-term imprisonment infeasible. Amputation was feasible, met the need to punish criminals, and gave the community a visible reminder of the criminal's offense of the crime. The *maqasid* approach not only provides an operative rationale for amputating the hand for theft but also puts policymakers who are equipped with that rationale in a position to analyze the applicability of the Qur'an's punishment to their own society.

To reiterate, the focus of this paradigm is not so much on the words and sentences of the texts as on the goal and purpose that is advocated and upheld. By comparison to the legal theory of the sources, the *usul al-fiqh*, the *maqasid al-shari'a* are not burdened with methodological technicality and literalist reading of the text. As such, the *maqasid al-shari'a* integrates a degree of versatility and comprehension into the reading of the Qur'an and Sunnah that is, in many ways, unique and rises above the vicissitudes of time and circumstance. At a time when some of the important elements of the *usul al-fiqh*, such as *ijma*, *qiyas*, and even *ijtihad*, appear cumbersome with the changing but prevailing socio-political climate of contemporary Muslim-majority states, the *maqasid* has become the focus of renewed attention because it tends to provide a ready and convenient access to Islamic law in the form of a set of principles rather than an approach that conforms to what some assert is a patriarchal form of Islamic law that is locked away amid the minutiae of jurists rather than a broadly accessible foray into the law generally.

V. Islamic Law within Nation-States

> Few took seriously or resolved the relationship of religious culture and state ideology. Somehow it was hoped that religion would just recede into private life. Neither rulers nor Western-oriented elites faced those issues. The fact is that the modern nation state has failed in many ways. The crises that generated contemporary Islamic revivalism in newly modernizing States occurred because after several decades, Western models of development were not working. Many concluded the State isn't turning out to be what we thought it would be, we're not getting the benefits that we thought we would get.
>
> — John Esposito, *The Future of Islam*

A. The Age of Modernism: Merging of Legal Systems

As mentioned in chapter 4, classical Islamic law underwent significant change in the face of the emergence of the nation-state, changing attitudes and social needs, and, in particular, the need to make government more effective. Legal reform was linked to the complicated and often difficult relationship between the Islamic world and the West, which in the nineteenth and twentieth centuries featured the adoption by various parts of the Islamic world of European legal models—a process that in turn led to a reevaluation of various Islamic doctrines. Although Islamic and common law traditions merged in some areas (such as the Indian Subcontinent), in most parts of the Islamic world, Islamic law was eclipsed or assimilated by the civil law tradition of continental Europe and codified, providing states with uniform and systematic legal statements. While perhaps the most-far reaching reforms took place during periods of European occupation or colonial rule, the first reforms began under the Ottoman Empire.

As discussed previously, in the Ottoman Empire the process of legal reformation began under the Tanzimat, which in the 1840s saw the establishment of separate civil and criminal courts that were staffed by both European and Ottoman judges and that employed elements of European procedure and European rules for evidence.[120] This pattern of enacting codifying laws and establishing Western-style courts, including special courts for Europeans, was emulated subsequently in other countries within the Islamic world. Consequently, with the substance of law fundamentally changed in the direction of European rather than classical Islamic law, both the need for the *ulama* and legal education within madrassas diminished. The jurisdiction of Islamic law contracted, becoming largely restricted to family law or, in some cases, eliminated entirely. Moreover, the pace and extent of legal reform varied from one area of the law to another. European models of public law were widely emulated at an early stage. And while Islamic law remained in place (but was codified) in family law, Islamic criminal law was simply abandoned in favor of European models.

Islamic and Common Law in the Indian Subcontinent

When it was part of the British Empire, the Indian Subcontinent (present-day Pakistan, India, and Bangladesh) fused Islamic and common law systems and adapted to a system of judicial precedent supplemented by statutes. Under this approach, judges were brought from Britain to apply common law principles of justice and equity, while the substance of the law remained Islamic. Common law hierarchies of courts were established, but the pace of reform was leisurely.[121] Later, this mix of Islamic and common law was extended to other parts of the British Empire, including Burma, Singapore, and parts of present-day Malaysia.

As British reforms took hold, Islamic scholars within the Indian Subcontinent proposed reforms to classical approaches of Islamic law. One prominent reformist was Shah Waliullah Muhaddith Dehlawi (d. 1762). He proposed rejecting the authority of *ijma*, and advocated that legal rules be freely chosen from among the doctrines of the four Sunni schools of jurisprudence, rather than be confined to a particular school of thought. He also proposed discounting reliance on the *hadith* (and by extension, on the Sunnah) as a source of law because of their uncertain authenticity, and he urged that any *hadith* repugnant to reason should be discarded. Another reformist, Sayyid Ahmad Khan (d. 1898), asserted that Islamic rules should be reconciled with various contemporary norms, including the abolition of slavery, the charging of interest on loans, and the disempowerment of the *ulama*'s grip over the interpretation of Islamic law generally.[122] Muhammad Iqbal (d. 1938) forcefully argued against *taqlid* and was in favor of contemporary Muslims conducting *ijtihad*. Iqbal also urged that the Qur'an should be understood considering contemporary needs and that *hadith* be used sparingly.[123] Legislatures, he argued, should be invested with the authority to deal with matters of Islamic law, and *ijma* should belong in the hands of legislative assemblies.

Islamic and Civil Law in the Middle East

Perhaps the most dramatic changes to Islamic law occurred as a result of European colonialism in the Middle East. First, let us consider France's treatment of Islamic law in Algeria

France made Algeria its colony in 1830 and it became one of France's longest-held overseas territories. Over the course of French colonization, Islamic law was largely eliminated from use, except for personal status laws. In 1916, the draft Code Morand presented a modernized version of Islamic principles, selectively chosen on those that most explicitly advanced notions such as equity, morality, and economic interests, and advanced the cause for social development. This draft code, which covered matters such as personal status, real property, and evidence, exerted considerable influence on Algerian jurisprudence even though it was never fully enacted into law and its remnants were abolished by the 1976 Civil Code.[124] Gradually, dissatisfaction among the Muslim population, with its lack of political and economic status, fueled calls for greater political autonomy and, eventually, independence from France. Tensions between the two population groups came to a head in 1954, when the first violent events of what was later called the Algerian War began. The departure of the French colonialists in 1962 did not significantly alter Algeria's

legal system. After independence, the Algerian government asserted state control over religious activities for purposes of national consolidation and political control. Islam became the religion of the state in the constitution, and was the religion of its leaders. The state monopolized the building of mosques, and the Ministry of Religious Affairs trained, appointed, and paid prayer leaders along with dictating their Friday sermons. Those measures, however, did not satisfy everyone. As early as 1964, a militant Islamic movement, called Al Qiyam (Arabic for "values"), emerged. Al Qiyam opposed what it saw as Western practices in the social and cultural life of Algerians and called for a more dominant role for Islam in Algeria's legal and political systems, including a more robust reinstitution of Islamic law.[125]

The most notable discrete legal change came in 1976, when an Algerian High Islamic Court (the Haut Conseil Islamique) was created. It consisted of fifteen members, among whom its president was selected with the approval of the Algerian president. The court's jurisdiction was limited, however; it was a consultative tribunal tasked with providing novel interpretations of Islamic law, and it delivered only advisory decisions that cannot overrule secular regulations.[126]

Egypt, in contrast, was an important focus of Islamic legal reform. Exposed to French law and French legal education in the early nineteenth century, Egyptians assumed a leading role in efforts to synthesize the French and Islamic traditions. Muhammad Qadri (d. 1888) became an expert in the comparative study of Islamic and French law, and during his tenure as minister of justice oversaw the promulgation of a number of new codes. He also produced a highly regarded codified version of Hanafi jurisprudence.[127]

The most powerful influence on liberal reformist thought in Islam in twentieth century was the work of the Egyptian religious scholar Muhammad Abduh (d. 1905).[128] His position in contemporary Islamic law cannot be understated. From his death to the present, Abduh has been widely revered as the chief architect of the modern reformation of Islam. He was educated at Al Azhar University and was associated with the Egyptian nationalist movement. He argued for the greater promotion of equity, welfare, and common sense, even if this occasionally meant disregarding the literal texts of the Qurʾan. His international eminence as an Islamic reformer was enhanced when he became the Grand Mufti of Egypt in 1899, and while in that capacity he rendered many *fatawa*. Abduh specifically contended that only those Islamic rules related to matters of worship (*ibadat*) were inflexible, whereas rules covering the everyday lives of Muslims could be adjusted as circumstances warranted in accordance with the criterion of social well-being, or *maslahah*. Abduh also resorted to the jurist's doctrine of freely choosing from the rules and doctrines of each of the schools of the Islamic jurisprudence, a doctrine known as *takhayyur*, as a means to devise innovative solutions to various contemporary issues. He also was particularly influenced by the Mu'tazilites, the rationalist movement discussed earlier that predominated during the first century of Islamic legal thought.

Abd al-Razzaq al-Sanhuri (d. 1971) was one of the most influential figures in modern Arab legal history and a prominent Islamic reformist.[129] Sanhuri was known for attempting to recreate a "pure" Islamic law through the use of Western laws, including writing some of the elaborate civil codes devised for Egypt in 1949 and later adopted by nearly every Arab state in the Middle East.

These codes aimed to synthesize Islamic doctrines within a matrix of codified laws inspired by a variety of models, including European law and existing Arab and Turkish codes. This hybrid Egyptian code permitted reference to Islamic law and custom as a default of applicable code provisions, leaving Islamic law strongest in the field of family law.

B. The Age of Revivalism: The Restoration of Islamic Law

When the Ottoman Empire met its end in the early twentieth century, it was widely believed that Islamic law would meet a similar fate.[130] There was good reason to anticipate its demise; after all, the caliphate had been abolished and the vast majority of the Muslim populous now lived either under the direct control of various Western powers or at the very least were subject to substantial legal influence from the West. Western domination, however, declined with the end of colonialism, but even the newly independent Muslim states found themselves having to pick sides in an ideological contest not of their own making. The global confrontation between the secular United States and the atheistic Soviet Union left no room, or so it seemed, for the revitalization of a legal system rooted in religion. At the same time, whatever residue of Islamic law that remained was largely confined to matters of personal status and family law—and that residue had been nonetheless codified, which to many Muslims meant that it had been drained of its intellectual and spiritual roots, as well as its humility vis-à-vis the Divine Legislator. In short, Islamic law was regarded as a historical phenomenon overrun by nation-states as well as by broader political and social change.

In the 1970s, however, a backlash against superpower domination, and especially against Westernization, began. Many Muslim majority states began enacting laws that selectively revived elements of classical Islamic law, including controversial prohibitions on blasphemy and apostasy, and limitations on women's rights, thereby undermining assertions about the extinction of Islamic law. The driving force behind this movement was not provided by a dramatic shift in global politics or by the reemergence of a unified Muslim polity such as a caliphate. Instead, it was supported by a broad-based reassertion of a transcendental identity: being Muslim. In other words, the reemergence of Islamic law can in part be attributed to "the universality and centrality of religion as a factor in the lives of the Muslim peoples."[131] Such an avowed adherence to religious identity, especially in the contemporary era, has often been translated into a reinstitution of Islamic law, but equally important to consider is the form in which it took. Specifically, inasmuch as many Muslims and Muslim-majority states seek to maintain an Islamic identity and even embrace the concept of Islamic law, for many, Islamic law, consistent with its penchant for rationalism, intellectual tolerance, and evolution, also seek to reform classical contexts in light of modernity. However, others, who view Islamic law as immutable, unchanging, and perhaps at its best when it functioned at a time when Muslims were politically ascendant, seek to re-institute Islamic law in what they regard as its pristine state.[132] In any case, the question remains as to the form that Islamic law will take, and perhaps equally important, the way in which it is interpreted in the future and by whom.

Islamic Law without Law: Islamic Ethics

Before addressing the particulars of the laws of contemporary states that reinstituted Islamic law, the form it has taken, not to mention its motivating factors, it is worth considering that while a growing number of Muslim-majority states have adopted Islamic law in part or on a broader scale, a significant number of Muslims when polled or given the opportunity to participate in elections, maintain that while steadfast in their Islamic identity, remain resistant to political movements that simply seek to reinstitute broad-based classical Islamic law without significant reform. Instead, they have charted a middle ground, Islamic law without the law: Islamic ethics.

At a basic level, and particularly for those living within and among Western-based systems of law, there is a sense of clarity between the concepts of ethics and law. Briefly, the word "ethics" is derived from the Greek word *ethos* (character), and from the Latin word *mores* (customs). Together, they combine to define how individuals choose to interact with one another. In philosophy, ethics defines what is good for the individual and for society and establishes the nature of duties that people owe themselves and one another. Although law within Western systems often embodies ethical principles, law and ethics are often far from coextensive. In other words, many acts that would be widely condemned as unethical are not prohibited by law—lying or betraying the confidence of a friend, for example. And the contrary is true as well, in much that the law does not simply codify ethical norms. Perhaps, more importantly, for purposes of this Practitioner's Guide, laws, unlike ethics, and the sanctions therein may be enforced by the mechanisms created by the state or other authority.

Islamic ethics (*akhlaq*) has always been a fundamental element of Islamic thought, and is central to both Islamic law and theology (*'aqidah*).[133] Islamic ethics begins in much the same way as Islamic law, operating on the premise that the most fundamental relationship in the life of human beings is their relationship with God and arguably, because of that relationship, the inevitable conclusion is that Islamic ethics are embodied and coextensive with Islamic law. Said another way, at the core of Islamic ethics is understanding the nature of the relationship between humanity and God, which are the very contours of a discussion about Islamic law.

Despite the assertion that Islamic ethics and law are one in the same and, therefore, the assumption that if one adheres to the concept of Islamic ethics then it should necessarily follow that they should be the very advocates for the reinstitution of Islamic law, a majority of Muslims living in a variety of Muslim-majority states, such as Indonesia, Turkey, and Malaysia, remain opposed to its wholesale reinstitution. There are a variety of reasons, but two strains of thinking emerge.[134] First, while Muslims acknowledge a natural tendency to adhere to Islamic law (especially concerning ritual practices), positions, such as classical notions about the treatment of women, for example, need to be reformed. Second, contemporary Muslims also remain concerned that even if assuaged of classical (or even pre-classical) positions being acceptable, those now Islamic laws, with an imprimatur of divinity, remain subject to the enforcement of politically minded nation-states and, therefore, subject to possible abuse. Thus, unless institutions within their respective governments can be assured of their adherence to the rule of law, the preferable

approach is to adhere to a set of generalized Islamic ethics which can be reflected in the understanding, application, and enforcement of otherwise secular, generally applicable laws.

Islamic Law Reinstituted: The Role of Wahhabist-Salafism

Of the many states (and some non-state groups) over the past century that have sought to restore Islamic law on the grounds of reflecting popular will, some have sought to institute a particularly narrow form of Islamic law, in part to address their own fundamental failures at governance, institutional weakness, and overall lack of the rule of law. Examples include the Taliban in Afghanistan, Al-Shahbab in Somalia, Boko Haram in Nigeria, and Ansar al-Din in Mali.[135] To place these militant movements, as well as the broader impetus for the reinstitution of Islamic law, in perspective, especially their ideology and legal approach to tolerance, we need, first, to consider two important ideological movements that have shaped Islamic law today, Wahhabism and Salafism, and, second to understand their merger in the late 20th century, which created "Wahhabist-Salafism."[136] We will begin with Wahhabism, which preceded the advent of Salafism.

Wahhabism emerged in the eighteenth century as a movement based on the ideas of the evangelist Muhammad ibn Abd al-Wahhab (d. 1792), who sought to rid Islam of the corruptions he believed had crept into the faith over time, including Sufi mysticism. He also was an ardent opponent of both rationalism and philosophy, which to him were attempts to elevate humanity above the Divine. In opposition, he argued for a strict adherence to literalism, for which the Qur'an and the *hadith* became the sole sources of legitimacy. Moreover, it was imperative to return to a pristine, simple, and straightforward Islam, which would be entirely reclaimable through a literal understanding and implementation of the commands issued and precedents set by the Prophet, and by a strict adherence to correct ritual practice. Abd al-Wahhab saw no room for deviation from a narrow path of religious observance. A Muslim was either a true believer or not a true believer, and if not, that Muslim should be declared an infidel and treated as such.[137] In effect, he espoused a self-sufficient and closed system of orthodoxy, an approach not unlike that of some present-day extremist groups, especially regarding the concept of objective values within Islam and the treatment of non-Muslims. Abd al-Wahhab, however, was primarily concerned about corrupt Muslims, not non-Muslims. He described the Ottoman Empire, for example, as the moral equivalent of the Mongols, as Muslims only in name, not in nature.

Abd al-Wahhab considered any attempt to interpret Divine Law from a historical or contextual perspective as a corruption or aberration from the true and authentic Islam. In the same vein, he viewed the classical approach to Islamic law, particularly the notion that each of the Sunni schools of jurisprudence was equally acceptable, as overly tolerant, preferring instead a single unified, and puritanical approach that severely limited the permissible categories for legal disagreement.

It is highly unlikely that Abd al-Wahhab's ideas would have spread, even within Arabia, had it not been for the Saud family, which united with the Wahhabi movement in the late eighteenth century to rebel against Ottoman rule.[138] Even so, Wahhabism soon lost favor when it put belief into action and set out to rid Arabia of those Muslims deemed insufficiently orthodox. This action included the indiscriminate slaughter of Sufi and Shi'i Muslims, regarded as heretics, and the

execution of a large number of Sunnis in Mecca and Medina considered insufficiently orthodox. Still, Wahhabi ideology was revived in the early twentieth century under the leadership of Abd al-Aziz ibn Al Saud (r. 1902–53), who adopted the puritanical theology of the Wahhabis and allied himself with the tribes of the Najd area of Arabia, thereby establishing the nascent beginnings of what would become Saudi Arabia. Wahhabism thus became deeply entrenched within the kingdom, a fact which would become more apparent as Saudi Arabia's global stature rose, propelled by abundant reserves of petroleum.

It is important to note that the term "Wahhabism" is considered derogatory to the followers of Abd al-Wahhab, as they prefer to see themselves as representatives of Islamic orthodoxy. According to its adherents, Wahhabism is not a school of thought within Islam; it is Islam, and it is the *only* possible Islam. And in rejecting the label of a school of jurisprudence, Wahhabism managed to imbue itself with a diffuse quality that made many of its doctrines and methodologies immanently transferable. Salafism, as it turned out, became a receptive ideological incubator for Wahhabist puritanism.

Salafism is an ideological movement that traces its origins to the reformists Jamal al-Din al-Afghani (d. 1897), Muhammad Abduh, Muhammad Rashid Rida (d. 1935), Muhammad al-Shawkani (d. 1834), and al-Jalal al-San'ani (d. 1810). The movement's founders appealed to a fundamental concept in Islam, that Muslims should follow the precedent of the Prophet and his earliest Companions. In fact, the term Salafism takes the name used to describe the first generations of Muslims, who were collectively referred to as the "Pious Predecessors" (*as-Salaf as-Salih*, or simply "the *Salaf*"). Specifically, the *Salaf* include three groups of people: the "Companions" of the Prophet (as-*Sahabah*), the "Followers" (*Tabi'un*), and the "Followers of the Followers" (*Tabi' al-Tabi'in*). (All other Muslims besides those three generations described are categorized as *al-Khalaf*.) In light of their temporal proximity to the Prophet and their role as devoted citizens of the early Muslim *ummah*, the *Salaf* are revered in some quarters. For instance, according to the Egyptian Islamist theorist Sayyid Qutb, the *Salaf* were "without comparison in the history of Islam, even in the entire history of man. After this, no other generation of this caliber was ever again to be found."[139]

Salafism was intuitively and religiously appealing because of its ideological promise to restore a pristine and unfettered notion of Islam, and because its founders maintained that Muslims should reinterpret the Qur'an and the Sunnah in light of modern needs, free from past juristic precedents. As originally conceived, Salafism was not necessarily anti-intellectual; like Wahhabism, it tended to be less interested in history, because emphasizing a presumed golden age in Islam was seen as idealizing the time of the Prophet and the first generation of Muslims but ignoring—even demonizing—the rest of Islamic history. Moreover, by rejecting juristic precedents and undervaluing tradition as a source of authority, Salafism adopted a form of egalitarianism that deconstructed traditional notions of established authority within Islam, in particular that of the *ulama* and their dominance of the right to interpret the law. Accordingly, anyone was considered qualified to return to the sources and interpret Divine Law. By liberating Muslims from the burden of juristic rules, however, Salafism also contributed to a vacuum of authority that still afflicts contemporary Islam.

Salafism, unlike Wahhabism, originally was not hostile to the juristic tradition or the practice of competing schools of thought, nor was it hostile to Sufism. Salafis were initially eager to throw off the shackles of tradition and to engage in the rethinking of Islamic solutions in light of modern demands. Salafi scholars fused various opinions from various schools to emerge with novel approaches to problems. Importantly, Salafism was founded by political nationalists who were eager to read the values of modernism into the Qur'an and the Sunnah; it was not by nature anti-Western.[140] In fact, its founders strove to project contemporary institutions such as democracy, constitutionalism, and socialism in the Qur'an and Sunnah to justify the concept of the nation-state within Islam. In this sense, Salafism, as originally conceived, tended to be more interested in the end-results than in maintaining the integrity or coherence of the juristic method. It strove more to render Islam compatible with modernity than to critically understand modernity, or even the Islamic legal tradition. For instance, the Salafis of the nineteenth and early twentieth centuries heavily emphasized the predominance of the doctrine of *maslahah* in the formulation of Islamic law. Accordingly, it was consistently emphasized that whatever would fulfill the public interest would to be deemed a part of Islamic law.

Salafism, however, which had initially promised a renaissance within the Islamic world, remained hampered by its political, rather than religious, orientation. As a political movement, it suffered from being unmoored from its long-held goal of reorienting Islam to its origins. When confronted by the challenge of nationalism, Salafis, consistently invoked public interest and necessity, which transformed the movement into a politically reactive force engaged in a broader struggle for identity and self-determination. As a result, Salafism was time and again restructured and redefined to respond to a constantly shifting power dynamic, which ultimately led to confusion over the ethical and moral principles it stood for.

By the mid-to late-twentieth century, Salafism had drifted into a politically amorphous ideology that left undefined its true religious orientation. Its initial optimistic liberalism had faded. Wahhabism, however, had become an insular religious force, bolstered by the legitimacy Saudi Arabia had gained as a global energy provider, which, in turn, helped rid itself of some of its extreme forms of intolerance, in particular, the *Ikhwan* (Arabic meaning "brothers"), a Wahhabist group who initially aided Ibn Saud in his conquest of Arabia, but who in 1920s and 1930s committed various massacres of Sufi, Shi'i, and other Sunnis and were later crushed by Saudi forces.

By the 1970s, Wahhabism had begun to embody what Salafism lacked, and the two ideologies became practically indistinguishable. First, both Wahhabism and Salafism imagined a golden age within Islam, which included a quasi-historical utopia retrievable in contemporary Islam. Second, both movements remained uninterested in critical historical inquiry and responded to the challenge of modernity by escaping to the secure haven of the sources. Third, both groups advocated a form of egalitarianism and anti-elitism insofar as they came to consider intellectualism and rational moral insight to be inaccessible, and thus corruptions of the pure form of Islam. These similarities facilitated the Wahhabi eclipse of Salafism and the emergence of something that might best be called Wahhabist-Salafism.

According to this Wahhabist-Salafism, there are only two paths in life: the path of God, or the straight path, and the crooked path, presumably a trail blazed by Satan. This outlook views Muslims who make any attempt to integrate or co-opt Western ideas such as feminism, democracy, or human right as having fallen prey to the temptations of Satan by accepting ungodly "innovations" (Arabic: *bidah*, viewed as representing the opposite qualities of *sunnah*). Islam, as the only straight path in life, must be pursued regardless of what others think or of how it has an impact on the rights and well-being of others. Importantly, this "straight path" is firmly anchored in Divine Law, manifested through a set of clear legal commands that cover nearly all aspects of life and that override any consideration of ethical values. The sole purpose of human beings is to realize the Divine by dutifully and faithfully implementing Divine Law. Wahhabist-Salafis insist that only the mechanics and technicalities of Islamic law can define morality; there are no moral considerations to be found outside of the numerous specific facets of the law. This relatively technical and legalistic way of life is considered inherently superior to all others. Anchored in the security and assuredness of a determinable law, it therefore becomes fairly easy to differentiate between the rightly guided and the misguided: the former obey the law; the latter either deny, attempt to dilute, or argue over the law. Any method of thought or process that would lead to indeterminate results, such as social theory, philosophy, or speculative thought, is part of the crooked path of Satan.

With the demise of the Ottoman Empire and the consolidation of the Saudi Kingdom, Wahhabi sentiment gained authority throughout the Arabian Peninsula; by controlling the cities of Mecca and Medina, Saudi Arabia became naturally positioned to exercise a considerable influence over Muslim culture and thinking. The holy cities of Mecca and Medina are the symbolic heart of Islam, and the sites where millions of Muslims go on pilgrimage each year. In its capacity of regulating what might be considered orthodox beliefs and practices while on pilgrimage, Saudi Arabia became uniquely positioned to influence greatly the belief systems of Islam. For instance, for purely symbolic purposes, the king of Saudi Arabia adopted the title of the "Custodian of The Two Holy Mosques," referring to the current-day holy sites in both Mecca and Medina.

The discovery and exploitation of oil that provided Saudi Arabia with high liquidity was of great importance to the country's status. Especially after 1975, with the sharp rise in oil prices and the nationalization of Saudi Aramco, Saudi Arabia aggressively promoted Wahhabi thought throughout the Muslim world. According to various estimates, as much as $100 billion has been spent over the past three decades by the Saudi government, through state-sponsored religious endowments, to export Wahhabi-Salafist beliefs.[141] By some estimates, Saudi funds account for up to 90 percent of all religious spending within the Islamic world, with that money being used to maintain existing mosques and construct over fifteen hundred new mosques, to fund scholarships and new madrassas, to train religious leaders, and to publish religious texts to promote Wahhabi-Salafi doctrines through the mass media.[142] This campaign, together with the fact that Saudi Arabia maintains a massive migrant population to support its economy, helps explain why surveys conducted throughout the Islamic world reveal that the Wahhabi-Salafi approach to Islam is perceived by most Muslims today to be the appropriate interpretation of Islam and Islamic law. But this approach also has its critics. Islamic scholar Khaled Abou El Fadl, for

example, asserts that Wahhabist-Salafism represents an artificial sense of confidence and an intellectual lethargy. Further, it fails to take account of the richness of Islamic tradition and does not offer a serious response to the challenges of the modern world.[143]

At a minimum, the process of revitalizing and reinstituting Islamic law has been fueled by a resurgence of religiosity and a perceived failure of nationalism to satisfy spiritual and material appetites, but it remains a work in progress. Simply returning to past practices is problematic, not least because the world today is very different from when classical Islamic law guided most believers. No state, not even the Saudi Kingdom, has replicated the classical Islamic legal regime entirely. According to some scholars, a full-fledged incorporation of that regime is impossible because of the absence of the authority that the *ulama* once possessed, the lack of apolitical institutions such as madrassas, and the fundamental political changes that have occurred over the past nine hundred years, especially the development of the nation-state. Even those governments that declare their desire to revive the heyday of Islam and of Islamic law are reluctant to embrace key elements of classical Islam, such as the religious and therefore political independence of the *ulama* and the intellectualism it encouraged, as well as the restraints upon unfettered government authority.

Nonetheless, there has been a sustained effort to replicate classical Islamic law in the modern world, and it has enjoyed some success. Islamic law has played a role in the emergence of international human rights law, entrenched itself within a few nations' criminal laws, and remains part of the personal status and family laws of many more nations, including a variety of non-Muslim states, Even some Western states have incorporated elements of Islamic law. As the following section discusses, Islamic law has also embedded itself within the constitutional laws of various nation states.

C. Contemporary Islamic Constitutional Law

"Constitutionalism" is generally understood to describe the philosophy that holds that government can and should be legally limited in its powers, and that its authority depends on enforcing these limitations. In a broader sense, constitutionalism can be considered a reflection of the philosophical orientation of the state itself, with constitutionalism being so deeply ingrained that its expression is both implicit as well as explicit.[144] Said another way, a constitution is often described as a "coordinating convention" that establishes "self-regulating" institutions that both "enable" and "constrain" popular and governmental behavior.[145]

At the same time, the Islamic experience with the concept of constitutionalism as mentioned earlier, which traces its origins to the Prophet Muhammad's Constitution of Medina in the seventh century (discussed in further detail in chapter 6) and for which the concept of constitutional authority (i.e., that governments can and should be legally limited in its powers) continued in an unwritten form (articulated above), but has evolved into an entirely new and different approaches given that unlike prior adherents, Muslims today live among nation-states, where political authority rests within the hands of governments.

Importantly, some have argued that Islamic constitutionalism, while reflective of a broad-based sentiment that since Islam plays an integral role in the lives of believers that so should it play a role in the state, is actually anti-constitutional. In other words, a state can have a written constitution that is against the spirit of constitutionalism. For some, the concept of including a provision or provisions which reflect the sentiment that a state must be in conformity creates an arena in which there are no limits and certainly any limits would be subject to an authority outside the scope of limiting powers. To put this tension in less oblique terms, consider that even as a constitution may prescribe the fundamental rights citizens may possess, how would the nature of such rights change when they contrasted with an authority wholly outside the direct scope of the constitution itself? And consider too what to make of such a situation if the authority outside the ambit of the constitution were itself considered immutable or Divine in nature? Add to the mix the fact that in the past six decades, Muslim-majority states have taken a variety of different approaches to making Islam part of their constitutional structures.

Considering the drive to reinstitute Islamic law during the past century, it should be of little surprise that various nations have written or rewritten their constitutions to specify an adherence to Islam and/or Islamic law.[146] Keeping in mind that some Muslim-majority states remain avowedly secular, for those that endeavored to do so, there are three identifiable categories of Islamic constitutionalism:

- The form of government of Iran is that of an Islamic Republic. —Article 1, Constitution of Iran
- Islam is the religion of the state and Arabic its official language. Principles of Islamic law are the principal source of legislation. —Article 2, Constitution of Egypt [2012]
- Islam is the religion of the Federation [of Malaysia]; but other religions may be practiced in peace and harmony in any part of the Federation.—Article 3, Constitution of Malaysia

As these examples show, states have taken different approaches to making Islam part of their constitutional structures. Some Muslim-majority states remain avowedly secular and do not mention Islam in their constitutions (see table 5-1), but those that do incorporate Islam into their constitutions can be identified as one of three types:

- States that see themselves as manifestations of Islam. Specifically, states in which Islam is the state religion; Islamic law has supremacy over other laws; and the state itself is structured to reflect its Islamic identity—for instance, Islamic adherence is used to define who can occupy positions of authority. Table 5-2 lists these states.

- States that declare Islamic law to be the supreme law of the land. Their constitutions may stipulate that Islamic law is a principal or the singular source of legislation, or they may contain “repugnancy clauses” designed to ensure that promulgated laws conform to Islamic law and that courts and legislatures are empowered to oversee adherence to that law. The states in this category are listed in Table 5-3 lists these states.

- States that declare Islam as the official religion or as one of the official religions of the state. These states have endorsed the role of Islam within the state but have not gone so far as to declare that religion shall rule the state's affairs. Table 5-4 lists these states.

Table 5-1. Officially Secular Muslim-Majority States

Albania	Azerbaijan	Bosnia and Herzegovina
Burkina Faso	Chad	Djibouti
Gambia	Guinea	Indonesia
Kazakhstan	Kosovo	Kyrgyzstan
Mali	Northern Cyprus	Senegal
Tajikistan	Turkmenistan	Turkey
Uzbekistan		

Table 5-2. States Recognizing Islam as the Source for Their Principal Political Institutions

Afghanistan	Iran	Mauritania
Pakistan	Saudi Arabia	Yemen

Table 5-3. States Recognizing Islamic Law as a Principal Source of the Law or as the Supreme Law of the State

Afghanistan	Algeria	Bahrain
Bangladesh	Egypt	Iran
Iraq	Kuwait	Libya
Malaysia	Maldives	Mauritania
Morocco	Oman	Pakistan
Saudi Arabia	Somalia	Sudan
Tunisia	United Arab Emirates	Yemen

Table 5-4. States in Which Islam Is the Official Religion or One of the Official Religions

Afghanistan	Algeria	Bahrain
Bangladesh	Brunei	Comoros
Egypt	Aceh Province (Indonesia)	Iran
Iraq	Jordan	Kuwait
Libya	Malaysia	Maldives
Mauritania	Morocco	Oman
Pakistan	Qatar	Saudi Arabia
Sudan	Somalia	Tunisia
United Arab Emirates	Yemen	

It should be remembered that even states that clearly avow adherence to Islam and Islamic law still find themselves having to include in their constitutions various provisions regarding individual rights; the need to impose institutional limits on states, and especially their governments, is novel in the history of Islamic law and poses unique challenges.[147] All of these matters will be addressed in further detail below.

At one end of the spectrum is the Kingdom of Saudi Arabia, which is avowedly Islamic. The text of its entire constitution is simply "God's Book and the Sunnah of His Prophet."[148] Even though it assumes that both the Qur'an and the Sunnah are clear in terms of what they say about governance, the Saudi monarchy introduced in the early 1990s a Basic Law, which not only elaborates on various parts of its governing structure but also includes rights and duties of the individual. At the same time, however, the Basic Law provides no protections for those citizens most likely to suffer from any ill-effects of the law, such as women and religious minorities.

Another approach is found in the Constitution of the Islamic Republic of Afghanistan.[149] Adopted in 2004, it includes provisions that declare that the state shall be an Islamic Republic (art. 1), Islam shall serve as the state religion (art. 2), and no law shall be repugnant to the tenets of the Islamic religion (art. 3). In addition, the Afghan constitution includes various other religious provisions, such as those stipulating that the date of the New Year shall be based on the Prophet Muhammad's exodus from Mecca to Medina (art. 18), that the national anthem shall include the phrase "God is Great" (art. 20), and that the president and two vice presidents shall be Muslim(art. 62). Afghanistan's constitution also contains a unique provision that allows judges to use Hanafi jurisprudence in the absence of a particular law on a given subject (art. 130). The Afghan constitution enumerates a number of individual rights, but they appear subject to the supremacy of Islamic law. Indeed, the Afghan constitution contains more references to Islam than any other modern constitution.

Another constitution instructive of Islamic conformity is that of the Islamic Republic of Pakistan. Like the Afghan constitution, it declares that the state and its laws abide by Islamic religious

tenets but the Pakistan constitution goes a step further by creating constitutional structures aimed at ensuring conformity to Islamic law.[150] For example, Pakistan's constitution creates a body of "experts"—an apparent to nod to the classical *ulama*—dedicated to advising the country's parliament on how to enact laws that will ensure conformity to Islamic principles and legal norms (art. 230). Similarly, Pakistan's constitution also establishes a specific federal court, the Federal Shari'at Court, whose sole responsibility is to review cases from the various trial courts that concern Islamic law.[151] But, in a nod to the supremacy of the state, even Federal Shari'at Court's opinions regarding Islamic law may still be appealed to the Supreme Court of Pakistan.

The Islamic Republic of Iran offers a unique example of Islamic constitutionalism that reflects the Shi'i perspective. Iran is largely organized around the Shi'i legal doctrine of wilyat *al-fiqh*, or guardianship of the jurist (discussed in detail in chapter 4), as interpreted by the republic's founder, Ayatollah Ruhollah Khomeini. This system of government is headed by the *Vali-ye faqih*, or the Supreme Jurist, who delegates his authority to a number of different actors.[152] While controversial even among Shi'i political theorists, centralized rule by a Supreme Jurist can be argued to comport with the Shi'i understanding of the unitary role between political leadership and jurisprudence, which favors rule by God's elect, the Imams.[153]

States that are less avowedly Muslim often have constitutions that are ambiguous about the role religion plays in governance. For example, Article 2 of the Iraqi constitution states, "Islam is the official religion of the State and is a foundation source of legislation."[154] The precise meaning of this phrase is at best ambiguous, however, because while Islam is considered a source of legislation, Article 2 raises a constitutional question about the precise definition of what does it mean to have an official religion. The Iraqi constitution like other constitutions among Muslim-majority states, contains provisions for non-Islamic religions such as Christianity and Judaism. But questions often arise over how broadly "Islam" is defined, especially more contemporary versions of Islam, such as the Ahmadiyya movement in Pakistan or the Baha'i religious tradition, both of which are regarded as heretical among traditional Muslims because they do not believe the Prophet Muhammad to be the last messenger of God.

The 2012 Constitution of Egypt represents the most novel approach to Islamic constitutionalism. Approved by voters in a two-stage referendum, it replaced the 1971 constitution, which had been suspended in 2011 following the popular uprising that deposed longtime president Hosni Mubarak. Both constitutions designate Islam as Egypt's official religion and Islamic law as the principal source of legislation, but the 2012 constitution defines the scope of Islamic law for the first time, as based on "evidence, rules, jurisprudence and sources" as accepted by Sunni Islam, Egypt's majority religious sect.[155] The new constitution also confers unprecedented powers on Al Azhar University, Sunni Islam's most respected contemporary religious institution, by stipulating that its scholars must be consulted on all matters relating to the interpretation of Islamic law.[156] At the same time, the Constitution does not indicate who should seek out Al Azhar's opinion or in relation to what matters specifically. The suggestion is that Al Azhar should be called upon to ensure that future legislation is in conformity with Islamic law, but the wording leaves the matter open to interpretation, which means that it is open to abuse. The Constitution is also silent on the

weight that must be given to such opinion. For example, should such opinions be treated as advisory in nature or are they to viewed as precedent-setting resolutions for such matters and from no other body may appeal? Having articulated some of its ambiguities it remains that, the new Egyptian constitution is the first in the contemporary era to establish a constitutional place for the *ulama* within the political structure of a Sunni Islamic state. Still, this step toward reviving the constitutional theory of Islamic law that once conferred religious interpretative power on the *ulama* has reformists concerned over the slowing of progressive interpretations of Islamic law.

Those Muslim-majority states that remain constitutionally secular are also susceptible to imprecision, if not in their constitutions, then in their legal understanding of secularism. Religion may be allotted no role by a state's constitution, but religion remains an influential, if not instrumental, force in the state. But even among the most avowedly secular states, personal-status laws, such as those governing family life, are regarded as too sacrosanct to eliminate, even though they are firmly rooted in Islam.

D. Islamic Family and Personal-Status Laws

Family and personal-status laws have always been central to Islamic law.[157] Among all legal topics addressed in the Qur'an and Sunnah, aside from purely ritual matters, family law predominates. Scholars both past and present have asserted that family law is at the heart of Shari'a, because of the clear and explicit nature of what the Qur'an and Sunnah say about the family.

Personal-status laws, of which family law is a major subset, describe a set of social conditions or relationships created and vested in an individual by an act of the law of particular state.[158] Personal status laws govern the substance and the procedures that pertain to familial relations, including marriage, divorce, child custody, and inheritance. Importantly, Islamic personal-status laws are in place not only in most Muslim-majority states today but also in a number of nations in which Muslims are a minority, such as India and Israel. Cases of Islamic family law have been adjudicated in Western states as well, including the United Kingdom, Canada, and Germany. In the United States, the Federal Arbitration Act of 1925 gave Christians, Jews, and Muslims the right to adjudicate family disputes according to their own religious laws, as long as they conformed to applicable federal and state laws.[159]

The enforcement of Islamic family and personal-status laws typically comes in the form of adjudicating disputes within specialized family tribunals, where *qadis* and *muftis* often still preside. The legal categories affected by classical and contemporary interpretations of Islamic law include but are not limited to marital age, marriage guardianship (e.g., determining whether a guardian's approval for marriage is essential), marital registration (e.g., determining the nature and extent of obligatory or voluntary registration requirements and sanctions), polygamy, obedience, maintenance (e.g., determining whether a wife is obligated to obey her husband); , divorce, child custody and guardianship, and succession (provisions regarding inheritance).[160]

Classical Concepts of Islamic Family Law

Central to Islamic personal status laws is marriage. Before the advent of Islam, wives, and women generally, were regarded by pagan Arab tribes merely as property; Islam, however, transformed women's status. Under Islamic law, a marriage is viewed as a contract (*nikah*), with significant religious, moral, and spiritual overtones, and requiring an offer, an acceptance, and consideration, as well as a dowry.[161] Because of Islamic law's emphasis on the contractual rubric to marriage, there are no preclusive impediments to marriage, such as the wealth of the spouse, or race, caste or other distinction [162] and the parties can specify any number of obligations within the marital contract. The groom enters into a *nikah* with the bride or, in some cases, the bride's legal guardian, who is typically her father. Under classical jurisprudence, a guardian may contract his minor daughter to marriage without her consent, but she generally maintains a right to rescind the marital contract upon reaching puberty. The *nikah*, like other contracts under Islamic law, only comes into effect only after a process of offer and acceptance has been attested to by two adult male witnesses or one adult male and two female witnesses. A marriage contract without the presence of witnesses, for example, can be considered legally irregular and therefore, voidable (fasid). Moreover, if the *nikah* is to be valid a groom must agree to pay his wife a dowry (*mahr*) of which she retains a sole undivided right of ownership.

Due in large part to the patriarchal influences to be found throughout the Islamic world, classical jurists generally favored the husband in most marriage contracts, as well as in its dissolution through divorce (*talaq*). According to classical Islamic law, the authority to divorce belongs solely to the husband and does not require adjudication before a *qadi* or assent by one's wife. *Talaq* severs the marital relationship and then a waiting period beings (*'iddah*). While the precise waiting period varies, classical law generally deemed it to be three menstrual cycles (or three months if the woman does not menstruate). After the expiration of the '*iddah*, the marriage is terminated.

It should be noted that during the classical era and up to the present although the right of unilateral divorce is conferred to the husband, it can be ceded by the husband to the wife as part of the marriage contract. The other alternative for a wife seeking divorce is to request a judicial decree (*khul*). This judicially ordered dissolution of marriage, which until recently was accepted only by a minority of the Sunni schools of jurisprudence, now has widespread acceptance among most Muslim-majority states. Still, it requires evidence of marital discord and can prove onerous for the wife, especially when compared with the unilateral right of divorce conferred to husband.[163]

Polygyny, or the right for a husband to have more than one wife, is an area of considerable debate today, as it was during the classical period. Although the Qur'an sanctions the practice of polygyny in *sura* 4:3—"[M]arry women of your choice, two, three or four—the Qur'an's stance vastly improved conditions for women at the time of the Prophet. Under Arab tribal law of the time, a husband was allowed to take an unlimited number of wives, concubines and women slaves, and to engage in incestuous relationships; he could divorce wives at will and deprive of them of their property, based on the belief that women lacked a soul. Moreover, at the time this

verse was written, a large number of Muslim men had died in battle, leaving a number of orphans and widows in need of support. Thus, *sura* 4:3 had the effect of limiting the number of wives to four while also allowing for some measure of protection of widows during a turbulent time in the infancy of the Muslim polity.

Turbulence eventually gave way to stability, but *sura* 4:3 remained, raising important questions about marriage for classical legal scholars. Extended, the verse reads, "[M]arry women of your choice, two, three or four; *but if you fear you will not be able to be just with them, then marry only one*" (emphasis added). This can be read as favoring monogamy over polygyny. This reading is bolstered by other portion of the Qur'an. *Sura* 33:4 declares, "God has not made for any man two hearts in one body," suggesting it impossible for one man to love women equally. Perhaps most important to the issue of polygyny is *sura* 4:129, which avers, "You are never able to be fair and just as between women, even if it is your desire." Thus, reading *sura* 4:3 in concert with *sura* 4:129 raises the question of whether the Qur'an actually mandates polygyny at all. Rather than seeing these verses as abrogating or superseding one another, classical scholars (likely in deference to patriarchal influences) attempted to see them as harmonious. As a result, thorny issues of equality among multiple wives were generally left for the groom and his brides to resolve through their *nikah*.

Under classical Islamic law, the children of divorced parents were to be in the custody of the mother until they reach a certain age, at which point the father had a presumptive right of custody. Different schools of jurisprudence stipulated different ages, but typically the father assumed custody when the child reached puberty.

Contemporary Islamic Family Law

Within the past century, a number of reforms have been introduced that have brought women greater equality within marriage. For example, in the early twentieth century, Islamic legal doctrines such as *maslahah* and *siyasa al-shari'a* empowered women to seek divorce, or *khul*. This right had previously not been granted under Hanafi jurisprudence, but it had been adopted by the Maliki school. In addition, new criminal codes barred underage marriages. In 1923, for instance, Egypt's criminal code provided criminal sanctions for marrying underage persons.

In the post–World War II era, Islamic legal scholars invoking the right to *ijtihad*, or the right to independent interpretation of the Qur'an and the Sunnah, made further liberal strides in the area of family law. For example, during the 1950s Tunisian scholars, in a full-fledged reinterpretation of the meaning of polygamy contained in the Qur'anic verses 4:3 and 4:126, asserted that equality as proscribed in Divine Text means more than just equal *financial* support (which was the interpretation offered by classical scholars), it also required equality of *love* and *affection* between spouses. They concluded that no Muslim man could meet the requirements for equality in a polygynous marriage set forth in verses 4:3 and 4:126. Accordingly, Article 18 of the Tunisian Code of Personal Status, which was introduced in 1956, abolished polygyny and declared its abolition consistent with Islamic law.

While other nations have not made such dramatic strides as Tunisia, a number of states have implemented a variety of changes. For example, in Pakistan, a wife was given an absolute right to divorce in return for making an appropriate payment to the husband, a ruling that involved reinterpreting the traditional institution of *khul* in light of Maliki legal jurisprudence, even though Hanafi jurisprudence typically prevails in Pakistan. Pakistan's Family Laws Ordinance of 1961 curbed polygamy by requiring a husband to first obtain permission from his wife and to appear before an arbitration council before taking a second wife. In India, courts have ruled that a husband's taking of a second wife constitutes such an insult to the first wife that, barring unusual circumstances, it would be inequitable to oblige the first wife to continue to live with the polygamous husband. Syria and Iraq allow for a second marriage only with judicial consent. Morocco, Libya, and Jordan have included laws which stipulate that if a man takes more than one wife at a time, the first wife is entitled, by that reason alone, to seek dissolution of marriage.

The range of areas of marriage that have seen reform in recent decades is illustrated by Jordan's 1976 Family Law, which contains provisions for proper marital age, marital consent, and marital custodian or guardian protocol. Other, more nuanced provisions include:

- Article 19: The bride can request in the marriage contract that her husband not force her to leave the country and not marry a second wife. She may also request a special clause to obtain the right to divorce.

- Article 40: A man who has more than one wife must treat all co-wives equitably and provide them with separate dwellings.

- Article 87: The husband can mandate another person to repudiate his wife. Under certain conditions (specified in other articles), the wife has the right to seek divorce if she can prove that she has suffered damage or ill-treatment; the decision- to grant or deny a divorce resides with a judge.

- Article 134: In case of divorce without legitimate cause, the judge can grant compensation to the wife, not exceeding the equivalent of one year's financial support.

- Article 154: The husband is the legal guardian of the children; the wife is only entitled to custody.

- Article 37: The wife owes obedience and cohabitation to her husband. She has the obligation to follow him wherever he decides to go provided he ensures her safety. If she refuses, she loses her right to financial support.

- Article 39: The husband must provide for his wife and treat her well; the wife owes obedience to her husband.

- Article 68: If the wife works outside the home without the consent of her husband, she loses her right to financial support.

Perhaps the most intriguing arguments regarding a woman's rights in marriage—and of divorce—come from contemporary Shi'i scholars within the Islamic Republic of Iran. These contemporary approaches to Islamic law are particularly significant because, since 1979, Iran has been ruled predominantly by Shi'i jurists, not elected politicians. Consequently, the innovative approaches advocated by Iranian jurists have had greater traction within the Islamic world because they are predicated on Islamic law rather than political expediency.

One important area of debate concerns the level of proof a wife must furnish to initiate a divorce. This is an especially important issue within Islamic law because perhaps no other area has incited charges of sexual inequity than the right of a woman to obtain a divorce. Thus, as previously discussed, contemporary Islamic legal scholars have argued for reform in that area of the law, considered to be almost immutable in the past, as a way of demonstrating that issues of gender are neither static nor devoid of intellectualism under the rubric of Islamic law.

Specifically, according to respected Shi'i scholar Ayatollah Yousef Saanei (b. 1937), if a wife requests her husband to grant her a divorce and he refuses to acquiesce, his refusal is in itself sufficient proof of hardship; the wife need only provide evidence of his refusal to be granted a *talaq* (a *khul* typically requires a more onerous evidentiary burden). Another contemporary Shi'i scholar, Hujjat al-Islam Mushin Sa'idzaddeh (b. 1958) takes an even broader approach to the question of gender parity in marriage by asserting that the entire field needs reinterpretation (*ijtihad*) in light of modernity. He proposes that, first, one must closely examine the context of marriage at the time Islam was founded and just prior to its founding; second, one must understand the role that Islam plays within marriage; and, third, one must consider the rationale for marriage. Mushin Sa'idzaddeh also contends that while Islam did not invent the concept of marriage, the Qur'an strengthened the position of women within marriage by explicitly restricting a husband's rights (e.g., by reducing to four the number of wives he could marry) and creating rights that favor the wife (e.g., maintaining her independent property rights in case of divorce). He asserts that the fundamental flaw of both classical and most contemporary jurists in evaluating marital rights is to view marriage as nothing more than a mere contractual relationship with a series of immutable protections detailed in the sources. Instead, he asserts that marriage should be seen more fundamentally, as a civil relationship between a man and woman, and that while the Qur'an details a series of protections, those protections were aimed at ameliorating the conditions at a specific time and in a particular place, and thus they can and should be changed to reflect other times and places, keeping in mind the fundamental concern of God, which is to maintain and reform marriage so that the parties to the marriage could act with greater equity and harmony.[164] This argument (which took the form of a *fatwa*) argues for the dismantling of a variety of measures, such as unilateral divorce, and, if it were widely accepted within the Muslim world, would pave the way for an entire reformulation not only of marital matters but also of women's rights, such the right to inherit.

Since the mid-1970s, however, voices calling for reform have met with opposition from those calling for a revival of Islamic traditionalism. One consequence has been to force states to introduce reforms incrementally, if at all. One example was an attempt in 1979 in Egypt to require a husband seeking a divorce not only to make a declaration of *talaq* directly to his wife but also to register that declaration with an appropriate court. Egypt's Constitutional Court declared such changes contrary to the country's constitutional adherence to Islam, and they were never implemented.[165] Another example of the resistance to reform comes from in Pakistan. The 1961 Marriage Family Laws Ordinance imposed a number of restraints on a husband's power to divorce through a declaration of *talaq*. Such provisions have been subject to various legislative attacks and repeatedly undermined by rulings from the Federal Shari'at Court, which called into question the ordinance's constitutionality and its conformity with Islamic law.[166]

Conservative traditionalists, too, can offer novel and abundantly tolerant positions. Take for example a *fatwa* issued in 1963 that hermaphrodites who felt trapped in the wrong sex were entitled under Islamic law to undergo surgery to correct their malady. The *fatwa* was issued by none other than Ayatollah Khomeini, and since 1979 Iranian law has prescribed a national policy in favor of sex change operations, issuing new identification documents and even financing them. In fact, Iran has conducted seven times as many such operations than the European Union.[167]

The fate of Islamic law, even at its core—personal status and family law—is subject to human interpretation, both traditionalist and reformist. The endurance of the current conservative resistance to reform, then, should prove to be a major factor in fate of Islamic law itself.

VI. Islamic Criminal Law

> Perhaps the most important message that Islam's past offers the present comes in the repeated recognition among believers that confidence should not harden into arrogance. If any single assumption beyond Islam's core beliefs can be said to have united the community throughout its long history, it is the view that sins are ultimately for God to judge.
>
> — Sadakat Kadri, *Heaven on Earth*

While Islamic personal status and family laws are the most widely implemented form of Islamic law today, perhaps no single area receives more attention from human rights activists and the media than efforts to reinstitute Islamic criminal law. Those efforts have often led nowhere. Despite the political impetus to implement classical Islamic criminal laws in modern states, few Muslim-majority states have done so. Furthermore, even in those states that do administer Islamic criminal law, defendants are rarely punished. Nonetheless, there is no denying that the subject of Islamic criminal law generates contemporary interest.

To properly understand the contours of contemporary Islamic criminal law, one must be familiar with its classical precedents. This chapter begins by discussing the basic principles of Islamic criminal law, especially as enshrined within the Qur'an, as well as their interpretation and elaboration by classical Islamic jurists. Next, it spotlights substantive criminal procedure and explores the different types of substantive criminal offenses—offenses against God, offenses against bodily harm, as well as other discretionary offenses—and the punishments for those offenses under classical Islamic law. This chapter concludes by examining the extent to which contemporary states adhere to classical practice.

A. Classical Concepts of Islamic Criminal Law

Islamic criminal law is shaped by a number of overarching themes—articulated by the Qur'an and revolutionary for their time—that still resonate with contemporary understanding of criminal law. First, the Qur'an embraces the principle of legality: there can be no crime or punishment except by law. Second, the Qur'an asserts that the law cannot be applied retroactively; an act performed before a law was in force cannot later be prosecuted under that law. Third, the Qur'an embraces the principle that individuals are responsible for their own actions. But for an act to be criminal, it must first be unlawful. Some actions, such as drinking alcohol, are unlawful *only* for Muslims. Other acts, such as homicide, under classical Islamic jurisprudence are unlawful for *all* persons.[168]

Classical Islamic law considers criminal responsibility to exist where the accused has the requisite capacity and mental state and where he or she has committed an unlawful act. Like most systems of law, classical Islamic law considers minors, the insane, the unconscious by reason of illness, and persons under certain forms of duress to lack the required capacity to commit a crime. (Classical Islamic law also treats insanity as a defense). However, unlike in many countries, a person who commits a crime while under the influence of alcohol is not regarded as lacking the capacity to commit a crime, the consumption of alcohol itself being a substantive crime in classical Islamic law. Under classical Islamic law, prepubescent individuals are considered minors, but the precise age at which maturity is deemed to occur varies among the Sunni schools of jurisprudence, which set the age of maturity at between fifteen to eighteen years of age.

Classical Islamic law also provides for the doctrine and the defense of uncertainty, or *shubha*, regarding the most serious offenses within Islamic criminal law, or *hadd* offenses (the plural is *hudud*) as well as homicide (these are discussed in further detail below) at the direction of the Prophet Muhammad, "Ward off [*hadd*] punishments from Muslims on the strength of uncertainty as much as you can."[169] Based on the *hadith* collections, and as found in most contemporary legal systems, there are two types of uncertainty under Islamic law: uncertainty of *facts* and uncertainty of *law*. These classifications are similar to the "mistake of law" and "mistake of fact" defenses that exist in other legal systems. Specifically, uncertainty of facts arises if a person believes his or her conduct to be lawful because of an excusable, but mistaken, belief in the identity of the persons and/or objects of the crime. For example, if one strikes what one believes to be a dead body, but actually kills a person, then uncertainty of facts would apply. Uncertainty of law arises from an erroneous understanding of the law. For example, in the Islamic context, whether one can drink wine for medicinal purposes is subject to uncertainty because of variety of exceptions under Islamic law involved in consuming something that is generally prohibited. The classical Islamic standard for uncertainty of the law is actually more liberal than is the case in some contemporary legal systems, some of which allow for no mistake or a justified mistake of law.

Another applicable defense under Islamic law is duress, which, according to classical jurisprudence, removes the unlawfulness of a crime if the perpetrator committed the act because he or she was threatened with death or serious injury should they refuse to commit the act. According to some schools, if a threat is made against one's close kin, it will be imputed as if threatening the accused. Included within classical jurisprudence is the doctrine of self-defense, which extends to the defense of property, life, and honor. Defense of honor, as defined in classical jurisprudence, occurs when a woman is sexually assaulted and fights back, including killing her attacker.

B. Islamic Criminal Procedure

During the classical period of Islamic law, the prosecution and enforcement of criminal law was generally *not* the province of the state. In classical Islamic jurisprudence, the majority of serious crimes were adjudged through private lawsuits (in much the same way that various torts are today

dealt with through civil suits), and only in a minority of cases was the state empowered to prosecute crimes. As mentioned previously, legal authority was generally divided between the caliph (or equivalent authority, such as a designee of the caliph, for example, a sultan) and the *ulama*.[170] The caliph typically delegated state authority through his *qadis*. But *qadis* were not the only agents of the state able to deal with criminal matters. The caliph sometimes channeled prosecution and enforcement authority to military commanders, governors, and the local police. These executive actors, however, were less bound than *qadis* to adhere to Islamic jurisprudence, and far more likely to act on considerations of political expediency for the benefit of the state; that is, to take recourse in *siyasa al-shari'a*.

While trials under the *qadis* were largely adversarial, procedurally they favored the defendant. The *qadi* acted in a passive manner, similar to the behavior of contemporary common law judges during criminal trials. Before the bench stood a plaintiff and a defendant. The plaintiff was usually the alleged victim, or the victim's heirs or assigns. Thus, in classical Islamic law, the victim served as the prosecutor. The accused or suspected perpetrator was designated as the defendant, but was not always compelled to appear before the court. Only upon the presentation of sufficient proof was the defendant required to provide sufficient evidence in response. Evidence adduced through duress or coercion was generally inadmissible in court. In cases involving bodily injury (addressed in detail later), *qadis* also considered causality, foreseeability, and intervening acts (those acts that interrupted the chain of causality) in determining the culpability of the accused.

Prosecution and trials before executive officials (i.e., trials held before officials other than *qadis*, such as military officials) were generally bound to classical rules of criminal procedure. In contrast to *qadis* (and their accompanying *muftis*), executive officials had wide-ranging authority to evaluate the strength of evidence in a case based on a defendant's past conduct and circumstantial evidence, and in some cases could preemptively punish a defendant so as to avoid trials before *qadis*, which typically involved a protracted trial and criminal procedures. Moreover, executive actors had license to adduce evidence through coercive means, provided a defendant reaffirmed his or her confession in a noncoercive setting. Those convicted of the most serious crimes might be imprisoned for extended sentences if an executive official could demonstrate that the convicted might pose a continuing threat to society as a whole.

During the classical period, evidence presented before *qadis* usually took the form of either an unambiguous (and sometimes a repeated) confession by the alleged perpetrator or testimonial evidence by a witness or witnesses, depending on the crime in question (the moral standing of a witness was often subject to separate scrutiny). Under classical Islamic law even a "voluntary confession" could always be retracted without any conclusion being made as to the guilt or innocence of the confessor. (A voluntary confession is a confession that is given out of a suspect's own free will, and has not been obtained by force, coercion, or intimidation.)

To constitute proper testimonial evidence (as opposed to a voluntary confession) under classical Islamic law, witnesses had to testify openly before a *qadi*. In cases where multiple testimonies were necessary, such as in cases of *zina* (unlawful sexual intercourse), the witnesses' testimony had to be identical to obtain a conviction; even minor discrepancies could be grounds for

excluding such evidence. Such testimony had to be precise to the point of including what would amount to "magical words," or specific words or phrases considered legally significant to qualify as sufficient, but not conclusive, testimony (the precise words were articulated by classical scholars depending upon the crime). Moreover, in cases involving the most serious offenses, (*hadd* offenses or those which involved retaliation for homicide, discussed below), testimonial evidence had to overcome additional hurdles. For instance, witnesses were neither morally nor legally obliged to testify; in some cases, witnesses were in fact religiously *discouraged* to testify altogether. Confessions were usually legally sufficient only if made in court, especially in cases involving serious offenses. There, the *qadi* presiding over the trial had to advise a perpetrator that he or she maintained the right to retract his or her testimony and that neither a prior confession nor its retraction before a court official could be used against him or her.

Oaths were often considered legally significant but not conclusive in certain situations: they were significant in the sense that they were seen as a religious invocation as to the truth of the matter, but they were not dispositive because refusing to take an oath might indicate guilt. Moreover, oaths were generally not given any weight in homicide cases, except in cases where there was strong—but inconclusive—evidence as to the identity of the perpetrator, and where multiple oaths could be taken to ascertain the identity of the perpetrator. This procedure of using multiple oaths to ascertain the identity of the perpetrator, known as the *qasama* procedure, was a way in which third-party oaths could be leveraged to produce results. Circumstantial evidence was admitted for some crimes, but was generally not used to support conviction for serious offenses, especially in case of *hadd* offenses.

A wealth of jurisprudence dating back to the classical period designated numerous protections for the individual from the authority of government. For example, if believers found fault with executive power in its totality, they were entitled to engage in just and rightful rebellion to assert their claims. Classical Islamic jurists also developed more specific protections from the excesses of government, including the presumption of innocence in criminal and civil proceedings, and burden of proof being placed on the accuser. As mentioned, in criminal cases, classical Islamic jurists argued that it was always better to release a guilty person than to run the risk of punishing an innocent one. Moreover, classical jurists condemned the use of torture, noting that the Prophet forbade mutilations in all situations and opposed the use of coerced confessions in all legal and political matters. In fact, a significant number of classical Islamic jurists articulated a doctrine similar to the exculpatory doctrine—that confessions or evidence obtained under coercion are inadmissible at trial. Some jurists even went so far as to assert that judges who relied on a coerced confession in a criminal conviction could be held personally liable for wrongful conviction and subject to possible execution, and most jurists argued that the defendant or the defendant's family could bring an action for compensation against the judge individually, and the caliph and his representatives generally, because the government was deemed vicariously liable for the unlawful behavior of its judges.

C. Substantive Criminal Offenses under Islamic Law

Substantive offenses under Islamic criminal law are generally divided into four broad categories: offenses against God, offenses of bodily injury, other "forbidden" offenses, and offenses against the public welfare of the state.

Hadd: *Offenses against God*

Hadd offenses are sins assigned fixed punishments within the Qur'an and the Sunnah, and are therefore recognized as the most serious earthly crimes. (Islam is not the only religion to see offenses such as theft, adultery, and apostasy within the context of religious law; the Bible treats these crimes in the same manner.[171]) Although there are a number of matters deemed offensive to God within the Qur'an and the Sunnah, some of which are of greater offense to God than those designated as *hadd* offenses, only those listed below are seen as criminally punishable because the punishment for the crime has been detailed in the sources. According to prevailing Islamic jurisprudence, the prosecution and punishment of those convicted of a *hadd* offense cannot be waived, but this sentiment is controversial.

Despite these criteria, contemporary Islamic jurists disagree about which offenses fall into the *hadd* category. According to the four Sunni schools of jurisprudence, the following are considered *hadd* offenses:

- Theft (*sarida*)
- Causing corruption on earth (*hirabah*)
- Unlawful sexual intercourse (*zina*)
- Unfounded accusation of unlawful sexual intercourse (*qadhf*)
- Drinking wine (*shurb al-khamr*)

The contemporary Sunni schools of jurisprudence, however, disagree about whether apostasy (*ridda* or *iritiad*) and the subordinate offense of blasphemy fit within the *hadd* classification.

The specific punishments for individuals convicted of these crimes are:

- Theft: amputation of the hand (as articulated by the Qur'an)
- Causing corruption upon the earth: either crucifixion, execution, amputation of the limbs or exile (as articulated by the Qur'an)

- Unlawful sexual intercourse: if unmarried, one hundred lashes; if married, death by stoning (as articulated by the Qur'an)

- Unfounded accusation of unlawful sexual intercourse: eighty lashes (as articulated by the Qur'an)

- Drinking wine: either forty lashes (as articulated by the Prophet Muhammad in various *ahadith*) or eighty lashes (as was the conduct of Caliph Umar)

Two considerations need to be taken into account regarding these punishments, which undoubtedly seem severe to people in the West today. First, if convicted and punished of a *hadd* offense, the person is considered to have expiated that sin for purposes of the Afterlife. Second, and perhaps more important, while the conviction of a *hadd* offense carries a harsh penalty, the evidentiary and procedural hurdles that stand in the way of securing a conviction are nearly impossible to surmount. For this reason, jurists tend to regard *hadd* offenses as deterrents, serving as a warning against committing such crimes and as a means of highlighting the importance of certain relationships, such as marriage, as well as the importance of personal property.[172] A firmer understanding of the difficulties associated with prosecuting the *hadd* offenses can be gained by considering each of them in turn.

According to classical Islamic law, the definition of the *hadd* offense of theft involved the surreptitious (or by means of stealth) taking away of movable property of a certain minimum value wholly owned or entrusted to someone other than the offender from a locked or guarded place. The removal of objects in open or public places did not qualify as theft. Nor could one be convicted for taking something for which one can make a good-faith argument for ownership, even if only partial ownership can be proven. Thus, under the classical definition, embezzlement did not qualify as *hadd*-based theft. Items left unguarded or hidden were not considered subject to theft. Jurists from the Hanafi school also excluded from the definition of theft the removal of perishable food items, because their value diminishes over time and their ownership is questionable.

Despite the assertion that *hadd* punishments cannot be waived today, there is historical precedent within the classical tradition regarding their *suspension*. Caliph Umar, the second caliph after the Prophet Muhammad, suspended prosecution of theft in 638 because of widespread famine.[173] Classical jurists approved of Umar's decision, concurring that necessity (such as the need to eat) could prevent the prosecution of an offense against God. In a broader sense, though, the suspension of the prosecution was seen as reflective of a society's ability to provide for its citizens, which in essence meant that only Muslim societies capable of properly delivering services to their population possessed the authority to prosecute *hadd* offenses generally.[174]

The constraints and exceptions that limit the prosecution of theft today are even more daunting for the prosecution of causing corruption upon the earth, or *hirabah* (Arabic for "unlawful warfare"; it is derived from the Arabic verb *hariba*, "to become angry and enraged"; the noun

harb means "war" and/or "enemy"). The punishment for *hirabah* is perhaps the most severe in all of classical Islamic criminal law: either crucifixion, execution, amputation of the limbs on opposite sides, or exile. While the punishment is clearly stated, the elements necessary to constitute the offense are unclear. *Hirabah* has been interpreted to mean highway robbery, piracy, rebellion, sedition, and terrorism.[175] During the classical period, some jurists confined *hirabah* to apostates and polytheists who chose to wage war on Muslims. By the thirteenth century, however, most jurists had begun to conclude that *hirabah* applied only to those who engaged in highway robbery or brigandage (plundering by armed gangs), considered two of the most heinous crimes at the time. A review of case law, however, suggests, *hirabah* really amounted to a catchall category covering crimes related to rebellion, sedition, and any other crime that the caliphate felt endangered public order. As discussed below, contemporary understanding of *hirabah* also varies, with it often being regarded as a broad catchall for the most serious crimes.

According to classical Islamic law, *zina* is defined as voluntary sexual intercourse between a man and a woman who are not married to one another, regardless of whether one or both of them are married to other persons. *Zina* does not differentiate, however, between the concept of *adultery* (i.e., sexual intercourse between a married man and a woman other than his wife, or between a married woman and a man other than her husband) and *fornication* (i.e., sexual intercourse between two unmarried persons). A minority of the schools of Islamic jurisprudence extend the definition of *zina* to include homosexual sex; however, this position remains in the minority largely because there are no explicit sanctions for homosexual conduct within the Qur'an.

A *zina* conviction requires either the identical, in-court testimony of four reputable eyewitnesses to the act of sexual penetration or the clear, free, and voluntary confession of the perpetrator, which must be offered four times in four separate legal proceedings without being subsequently recanted. In assessing the credibility of one's confession or the testimony of an eyewitness, a judge is obligated to question the matter closely. For example, in the case of confession, a judge might ask, "Have you perhaps just kissed her or just touched her?" "Did you fu** her?" "Did that thing of yours enter that thing of hers?" "Like a kohl stick enters a kohl container?"[176] Jurists have long admonished it is morally commendable to refrain from testifying altogether. In essence, the classical legal requirements make it nearly impossible to convict perpetrators of consensual but unlawful sex.

The barrier to conviction of *zina* is raised yet higher by the presence of another *hadd* offense, an unfounded accusation of unlawful sexual intercourse, or *qadhf*. The elements for *qadhf* are essentially any failure to meet the requirements of *zina*: if one person accuses another of *zina* but fails to meet the required evidentiary standards (i.e., four eye witnesses to the act of penetration), the accuser is subject to the punishment of eighty lashes and may be barred from offering testimony in any legal matter either for the rest of his life or (according to most schools of jurisprudence) until he repents.

All Sunni schools of jurisprudence agree that the consumption of wine, or *shurb al-khamr* (*shurb*: "to drink"; *khamr*: "grape wine"), by a Muslim (the law does not apply to non-Muslims) is

forbidden, but disagree about whether it constitutes a *hadd* offense, in part because of ambiguity about the precise elements of the crime and, separately, because the punishment is not delineated in the Qur'an, but rather in the *hadith*. Furthermore, the majority of classical scholars failed to adopt the Prophetic example of *forty* lashes and instead adopted the approach of the Caliph Umar, who meted out *eighty* lashes.

While the elements that constitute the offense of drinking wine are generally understood, the extent to which drinking other intoxicants amounts to a crime is less clear. Most of the schools of jurisprudence agree that consuming any alcoholic potable in *any* amount suffices for conviction. A minority position contends, however, that a Muslim may be convicted only if he or she consumes *khamr*, or grape wine, because other specific alcoholic or inebriating potables go unmentioned in the Qur'an and *hadith* collections. According to a minority position held by the Hanafi school, the most predominant school of law, a Muslim may be convicted of *shurb al-khamr* when drinking a potable other than wine only if they become intoxicated.

Among both classical and contemporary jurists stands the *hadd* offense of apostasy and the closely related offense of blasphemy (Arabic *riddah*: "relapse" or "regress"; the infinitive, which most closely translates to word "apostasy," is *irtidad*), but the status of apostasy as a *hadd* offense is controversial. Those who subscribe to the notion that apostasy can constitute a *hadd* offense cite numerous technical elements. For example, like drinking wine, apostasy can be committed only by a Muslim who is a sane adult who has publicly renounced his or her belief in Islam. The punishment for apostasy is execution. But both classical and contemporary jurists are divided over whether apostasy can constitute a *hadd* offense.

As noted above, *hadd* offenses are understood as those offenses that are against God and for which there is a prescribed punishment within the Qur'an and the Sunnah. But there is no earthly punishment prescribed within the Qur'an for departing from one's Muslim beliefs. Indeed, the sacred text goes so far as to declare, "There is no compulsion in religion," (2:256), suggesting that apostasy is not a crime and should not be punished. *Sura* 2:256, however, did not stand alone within the Divine Text.[177] In fact, the only source for the appropriate punishment for apostasy is found in the *hadith* compilations, in which two specific narratives directed against a specific person are cited to assert the Prophetic command, "Whoever changes his religion, kill him." How is this tension between a verse of the Qur'an and a *hadith* to be resolved? Some classical scholars have followed the *usul al-fiqh*, which treats the Qur'an as more authoritative than anything found in the *hadith*; in other words, they did not consider apostasy a valid *hadd* offense.

Another issue that classical jurists had to contend with in property classifying and punishing apostasy was whether a Prophetic narrative (i.e., a *hadith*) should be elevated to be considered part of the Prophetic Sunnah. In this case, the supposed apostate named in the narratives never received a punishment. Equally, if not more important, if it was his right, the Prophet never ordered the death of anyone for committing apostasy during his lifetime, despite the fact that he encountered numerous cases of Muslim apostasy.[178] In light of this, the Hanafi and Shi'i schools of jurisprudence concluded that apostasy cannot constitute a *hadd* offense, a jurisprudential position that remains in place today.

Even so, some of the other schools still regard apostasy as a *hadd* offense. For these schools, a public renunciation of belief in Islam can be committed either explicitly, through an expressed renunciation of one's faith or conversion to another faith, or implicitly, by asserting that universally obligatory acts, such as fasting during the month of Ramadan, are not in fact obligatory or are a mockery of the Prophet(s) or of God. In other words, blasphemy was seen as strong evidentiary support of one's apostasy from Islam. These schools also agree on the need for the accused to be offered one or more opportunities to recant and publicly seek the repentance of God. In deference to the doctrine of uncertainty, which generally provides that doubt always favor the accused, a charge of apostasy can rarely be supported by anecdotal evidence alone, and usually requires the defendant to make a free and overt renunciation of Islam.

Qisas *and* Diyya*: Offenses of Bodily Injury*

Classical Islamic law created a category of offenses related to bodily injury ranging from homicide to the slightest injury. But rather than introduce a novel set of discrete laws tied to the particular dictates of the Islamic faith, as was the case in *hadd* offenses, classical Islamic law aimed to radically reform pre-Islamic practices regarding bodily injury and homicide. Unlike many of the *hadd* offenses, laws regarding bodily injury were made applicable to all citizens of the state, Muslim and non-Muslim alike.

Before the advent of Islam, the Arabian tribal law was straightforward: any bodily injury was dealt with through proportionate retaliation—an eye for an eye, a tooth for a tooth, and so forth. The tribal structure in place, however, made the tribe collectively responsible for the protection of its members' lives. And in the event of violence against any member, the tribe as a whole would collectively exact revenge on the offender's tribe, which in turn was made responsible for the crime. Retaliation, however, was not limited to the perpetrator; it could be extended to any number members of his tribe, depending on the status of the victim and the power of his tribe. Such collective action and tit-for-tat violence fueled feuds that often continued for generations. Classical Islamic law dramatically reformed this approach.

First, Islamic law confines criminal responsibility to individuals, thereby effectively eliminating the accepted pre-Islamic notion that criminal culpability be borne by the tribe. Second, Islamic law restricts the practice of retaliation (Arabic: *qisas*), only to cases of intentional killing and intentional injury. Furthermore, a perpetrator had to be convicted at trial, with a *qadi* presiding, which also meant a stringent application of the rules of evidence articulated above, including reliance upon eyewitness testimony or confessions, as opposed to circumstantial evidence.

If the accused was convicted of an intentional bodily injury or intentional homicide at trial, the punishment of retaliation remained solely in the hands of the victim or the victim's heirs and assigns. Rather than simply retaliate, however, the Qur'an specifically allowed the victim or the victim's heirs and assigns to accept monetary compensation (*diyya*) or, if they chose to so, forgive (*tawba*) the perpetrator. If the victim's family opted for retaliation, any retaliation required parity between the victim and the perpetrator. Retaliation was allowed only if the victim's status equaled or exceeded that of the perpetrator: a Muslim was equal to another Muslim (whether a man or a

woman), but a non-Muslim was not equal to a Muslim, nor was a slave equal to his or her master. In case of *diyya*, which is similar to providing for a victim's family in a tort, the value of a victim's compensation varied with the victim's age, sex, religion, and legal status (slave or master). Under classical Islamic law, *diyya* was not just limited to homicide; it was required for *any* injury or incident resulting in bodily harm, intentional or unintentional, caused by another person.

Taz'ir *and* Siyasa*: State-Prosecuted Offenses*

Generally, if an offense is not a *hadd* offense or an offense related to bodily injury, but is nonetheless is forbidden or deemed sinful by either the Qur'an or the Sunnah, the perpetrator might still incur punishment under classical Islamic law. This type of offense, known as *taz'ir*, ("chastisement"), was used and is still used in limited jurisdictions, such as Afghanistan and Saudi Arabia, as a legal catchall to punish those who could not otherwise be convicted of a more serious offense but were culpable for religious crimes, such as not conducting the obligatory prayers or failing to pay the alms tax. Typically, only repeat offenders are charged and the punishment allotted is typically rehabilitative rather than punitive. Unlike an offense related to bodily injury, *taz'ir* offenses are solely prosecuted by the state, and punishments, which are often aimed at preventing recidivism, are discretionary and ranged widely, from a mere reprimand to corporal punishment and, in rare instances, death.

Another distinct category of offenses involve offenses against the public order of the Muslim polity; known as *siyasa* offenses, these derive from the paradigm of *siyasa al-shari'a*. Examples of these offenses include espionage and treason. *Siyasa* offenses are often grouped with *taz'ir* offenses, with which they share several characteristics. First, both *taz'ir* and *siyasa* offenses are derived from the caliph's authority, although the prosecution of *taz'ir* offenses was seen as part of the caliph's duty to maintain the religious order of society, whereas the prosecution of *siyasa* offenses was seen as part of the caliph's duty to maintain general social order. Second, both types of offenses were prosecuted by state officials, including police officers, market inspectors, and, occasionally, even military officials. Trials of both *taz'ir* and *siyasa* offenses, however, did not adhere to the strict evidentiary procedures in place for the prosecution of *hadd* offenses or offenses against bodily injury. Thus, the without criminal procedural protections imposed with respect to *hadd* offenses, *qadis* could account for retracted confessions and a variety of forms of hearsay evidence, even in cases where doubt clouded certainty. They were, however, distinct because *taz'ir* offenses were tried by *qadis*, while *siyasa*-based offenses were tried by the caliphate's legal actors, such as market inspectors. In both cases, the prosecution of such offenses was often a matter of discretion, largely dictated by political expediency.

D. Contemporary Islamic Criminal Law

Like most areas of Islamic law, criminal law has experienced two waves of reform. The first wave began in the sixteenth century, some four hundred years after the conclusion of classical Islamic law, and sought to codify Islamic criminal law and to avoid arbitrary application of *taz'ir* and

siyasa offenses, which were areas that had been left largely unspecified by classical jurists and put in the hands of the caliphate, but there were varying approaches within the Islamic world. The Ottomans, for example, promulgated a series of codes that criminalized the selling of wine, forgery, neglect of prayer, and failing to fast during Ramadan as *taz'ir* offenses.[179] Reforms aimed at clarifying undefined areas of Islamic criminal law continued until the early twentieth century.

With the collapse of the Ottoman Empire in the first quarter of the twentieth century, a second wave of reforms took place, this time involving both reform of religious laws and the introduction of an altogether anti-religious approach to criminal law. In particular, while the Turkish Republic looked to Europe (especially the Italian and German criminal codes) for both the substance and procedure of Turkish criminal laws, many other Muslim countries (among them Egypt, Jordan, Iran, Iraq, Lebanon, Pakistan, Palestine, and Syria) adopted a mixture of reformed Ottoman codes and French, Italian, English, and Indian laws. Until the 1970s, only Saudi Arabia and the former North Yemen adhered to classical Islamic criminal law.

As described earlier in this chapter, in the 1970s a great wave of Islamic revivalism began to sweep the Muslim world. In the decades since, some revivalists have advocated that there should be no half-measures when it comes to implementing Islamic law, and that it should be implemented in its entirety, including its criminal law and its provisions regarding *hadd* offenses. Beyond this ideological impetus to embrace all of Islamic law, there is a common denominator among states that have recently adopted Islamic criminal laws: they are experiencing social and political upheaval. In every case where Islamic criminal law has been imposed, the rule of law usually has been on the decline, in concert with or as a result of significant social and political upheaval, and citizens have put the rule of law at the top of their list of demands.

Today, we sit at the convergence of competing tensions, between criminal law reform that still favors Western approaches along with demands to reinstitute classical Islamic criminal laws. But for all of the demands to reinstitute classical criminal law, which are often viewed more as an effort to roll back both Western-based approaches and a variety of Ottoman reforms, it should be remembered that the Muslim world today, in which nation-states are the most powerful actors, is far different from the Islamic world during the classical period. Thus, any reinstitution of classical law needs to take account of a fundamentally different political landscape. Today, criminal law remains the sole province of the state, entrusted to state-appointed prosecutors and state-appointed judges, and generally predicated upon state-based codified laws, which—as explained in chapter 5—are outside the control of the *ulama*. And it should be remembered that one consequence of reducing or eliminating the role of the *ulama* is that the law is no longer subject to multiple interpretations. Furthermore, because enactment of laws rests in the hands not of the *ulama* but of legislators, the implementation of criminal law is often seen as untethered from legal scholarship and is instead vulnerable to political manipulation.

Table 6-1. States Applying Islamic Criminal Law		
Afghanistan	Iran	Libya
Nigeria	Pakistan	Saudi Arabia
Sudan	United Arab Emirates	Yemen

Today, nine states adhere to Islamic criminal law (see table 6-1). Other states enact laws similar to Islamic criminal law (e.g., the Islamic Republic of Mauritania, which has sentenced adulterers to death, or Qatar, whose laws prescribe a punishment for alcohol consumption but which has yet to prosecute anyone for drinking alcohol). Still other states have actively considered its wholesale implementation, including the Maldives, whose draft Islamic penal code was written in part by the United Nations and Egypt. Egypt's own penal law, which as of this writing (spring 2013) is being redrafted, is likely to embrace substantial portions of Islamic criminal law following the adoption of a new constitution in 2012. In addition, a number of states have adopted some parts of Islamic law, especially blasphemy laws. A number of powerful non-state actors in various parts of the Islamic world also claim to adhere Islamic criminal law, including the Islamic Courts Union/Al-Shabab in Somaliland, Boko Haram in northern Nigeria, the Taliban in Pakistan and Afghanistan, and Al Qaeda in various parts of Yemen.

Despite the increasing adoption of Islamic criminal laws, the effective prosecution of *hadd* offenses has been and remains exceptionally rare. Generally, cases where prosecution has resulted in convictions, anecdotal evidence suggests that the defendants were often not fully aware of their rights. For example, it is unclear whether defendants in cases in Saudi Arabia, based the available information, are properly and repeatedly informed of their right to retract their confessions. In other instances, Islamic states have created various peculiarities to avoid carrying out a *hadd* punishment. For example, in Libya, thieves could have their hands amputated only with general anesthetic, and the amputation would not be conducted if it might "prove dangerous to [the offender's health]," effectively making the punishment impossible to administer. Consistent with the procedural requirements set forth under classical Islamic law, the actual enforcement of *hadd* offenses has been exceptional. For example, Pakistan has never carried out a single *hadd* punishment. Libya, under Colonel Muammar Qaddafi, conducted just one amputation. Iran's enforcement of *hadd* offenses has waned dramatically, with certain punishments suspended altogether.[180]

On the other hand, Pakistani politicians have sought to expand the range of *hadd* offenses, interpreting the substantive crimes of blasphemy and rape in a way that equates them with the *hadd* offenses of apostasy and unlawful sexual intercourse. Enacted during the drive toward "Islamization" in the early 1980s, Pakistan's blasphemy laws, as codified, criminalize "derogatory remarks, etc., in respect of the Holy Prophet . . . either spoken or written, or by visible representation, or by any *imputation, innuendo,* or *insinuation*, directly or *indirectly* . . . [and those guilty of making such remarks] shall be punished with death, or imprisonment for life, and shall also be liable to fine"[181] (emphasis added). As written, the law is sufficiently vague as to

permit a multitude of interpretations. This vagueness is exacerbated by the fact that Pakistan, like all other contemporary states, places enforcement in the hands not of jurists educated in the nuances of Islamic law but of state-appointed judges and prosecutors, who are often less inclined to examine the subtleties of Islamic law and who are determined, for political purposes, to secure convictions.

In 1990, the Federal Shari'at Court sought to eliminate any ambiguity about the punishment for blasphemy by ruling that "the penalty for contempt of the Holy Prophet . . . is death and nothing else," a decision later affirmed by the Pakistani Supreme Court and that remains in effect today.[182] The court, however, reached its decision by conflating the classical-era punishment for apostasy with blasphemy, which are distinct offenses but neither of which finds its basis within the Qur'an itself. Moreover, Pakistan's blasphemy laws further depart from classical Islamic law's rules on apostasy by extending the law's reach to non-Muslims as well as to Muslims. Finally, as written, the current blasphemy law does not take into account classical Islamic legal defenses pertaining to prosecuting *hadd* offenses, such as requiring proof of intent or the defense of uncertainty. The Ahmadiyya community, which subscribes to a form of Islam the lies outside traditional Sunni and Shi'i beliefs, has suffered under Pakistan's blasphemy laws. Christians have also suffered, and often found it impossible to defend themselves against such vague laws. Moreover, Pakistani politicians and judges who have criticized the blasphemy laws have been harassed and even assassinated. Politically, the laws are contentious, but they have the backing of various Islamist political parties, which view such laws as elemental to Pakistan's Islamic identity.

The difficulties encountered in attempting to apply classical Islamic standards to a contemporary context are best illustrated by Pakistan's rape laws.[183] Their reinstitution of *hadd* offenses in the late 1970s meant that unlawful but consensual intercourse (*zina*), would be punished, as would a false accusation of sexual intercourse (*qadhf*). The question arose of how to legally treat rape, which involves nonconsensual sexual intercourse. Classical jurists treated rape (*mustakraha*) as a defense against the charge of *zina*, but never regarded rape as a distinct and substantive offense. When Pakistan attempted to fold rape into its *hadd* offenses, confusion resulted. For a victim to bring a charge of rape, unless she had four eye-witnesses to the rape, she would have to admit to having had sexual intercourse and open herself up to a charge of having committed the *hadd* offense of *qadhf*. The reason for the confusion was Pakistan's blind adherence to both classical Islamic criminal laws along with adhering to the classical rules of evidence. As discussed earlier, classical Islamic law typically did not admit the use of circumstantial evidence because of its reliability and because of the harshness of the punishment. Pakistan, rather than addressing the concerns of reliability by classical scholars, simply adhered to the classical rules of evidence and, because those rules excluded the use of modern forensic evidence, they were incapable of dealing with the substantive crime of rape, leaving contemporary women with a no-win proposition when seeking prosecutions for rape. In 2006, the substantive offense of rape was removed from the jurisdiction of the specialized Islamic legal courts and instead prosecuted within the regular civil law courts, where, judges were permitted to consider modern forensic evidence. Since that change was made, women have been able to prosecute for the offense of rape, with more just results.[184]

The regime in contemporary Iran has used the prosecution and enforcement of Islamic criminal laws as a means of defending its own legitimacy.[185] Especially in the early years of the Islamic Revolution, the government charged many of its critics with the broad crime of *hirabah*, or spreading corruption on earth, and effectively accused them of opposing the revolution itself. The conviction rate for *hadd* offenses in Iran has been significantly higher than the rate in Saudi Arabia. Anecdotal evidence suggests that in Iranian courts evidentiary burdens within classical Islamic criminal law are also not being strictly adhered to.

Most convictions of Islamic law today come under the broad umbrella of *taz'ir* offenses. There are a number of reasons, but perhaps two are most obvious. First, under classical Islamic law, *taz'ir* conviction and punishment was tied to the discretion of the state, which, because of the centrality of state authority in the enforcement of crimes in the contemporary era becomes more prone to abuse, as opposed to the libertarian posture of the caliphate during the classical era. Second, because punishment of *taz'ir* offenses during its classical origins was not tethered to a set of strict evidentiary requirements, as is in the case with *hadd* offenses, both the *scope* and the *punishments* for such crimes have wildly expanded. In Iran, for example, courts are authorized to order seventy-four strokes of the whip for the breach of "any religious taboo" and ninety-nine for an offense against "public morals," which includes attendance of a party. In Saudi Arabia, there is no clear sense of which crimes can be *excluded* from the *taz'ir* category. In 2006, for example, a married teenager and a male friend were sentenced to ninety lashes for sitting in a car unchaperoned. That the two were together unattended, however, came to light only because both had been dragged from the car and raped by seven men. The outcry over the teenager's punishment, however, finally drew the attention of King Abdullah, who pardoned them.

VII. Islamic Law and International Law

> People, We created you all from a single man and single woman, and made you into races and tribes so that you should recognize one another. In God's eyes, the most honored of you are the ones most mindful of Him: God is all knowing, all aware.
>
> — Qur'an 49:13

> Muslim thinkers after the fashion of their Greek predecessors, took for granted that by nature "man is a social animal"; he can only live as a member of society. No individual except God . . . can live alone. Men were created to live together.
>
> — Majid Khadduri, *War and Peace in the Law of Islam*

While Islamic law can be described as a legal system primarily devoted to regulating the relationship between God and believers, it also regulates the relationship between believers and nonbelievers. Such religious distinctions might initially appear inappropriate in a discussion about contemporary international law—which is generally defined as the set of rules accepted as binding in relations between states and nations—but it must be remembered that before the advent of nation-states, one's paramount identity was often based on one's religious affiliation. Thus, classical Islamic law was developed in a world divided primarily along religious, rather than national, boundaries. The approach of dividing the world on the basis of believers and nonbelievers is hardly novel nor confined to Islam. St. Augustine, for instance, proposed a similar construct whereby Christians were divided between areas under the domain of religious law, or *civitas dei* (the city of God), and areas outside that domain and within the *civitas terrenae* (the earthly city).[186] And while most have concluded that ethnic and national identity has overtaken religious identity in recent centuries, as the Age of Revivalism demonstrates, religious identity has not been extinguished and arguably is making a resurgence.

Because they equated religious differences with international boundaries, classical Islamic jurists articulated a coherent and complex vision of international relations with other, non-Islamic states that originated with the rise of the Islamic faith in Medina where the Prophet governed in the midst of other religious populations, discussed in further detail below.

A. The World Divided: An Abode of Peace and an Abode of War

In particular, classical Islamic jurists articulated a distinct worldview, one which divided the world between the abode of peace, or *dar al-islam*, and the abode of war, or *dar al-harb*.[187] The abode of peace was described as an area occupied by a geographically contiguous Muslim polity where a Muslim ruler presided and where Islamic law was enforced, commonly understood as a

caliphate. In other words, to reside within the *dar al-islam* was not just to live in a society where citizens abided by Islamic law, particularly its ritual components—that requirement applied no matter where a Muslim lived. To live within the *dar al-islam* was to live in a society where a Muslim such as a caliph or sultan (or Imam) ruled, where Islamic law governed the entire social order, and, therefore, where one had substantial obligations. Adherence to a common faith impelled Muslims to respect one another's life, property, and honor primarily as a matter of *moral* and *religious* obligation, but their common residence and recognition of a common government within the *dar al-islam* created *political* ties that justifies coercive enforcement of those moral obligations whenever they are breached. Thus, the *dar al-islam* represented a conjunction of moral and political ideals that rendered coercive enforcement of norms legitimate. An example of the applicability of law within the *dar al-islam* were obligations to abide by *siyasa al-shari'a* regulations, which existed solely within the *dar al-islam*.

The rest of the world consisted of the *dar al-harb*—which was considered to be populated chiefly by non-Muslims. More specifically, the *dar al-harb* was seen as including persons and territories that had neither accepted the Islamic faith nor entered into some kind of formal peace with the Islamic polity. The rationale for this classification was born of its time. When the Abbasid Caliphate was ascendant, Islam was on the rise, with its cities, legal development, and scientific advances unparalleled in the world. It scholars assumed that Islam would eventually come to dominate the entire globe, and consequently denoted all areas outside the Islamic realm as areas for future conquest. As such, at least from the perspective of Islamic law, relations between the Islamic polity and the *dar al-harb* were governed by the norms of war, which meant looking at the rest of the world as potential adversaries.

Time, however, proved the classical theory of international relations to be an unworkable one. To the extent that the ideal of a united Muslim polity ever existed in practice, at best it only lasted until the end of thirteenth century. Thereafter, the *dar al-islam* was itself divided for centuries between, on the one side, the Sunni-dominated Ottoman and Mughal Empires and, on the other side, the predominately Shi'i-dominated Safavid Empire. And when the Ottoman Empire collapsed in the early twentieth century, even the idea of a united Islamic polity evaporated as the Islamic world split into modern nation-states.

Today, every Muslim belongs to a state that is part of a global political and economic system. Every such state is a member of the United Nations and subject to modern international law. Moreover, no state is religiously homogeneous, politically insulated, or economically independent from the non-Muslim world. (It is also the that case nearly one-quarter of all Muslims live outside Muslim-majority states.) Even wealthy, self-identified Islamic states such as Saudi Arabia are dependent in various ways—economically, technologically, militarily, and so forth—on non-Muslim parts of the world.

Yet, while the distinction between *dar al-islam* and *dar al-harb* has been eroded by a number of forces over the course of history,[188] some of the rules enunciated by classical Islamic law still have a bearing on international relations currently. Perhaps equally important, the *ummah* is now divided among nation-states. How, then, do Muslims contend with the concept of international

human rights law, when no such provision existed in the classical construction of international relations?

B. International Treaty Obligations under Islamic Law

The broad conceptual framework that classical scholars developed as a way to organize the world may have lost its currency, but the importance attached to treaty obligations has proved to be an enduring, prominent feature of Islamic law's approach to international relations. Muslims believe that because the Islamic polity's authority is derived from God, Muslims should be cognizant of their religious obligations when they attach their signatures to international agreements. According to the Qur'an, upholding treaty obligations with non-Muslims—and international relations, from the Qur'an's perspective, is fundamentally a matter of dealing with other faiths[189]—was itself a divine command: "But if they seek your help in the cause of the true Faith, it is your duty to assist them, except against a people with whom you have a treaty" (8:72). This particular verse was revealed after the exodus from Mecca to Medina, when the Prophet negotiated the Treaty of Hudaybiya with the Quryash and other tribes arrayed against him and his nascent Muslim community.[190] The treaty between the Prophet and the idolatrous tribes of Mecca was aimed at achieving a truce between the warring sides, and later came to be viewed by classical Islamic jurists as a Prophetic example of the divine command to uphold treaty obligations faithfully, even to the detriment of the Islamic polity.[191] Thus, both the Qur'an and classical Islamic law anticipated by one thousand years the now widely accepted notion that obligations in treaties must be fulfilled.[192]

Beyond the obligation to recognize and adhere to treaties, classical jurists expounded on the Qur'anic principle as well as the Prophetic example by asserting a strict view of treaty interpretation in which ambiguities were construed in favor of the *non-Muslim* party. This principle was encapsulated in two closely related legal maxims: "Muslims are bound by their agreements," and Muslims must "avoid committing treachery."[193] Accordingly, while Islamic law permitted both parties to renounce their treaty commitments, under classical jurisprudence, the Muslim party to a treaty remained bound by its terms until it manifestly and unambiguously renounced its adherence to the treaty and after giving sufficient notice to the non-Muslim party to prepare for the termination of the treaty relationship.

From the time of the Prophet to the end of the Ottoman Empire, numerous treaties and interstate obligations were made between Islamic empires and non-Muslim empires. Some of these treaties not only regulated conduct between empires but also regulated the conduct of specific persons, including diplomatic recognition, safe passage, and rights given to individual communities within Islamic lands.[194] In fact, classical Islamic law recognized the sovereign equality of Muslim and non-Muslim states,[195] and classical jurisprudence frowned on any external power imposing its will on a sovereign entity.[196]

Today's thinking regarding Islamic international relations has largely been shaped by two twentieth-century scholars, Ali Abd al-Raziq (d. 1966) and 'Abd al-Razzaq al-Sanhuri.[197] Both set forth novel approaches to how contemporary Muslim-majority nation-states should regard centuries of Islamic legal precedents in international relations. While both men asserted that the notion of a contest between the *dar al-islam* and *dar al-harb* no longer applied, they vigorously supported respect for international treaty obligations, and they saw participation in multinational entities such as the League of Nations and the United Nations as consistent with obligations under Islamic law.

C. International Human Rights Law and Islamic Law

The conclusion of World War II ushered in a fundamental change in the substance of international law. Where once international law had focused purely on regulating relations between states, now it increasingly came to regulate conduct within states, especially the relationship between the state and its citizens. This switch from an interstate to an intrastate focus both promoted and reflected a rights-based approach to international law, with the international community imposing limits on how governments could treat their populations. While this shift was taking place, the overwhelming majority of Muslims were only just emerging from a protracted period of European colonialism. They were becoming citizens of separate states at the very same time that the international community (led in large part by some of the former colonial powers) spoke of a set of new obligations that diluted the sovereignty of states. Repeated assertions that international law could bypass national borders is still a source of resentment among Muslim-majority states and opened the door to debate about whether the concept of international human rights is compatible with Islamic law generally.

While classical jurists devoted considerable attention to the division of rights and duties between God and humanity, they devoted less attention to defining the rights and relationship between *rulers* and the *ruled*. During most of Islamic history, the caliph's power was weighed against the *ulama*. Classical jurists held that as long as the caliph faithfully applied Islamic law to his subjects, his authority would remain valid under Islam.[198] Classical Islamic law, however, did not fully imagine a set of unwavering and generalizable rights that are held by every individual at all times and that could be used against their government. Rather, the citizenry's best recourse against the caliphate was outright rebellion until their grievances were addressed or new leadership installed. Moreover, classical jurists thought of individual rights as arising from a legal cause brought about by the suffering of a legal wrong. Like other areas of Islamic law, the concept of individual human rights has been the subject of serious reevaluation.[199]

Even in very basic terms, there are various approaches to viewing international human rights in the context of Islamic law. One approach, while historically based, is straightforward and embraced by most modern-day Wahhabist-Salafis. They assert that matters outsider the realm of practice by the Prophet should be regarded as innovations and, therefore, regarded as prohibited under Islamic law. To them, anything not precisely recognized by the Prophet and his earliest

companions and followers could not be part of Islamic law, thus, they reject the concept of a binding legal relationship between the individual and the state only so far as the state is to uphold Islamic law. Such a strict approach has translated into a dim view toward concepts such as popular sovereignty and the role of democracy in governance as well as the modern concept of individual rights, wherein individuals are considered to retain rights either afforded them by their national constitutions or enshrined in international treaties and declarations. While this approach has superficial appeal, it simply is incomplete against the backdrop of both Islamic legal principles as well as Prophetic example.

Another approach, which accepts the concept of individual rights, takes its cue from the classical *usul al-fiqh*. The starting point for treating what might be considered a legal novelty (which is hardly new, as will be shown) begins with the legal principle that unless something is specifically forbidden, it is permitted (Qur'an 2:29). Moreover, as discussed over the course of this Practitioner's Guide, the vast majority of what constitutes Islamic law is man-made—even the interpretative paradigms that guide the very construction of what is regarded as Islamic law—fallible, and subject to interpretation. Consistent with this permissive principle and embracing the fallibility of legal interpretation, a multitude of contemporary Islamic scholars and, perhaps more importantly, nearly every government of a Muslim-majority state regard international human rights laws as not only consistent with Islamic law but also compatible with a classical understanding of Islamic law. Again, however, this approach ignores a much richer treatment to the concept of immutable rights in Islamic law.

Yet the approach takes its cue from Prophetic example as well as by his immediate successors. The first example can be found in the Constitution of Medina, which arguably was not only history's first constitution, but also and perhaps more importantly the first application of human rights in Islam.[200] In this agreement between the Prophet and those who followed him in the exodus from Mecca to Medina, on the one side, and the different tribes belonging to different religions, including Christians and Jews, who lived in and around Medina, on the other side, a covenant was established providing for equality of all citizens before the law, supremacy of the law for each religious community, nondiscrimination between persons of different tribes and religions, and guaranteed freedom of religion for Muslims, Christians, and Jews. A year later, the Prophet signed the Treaty of Hudaybiya, which, as mentioned previously, served not only as the basis for the recognition of treaties in Islamic law, it also outlined various measures for what were at the time international obligations recognized in Islam.[201] For example, the treaty provided for measures for nonaggression, protection of life and property, and prisoner exchange.

Shortly after the Prophet's death, the first caliph, Abu Bakr, prior to launching a military campaign in Syria, issued what is known as the Admonition of Abu Bakr, which called for the protection of civilians in every respect and the treatment of prisoners with dignity. Specifically, he prohibited any attack on civilians or the destruction of civilian property, and the use of torture and other cruel or demeaning treatment when dealing with prisoners. Abu Bakr's instructions even prohibited the cutting down of fruit-bearing trees or the destruction of crops belonging to the enemy. Consider also Caliph Umar's Pledge of Jerusalem. Despite defeating the Romans at the Battle of Yarmouk in 638, which preceded the Muslim entry into Jerusalem, Caliph Umar

made a pledge on behalf of all Muslims and for all times to protect the religious places of worship of Jews and Christians and to allow freedom of access to them by their respective coreligionists.[202]

The concept of human beings inherently possessing a set of individual rights within Islamic law is also not a new one.[203] It should be remembered that Islamic law is centered on the relationship between God and humanity; however, a distinction is made between the rights of God and the rights of people. The rights of God (*huquq Allah*) are rights retained by God in the sense that only God can say how the violation of these rights may be punished, and only God has the right to forgive such violations. But all rights not explicitly retained by God are retained by people. And while violations of God's rights are only forgiven by God through adequate acts of repentance, the rights of people may be forgiven only by people. These distinctions within Islamic law are perhaps best enumerated in the context of Islamic criminal law where *hadd* offenses are viewed as offenses against God, but offenses against bodily harm may be dealt with only by the aggrieved individual or his or her heirs. Importantly, neither a government nor God has the right to forgive or compromise because that right is the sole province of the victim or the victim's family. (This particular legal construction within Islamic criminal law poses challenges, for example, to state-sponsored amnesties in post-conflict situations.)

Another approach has been to maintain fidelity to the classical tradition; that is, to focus on the relationship between God and humanity. And as contemporary Islamic legal scholar Khaled Abou El-Fadl has pointed out, supporting immutable individual rights is consistent with a sound understanding of the relationship between God and man; a commitment to human rights, he contends, is a commitment in favor of God's creation and ultimately a commitment in favor of God.[204] Confirming Professor El-Fadl's proposition, a close inspection of d the Qur'an and the *hadith*, which are regarded as the foundation for all human rights under Islamic law, reveals an implicit right to human dignity. Islamic law, addresses the fundamentals of human rights, particularly the concepts of human fellowship; equality among members of the community without regard to race, color, or class; respect for the honor, reputation, and family of each individual; the right of each individual to be presumed innocent until proven guilty; and individual freedom.[205]

Beyond this, one also should consider perhaps the most influential universal document on human rights within Islam, the Organization of the Islamic Cooperation's Cairo Declaration of Human Rights in Islam, because it was the first time Islamic states and contemporary scholars were forced to put into a coherent form the concept of individual rights in Islamic law in the contemporary era. The Cairo Declaration represents an important and robust compendium of human rights drawn from the Islamic legal tradition, but the extent and breadth of its application remains the province of individual states.

The Right to Human Dignity

Central to the entire concept of human rights is an individual's irreducible personal dignity. The most explicit affirmation of human dignity (*karamah*), found in the Qur'an is contained within a general but unqualified declaration: "We have honored the children of Adam . . . and favored them specially above many of those We have created" (17:70). Bolstering this proposition is the theological view within Islam that humanity is generally regarded as God's viceregent (i.e., His representative or trustee on Earth) and therefore bestowed with a unique status by which to act and live accordingly. More broadly, jurists have asserted that the dignity accorded to human beings is not the product of mere meritorious conduct; it is an expression of God's grace. Dignity is regarded as a natural and absolute right, which inheres in every human person, regardless of his or her faith, at the moment of birth.[206] It is God-given and natural; hence, no individual or state can take it away from anyone.

Compare this religious conception of dignity with that contained within Articles I and II of the Universal Declaration of Human Rights adopted by the United Nations in 1948. Article I states, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Article II declares that "no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty." Both the Qur'an and the Universal Declaration of Human Rights speak of the innate qualities of human beings, and both aver that their unique status does not depend on borders or bounds of national sovereignty.

The Islamic conception of human rights remains to be fully articulated, especially in light of modern interpretative approaches to Islamic law such as the *maqasid al-shari'a*, which looks beyond the mere texts of the sources to the larger goals of the Qur'an and the Sunnah.

The Cairo Declaration of Human Rights in Islam

As mentioned, the single most universal comprehensive statement about "rights" in the contemporary Islamic world is the Cairo Declaration of Human Rights in Islam, which was adopted in 1990 by fifty-six nations of the Organization of the Islamic Conference.[207] The Cairo Declaration represents a measured effort by a variety of Muslim states to assert and protect an array of rights that, taken collectively, form a distinctly Islamic view of individual human rights. The Cairo Declaration contains six categories of freedoms: nondiscrimination, expression and speech (grouped into a single category), due process, international humanitarian law, family law, and the rights of women

The Cairo Declaration begins by forbidding "discrimination on the basis of race, color, language, belief, sex, political affiliation, social status or other considerations" (art. 1). The second article proclaims the sanctity of life by asserting the "preservation of human life" as a duty prescribed by Islamic law.

The declaration provides for freedom of speech and expression, but attaches certain conditions to the exercise of those freedoms. “Everyone shall have the right to express his opinion freely,” Article 2(c) states, “in such manner as would not be contrary” to the principles of Islamic law. Article 22(b) specifies, “Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic shari’ah.” Article 22(c), states “Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith.” Article 22(d) declares, “It is not permitted to arouse nationalistic or doctrinal hatred or to do anything that may be an incitement to any form of racial discrimination.”

The declaration contains a number of due process protections, including protecting individuals from arbitrary arrest, torture, maltreatment, and/or indignity. Article 19(b) guarantees a presumption of innocence; guilt is to be proven only through a trial in “which he [the defendant] shall be given all the guarantees of defense.” The declaration forbids the promulgation of “emergency laws that would provide executive authority for such actions,” implying that emergency laws intended to maintain authority or impose martial law would be against the declaration (art. 20). It also forbids any abuse of authority subject to Islamic law (art. 24). With regard to the laws of war, Article 3(a) guarantees “non-belligerents such as old men, women and children,” “wounded and the sick,” and “prisoners of war” the right to be fed, sheltered, and given access to safety and medical treatment in times of war.

With regard to family law and the rights of women, Article 5(a) of the declaration gives men and women the “right to marriage” regardless of their race, color, or nationality. In general terms, women are not given equal rights with men but they are given “equal human dignity,” their “own rights to enjoy, “duties to perform,” their “own civil entity,” “financial independence,” and the “right to retain [their] name and lineage” [art. 6(a)]. The declaration’s Article 6(b) makes the husband responsible for the social and financial protection of the family. but the declaration gives both parents rights over their children, and makes it incumbent upon both of them to protect the child, before and after birth (art. 7).

Focusing on the specific role of Islamic law, Articles 24 and 25 state, “All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari’ah,” and “The Islamic shari’ah is the only source of reference for the explanation or clarification to any of the articles of this Declaration.” The signatory governments did not, however, specify the precise meaning of the term “shari’a.” As explained in the introductory chapter to this Practitioner’s Guide, Shari’a is an inherently ambiguous term. Moreover, as discussed in chapter 5, the interpretation of Islamic law, which was once the preserve of legal scholars and jurists, is now the province of the state. Thus, the Shari’a is not the independent body of law that the Cairo Declaration implies it to be. Because states effectively control or at least heavily influence the interpretation of the Shari’a, they effectively control the very check on their authority. This raises unsettling questions regarding, for example, how citizens can be protected from the machinations of the state, and how it is determined whether a state is acting on its own authority or the authority of religion.

Contemporary scholars of Islamic law have offered a variety of answers to these questions. One approach, albeit controversial within conservative circles, is to reexamine the role of secularism, and, more specifically, to explore secularism's potential so as to act in concert with (not in competition with) Islamic law. Abdullahi Ahmed An-Na'im argues for a fuller separation of Islam from the state, together with the regulation of the political role of Islam through constitutionalism and the protection of human rights. These latter safeguards would ensure freedom and security for Muslims (and non-Muslims), while providing them with the opportunity to participate in debate over fresh interpretations of Islamic law. Muslims would be able to propose policy or legislation stemming from their religion, provided that they supported such proposals with "reasons that can be publicly debated and contested by any citizen, individually or in community with others, in accordance with norms of civility and mutual respect."[208]

While the Cairo Declaration might create opportunities for abuse by state authority, the document also provokes concern because of its omissions. For example, it does not mention freedom of religion, assembly, or association; free consent to marriage; the right to a fair trial; the rights of prisoners; or the right to suffrage. The declaration also includes several crucial allowances and limitations. For example, it allows the right to take a life, inflict bodily harm, restrict freedom of movement, and deny refugees protection whenever permitted by "Islamic law."

For all of its apparent religiosity, the Cairo Declaration, with its vague but repeated invocation of Islamic law, is at best a self-serving instrument for the states that signed it. Those states have widely disparate religious policies, but they have a shared interest in disarming international criticism of their domestic human rights record.[209] While Islamic law has historically demonstrated flexibility, it has shown increasing rigidity as states have assumed control over both its interpretation and implementation. Many states use the concept of cultural relativism to legitimize their adherence to Islamic law. They contend that it is difficult, if not impossible, to create universal human rights standards that will apply equally to all members of the global community. Their position generally suggests, given the diversity of cultural traditions, political structures, and levels of development in the world, that it is virtually impossible to define a single distinctive and coherent human rights regime. At the same time, however, many of the states that cling to Islamic legal principles should keep in mind that Islamic law has clearly identified the right to dignity and brotherhood; equality among members of the community without regard to race, color, or class; respect for the honor, reputation, and family of each individual; and the right of each individual to be presumed innocent until proven guilty; and individual freedom.

VIII. Islamic Property Law

> The application of shari'ah law exclusively and in its totality is not possible today without compromising admixtures of modern ideas (as exemplified by the reformers who adopt modern rationalism as axiomatic), or through stultifying simplification . . . unless the world itself were to return to another age. And this is not feasible for whole societies without changes of cosmic proportions which are out of human hands, whatever may be possible for individuals.
>
> — Cyrill Glass, *The Concise Encyclopedia of Islam*

It is increasingly evident that land and natural resources issues are elemental to interstate and intrastate conflict and of great concern to post-conflict nations and nations enduring political and social upheaval. Few places have experienced greater social and political upheaval than those within the Islamic world.[210] Property law has the potential to help defuse these conflicts before they escalate into violence and is consequently attracting increasing international attention. This Practitioner's Guide therefore concludes by offering a primer on property rights according to classical Islamic law, but for purposes of brevity it does not delve into an examination of the particulars of this area.[211]

A. The Concept of Viceregency in Islamic Law

The principle of ownership is referred to numerous times within the Qur'an. All aspects of creation, according to the Qur'an, are ultimately the property of God, and human beings since the time of Adam are considered as God's viceregent. Vicegerency, or the concept of a trust and in particular of a trustee, is a right that belongs to every member of the human race, but each person is required to act according to the regulations set forth by the True Owner. Consequently, Islamic law considers property rights to be both God-given and God-regulated.

In legal terms, Islamic law defines personal property as "an exclusivity over an object vesting the owner, alone and on owner's own behalf, with a legal authority of its use and enjoyment and of its disposal except when legally restricted."[212] Personal property can be either material or abstract. Thus, the concept of ownership in Islamic law therefore includes intellectual as well as financial properties. In any case, personal property carries a moral and religious connotation according to Islamic law. For instance, since Islamic moral standards condemn alcoholic beverages and other intoxicating substances, they cannot be the personal property of Muslims. The same applies to swine and their by-products, as they are religiously prohibited in Islam. Non-Muslims, however, can own swine.

B. The Nature of Ownership

The classical Islamic legal definition of property, especially in light of the concept of viceregency, began as concept for the authority of the caliph and gained instrumental use in areas such as human rights law and establishing basic property rights, especially as it pertains to ownership and which has several important implications.

The first and most important of these is the concept that ownership in Islam is a right or collection of rights allowed by God, the Ultimate Lawmaker, and not by society or its legislative authority. Thus, neither society nor its lawmaking organs have any legislative power to fundamentally bar the basic rights laid down by God. Property rights are granted by God; they are not determined by society. A second implication is that private property is protected by Islamic law itself because property rights is seen as reflecting Divine Law. Here, the law protects the property owner against any possible transgression, whether from the government or other persons. A third implication is that property rights entitle the owner to the full authority to use, benefit from, and dispose of the owned object. This gives the property owner a wide range of economic freedom, although that freedom is limited by some other provisions of Islamic law, such as the forbidding of unfair exchanges. A fourth implication is that no one, regardless of gender, religion, or ethnicity may be denied the right to own property; Islamic law makes it clear that men and women are equal regarding property rights—a stance that was adopted long before most other legal systems and cultures treated men and women equally in this respect.

Specifically, classical Islamic law defines property as an object that "must satisfy two conditions: (1) possibility of physical possession and (2) having potential beneficial uses." Classifications of property include valued and unvalued property (defined as public property or "properties with non permissible uses . . . [such as] wine and pork"), immovable or movable property, and fungible or non-fungible property.[213] Each classification is subject to detailed rules in the different schools of jurisprudence.

C. Public and Private Property

Generally, classical Islamic law distinguishes between two kinds of property: private and public. (All schools of jurisprudence also include a third finite category, religious endowment, which will not be covered here because it concerns territory for the purpose of public worship and religious education generally.) Public property is regarded as property owned collectively by the whole of society or a community and intended for the benefit all or most members of the group. Examples include roads, rivers, forests, parks, lakes, and natural springs. Public property also includes land not privately owned, land designated for community use, and mineral resources.

According to classical Islamic law, the government (presumably enforced by an Islamic government) possesses the authority to administer public property on behalf of the people and in their best interests according to the doctrine of *maslahah* and governed by *siyasa al-shari'a*.

From the perspective of regulating governmental power in this regard, public property can be divided into three types:

- *Public property designated for community use*, such as roads, rivers, and mosques. This type of public property cannot be sold or disposed of by the government, and cannot be acquired or owned by private persons. However, if a community public property ceases to produce its desired benefit to the community and becomes deserted, government can substitute it for a new property, provided that it confers a similar benefit.

- *Unused public land*—that is, all lands that are not economically productive. In Islamic legal terms, this land is called *mawat* ("dead"). Individuals, however, possess the right to revive *mawat* land, thereby putting public land into economic use; this by itself is considered a sufficient reason to convert public lands to private ownership, which is regarded as inviolable.

- *State public property*. This category covers all other public properties on the condition that the government is obligated to use it for best interests of the people (*masalah*).

The concept of private property is based largely on its use. Under Islamic law one can acquire real property by appropriation. That is, if there is vacant, undeveloped land, one may develop it and acquire title to it by doing so. The act of making unproductive land productive, of using something unused, creates ownership. Thus, the creative act of making something useful is recognized as a means of acquiring ownership, even of real property. According to classical Islamic legal manuals, Islamic law recognizes six discrete causes for the establishment of *personal property* rights. Note that the first three causes create *new* property rights, and the last three transfer an existing property from one person to another:

- Lawful work involving the acquisition of unowned, publicly available things, such as hauling water from a river, hunting, and collecting firewood.

- Revitalization of unused public land. Land revitalization implies making it productive agriculturally, industrially, or economically. According to Islamic legal guides, the acquisition of land merely by fencing or demarcating it cannot create a right of ownership.

- The growth in value of an already owned property, with or without labor involved. This growth includes fruits of owned trees and offspring of owned livestock. It also includes increases in value of owned merchandise.

- Contractual relationships, including exchange contracts, such as those used in sales and hiring; contributory contracts, such as those involving gifts and last wills; and acceptance of religious and legal spending obligations, such as alimony, money solemnly vowed to

certain lawful purposes, and expiatory payments determined under Islamic law for committing certain sins, such as breaking the fast in the month of Ramadan.

- Tort liabilities that create a right of compensation.

- Inheritance, for which details of heirs and their shares are outlined in the Qur'an.

D. Acquisition of Property

Classical Islamic law forbids any *non*contractual acquisition of the property of others, including by means of theft, swindling, plundering, looting, usurpation, acquisition by coercion, and fraudulent practices, as well as acquisition of unused land without revitalization and exchanges that are intrinsically invalid or prohibited under Islamic law.

Invalid relationships include contracts that lack consent. Prohibited exchanges include the payment of interest on loans (the Qur'an mentions that a lender is only entitled to get the principal back and considers any increment as oppressive), income from gambling; bribery, and contracts whose objective is condemned under Islamic law, such as transactions of prohibited substances and prostitution.

Islamic law regards property acquired by prohibited means as the property of the original owner, which should be returned to him or her or to their rightful heirs. If the owners or their heirs do not exist, property should be disposed of for charitable purposes on behalf of the true owners.

E. Restrictions on Use and Enjoyment

As already spelled out above, Islamic property law creates a close association between property ownership and property use—as; viceregents, humans are obliged to use land and property productively. Classical Islamic law distinguishes between two kinds of restrictions on property. The first kind concerns the use and disposition of one's property. Islamic law seeks to assure that property fulfills its objectives—namely, to give the owner the benefit and enjoyment derived from owned things. The Qur'an stakes out a middle ground that suggests enhancement of property value but forbids wastefulness.

In addition, classical Islamic law recognizes that the use of one's property is constrained by others' rights. This means that extracting benefit and enjoyment form one's property must not be done at the expense of the rights of other individuals or of the society as a whole. Islamic law disallows this kind of exercise regardless of intent, and charges those who do harm to compensate the injured. Examples of such actions are constructing a building to an extent that reduces the ventilation and sunshine reaching a neighbor's property (individual harm) and monopolistic practices (societal harm).

The second type of restriction on the use of one's property of concern to Islamic law is related to inheritance and last will. Given that the true owner of all properties is God and that private property is just a divine grant, the ownership right holds as long as the owner lives, but on death reverts to the true owner. Shares are assigned to different heirs by God in the Qur'an, and the owner has no right to change these shares under any circumstances. The heirs designated within the Qur'an are sons, daughters, parents, grandparents, spouses, siblings, uncles, and aunts. A person may make a last will, provided that it does not cover more than one-third of his or her estate and does not depart from what classical jurisprudence dictates are the relative shares of the heirs.

Another restriction is taxation for charitable purposes. In recognition of society's need for philanthropy, Islamic law creates a built-in financial obligation on personal property based on the obligation to provide *zakat*, or obligatory charity, at an annual rate of 2.5 percent of the value of property, with exemptions related to living expenses. Besides *zakat* obligations, other financial duties or taxes on personal property are determined by the needs and interests of the society if the stream of public revenue coming from public property proves to be insufficient.

F. Water Law

The Qur'an recognizes the importance of water, alluding to its fundamental importance in *sura* 21:30, which states, "We have made every living thing of water." Moreover, water is regarded as an essential part in ritual purity, but perhaps its importance is best reflected in the very concept of Shari'a itself, namely, that it is "a path to water." Consequently, it may be of little surprise that classical Islamic law treated water as held in the public trust and that ownership of water rights was typically forbidden under Islamic law.[214] More to the point, Specifically, water was held in the public trust because it was considered a community right; it was central to ritual acts of worship, not to mention sustaining human life altogether. At the same time, according classical jurists, a person could use public water sources for irrigation, provided that he "[did] not infringe upon a third party or damage the community."[215]

Consistent with the Islamic concept of beneficial use, however, Islamic law creates a qualified right of ownership to water rights provided that the owner adds "value" in the form of retaining water and either distributing it or conserving it. Conversely, Islamic law can hold a party liable for the "withholding or misuse of water, including for polluting or degrading clean water."[216]

IX. Conclusion

Today's Muslims, living in the shadow of the Prophet, are the heirs to a remarkable religious and political legacy; however, they live in a world far different from the world in which classical Islamic law was developed. Today's Muslims face a profound question: Do they wish to carry a part of their legacy forward to the present, and, if so, in what form will they carry it—preserved in its pristine state or altered to meet new and unexpected challenges?

In an era of renewed Islamic religiosity, rule of law practitioners need to consider this time-honored system of law by considering its history as well as its future path. At the time of this writing (spring 2013), important and robust debates are taking place in Egypt, Libya, and Tunisia, each of which recently underwent a massive political revolution and is now examining the precise contours of Islamic law and the role of the state in enforcing that law. The outcomes of those debates remain uncertain, but the issues at stake are of interest not just to the countries of the Arab Spring, and not just to the Muslim world, but to the world as a whole.

This Practitioner's Guide has attempted to answer an age-old question: What is Islamic law? And while it has provided an overview of both classical and contemporary characteristics on the subject, it is vital to consider that inasmuch as Islamic law aspires for the Divine, it remains an intrinsically rational system.

X. Further Reading

The following English-language works are recommended for those who want to learn more about Islamic law. Each entry is accompanied by a brief description of the work.

The Qur'an: A New Translation, trans. by A. S. Abdel Haleem. New York: Oxford University Press, 2008. *This is the source of quotations from the Qur'an in this Practitioner's Guide*

Abou El Fadl, Khaled. *Speaking in God's Name: Islamic Law, Authority, and Women*. Oxford: Oneworld, 2001. *An in-depth and highly intricate analysis of Islamic law and its philosophy, as well as a broad-based critique of Wahhabism and puritanical approaches to Islamic law.*

———. *The Great Theft: Wrestling Islam from Extremists*. New York: HarperCollins, 2007. *An overview of contemporary trends in Islamic jurisprudence, particularly in light of Islamic extremist approaches to Islamic Law.*

An-Na'im, Abdullahi Ahmed. *Islam and the Secular State: Negotiating the Future of Shari'a*. Cambridge, MA: Harvard University Press, 2010. *Examines the interplay of state control and interpretation of Islamic law and the argument for secularism in Muslim-majority states.*

———. *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law*. Syracuse, NY: Syracuse University Press, 1996. *Examines the contemporary concept of rights under Islamic law.*

Aslan, Reza. *No god but God: The Origins, Evolution, and Future of Islam*. New York: Random House, 2006. A readable and cogent of Islamic history including facets of Islamic law, Shi'ism, and contemporary trends within the Islamic world.

Bakhtiar, Laleh, and Kevin Reinhart. *Encyclopedia of Islamic Law: A Compendium of the Major Schools*. Chicago: Kazi Publications, 1996. *A guide to various aspects of Islamic law, such as ritual practices and family law, and to various schools of law.*

Black, Antony. *The History of Islamic Political Thought: From the Prophet to the Present*. New York: Routledge, 2001. *A historical analysis of Islamic legal and political theory.*

Brown, Jonathan. *Hadith: Muhammad's Legacy in the Medieval and Modern World*. Oxford: Oneworld, 2009. *An in-depth analysis and historical overview into various bodies of religious narrative literature attributed to the Prophet Muhammad.*

Esposito, John. *The Oxford History of Islam*. Oxford: Oxford University Press, 1999. *A broad-based overview of the history of Islam.*

Feldman, Noah. *The Fall and Rise of the Islamic State.* Princeton, NJ: Princeton University Press, 2010. *A cogent analysis into the historical evolution of Islamic law as well as an explanatory guide to the constitutional balance between the ulama and the caliphate in Sunni political and legal thought.*

Grote, Rainer, and Tillman J. Röder, eds. *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*. New York: Oxford University Press, 2012. *A compendium of scholarship dedicated to examining Islamic constitutionalism in North Africa, the Middle East, and Central and Southern Asia.*

Hallaq, Wael B. *Authority, Continuity and Change in Islamic Law*. Cambridge: Cambridge University Press, 2005. *An analysis of the historical development of Islamic law, including the competition among various methodologies and hermeneutics and the mechanisms of change within Islamic law.*

Kadri, Sadakat. *Heaven on Earth: A Journey through Shari'a Law from the Deserts of Ancient Arabia to the Streets of the Modern Muslim World.* New York: Farrar, Straus & Giroux, 2012. *An accessible historical study of the evolution of Islamic law, particularly its criminal elements, and a discussion of extremist narratives within the context of Islamic history.*

Kamali, Mohammad H. *Principles of Islamic Jurisprudence*. Cambridge, UK: Islamic Texts Society, 2003. *A dense but thorough examination of the various elements of the* usul al-fiqh*; suitable for readers well versed in Islamic law generally.*

Schacht, Joseph. *An Introduction to Islamic Law*. New York: Oxford University Press, 1983. *Widely regarded as one of the most cogent English introductions to Islamic law.*

XI. Notes

[1] Shlomo Avineri, "The Return to Islam," in *Global Studies: The Middle East,* William Spencer, ed. (Guilford, CT: Dushkin Group, 1973), 167–170.

[2] See Abdulaziz Sachedina, "The Ideal and the Real in Islamic Law," in *Perspectives on Islamic Law, Justice, and Society,* ed. R. S. Khare (Lanham, MD: Rowman and Littlefield, 1999), 15–17.

[3] It should also be noted that Islamic law can be divided between regulations relating to worship and ritual duties or "acts which honor God" (ibadat), and regulations, or "transactions," of a juridical, political, or interpersonal nature (mu'aamalat). See H. A. R. Gibb and J. H. Kramers eds., *Shorter Encyclopedia of Islam* (Leiden: Brill, 1953), 143.

[4] David A. Westbrook, "Islamic International Law and Public International Law: Separate Expressions of World Order*," Virginia Journal of International Law* 33 (1993): 825.

[5] "In Islam, law plays a greater role than it does in Western societies. Islamic law governs the life of every Muslim in every way. Law and religion are one. The Koran serves as the basic constitutional document and regulates all aspects of life, from the proper clothes to be worn and food to be eaten, to specific penalties for certain crimes." Joseph L. Brand, review of *The Islamic Conception of Justice*, by Majid Khadduri, *American Journal of International Law* (1988): 431–432.

[6] See Ahmed Rashid, *Taliban: Islam, Oil and the New Great Game in Central Asia* (London: Tauris, 2000), 201, on the Taliban's Ministry of the Propagation of Virtue and the Prevention of Vice, which forced Afghans to attend obligatory prayers; and Scott MacLeod, "Vice Squad" *Time*, July 26, 2007, on Saudi Arabia's Mutaween, the government-recognized religious police, which possesses the authority to make believers perform their prayer obligations properly and whose authority has been the subject of reform and review.

[7] See Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oxford: Oneworld, 2008), 2.

[8] The term may also be interpreted as a "way of life" or a "method." Over time it has come to mean a "divinely ordained way of life." Abdullahi Ahmed An-Na'im, "Qur'an, Shari'a and Human Rights: Foundations, Deficiencies, Prospects," in *The Ethics of World Religions and Human Rights,* ed. Hans Küng and Jürgen Moltmann (Norwich, England: SCM Press, 1990), 63.

[9] Amin Ahsan Islahi, *Fundamentals of Hadith Interpretation*, trans. Tariq Mahmood Hashmi, (Lahore: Al-Mawrid, n.d.), 20, http://www. monthly-renaissance.com/DownloadContainer.aspx?id=71.

[10] See Asifa Quraishi, "Who Says Shari'a Demands the Stoning of Women? A Description of Islamic Law and Constitutionalism," *Berkeley Journal of Middle Eastern and Islamic Law* 1 (2008): 163–177.

[11] See Mona Siddiqui, *The Good Muslim: Reflections on Classical Islamic Law and Theology* (Cambridge: Cambridge University Press, 2012), 2.

[12] *The Qur'an: A New Translation*, trans. A. S. Abdel Haleem (New York: Oxford University Press, 2008), ix. Except where noted, all quotations from the Qur'an are from this source.

[13] See Cyril Glasse, *The Concise Encyclopedia of Islam* (Harper and Row, 1989), 228–232.

[14] See Mohammad H. Kamali, *Principles of Islamic Jurisprudence*, 3rd ed. (Cambridge: Islamic Texts Society, 2003), 39–40.

[15] See Kamali, *Shari'ah Law,* 19–22.

[16] Ibid., 22.

[17] See Rudolph Peters, *Crimes and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge: Cambridge University Press, 2005), 35–36.

[18] Kamali, *Shari'ah Law,* 23.

[19] See Toby Lester, "What Is the Koran?" *Atlantic Monthly,* January 1999, 43–56. Recently discovered evidence suggests that there may be other variants of the Qur'an still in existence. See also Ibn Warraq, ed., *The Origins of the Koran: Classic Essays on Islam's Holy Book* (New York: Prometheus, 1998).

[20] Daniel Brown, *A New Introduction to Islam*, 2nd. ed. (Sussex: Wiley-Blackwell, 2009), 82.

[21] See Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2010), 47.

[22] While the term "sunnah" is mentioned in the Qur'an in the sense of an established practice or course of conduct, the Sunnah of the Prophet is mentioned more obliquely within the Qur'an (see, for example, 48:23 and 17:77). The Sunnah of the Prophet is not clearly mentioned in the Qur'an, but the closest parallel, the uswah hasanh ("excellent conduct") of the Prophet, is mentioned (see 33:21); this is interpreted as a reference to the Prophetic Sunnah.

[23] See Hallaq, *Origins and Evolution of Islamic Law,* 47.

[24] *See* Jonathan Brown, *Hadith: Muhammad's Legacy in the Medieval and Modern World* (Oxford: Oneworld, 2009), 87.

[25] See Daniel Brown, *Rethinking Tradition in Modern Islamic Thought* (2003), 8–12.

[26] See Kamali, *Principles of Islamic Jurisprudence,* 50.

[27] Brian B. Kettell, *Introduction to Islamic Banking and Finance* (Petersfield, UK: Harriman House, 2011), 19. Although the term *hadith* was familiar in terms of Arabic usage, it took an entirely different meaning when referring to narratives of the Prophet used to construct the Sunnah.

[28] See John Esposito, ed., *Oxford Encyclopedia of the Islamic World*, rev. ed. (Oxford University Press), 1:487.

[29] See Kamali, *Principles of Islamic Jurisprudence,* 65–68. Even among pious followers, the different versions of the *hadith* were not compiled until around the 9th century, when it was discovered that *hadith* texts differed and that many of the *hadith* collections were fabricated.

[30] Ibid., 65–66.

[31] See Brown, *Hadith*, 31.

[32] Ibid., 31–32.

[33] Ibid., 15–66.

[34] Ibid., 33.

[35] Ibid., 129–133.

[36] Hamid Dabashi, *Theology of Discontent: The Ideological Foundation of the Islamic Revolution in Iran,* (New Brunswick, NJ: Transaction, 2006), 463.

[37] Brown, *Hadith*, 11.

[38] Ibid.

[39] See Brown, *Rethinking Tradition,* 67–80.

[40] Such matters included the allocation of public funds, appointment of state officials, and signing of treaties. For example, the Prophet Muhammad, after winning the Battle of Khyber, distributed the land of Khyber among the conquerors, as this was considered the best action under the circumstances. Different orders were issued at the conquest of Mecca: property was left untouched to win the hearts and minds of the locals. Generally, sunnah of this type may not be practised by an individual without prior authorization of a competent governmental authority. Sunnah from the Prophet in his capacity as a judge, particularly those dealing with disputes, consist of two parts: one that relates to the claim, evidence, and factual proof; the other to the judgment. The first part is situational and does not constitute general law. The second part lays down general law, but it is not binding on individuals and no one can act upon it without prior authorization from a competent judge. All claimants must follow proper procedures as laid down by a Muslim state to prove the claim and obtain a judicial decision.

[41] See Kamali, *Principles of Islamic Jurisprudence*, 197.

[42] Esposito, *Oxford Encyclopedia of the Islamic World* 4:457–458.

[43] See Kamali, *Principles of Islamic Jurisprudence*, 197.

[44] Esposito, *Oxford Encyclopedia of the Islamic World* 4:329–501, discussing topics such as commands, implications, ambiguities, and unqualified expression.

[45] See Kamali, *Principles of Islamic Jurisprudence*, 198.

[46] Muhammad Ibn Majah, Sunan Ibn Majah (an eponymous collection of canonical *hadith*), Hadith 3950.

[47] Brown, *New Introduction to Islam*, 157.

[48] Esposito, *Oxford Encyclopedia of the Islamic World* 1:487.

[49] Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-fiqh* (Cambridge: Cambridge University Press, 1999), 20, 27–28.

[50] See Esposito, *Oxford Encyclopedia of the Islamic World*, 1:487.

[51] Ibid., 487–488.

[52] See Muhammad Abduh and Rashid Rida, Tafsir al-Qur'an al-Azim al-Ma'ruf bi Tafsir al-Manar (Samir Mustafa Rabab, 2002).

[53] Kamali, *Principles of Islamic Jurisprudence*, 168–169.

[54] *Merriam Webster Dictionary on World Religions*, s.v. "Ikhtilaf."

[55] Sadiq Reza, "Torture and Islamic Law," *Chicago Journal of International Law* 8 (2007): 21.

[56] See Hallaq, *History of Islamic Theories*, 7–16.

[57] See Reza Aslan, *No god but God: The Origins, Evolution, and Future of Islam* (New York: Random House, 2006), 132–138.

[58] See Martin, Richard C.; Mark R. Woodward, and Dwi. S. Atmaja, *Defenders of Reason in Islam: Mu'tazilism and Rational Theology from Medieval School to Modern Symbol* (Oxford: Oneworld, 1997), 25–31.

[59] See, for example, Aslan, *No god but God* , 152–155.

[60] Ibid.

[61] Ibid.

[62] Ibid.

[63] See, for example, Brown, *New Introduction to Islam*, 158–159.

[64] See Kamali, *Principles of Islamic Jurisprudence*, 238–242.

[65] Ibid.

[66] Ibid.

[67] See Aslan, *No god but God*, 162.

[68] Ibid.

[69] See, generally, Muhammad Qasim Zaman, *The Ulama in Contemporary Islam: Custodians of Change* (Princeton, NJ: Princeton University Press, 2002).

[70] Esposito, *Oxford Encyclopedia of the Islamic World,* 2:218–219.

[71] See Bernard Weiss, *The Spirt of Islamic Law* (Athens: University of Georgia Press, 2006), 113–144.

[72] Ibid., 128. See also George Makdisi: "Madrasa and University in the Middle Ages," *Studia Islamica* 32 (1970): 255–264, regarding the ijazah's comparative status with the contemporary doctorate.

[73] See Kamali, *Principles of Islamic Jurisprudence*, 367.

[74] See Reza, "Torture and Islamic Law," 26.

[75] See Khaled Abou El Fadl, *Speaking in God's Name, Islamic Law, Authority, and Women* (Oxford: Oneworld, 2001), 171.

[76] In one hundred short years, Islam had built a magnificent but deeply divided empire. By the time of the Prophet's death in 632, all of Arabia was under the control of Islam. In 637, Muslims took over the Persian capital of Ctesiphon; in 638, they entered Palestine after parts of Byzantium collapsed following the Battle of Yarmouk. After conquering Syria, Lebanon, and Iraq 641, Muslims advanced into Egypt. The Catholic Archbishop's invitation to help free Egypt from Roman oppressors exemplified the alliances formed between Muslims, Christians, and Jews. Egypt, Persia, and the Fertile Crescent were ruled by the four Rightly Guided Caliphs until 662; later these regions were ruled by the Umayyad dynasty. By 651, the entire Persian realm came under the rule of Islam as it continued its westward expansion. At the same time, the Muslim conquest reached Morocco in North Africa. By 711, Muslims had begun the conquest of Sindh in Afghanistan; by 718, almost the entire Iberian Peninsula was under Islamic control. In 732, at the Battle of Poitiers, Islamic expansion was halted in France, but it continued into parts of Asia and Africa. See, generally, Esposito, *Oxford History of Islam*; and Milton Viorst, *In the Shadow of the Prophet: The Struggle for the Soul of Islam* (New York: Anchor, 1998), 162–167.

[77] This discussion (up to note 78) is based on Kamali, *Shari'ah Law*, 68–86.

[78] Azizah al-Hibri, "Islam, Law and Custom: Redefining Muslim Women's Rights," *American University Journal of International Law and Policy* 12 (1997): 7–8.

[79] Ibid., 8.

[80] See Joseph Schacht, *An Introduction to Islamic Law* (Oxford University Press, 1983), 70–71. See also Wael B. Hallaq, "Was the Gate of *Ijtihad* Closed?" *International Journal of Middle East Studies*, 16, no. 1 (1984): 3–41, which challenges the assertion of *ijtihad*'s demise.

[81] See Schacht, *Introduction to Islamic Law,* 71.

[82] Kamali, *Shari'ah Law*, 83–86.

[83] Ibid., 169–171.

[84] Ibid.

[85] Ibid., 170–174.

[86] See Antony Black, *The History of Islamic Political Thought: From the Prophet to the Present* (New York: Routledge, 2001), and 18–31; Delia Cortese and Simonetta Calderini, *Women and the Fatimids in the World of Islam,* (Edinburgh: Edinburgh University Press, 2006), 124–125.

[87] Baber Johansen, "A Perfect Law in an Imperfect Society. Ibn Taymiyya's Concept of 'Governance in the Name of the Sacred Law,'" in *The Law Applied: Contextualizing the Islamic Shari'a,* ed. Peri Bearman, Wolfhart, Heinrichs, and Bernard G. Weiss (London: Tauris, 2008), 261.

[88] See Asifa Quraishi, "The Separation of Powers in the Tradition of Muslim Governments," in *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, ed. Rainer Grote and Tilmann J. Röder (New York: Oxford University Press, 2012), 65–66.

[89] Ibid.

[90] See Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (New York: Brill 2000), 190.

[91] For an English translation, see Omar Farukh, *Ibn Taymiyya on Public and Private Law in Islam* (Beirut: Khayats, 1966).

[92] See Clark B. Lombardi and Nathan J. Brown, "Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law," *American University International Law Review* 21 (2006): 379n68.

[93] See Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi* (New York: Brill, 1996).

[94] See Querishi, "Separation of Powers," 63–73; and Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton, NJ: Princeton University Press, 2010).

[95] Khaled Abou El Fadl, "Islam and the Challenge of Democratic Commitment," *Fordham International Law Journal* 27, no. 1 (2003): 4, 64.

[96] See Black, *History of Islamic Political Thought*, 280.

[97] Ibid.

[98] An unofficial English translation of the 2012 Egyptian Constitution is available at http://www.acus.org/egyptsource/unofficial-english-translation-egypts-draft-constitution.

[99] See Aslan, *No god but God,* 115–118.

[100] This note, and all citable information up to note WWW, is based on Aslan, *No god but God,* 173–184.

[101] See Brown, *Rethinking Tradition*, 60–61.

[102] See Aslan, *No god but God,* 181–184.

[103] Ibid.

[104] See Black, *History of Islamic Political Thought*, 41–44.

[105] See Youseuf N. Lalljee, *Know Your Islam,* 3rd. ed. (Elmhurst, NY: Tahrike Tarsile Qur'an, 1993), 136.

[106] See Black, *History of Islamic Political Thought*, 40–43.

[107] See Brown, *Hadith,* at 123–148.

[108] Lalljee, *Know Your Islam,* 90.

[109] See Kamali, *Shar'ia Law,* 88.

[110] See Brown, *New Introduction to Islam,* 159.

[111] See, for example, the website of Grand Ayatullah al-Sayyid Ali al-Hussani al-Sistani, http://www.sistani.org/index.php?p=616687&id=1249.

[112] See Mirjam Künkler and Roja Fazaeli, "The Life of Two *Mujtahidas:* Female Religious Authority in 20th-Century Iran," in *Women, Leadership and Mosques: Changes in Contemporary Islamic Authority,* ed. Masooda Bano and Hilary Kalmbach (Leiden: Brill, 2012), 127–160.

[113] See Esposito, *Oxford Encyclopedia of the Islamic World*, 3: 488–492.

[114] See, generally, Said Amir Arjomand, *The Shadow of God and the Hidden Imam: Religion, Political Order, and Societal Change in Shi'ite Iran from the Beginning to 1890* (Chicago: University of Chicago Press, 1984).

[115] See Imam Khomeini, *Islamic Government: Governance of the Jurist*, Trans. Hamid Algar, (Tehran: Institute for Compilation and Publication of Imam Khomeini's Works, 1970), http://www.al-islam.org/islamicgovernment/.

[116] See Kamali, *Shar'ia Law,* 87–93.

[117] See Esposito, *Oxford Encyclopedia of the Islamic World,* 5:135–148. See also Kamali, *Shari'ah Law*, 87–88.

[118] "Permissibility of Following 'al-Shia al-Imamiyyah' [Jafari] School of Jurisprudence," text of the fatwa issued by Shaikh Mahmood Shaltoot, head of Al Azhar University, Cairo, Egypt, July 6, 1959, http://www.al-islam.org/encyclopedia/Chapter1b/14.html.

[119] Kamali, *Shar'ia Law,* 125–131, is the source for all of the discussion in this section.

[120] Esposito, *Oxford Encyclopedia of the Islamic World*, 5: 324–327.

[121] Ibid., 3:402–404.

[122] See Shamsur Rahman Faruqi, "From Antiquary to Social Revolutionary: Syed Ahmad Khan and the Colonial Experience" (published remarks presented at the Sir Syed Memorial Lecture, Aligarh Muslim University, 2006), available at http://www.columbia.edu/itc/mealac/pritchett/00fwp/srf/srf_sirsayyid.pdf.

[123] See, generally, Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam* (Oxford: Oxford University Press, 1934; Slough, England: Dodo, 2009).

[124] See Chibli Mallat, *Introduction to Middle Eastern Law* (Oxford: Oxford University Press, 2007), 254.

[125] See, generally, Robert Malley, *The Call from Algeria: Third Worldism, Revolution, and the Turn to Islam* (Berkeley: University of California Press, 1996).

[126] See Esposito, *Oxford Encyclopedia of the Islamic World*, 3:403–404.

[127] See, for example, Muhammad Qadri [Basha], Kitab Murshid al-hayran ila ma'arifa ahwal al-insan fi l mu'amalat al-shar'iyya (2nd ed., Cairo 1891).

[128] See Robert Wuthnow, ed., *Encyclopedia of Politics and Religion* (Washington, DC: Congressional Quarterly Press, 1998).

[129] See, generally, Mallat, *Introduction to Middle Eastern Law,* 261–288.

[130] See, generally, John Esposito, *The Islamic Threat: Myth or Reality* (New York: Oxford University Press, 1995).

[131] Abdullahi An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse, NY: Syracuse University Press, 1996), 3. For an account of the growing need to return to an Islamic identity in Turkey, see generally June Starr, *Law as Metaphor: From Islamic Courts to the Palace of Justice* (Albany: State University of New York Press, 1992).

[132] Esposito, *The Islamic Threat,* 122, 126.

[133] See M. Hakan Yavuz, "Ethical, Not *Shari'a* Islam: Islamic Debates in Turkey," *Review of Faith and International Affairs* 10, no. 4 (2012): 32–33.

[134] Ibid., 29

[135] See, for example, Lydia Polgreen, "Timbuktu Endured Terror under Harsh Shariah Law" *New York Times,* January 31, 2013.

[136] See, generally, Khaled Abou El-Fad, *The Great Theft: Wrestling Islam from Extremists* (New York: HarperCollins, 2007), 55–74, describing the historical development that eventually led to the rise of Wahhabism in the Muslim world; Aslan, *No god but God,* 241-248, describing the historical development of Wahhabism; and Gilies Kepel, *The War for Muslim Minds: Islam and the West,* trans. Pascale Ghazeleh (Cambridge, MA: Harvard University Press, 2004), 157–161, describing the beliefs of the Wahhabis.

[137] Muhammad bin 'Abd al-Wahhab, *Kashf al-Shubuhat: al-Risala al-Thalitha, in Majmu'at al-Tawhid* (Damascus: al-Maktab al-Islami 1962), 106; and 'Abd al-Rahman b. Muhammad bin 'Abd al-Wahhab, "Bayan al-Mahajja fi al-Radd 'ala al-Lujja: al-Risala al-Thalitha 'Ashra," in 'Abd al-Wahhab, *Kashf al-Shubuhat,* 459, 534. Part of the puritan approach on this issue is to cite and emphasize traditions, attributed to the Prophet or Companions, which seem to condemn debate, argumentativeness, excessive eloquence, or sophistry. See Muhammad bin 'Abd al-Wahhab, *Mu'allafat al-Shaykh al-Imam Muhammad bin 'Abd al-Wahhab: Qism al-'Aqidah wa al-Adab al-Islamiyya* 1:13–14 (n.d.). For a work by a Wahhabi author attacking all rationalist orientations within Islam, see al-Amin al-Sadiq al-Amin, *Mawqif al-Madrasah al-'Aqliyya min al-Sunna al- Nabawiyya* (2 vol. 1998). Another Wahhabi author wrote a multivolume work listing a number of presumably heretical books that Muslims should not read. For this list, which includes a large number of books advocating rationalist approaches to the study of Islam, see Abu 'Ubaydah Mashhur bin Hasan al-Salman, *Kutub Hadhdhar minha al-'Ulama'* (1995).

[138] Ahmad Dallal, "The Origins and Objectives of Islamic Revivalist Thought, 1750–1850," *Journal of the American Oriental Society* 113 (1993): 341–359.

[139] Sayyid Qutb, *Milestones* (Damascus, English translation of 1962 Arabic edition, n.d.), 15.

[140] See Esposito, *Oxford Encyclopedia of the Islamic World*, 5:28–35.

[141] Gilies Kepel, *Jihad: The Trail of Political Islam,* trans. Anthony F. Roberts (Cambridge, MA: Harvard University Press, 2002): 69-75.

[142] Ibid., 72. See also Abou el Fadl*, The Great Theft,* 48–64; and Dawood al-Shirian, 'What Is Saudi Arabia Going to Do?' *Al- Hayat*, May 19, 2003.

[143] Abou el Fadl*, The Great Theft,* 77–80.

[144] See Scott Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today* (Cambridge, MA: Harvard University Press, 1999), 4.

[145] See generally, Stephen Holmes, *Passions and Constraints: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995).

[146] For an in-depth discussion of a variety of constitutional issues confronting the Islamic World, see Rainer Grote and Tillman J. Röder, eds. *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (New York: Oxford University Press), 2012.

[147] See Noah Feldman, "Islamic Constitutionalism in Context: A Typology and a Warning," *University of St. Thomas Law Journal* 7 (2010): 444.

[148] See Basic Law of Governance, 1992, art. 1, available at http:// www.saudiembassy.net/about/country-information/laws/ The_Basic_Law_Of_Governance.aspx.

[149] See the constitution of Afghanistan online at http://www.afghanembassy.com.pl/cms/uploads/images/Constitution/The%20Constitution.pdf.

[150] See the constitution of Afghanistan online at http://www.afghanembassy.com.pl/cms/uploads/images/Constitution/The%20Constitution.pdf.

[151] See art. 203C. A law found to be incompatible with Islamic injunctions must be amended within a specified period or it will be considered invalid after the specified date. Citizens, the federal government, and provincial governments can challenge the Islamic standing of any law. The court can also initiate review proceedings by its own motion (see art. 203D).

[152] See Aslan, *No god but God*, 189–192.

[153] See discussion in Black, *History of Islamic Political Thought*, 41–44.

[154] Constitution of the Republic of Iraq, available online at http://www.wipo.int/wipolex/en/text.jsp?file_id=230000.

[155] See art. 221 of the unofficial translation of the constitution of Egypt (hyperlink at note TTTT).

[156] Art. 2 of the Egyptian constitution.

[157] See Esposito, *Oxford Encyclopedia of the Islamic World*, 2:212.

[158] *Black's Law Dictionary*, 6th. ed. (West Publishing, 1990), 1410.

[159] Sadakat Kadri, *Heaven on Earth: A Journey through Shari'a Law from the Deserts of Ancient Arabia to the Streets of the Modern Muslim World* (Farrar, Straus and Giroux, 2012), 279.

[160] See Islamic Family Law at http://www.law.emory.edu/ifl/.

[161] See Kecia Ali, "Marriage in Islamic Jurisprudence: A Survey of Doctrines," in *The Islamic Marriage Contract, Case Studies in Islamic Family Law,* ed. Asifa Quraishi and Frank Vogel (Islamic Legal Studies Program, Harvard Law School, 2008), 11.

[162] See Jamal J. Nasir, *The Status of Women Under Islamic Law and Under Modern Islamic Legislation,* 2nd ed. (Boston and London: Graham and Trotman, 1994).

[163] Ibid., 216–219.

[164] See Ali, "Marriage in Islamic Jurisprudence," 11.

[165] See Esposito, *Oxford Encyclopedia of the Islamic World*, 2:213–214.

[166] See *Ashique Hussain v. First Additional Judge* (1991 PLD Kar 174).

[167] Kadri, *Heaven on Earth,* 250–251.

[168] Peters, *Crimes and Punishment,* 24, 64.

[169] See Ibn Hajr al-Asqalani, *Bulugh al-maram min adilliat al-akham* (Cairo: Dar al-Kitab al-Arabi, n.d.), often translated as "Attainment of the Objective According to Evindences of the Ordinances." The rest of this section draws on this work.

[170] See Quraishi, "Who Says Shari'a Demands the Stoning of Women?" The rest of Section B draws on this work.

[171] See, for example, Acts 21:21; 2 Thessalonians 2:3; Luke 8:13; 1 Timothy 4:1; Hebrews 3:12; Jeremiah 7:9-10; Exodus 20:15; and Mark 10:19.

[172] Peters, *Crimes and Punishment,* 55.

[173] See Tariq Ramadan, *Radical Reform: Islamic Ethics and Liberation* (New York: Oxford University Press, 2008), 274–77.

[174] Ibid. See also, Esposito, *Oxford Encyclopedia of the Islamic World*, 2:449.

[175] See, generally, Sherman Jackson, Domestic Terrorism in the Islamic Legal Tradition, 91, no. 3–4 *Muslim World* (September 2001): 293.

[176] Peters, *Crimes and Punishment,* 55.

[177] See Taha Jabir Alalwani, *Apostasy in Islam: A Historical and Scriptural Analysis* (Herndon, VA: International Institute of Islamic Thought, 2011): 25–41.

[178] Ibid., 42–66.

[179] Peters, *Crimes and Punishment,* 94–95.

[180] Kadri, *Heaven on Earth,* 220, 232–232.

[181] Pakistani Penal Code, Act XLV of 1860, art. 295-C (amended 1986).

[182] See *All Pakistan Legal Decisions*, vol. 43, part 2, (1991): 26.

[183] Peters, *Crimes and Punishment,* 155–160.

[184] See David Montero, "Rape Law Reform Roils Pakistan's Islamists," *Christian Science Monitor,* November 17, 2006.

[185] Kadri, *Heaven on Earth,* 234.

[186] See generally, James Turner Johnson, *The Holy War Idea in Western and Islamic Traditions* (University Park: Pennsylvania State University Press, 1997).

[187] See Esposito, *Oxford Encyclopedia of the Islamic World,* 2:26–28.

[188] See, for example, Hamid Khan, "Nothing is Written, Fundamentalism, Revivalism, Reformism and the Fate of Islamic Law," *Michigan Journal of International Law* 24 (2003): 322, 324.

[189] See, generally, Mark Janis, "American Versions of the International Law of Christendom: Kent, Wheaton and the Grotian Tradition," *Netherlands International Law Review* 39 (1992): 37.

[190] See M. Cherif Bassiouni, "Protection of Diplomats under Islamic Law," *American Journal of International Law* 74 (1980): 611–612; and Montgomery Watt, *Muhammad at Medina* (Oxford: Oxford University Press, 1956), 221–225.

[191] See Hasan Moinuddun, *The Charter of the Islamic Conference and Legal Framework of Economic Co-operation among Its Member States* (Oxford: Clarendon, 1987), 49. The caliph always retained the authority to enter into treaty arrangements for the Islamic State. See also, Bassiouni, "Protection of Diplomats," 610.

[192] See Moinuddun, *Charter of the Islamic Conference,* 48.

[193] From the compilation known as Sahih Bukhari.

[194] See Esposito, *Oxford Encyclopedia of the Islamic World,* 3:14.

[195] See Sarvenoz Bahar, Khomeinism, "The Islamic Republic of Iran, and International Law: The Relevance of Islamic Political Ideology," *Harvard International Law Journal* 33 (1992): 190.

[196] Muhammad Hamidullah, *Muslim Conduct of the State* (Lahore: Sheik Muhammad Ashraft, 1977), 126. Hamidullah clarifies that "it is the right of a State to administer all of its internal and external affairs in such a way that it is neither controlled nor interfered with by a foreign power" (p. 298).

[197] See Esposito, *Oxford Encyclopedia of the Islamic World,* 3:13–17.

[198] Johansen, "A Perfect Law."

[199] See Abou El Fadl, "Democratic Commitment," 47–48.

[200] See M. Cherif Bassiouni, ed, *Al Watha'eq al-Dawlia al-Ma'neyya bi Huquq al-Insan: Al-Watha'eq al-hlamiya wal-Iqlimia* [International Protection of Human Rights: Islamic and Regional Instruments] (Cairo: Dar El Shorouk 2003), 2.

[201] M. Cherif Bassiouni, "Evolving Approaches to Jihad: From Self-Defense to Revolutionary and Regime-Change Political Violence," *Chicago Journal of International Law* 8 (2007): 306.

[202] Bassiouni, *International Protection of Human Rights*, 37.

[203] See Abou El Fadl, "Democratic Commitment," 47–48.

[204] See Khaled Abou El Fadl, *Islam and the Challenge of Democracy* (Princeton, NJ: Princeton University Press, 2004), 4.

[205] See Abdullahi Ahmed An-Nai'im, ed., *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992).

[206] See, generally, Mohammad Hashim Kamali, *The Dignity of Man: An Islamic Perspective,* (Cambridge: Islamic Texts Society, 2002).

[207] "Cairo Declaration on Human Rights in Islam, Aug. 5, 1990," reprinted in *Twenty-Five Human Rights Instruments* (New York: Columbia University, Center for the Study of Human Rights, 1994); and U.N. GAOR, World Conference on Human Rights, 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993).

[208] See generally, Abdullahi Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari`a* (Cambridge, MA: Harvard University Press, 2008).

[209] See "Islamic Declarations of Human Rights," in *Universality and Diversity Human Rights*, ed. Eva Brems (Martinus Nijhoff, 2001), 241–284.

[210] The subject is covered in a number of publications issued as part of the Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflict. The Toolkit is a partnership effort by the United Nations and the European Union. Available at http://www.unep.org/.

[211] 340 See, generally, Hiroyuki Yanagihashi, *A History of the Early Islamic Law of Property* (Leiden: Brill, 2004).

[212] And Al-Salaam al Abbadi, *Al Milkiya Fi al Shari'ah Islamiyya* [Ownership in Islamic Shariah], vol. 1 (Maktaba al Aqsa, 1975), 150.

[213] See Mahmoud A. El-Gamal, *Islamic Finance: Law, Economics, and Practice* (Cambridge: Cambridge University Press, 2006), 36–39.

[214] Melanne Andromecca Civic, "A Comparative Analysis of the Israeli and Arab Water Law Traditions and Insights for Modern Water Sharing Agreements," *Denver Journal of International Law and Policy* 26 (1998): 439.

[215] Melanne Andromecca Civic, "A Comparative Analysis of the Israeli and Arab Water Law Traditions and Insights for Modern Water Sharing Agreements," *Denver Journal of International Law and Policy* 26 (1998): 439.

[216] See Chibli Mallat, "The Quest for Water Use Principles: Reflections on Shari'a and Custom in the Middle East," in *Water in the Middle East: Legal, Political and Commercial Implications,* ed. J. A. Allan and Chibli Mallat (I. B. Tauris, 1995), 127, 129–130.