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Shari‘a and the Modern State

*Anver M Emon***Introduction**

When Islamic law and international human rights law are juxtaposed in the same sentence or title, the assumptions that arise can vary. Some might see in that juxtaposition an attempt to challenge contemporary Islamic legal practices in the interest of human rights agendas. Others might see in the juxtaposition an implicit attempt to perpetuate the colonial dominance of the global North over the Muslim parts of the global South. Yet others may see in the juxtaposition a qualification of any claim to truth or any aspiration for a shared language of global cooperation.

In the context of this book, the juxtaposition is designed to shift the debate from the content of the law to the dynamics of legal ordering. In other words, the authors writing about Islamic law and international human rights law approach their respective topics by inquiring into the dynamics of law (whether international or Islamic) as a system, or as Ronald Dworkin might say, as having integrity, or in a phrase of increasing popularity, as ‘rule of law’. This introduction to Islamic law argues that ‘rule of law’ provides a useful conceptual frame to illuminate how Shari‘a is not simply a doctrinal corpus, or catalog of legal rules. It is, rather, both constitutive of and constituted by a view about the enterprise of governance. To view Shari‘a in this fashion is to recognize the inevitable relationship between law and politics as features of Shari‘a’s legitimacy and legitimating power. Consequently, instead of pursuing a methodology of listing shared values, this project juxtaposes separate analyses of international human rights law and Islamic law to show that, at the heart of both legal systems, is an aspiration to regulate and govern in accordance with an idea(l) of the individual’s place within a regulated polity built upon and organized around different and at times competing core values.

By framing this introduction to Islamic law in terms of rule of law and governance more generally, this essay does not attempt to impose a modern concept anachronistically upon a premodern tradition. Rather, ‘rule of law’ offers a conceptual approach to help situate the study of Islamic law in a manner that allows for a juxtaposition of Islamic and international human rights law in Part I and throughout this book. Indeed, the chapters of this volume depart from the often important, but sometimes trite, effort to find shared or common values between competing traditions. Instead, many of the authors in this volume recognize that at the heart of both Islamic law and international law lies the aim and aspiration to regulate and

order, or to ensure good and right governance. The subjects of governance and the institutions of governance may change or differ across traditions, but that both legal traditions are mindful of governance is the one common denominator of both traditions that is featured throughout this collection of essays.

Given the rule of law and governance framework, this introduction to Islamic law will depart from conventional works that seek to introduce Islamic law to the uninitiated. Many introductory books and chapters provide:

- an overview of the history of Islamic law;
- an account of its primary source texts (ie the Qur'an and traditions of the Prophet);
- an outline of the methods of legal analysis; and
- a narrative discussing the transformation of Islamic law from the 'classical period' to the Ottoman Empire, and beyond to the age of European colonialism and the era of the independent modern state.

Studying these topics is an important part of understanding Islamic law, and all of them will of course be addressed in this essay. They provide an insight into the complex features of Islamic law in terms that reflect and respect the way in which jurists within the tradition understood and expounded the law. But in the context of this study, these basic features of Islamic law will be situated within a larger argument about Islamic law as a system of legal ordering.

This introduction to Islamic law will proceed as follows. Section A introduces the reader to basic themes in Islamic law by providing an overview of the received narrative of the legal tradition, by which is meant the history of the legal tradition as encapsulated by leading scholarly research in the 20th and 21st centuries. Section B will move beyond the premodern tradition as outlined in Section A and bring the narrative into the modern period. Section B will show how the shifts in governance frameworks that came with the era of European colonialism and the modern state system has drastically altered the substance and authority of Islamic law in contemporary legal systems. This does not change the fact that Islamic law remains part of modern Muslim states; but its role is considerably different from what existed in the premodern period. As such, any effort to juxtapose Islamic and international law without also accounting for the mediation of the modern state will more often than not create fears and anxieties that are imagined and not real—'red herrings', so to speak.

Section C will offer an intervention to the received narrative of Islamic law in the premodern and modern periods by recasting it in a different thematic frame, namely Shari'a as rule of law. By adopting this frame, Section C will link together various features of the historical narrative of Islamic law to show the ways in which the Islamic legal system is both constituted by and constitutive of the enterprise of governance. As such, Islamic law is neither separate from the political order nor wholly reducible to the political. Because of this constitutive mutuality, Islamic law does not, and indeed cannot, escape the hegemonic character that attends to any institution that is empowered not only to decide matters of value or truth, but to make such values manifest in the world.

Section D will bring this essay to a close by explicating how the proposed systemic approach to Islamic law allows us to appreciate the way in which it (and human rights law) are embedded in different systems of governance, and co-exist with multiple traditions that contribute to the way in which society is governed. In the case of Islamic law, the rule of law approach reminds us how, over the course of centuries, Islamic law has become a system of rules that constitutes an important source of law for modern Muslim states, but does not preclude other sources from having legal legitimacy. Muslim states that wish to adopt Islamic legal principles or doctrines in their legal systems are situated in complex webs of political and legal authority operating at the local, national, and international levels. The challenge therefore is less about learning about Islamic law in a disciplinary vacuum, and instead to explore what it can and does mean, given that the prevailing unit of governance (the state) exists in a legally pluralist context that begs fundamental considerations about authority and legitimacy in both law and politics.

A. The received narrative of Islamic law

1. Source texts, interpretive authority, and doctrinal development

Shari‘a has a history whose normative foundations and development stretch from the 7th century to the present.¹ Its history illustrates that legal rules were often the product of a legal discipline that was both inculcated and deployed amidst a culture and institution of education, precedent, principles, and doctrines.² The interpretive theory of Islamic law certainly espouses a commitment to the Qur’an and traditions of Prophet Muhammad (d 632 CE), the latter called *hadith*. These foundational sources, herein called source-texts, provide an authoritative basis for juristic analysis and interpretation. As foundational texts, they anchor the legal tradition, in large part because of a theology that underlies both of them. The Qur’an is understood to be the revelation of God to Muhammad, the prophet of God who bore the responsibility for conveying God’s message to his people. The *hadith* are statements of the Prophet about his deeds, decisions, and actions, all of which are meant to have normative implications for the adherent Muslim. The authority of these two sources for the Islamic legal tradition is based upon a theology that recognizes the importance of the Qur’an as God’s guidance to humanity, and the significance of the *hadith* as inspired prophetic guidance that both gives additional insight into the Qur’an and addresses those issues not covered expressly or impliedly by the Qur’an.

¹ For historical introductions to Islamic law, its origins and evolutions, see Joseph Schacht, *An Introduction to Islamic Law* (1954; reprint, Oxford: Clarendon Press, 1993); N J Coulson, *A History of Islamic Law* (1964; reprint, Edinburgh: Edinburgh University Press, 1997); Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th–10th Centuries, CE* (Leiden: Brill, 1997); Yasin Dutton, *The Origins of Islamic Law: The Qur’an, the Muwatta’, and Madinan ‘Amal* (Curzon Press, 1999); Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005).

² For a discussion of the curricula that was characteristic of Islamic legal education in the medieval Muslim world, see George Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh: Edinburgh University Press, 1981).

But guidance in life and legal rules are two very different things. Islamic law can be viewed as a tradition that has historically attempted to draw out the legal significance from the Qur'an and *hadith* on a great variety of issues not necessarily addressed by either source-text. The Qur'an contains 114 chapters and over 6,000 verses, but only a small fraction of its content can be characterized as 'legal'.³ Likewise, the *hadith* pose problems of authenticity and meaning, given that they are a textual rendition of an oral tradition, and were reduced to written form in vastly different historical contexts. A *hadith* has two parts, namely the chain of transmitters (*isnad*) and the text of what the Prophet reportedly said (*matn*). The chain of transmitters is a list of all the people who conveyed the Prophet's statement across generations before the *hadith* was written down in a compiled source. A *hadith* might look something like this:

David said that Chantal said that Brenda said that Adam said that the Prophet said: '[textual content or *matn*].'⁷

Many authoritative compilations of *hadith* were written in the mid-9th century, which means the *hadith* assumed recorded form over two centuries *after* the Prophet's death.⁴ Subsequently, Muslim jurists developed methods to authenticate the *hadith*. Some of those methods involved a historical analysis of each member of the chain of transmission and an assessment of their reputation for truthfulness. Other methods focused on the textual content itself and its implications on other authoritative texts, whether from the Qur'an or other established *hadith* sources. Nonetheless, as both Muslim jurists and Western scholars of Islam have noted, as the embodiment of an earlier oral tradition, the *hadith* cannot always be relied upon as authentic statements of what the Prophet said, did, or decided.⁵ For instance, some traditions were fabricated for socio-political reasons having to do with early

³ Various commentators suggest that there are anywhere from 80 to 600 verses of the Qur'an that have content that can be called legal. For instance, Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (3rd edn, Cambridge: Islamic Texts Society, 2003), 26, states that the Qur'an contains 350 legal verses. Abdullahi Ahmad An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse: Syracuse University Press, 1990), 20, notes that some scholars consider 500 or 600 of the over 6,000 verses in the Qur'an to be legally oriented. However of those, most deal with worship rituals, leaving about 80 verses that deal with legal matters in a strict sense.

⁴ Jonathan Brown, *The Canonization of al-Bukhari and Muslim: The Formation and Function of the Sunni Hadith Canon* (Leiden: Brill, 2007). Notably, Sunni and Shi'a Muslims will have their own canonical collections of *hadith*. For a list of Shi'a sources and an introduction to the jurisprudence of the Ja'fari school, see Hossein Modarressi, *An Introduction to Shi'i Law: a bibliographical study* (London: Ithaca Press, 1984).

⁵ Many authors address the oral tradition that culminated in the *hadith* literature, and provide alternative methods of understanding their historical import. Some such as Schacht argue that the *hadith* are complete forgeries and cannot be relied on for knowing anything about what the Prophet Muhammad said or did during his life. Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1967). Others such as Fazlur Rahman suggest that the *hadith* tradition reflects the collective memory of Muslims about the Prophet, although some certainly reflect later historical political and theological controversies. Fazlur Rahman, *Islamic Methodology in History* (Islamabad: Islamic Research Institute, 1964). Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (Oxford: Oneworld Publications, 2001), suggests that the *hadith* literature represents an 'authorial enterprise' and the challenge is to determine the extent and degree to which the Prophet's voice has been preserved.

sectarian rivalries, political concerns about the legitimacy of rulers, and even theological disputes. Fazlur Rahman offers various examples of *hadiths* that reflect underlying theological and political disputes that arose well after the Prophet's death, but were nonetheless seemingly anticipated and even resolved by the Prophet in traditions attributed to him. Rahman argues that 'the basic function of *hadith* was not so much history-writing but history-making. Contemporary phenomena were projected back in the form of *hadith* in order to mold the community on a certain spiritual, political, and social pattern.'⁶

a. Islamic law and legal interpretation

Both the Qur'an and *hadith* occupy an undeniable position of authority within Islamic law. But they alone do not and cannot, given their finitude, define for all times and for all situations the relevant Islamic legal ruling. Indeed, premodern Muslim jurists were well aware that the finitude of these source-texts cannot meet the needs of the infinite issues that can and do arise in human experience. Consequently, premodern Muslim jurists developed different methods that constituted authoritative bases of legal analysis. Their debates about the viability of these methods are found in a genre of Islamic legal literature called *usul al-fiqh*. This phrase has been translated in different ways, whether as 'philosophy of Islamic law', 'principles of Islamic law', or 'Islamic legal theory'.⁷ At their core, the different treatises that fall into this genre outline at times competing philosophical and methodological frameworks for deriving a ruling of Islamic law. Within those frameworks, jurists debate the authority of many principles and methods in Islamic law. Below are just a few examples of the topics of debate in such treatises:

- The authority of reason as a source of law, where revelation is silent.⁸
- The nature and authority of consensus (*ijma'*) in Islamic law.⁹
- The methodology and scope of reasoning by analogy (*qiyas*) and related principles of logic.¹⁰
- The place of the public interest (*maslaha*) in accounting for changing mores that may affect change in the law.¹¹

⁶ Rahman, *Islamic Methodology in History*, 47.

⁷ For general overviews of the field of *usul al-fiqh*, see Kamali, *The Principles of Islamic Jurisprudence*; Wael Hallaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1997); Bernard G Weiss, *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Din al-Amidi* (Salt Lake City: University of Utah Press, 1992); Bernard G Weiss, *The Spirit of Islamic Law* (Athens, Georgia: University of Georgia Press, 1998); Muhammad Khalid Masud, *Islamic Legal Philosophy: A Study of Abu Ishaq al-Shatibi's Life and Thought* (Delhi: International Islamic Publishers, 1989).

⁸ See Anver M Emon, *Islamic Natural Law Theories* (Oxford: Oxford University Press, 2010).

⁹ See Ahmad Hasan, *The Doctrine of Ijma' in Islam: A Study of the Juridical Principle of Consensus* (1978; reprint, Islamabad: Islamic Research Institute, 1984).

¹⁰ See Ahmad Hasan, *Analogical Reasoning in Islamic Jurisprudence: A study of the juridical principle of Qiyas* (Islamabad: Islamic Research Institute, 1986); Hallaq, *A History of Islamic Legal Theories*, esp ch 2; Wael B Hallaq, 'Non-Analogical Arguments in Sunni Juridical Qiyas' (1989) 36(3) *Arabica* 286–306.

¹¹ Felicitas Opwis, *Maslaha and the Purpose of the Law: Islamic Discourse on Legal Change from the 4th/10th to 8th/14th Century* (Leiden: Brill Publications, 2010).

- The authority of de novo interpretation (*ijtihad*) and the requirements for one to exercise *ijtihad* authoritatively.¹²

The above topics are only a small fraction of the range of issues debated in the genre of *usul al-fiqh*. They are introduced here to illustrate the kinds of issues, topics, and debates that fall within the general label of 'Islamic law'. Consequently, despite popular representations to the contrary, Muslim jurists did more than simply read the Qur'an and *hadith* as if they were codes and thereby transparently and determinately meaningful. It is highly misleading to suggest that Islamic law was and remains constituted by the Qur'an and traditions of the Prophet without further recourse to techniques of juristic analysis that allowed the law to remain socially responsive without at the same time undermining the legal tradition's authority.

As an illustration, premodern Sunni jurists differed on whether a victim of theft could seek financial compensation for his stolen property in the event that the thief no longer possesses the property. The Qur'anic injunction against theft reads as follows: 'Regarding the male and female thieves, cut their hands as punishment for what they did as a warning from God'.¹³ This verse provides for corporal punishment, but makes no mention of compensatory damages. In a *hadith*, however, Muhammad is reported to have denied compensation if the thief suffers amputation.¹⁴ Jurists of the four Sunni schools debated the authenticity of this *hadith*. For instance, the Maliki Ibn Rushd al-Hafid and the Hanbali Ibn Qudama were skeptical of its authenticity.¹⁵ The Shafi'i al-Mawardi stated that in the time of the biblical Jacob, thieves simply compensated their victims for their crimes. He argued that the Qur'an abrogated that earlier law, and the *hadith* merely corroborates that fact.¹⁶ Nonetheless, the Hanafis relied on this tradition to deny compensation to the victim if the thief had already suffered amputation of his hand. Indeed, Hanafi jurists said that the Qur'an requires only one punishment. For them, to

¹² Wael Hallaq, 'Was the Gate of Ijtihad Closed?' (1984) 16 *Int'l J Middle East Studies* 3–41.

¹³ Qur'an, 5:38.

¹⁴ Jalal al-Din al-Suyuti, *Sharh Sunan al-Nisa'i* (Beirut: Dar al-Kutub al-'Arabi, n.d.), 8:93; Ibn Rushd, *Bidayat al-Mujtahid wa Nihayat al-Muqtasid*, 'Ali Mu'awwad and 'Adil 'Abd al-Mawjud (eds) (Beirut: Dar al-Kutub al-'Ilmiyya, 1997), 2:662. See also al-Mawardi, *al-Hawi al-Kabir*, 'Ali Muhammad Mu'awwad and 'Adil Ahmad 'Abd al-Mawjud (eds) (Beirut: Dar al-Kutub al-'Ilmiyya, 1994), 13:184, who cited a different version of the *hadith* in which the Prophet is reported to have said, 'If the thief is amputated, there is no liability for compensation' (*idha quti'a al-sariq fa-la gburm*). For this version, see also al-Kasani, *Bada'i' al-Sana'i' fi Tartib al-Shara'i'*, 'Ali Muhammad Mu'awwad and 'Adil Ahmad 'Abd al-Mawjud (eds) (Beirut: Dar al-Kutub al-'Ilmiyya, 1997), 9:341. Badr al-Din al-'Ayni, *al-Binaya Sharh al-Hidaya*, ed Ayman Salih Sha'ban (Beirut: Dar al-Kutub al-'Ilmiyya, 2000), 7:71 cited yet a third version of the *hadith*, which states: 'There is no liability for compensation on the thief after his right hand has been amputated' (*la gburm 'ala al-sariq ba'da ma quti'at yaminuhu*). For other versions of this tradition, see also al-Dar Qutni, *Sunan al-Dar Qutni*, ed Magdi al-Shura (Beirut: Dar al-Kutub al-'Ilmiyya, 1996), 3:129–30. Notably, 'Ayni said that this tradition occurs in the collections of both al-Nisa'i and al-Dar Qutni. Al-'Ayni, *Binaya*, 7:71.

¹⁵ Ibn Rushd, *Bidayat al-Mujtahid*, 2:662–3; Ibn Qudama, *al-Mughni* (Beirut: Dar Ihya' al-Turath al-'Arabi, nd), 8:271.

¹⁶ Mawardi, *al-Hawi al-Kabir*, 13:184. For the Hanbali Abu Ishaq Ibn Muflih (d 804/1401), the *hadith* means that no one should be compensated for amputating a thief's hand (ie *ujrat al-qati'*). Abu Ishaq Ibn Muflih, *al-Mubdi' fi Sharh al-Muqni'*, ed Zahir Shawish (Beirut: al-Maktab al-Islami, 1974), 9:144.

impose liability for compensation in addition to the amputation not only contravened the Qur'anic stipulation of a single punishment, but also the *hadith* denying compensation from a thief who had suffered amputation.¹⁷

The other schools of law, though, did not rely on that *hadith*. In rejecting it as dispositive, they had to reason to a legal conclusion. For jurists of the Shafi'i, Hanbali, and Maliki schools, the thief committed a social wrong, and thereby deserved the corporal punishment for retributive purposes. But the corporal punishment alone did not redress the injury suffered by the victim. The victim's lost property was not something that the jurists of these schools could ignore. Consequently, Shafi'i and Hanbali jurists concluded that the victim could seek compensatory damage, even if the thief suffered corporal punishment. The Malikis, while attentive to the victim's plight, were also mindful of the fact that the thief might suffer unduly if he both lost his hand and was indebted financially. If the thief were poor, the debt might appear to be a second punishment. Therefore, the Malikis concluded that if the thief was sufficiently wealthy from the moment he stole to the moment his hand was amputated, he must pay compensation. But if he was poor in that period, he owed no compensation. For the Malikis, the prospect that such a financial debt might be punitive seemed unduly retributive.¹⁸ This brief example showcases the interpretive role of the jurist. Between authoritative text and the demands of a legal controversy sat the jurist who had to devise an authoritative legal ruling to resolve a case at hand, a ruling that could have precedential effect on future issues that may be analogous.

b. Legal doctrines (fiqh) and the schools of Islamic law (madhahib)

As interpreter, the jurist brought a wealth of training about the Qur'an and prophetic traditions, as well as the vast body of rulings of his own legal school, and possibly others. Bringing them all to bear in his legal analysis required an awareness of the authority of source-texts, of where they were dispositive, of where they were ambiguous, and of the lacuna in the source-texts that needed to be supplemented with disciplined legal analysis. Their interpretations of the law offered touchstones of legal authority. Their legal rulings are called *fiqh* and represent the doctrines of Islamic law with which many are familiar. The *fiqh* tradition addresses issues that include, but are not limited to the following:

- Rules of ritual practice (eg prayer, purification).
- Contract law (eg formation, breach, liability).
- Tort law (eg categories of injuries, liability, and damage rules).
- Court administration (eg witness testimony, evidence, pleadings).
- Criminal law (eg substantive crimes, evidentiary requirements, sanctions).

¹⁷ See, for example, Abu Bakr al-Sarakhsi, *Kitab al-Mabsut* (Beirut: Dar al-Kutub al-'Ilmiyya, 1993), 9:157; Kasani, *Bada'i*, 9:340–1.

¹⁸ For a fuller discussion of this issue, see Anver M Emon, 'Huquq Allah and Huquq al-'Ibad: A Legal Heuristic for a Natural Rights Regime' (2006) 13(3) *Islamic Law and Society* 325–91, 358–72.

Fiqh doctrines on whole areas of law arose through a systematic process of juristic commentary and analysis that stretched over centuries. During this process, different interpretations of the law arose, leading to competing 'interpretive communities'¹⁹ of the law or what are often called 'schools of law' (*madhabib*, sing. *madhhab*)—all of which were historically deemed equally orthodox and authoritative.²⁰ Over time, the number of Islamic law schools diminished, to the extent that there are now four remaining Sunni legal schools and three Shi'a schools. The Sunni schools are the Hanafi, Maliki, Shafi'i, and Hanbali schools. The Hanafi school is predominant in South Asia and Turkey; the Maliki school is prevalent in North Africa. The Shafi'i school is pervasive in Southeast Asia and Egypt, while the Hanbali school is found in the Gulf region. The Shi'a schools are as follows: Ja'fari (mostly in Iran),²¹ Isma'ilis,²² and Zaydis.²³ A different school, with an intellectual genealogy to the premodern *kharijis* is the 'Ibadi school, which is dominant today in Oman, East Africa, and Algeria.²⁴ Consequently, if one wants to determine a rule of Islamic law, one will often start with a *fiqh* treatise of one or another school of law, rather than with the Qur'an or *hadith*. *Fiqh* treatises come in a variety of sizes depending on the use to which they are put. One may consult a summary of a particular school's *fiqh* (ie *mukhtasar*) for quick reference,²⁵ or an elaborate encyclopedia written by a jurist who not only addresses the doctrines of his own school, but also shows how and why others schools differ.²⁶

For instance, in the *fiqh* on marriage and divorce, a husband has the right to unilaterally divorce his wife through a procedure known as *talaq*, while the wife does not have this power, unless she negotiated to have this power included as a condition in her marriage contract (*'aqd al-nikah*).²⁷ If a wife has not done so, she

¹⁹ The phrase 'interpretive community' is borrowed from the work of Stanley Fish, *Is There a Text in this Class? The Authority of Interpretive Communities* (Cambridge: Harvard University Press, 1980).

²⁰ For the history of the legal *madhhab*, see Melchert, *Formation of the Sunni Schools of Law*; Hallaq, *The Origins and Evolution of Islamic Law*. For the curriculum often taught at these legal schools, see Makdisi, *The Rise of Colleges*.

²¹ For an introduction to Shi'ite law, see Hossein Modarressi, *An Introduction to Shi'i Law*.

²² On the Isma'ilis, see Farhad Daftary, *The Ismailis: Their History and Doctrines* (Cambridge: Cambridge University Press, 1990).

²³ On the Zaydi school, see W Madelung, 'Zaydiyya', *Encyclopaedia of Islam, Second Edition*, P Bearman, Th Bianquis, C E Bosworth, E van Donzel, and W P Heinrichs (eds) (Brill Online).

²⁴ For more on the 'Ibadiyya, see T Lewicki, 'al-'Ibadiyya', *Encyclopaedia of Islam, Second Edition*.

²⁵ Mohammad Fadel, 'The Social Logic of *Taqlid* and the Rise of the *Mukhtasar*' (1996) 3(2) *Islamic Law and Society* 193–233.

²⁶ For a bibliographic listing of medieval Arabic *fiqh* sources from the various Islamic legal schools, see John Makdisi, 'Islamic law bibliography' (1986) 78(1) *Law Library J* 103–89. An example of a *fiqh* text that also explains the differences between legal schools is the treatise by Ibn Rushd (d 1198)—known in the West as the philosopher Averroes—entitled *Bidayat al-Mujtahid wa Nihayat al-Muqtasid*. For a translation of his masterful text, see Ibn Rushd, *The Distinguished Jurist's Primer*, trans Imran Nyazee, 2 vols (Reading, UK: Garnet Publishing Ltd, 1996).

²⁷ One of the formalities of a valid Islamic marriage is that the parties have a marriage contract, which can be analogized to a premarital agreement. There is a lengthy juristic tradition of allowing parties to a marriage to negotiate certain provisions and create conditions in a marriage contract. One such condition is for the husband to grant his wife the power to unilaterally divorce herself. This procedure is known as *tafwid al-talaq*. Haifaa A Jawad, *The Rights of Women in Islam* (New York: St Martin's Press, 1998), 35–40; Lucy Carroll, *Talaq-i-Tafwid: the Muslim Woman's Contractual Access to Divorce* (Women Living Under Muslim Law, 1996). For a general discussion on marriage law and

must petition a court to issue a divorce. A wife can seek either a for-cause divorce or a no-cause divorce. In a for-cause divorce, she alleges some fault on the part of her husband (eg failure to support, abuse, impotence) and seeks a divorce while preserving her financial claims against her husband. In a no-cause or *khul'* divorce, a woman asserts no fault by her husband, and agrees to forgo any financial claim against her husband to be free from the marriage.²⁸ The difference between a husband's right of divorce and a wife's right in this case is fundamentally a matter of the degree and scope of the power to assert one's liberty interests.

According to the Shafi'i jurist Abu al-Hasan al-Mawardi (d 1058), the husband's unilateral power to divorce is based on a Qur'anic verse which reads: 'O Prophet, when you divorce women, divorce them at their prescribed periods.'²⁹ One might ask why this verse should be read as giving men a substantive unilateral right to divorce their spouses to the exclusion of women, rather than as a mechanism prescribing the procedure a man should follow when divorcing his wife? Read as providing a procedural mechanism, the verse arguably grants implicitly the right of unilateral divorce to *both* men and women, while requiring men to utilize their power in a certain procedural manner. However, most jurists held the verse substantively grants men a unilateral power of a divorce to the exclusion of women. The challenge for jurists was to provide a rationale for extending the substantive right of divorce only to men.³⁰ Al-Mawardi, for example, argued that since the duty to provide support and maintenance (*mu'una*) falls exclusively on the husband, he is entitled to certain special rights given this difference.³¹ Second, and most troubling, al-Mawardi stated that the power of *talaq* is denied to a woman because her whims and desires overpower her (*shahwatuha taghlibuha*) and hence she may be hasty to pronounce a divorce at the first sign of marital discord. But men, he said, dominate their desires more than women, and are less likely to hastily invoke the *talaq* power at the first sign of discord.³²

Certainly many readers, Muslim and otherwise, will find al-Mawardi's reasoning not only patriarchal but frankly offensive. The rationale provided for distributing the right of *talaq* to men and not women is hardly persuasive, given a contemporary liberal democratic context where gender equality is generally an honored and respected norm.³³ Consequently, one might suggest that the patriarchal tone of

the marriage contract, see Susan Spector, 'Introduction' in *Chapters on Marriage and Divorce* (Austin, Texas: University of Texas Press, 1993).

²⁸ For discussions on this distribution of rights scheme concerning the right of divorce, see Susan Spector, 'Introduction', 27–39, 50–2; Jawad, *The Rights of Women in Islam*. For a survey of how modern Muslim states deal with divorce right schemes, see Abdullahi A An-Na'im (ed), *Islamic Family Law in a Changing World: A Global Resource Book* (London: Zed Books, 2002).

²⁹ Qur'an 65:1.

³⁰ Mawardi, *al-Hawi al-Kabir*, 10:111.

³¹ Mawardi, *al-Hawi al-Kabir*, 10:114.

³² Mawardi, *al-Hawi al-Kabir*, 10:114.

³³ See, for instance Art 15 of the *Canadian Charter of Rights and Freedoms*, providing: 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

al-Mawardi's reading was elemental to a particular context that gave meaningfulness to this rule, but which no longer prevails. To do so need not necessitate countering the Qur'anic verse. Rather the Qur'anic verse noted above is arguably broad and ambiguous enough to tolerate multiple readings. However, as discussed below, the challenge of reforming Islamic law today is not as simple as arguing that a particular reading of the Qur'an is unpersuasive. Rather, one must account for how source-texts such as the Qur'an and *hadith* were used to justify certain positions. Indeed, the example from al-Mawardi illustrates the interplay between source-text, the jurist as interpreter, and the development of legal doctrines meant to distribute rights and duties across different members and sectors of society.

2. Islamic law and institutions

Thus far, the narrative of Islamic legal history has focused on textual traditions, legal doctrines, and the role of the jurist as a legal interpreter. An additional aspect to the narrative of Islamic legal history is institutional. The institutions of adjudication and enforcement were the means by which legal doctrines were applied to actual cases in controversy. Whether deciding rules of pleading, sentencing, or litigation; or exercising jurisdiction over a range of controversies, the way jurists determined and at times constructed rules, individual rights, and entitlements was significantly influenced by assumptions of institutions of adjudication and enforcement.³⁴ The law was not simply created in an academic vacuum devoid of real world implications. Rather the presumed existence of institutions of litigation and procedure contributed in part to the determination and meaningfulness of the *fiqh*.

Three examples of legal institutions in Islamic legal history are those associated with the offices of the *qadi*, *mufti*, and *muhtasib*. The *qadi* was a judicial officer appointed by the ruling authority with the power to make and enforce judgments of law. Historians situate the beginnings of the judicial office (*qadi*) in the late Umayyad (r 41–132/661–750 CE) or early 'Abbasid periods (r 132–656/750–1258) of Islamic history. The *qadi* started out as an appointee by the executive (eg caliph, sultan, etc) tasked with responsibilities that included tax collecting and government administration. Only over time did the scope of the office focus on judicial decision-making. As judge, the *qadi*'s rulings were backed by the coercive force of the ruling regime.³⁵ In contrast to the *qadi* was the *mufti*. While the *qadi* was a government appointee with the power to enforce his judgments, the *mufti* operated outside the circles of officialdom. Often considered the most knowledgeable jurist in a region, the *mufti* would provide non-binding determinations for questions of law posed to him. A questioner, the *mustafti*, would approach the *mufti* with a particular legal question. The *mufti* would provide an answer in the form of a *fatwa*. The questioner, who might also be a petitioner in a case before a *qadi*, might submit the *fatwa* to the *qadi* as evidence of the proper legal outcome of a given

³⁴ For examples of how jurists created rules of pleading, litigation and sentencing in light of presumptions of an efficacious institutional framework, see Emon, 'Huruq Allah and Huruq al-'Ibad.'

³⁵ Hallaq, *The Origins and Evolution of Islamic Law*, 57–101.

dispute. Consequently, while the *qadi* and *mufti* were distinct offices with different competences and authority, they nonetheless interacted with one another in certain cases.³⁶ The third institution is the *muhtasib*, often called the ‘market inspector’. The *muhtasib* as an office seems to have appeared in the 9th century. It was tasked with, specifically, managing and overseeing the marketplace, and more generally with ensuring social order in accordance with general religious precepts. The distinction between the *muhtasib* and *qadi* lay less in their jurisdiction over certain issues than in the methods by which they approached their work. The *qadi* ‘judged matters concerning which there had been a complaint and held an inquiry to discover the truth . . . the *muhtasib*, on the other hand, concerned himself only with obvious and incontestable facts: he did not hold an inquiry, but intervened of his own accord, without waiting for a complaint’.³⁷

While there is much that can be further written about the received narrative of Islamic law, it is important at this point to recognize that Islamic law was, historically speaking, more than just a collection of rules in the abstract. Rather, the institutional features of Islamic legal history constituted part of the backdrop that informed the jurists as they developed legal doctrines. For instance, the medieval Shafi‘i jurist Abu al-Ma‘ala al-Juwayni (d 1098) related a hypothetical about a Hanafi husband and a Shafi‘i wife. Suppose the husband declares to his wife in a fit of anger that he divorces her. According to al-Juwayni, the Hanafis held that such a pronouncement is invalid and ineffective, whereas the Shafi‘is considered it to be valid. Are the husband and wife still married? According to the husband they are married, but according to the wife they are divorced. Which view should prevail? Certainly the two parties can insist on their respective views and claim to be justified in doing so. But to resolve the dispute, the parties must resort to a legal process, namely adjudication. They will submit their case to a *qadi* whose decision, based on his own analysis, will be binding on both parties. The *qadi*’s decision is authoritative not because it accords with one specific legal rule or another; rather it is authoritative because of the imperium tied to his institutional position within a Shari‘a rule of law system.³⁸

Section A has thus far provided an overview of various features of the received narrative of Islamic law. It is received in the sense that scholars have contributed extensive time, research, and effort to paint a historical picture of this long-standing

³⁶ See for example, David S Powers, *Law, Society and Culture in the Maghrib 1300–1500* (Cambridge: Cambridge University Press, 2002).

³⁷ Claude Cahen, R Mantran, A K S Lambton, and A S Bazmee Anar, ‘Hisba’, *Encyclopaedia of Islam, Second Edition*.

³⁸ Abu al-Ma‘ali al-Juwayni, *Kitab al-Ijtihad min Kitab al-Talkhis* (Damascus: Dar al-Qalam, 1987), 36–8. For a discussion of al-Juwayni’s hypothetical, see Abou El Fadl, *Speaking in God’s Name*, 149–50. Elsewhere Abou El Fadl argues that in the hypothetical above, if the judge decides in favor of the husband, the wife should still resist as a form of conscientious objection. Abou El Fadl, *The Authoritative and Authoritarian in Islamic Discourses: A Contemporary Case Study* (3rd edn, Alexandria, Virginia: al-Saadawi Publications, 2002), 60 n 11. However this position seems to ignore the fact that Shari‘a as a rule of law system is more than abstract doctrine of fundamental values that governs behavior. Rather, as suggested in this study, Shari‘a as a rule of law system implies the existence of institutions to which members of a society may grant authority either through certain social commitments or even through the very act of seeking the court to adjudicate disputes.

tradition. It is a picture that reflects themes associated with substantive and procedural law, legal doctrines, and legal institutions. This overview, therefore, rests upon a vast amount of scholarly effort since the late 19th century, only some of which could be cited in the footnotes herein due to space limitations. But this only takes us part of the way into the story. For various reasons, the image of Islamic law today is far removed from the image of that tradition as described throughout Section A. As Section B will illustrate, after the 18th century, the doctrinal corpus and institutional structure that gave real-world significance to Islamic law began to be lost or changed. This more recent story of Islamic law is crucially important if we are to appreciate the thrust of this anthology regarding Islamic law and human rights. The modern context of Islamic law is conditioned by the existence of the international state system, which defines the principal arena within which human rights doctrines and institutions operate. To appreciate the impact of the state on Islamic law is, in part, to better understand what is at stake when juxtaposing Islamic law and human rights.

B. Shari‘a, the modern state, and the international system

The historical picture of Islamic law, as addressed in Section A, no longer prevails in the modern world. By the 18th century if not earlier, the institutional structures that gave real-world significance to Islamic law began to be dismantled or modified in the Muslim world. For instance, pursuant to the Capitulation agreements with the Ottoman Sultan, non-Muslim Europeans were exempted from the jurisdiction of Ottoman courts. In Egypt, the use of the Mixed Court to hear cases involving non-Muslim parties and interests further eroded the extent to which Shari‘a was applied. When Egypt adopted the Napoleonic Code in the late 19th century and created national courts to adjudicate it, Shari‘a courts and the law they applied began to lose relevance and institutional efficacy in resolving legal disputes. The image of Islamic law today suffers from a discontinuity with its past—a discontinuity brought on by the era of colonial rule and the relatively recent rise of the modern Muslim state in an international system of sovereign states. Consequently, when discussing Islamic law today, there are two features that stand out most prominently. The first is the emphasis on source-texts and *fiqh* treatises as definitive of what Islamic law is and what it requires. The second is the plurality of legal authorities that operate upon the state, such that Islamic law is only one among multiple legal traditions that operate within and upon a state whose legitimacy often consists of a delicate, and often politically fraught, balance of different and authoritative traditions.

In the era of European colonialism over the Muslim world, Islamic law posed a challenge for colonial administrators. On the one hand, it offered a local, indigenous tradition of law and order that could not be forcefully removed without engendering massive protest and opposition to colonial control. On the other hand, the more Islamic law remained part of the socio-legal and political fabric, the greater the danger that it could be utilized as part of an opposition movement

against a colonial regime. In the colonial period, Islam had ‘played an important role in mobilization against European colonial rule in nearly all Muslim countries’, and administrators reasoned that to support the prevailing Islamic legal systems would undermine the colonial venture.³⁹ Consequently, the colonial period marked a decrease in the degree to which Islamic law was given jurisdiction, and thereby authority.

For instance, to protect Europeans living in the Ottoman Empire to conduct and manage trade relations, Western powers negotiated ‘Capitulation’ agreements with the Ottoman sultan. These agreements, in part, immunized European foreigners from the jurisdiction of the Ottoman courts of law.⁴⁰ Their cases were adjudicated by consuls representing the different European countries. Commercial disputes between foreigners and indigenous claimants were heard before special tribunals adjudicated by both foreign and Ottoman judges, or were heard before ordinary Ottoman courts generally with the presence of a consular official.⁴¹ As local leaders looked to Europe for financial investment and deeper economic relations, they were asked to grant foreigners greater immunities from the application of Shari‘a law, thereby expanding consular jurisdiction in managing the legal affairs of foreigners. But to grant consular officials jurisdiction to hear such cases contributed a degree of indeterminacy in legal outcomes. From the chaos of venues that arose from consular jurisdiction, the Mixed Court, for example, was established in Egypt to adjudicate cases involving foreign interests, ie where one of the parties was a foreigner or where a foreign interest was implicated even if both parties before the court were native Egyptians. Gradually, the Mixed Court acquired greater jurisdiction.⁴²

In places like Algeria in the 19th century, French colonial officials restructured the prevailing Shari‘a legal system to create an active commercial market in land with favorable implications for colonial entrepreneurs. Under the prevailing Islamic legal system, much of the land was tied up in family *waqfs* or trusts that were held in perpetuity under Islamic law. The Islamic *waqf* structure ensured that property would remain in a family’s possession without being dismantled into smaller fragments by the Islamic laws of inheritance. But this Islamic legal arrangement undermined French interests in buying and cultivating land for industrial purposes, and ultimately in creating a land market of freely alienable property. To challenge the continuity of these family *waqfs*, two tactics were adopted: to marginalize Islamic law by substituting new legal orders, and to reinterpret and re-assert Islamic law for the Muslims, who were deemed unable to see the truth of their own tradition.⁴³ As David Powers explains,

³⁹ Allan Christelow, *Muslim Law Courts and the French Colonial State in Algeria* (Princeton: Princeton University Press, 1985), 6–7.

⁴⁰ Jasper Y Brinton, *The Mixed Courts of Egypt* (rev edn, New Haven: Yale University Press, 1968), 4.

⁴¹ Brinton, *The Mixed Courts*, 4.

⁴² For a history of the Mixed Courts of Egypt, see Brinton, *The Mixed Courts*.

⁴³ David S Powers, ‘Orientalism, Colonialism, and Legal History: The Attack on Muslim Family Endowments in Algeria and India’ (1989) 31(3) *Comparative Studies in Society and History* 535–71.

To exploit the colony's important agricultural and mineral resources, France had settled increasing numbers of its civilians in the Algerian countryside... It was essential that the government facilitate the colonists' acquisition of Muslim land and assure them of their rights... To this end, the French endeavored to elaborate a new system of property law that favored the colonists.⁴⁴

However, as Powers further indicates, the new legal regimes were not sufficient to settle the matter of *waqf* land held in perpetuity. While the colonial government imposed new legislative schemes, French jurists began expounding on various features of Islamic law, in particular the family *waqf*. As Powers notes, French orientalist scholars redefined 'Islamic law so that it would be in harmony with French legal conceptions'.⁴⁵

Importantly, this pattern of limiting or removing the jurisdiction of Shari'a (and thereby its legitimating force) was not perpetuated only by colonial administrators and officials. It was done by the Muslim elites themselves, working within the prevailing systems of governance while contending with the increasing plurality of legal regimes with which they came into contact. In the late 19th century, the Ottoman Empire initiated a series of legal reforms that involved modeling European legal codes. In offering their own interpretations and codifications of Islamic law, Muslim elites challenged the occupier's treatment of Islamic law, but only by attempting to fit Islamic law into a European mold.⁴⁶ Notably, while many argue that this reform approach, the *Tanzimat*, was an Ottoman response to a Eurocentrically defined notion of modernity, recent scholarship has shed light on how the *Tanzimat* reforms were meant to bolster the Islamic legitimacy of an Ottoman sultanate contending with domestic challenges to its authority.⁴⁷

Premodern Islamic law was characterized by a multiplicity of opinions, different doctrinal schools, and competing theories of interpretive analysis. In the Ottoman reform period, this complex substantive and theoretical diversity was reduced through a selective process of codification. For instance, when Muslims began to codify Islamic law, such as when the Ottomans drafted the Islamic law code *The Majalla*,⁴⁸ they had to decide which rules would dominate. Would they create a Hanafi, Maliki, Hanbali, or Shafi'i code for those countries that were mostly Sunni? What would they do about their Shi'a population? Often, these reformers would pick and choose from different doctrinal schools to reach what they felt was the best

⁴⁴ Powers, 'Orientalism, Colonialism, and Legal History', 539–40.

⁴⁵ Powers, 'Orientalism, Colonialism, and Legal History', 543.

⁴⁶ For a brief study of how subaltern communities might fit their indigenous custom or law within models or frameworks that put their respective traditions in at least the same form as the imposed law of the colonialist, see Sally Engle Merry, 'Law and Colonialism' (1991) 25(4) *Law and Society Review* 89–922.

⁴⁷ Frederick F Anscombe, 'Islam and the Age of Ottoman Reform' (2010) 208(1) *Past and Present* 159–89. The reforms emanating from this period are called, collectively, the *Tanzimat*. For a history of the reforms in this period, see Herbert J Liebesny, *The Law of the Near & Middle East: Readings, Cases and Materials* (Albany: State University of New York Press, 1975), 46–117.

⁴⁸ For an English translation of the *Majalla*, see C R Tyser et al, trans, *The Mejelle: Being an English Translation of Majallah El-Ahkam-I-Adliya and a Complete Code on Islamic Civil Law* (Kuala Lumpur: The Other Press, 2001).

outcome. This process of selection (*takhayyur*) and harmonization (*talfiq*) of conflicting aspects of medieval opinions allowed reformers to present a version of Islamic law that paralleled the European model of law in form and structure; but in doing so, they reduced Islamic law to a set of positivist legal assertions divorced from the historical, institutional, and jurisprudential context that contributed to the intelligibility of *fiqh* doctrines in the first place.⁴⁹

As another example, the Egyptian government in 1883 adopted the Napoleonic Code as its civil law and created national courts to administer that Code. The result was three Egyptian court systems: the Mixed Courts, the secular National Courts, and the Shari'a courts.⁵⁰ In 1949 Egypt adopted a civil code borrowed mostly from the French Civil Code, and which also incorporated minimal elements of Islamic law. Subsequently, in 1955 the Shari'a courts were disbanded in the country.⁵¹

Importantly, these alterations in the authority and power of Shari'a to define both the nature of legal inquiry and the system of governance should not suggest that Shari'a does not exist in today's Muslim majority state. Nor should the Muslim elites be accused of ignoring the role Shari'a can play in the design of modern governance regimes. For instance, when 'Abd al-Razzaq al-Sanhuri drafted the Egyptian Civil Code of 1949, he relied heavily on the French Civil Code, but was mindful of the potential contribution of Islamic law to the Egyptian legal order. Defining Shari'a by reference to the premodern rules of law (or *fiqh*), he held, could fill in any lacuna in the Code or customary law, so long as no *fiqh* ruling contravened a general principle of the Code.⁵² Furthermore, in the modern legal curriculum of law schools in the region, such as Jordan for instance, students must take two or three courses on Islamic law during a full course of legal study.⁵³

Correlatively, while Islamic law is certainly present, it is subsumed within a contemporary system of diverse statutes with various provenances, is often defined as a body of premodern rules, and is significantly circumscribed in its application in modern legal systems. For instance, one field of Islamic law that is most commonly found in modern Muslim state legal systems is Islamic family law. Both colonial administrators and Muslim nationalist assemblies preserved Islamic family law in codified form while modernizing other legal areas such as commercial law. This reduction in jurisdiction and application arguably placated Islamists who considered the preservation of traditional Islamic family law to be necessary to maintain

⁴⁹ On the process of doctrinal selectivity and its effect on the nature of Shari'a, see Wael Hallaq, 'Can the Shari'a Be Restored?' in Yvonne Yazbeck Haddad and Barbara Freyer Stowasser (eds), *Islamic Law and the Challenge of Modernity* (New York: Altamira Press, 2004); Hallaq, *A History of Islamic Legal Theories*, 210.

⁵⁰ For a discussion of the gradual demise of Shari'a courts in Egypt, see Nathan Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge: Cambridge University Press, 1997).

⁵¹ For a historical account detailing the move from Islamic to secular law in Egypt, see Brown, *The Rule of Law in the Arab World*, esp 61–92.

⁵² 'Abd al-Razzaq al-Sanhuri, *al-Wasit fi Sharh al-Qanun al-Madani al-Jadid*, ed Ahmad al-Maraghi (Cairo: Dar al-Nahda al-'Arabiyya, 2007), 1:44–50.

⁵³ Abu-Odeh tells of her own legal education in Jordan, where she took only three courses on Islamic law (marriage and divorce, inheritance and wills, and Islamic jurisprudence) over a four-year legal curriculum. See Lama Abu-Odeh, 'The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia' (2004) 52 *Am J Comp L* 789–824, 791.

an Islamic identity in the face of an encroaching modernity.⁵⁴ This phenomenon is widespread across the Muslim world, and has a profound effect on the Muslim and European assumptions of what Shari'a is and can be. In redefining Shari'a, reducing its scope, and incorporating it piecemeal into particular statutes without historical contextualization, colonial powers and Muslim elites have contributed to a particular image of Shari'a as rigid, static, and codified, while situating it as one among many legal traditions that operate within a modern state.⁵⁵

In the modern world, law-making and legitimized coercion are often considered to be rightfully in the hands of a centralized sovereign state government that issues decrees or legislation defining the law for a region that is delineated by geo-political boundaries. The state operates within an international state system in which all states are considered equal sovereigns and entitled to their territorial integrity.⁵⁶ These states engage each other as actors on a global stage, whether through trade negotiations, diplomatic relations, or international organizations such as the United Nations. Those states whose territory was once under the rule of Islamic empires often incorporate Islamic law in their legal systems. However, as many have shown already and in great detail, these states only incorporate Islamic law in piecemeal fashion. Such states often adopt only premodern Islamic family law in modern personal status codes, while borrowing or modifying legislative schemes from European and North American states on matters of obligations, procedure, commercial law, finance, and so on.⁵⁷ Modern lawyers in Muslim states that apply Islamic law do not often study Islamic law in the fashion once taught in premodern *madrasas* (Islamic law colleges) centuries ago, but instead take a few courses on the topic, while focusing on a 'secularized' legal curriculum for the most part.⁵⁸ In fact,

⁵⁴ Locating an authentic past on the bodies of women within the family has been used to construct modern national identities in post-colonial societies where the past provides an authentic basis for the national identity of new states immersed in a modern world. Traditional family law regimes may be used to bring the values of the past into the present national consciousness to provide a sense of identity in opposition to the norms perceived to emanate from the colonizing world. For an excellent analysis of women, family, and nationalism, see Anne McClintock, 'Family Feuds: Gender, Nationalism and the Family' (1993) 44 *Feminist Review* 61–80. One exception to this colonial inspired narrative about the narrowing of Shari'a is the case of Saudi Arabia. Colonial powers did not seem to exert much control over Saudi Arabia, and consequently the colonial narrative does not universally apply across the Muslim world. However, I would suggest that the narrative about the reduction of Shari'a is not dependent on colonization as its only topos. Rather the colonial topos is only part of the narrative, which fundamentally involves a relationship between power, law, and the formation of political/nationalist identities. For instance, colonists used a reductive but determinate notion of Islamic law to bolster their legitimacy and ensure administrative efficiency, while also marginalizing the tradition when necessary to attain colonial goals. Likewise, the Saud family's use of Wahhabism as an ideological narrative that trumped tribal loyalties in the Najd, has also allowed the Saudi state to utilize a reductive, often literalist approach to Islamic law to bolster its own political legitimacy and authority.

⁵⁵ For a discussion of the impact the reified and static version of Islamic law had on Muslims under colonial occupation, see the excellent study by Scott Alan Kugle, 'Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia' (2001) 35(2) *Modern Asian Studies* 257–313.

⁵⁶ See for instance, the UN Charter, Art 2, Sec 1, which provides: 'The Organization is based on the principle of the sovereign equality of all its Members'.

⁵⁷ Abu-Odeh, 'The Politics of (Mis)recognition', 789, 791.

⁵⁸ Abu-Odeh, 'The Politics of (Mis)recognition', 791.

Lama Abu-Odeh has vociferously argued that to understand Islamic law in the modern day, one need not concern oneself with the premodern period at all. Islamic law today is immersed within a complex, bureaucratic state system, in which Islamic law is a partial source, if even that, for legal systems that are primarily based on European models of civil law and governance.⁵⁹ But that does not mean Shari‘a plays no role in governing society. If Shari‘a implies an active engagement with ordering society, we cannot easily divorce it from the modern context. Indeed, for that reason, studies such as this one remain vital opportunities of critical engagement and reflection on the complexity that attends to any study that operates at the intersection of law, politics, and the demands of lived experience.

C. Shari‘a as ‘rule of law’

Sections A and B provided an overview and introduction to Islamic law across a historical period that has witnessed considerable change. Whereas the premodern Islamic mode of governance was, at least in aspirational terms, imperial in nature, the prevailing unit of governance today is the state. While some might claim that the state is not nearly as significant today as it once was, there is little to deny its ongoing relevance and significance as a feature on the world stage in matters of economics, security, and most significantly for our purposes, the law. Indeed, the relationship between the law and the state is an important feature that is often used to distinguish the modern context of Islamic law from the premodern one. Indeed, as suggested by the hypothetical from al-Juwayni about a divorcing husband and wife, the intelligibility of his legal conclusion is in part based upon his presumption about the prevailing political order that permits him to posit the existence of *qadis* who can resolve disputes.

This section introduces the concept of ‘Shari‘a as rule of law’ by building upon the observations about the relationship between the political order and the legal order. In doing so, it does not add or subtract from the received narrative outlined in Sections A and B. Nor does it aim anachronistically to impose a modern concept on a historical tradition. To imagine Shari‘a as a rule of law system is in no way meant to suggest that it existed in actual fact throughout the regions inhabited by Muslims. This introduction uses ‘rule of law’ to frame the study of Shari‘a to highlight how various factors of Islamic legal history—from educational institutions to adjudicatory ones—contributed to a set of background assumptions for jurists who debated and justified various rules of Islamic legal doctrine, many of which are the topics of essays in this book.

Admittedly, definitions of rule of law abound.⁶⁰ The term has assumed a panacea-like (if not trendy) quality in recent decades, being offered as the principal

⁵⁹ Abu-Odeh, ‘The Politics of (Mis)recognition’.

⁶⁰ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 3 (quoting International Commission of Jurists, *The Rule of Law in a Free Society* (Geneva, 1959), p VII).

solution to the development of effective, efficient, and just government in transitional states.⁶¹ That might be reason enough to be skeptical of its usage. To define rule of law is not the task of this essay. Rather, this essay recognizes that a significant characteristic of rule of law is its rhetorical power at the site of contestations about justice. Writing about the rhetorical feature of rule of law, John Ohnesorge writes: 'Rule of Law rhetoric is more typically invoked when a commentator wishes to criticize a particular legal rule or judicial decision.'⁶² Adopting this rhetorical approach, 'rule of law' is used herein to emphasize the various features of Shari'a as constituting a site of ongoing contestations about what justice requires. Viewing Shari'a through the lens of rule of law makes possible an inquiry into Shari'a as a conceptual site in which debates between competing and compelling interests are resolved using a disciplined mode of inquiry that is nonetheless framed by the given political context in which individuals, officials, and institutions of government make demands on each other. This final section will weave together various features of the received narrative of Islamic law to illustrate why 'rule of law' offers a useful approach for imagining how to 'clear ground' when inquiring into what Shari'a is or might be. To illuminate why and how 'rule of law' offers a useful organizing concept for understanding Shari'a, the remainder of this essay will examine three examples. The first concerns juristic debates on the relationship of Shari'a to good governance. The second addresses the debates among jurists about whether to accept judicial appointments made by the governing authorities. The third and final example relates to the professionalization of legal education and its role in constituting the legitimacy of the political order.

1. Governing, core values, and law

The first point to draw from 'Shari'a as rule of law' is that doctrinal debates are embedded within a presumed enterprise of governance, thus placing the two in a mutually constitutive relationship. This relationship between the two was not lost on premodern jurists, who recognized that governing well requires a framework for evaluating various outcomes. That evaluative framework is constituted by the core values that unify a polity and contribute to the vision of its enterprise of governance. Importantly, the language of those core values is mediated through the language of law, and juridified in the name of Shari'a.

For instance, the 10th century jurist al-Mawardi (d 450/1058) wrote that experience dictates that no kingdom can exist without having at its foundation a faith or ideological tradition (*diyana min al-diyanat*). The legal system depends upon an acceptance of one's obligation or sense of duty. According to al-Mawardi, every faith tradition espouses the virtue of knowing God, thus inculcating a sense of duty in the individual to adhere to God's will. By extension, this duty can be directed toward the ruling authority. He remarked that the underlying tradition is

⁶¹ See for example, Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76 *Foreign Affairs* 22–43.

⁶² John K M Ohnesorge, 'The Rule of Law' (2007) 3 *Annual Review of Law and Social Science* 99–114, 102.

the foundation upon which all conditions and rules of governance are built. In fact, if any kingdom were to stray from its foundational value system, internal schisms and contestations would arise, and thereby adversely affect the legitimacy and continuity of the sovereign.⁶³ He reminded his reader that rules and regulations in a legal system arise out of a set of foundational commitments that legitimate governance in the first place.

Interestingly, for al-Mawardi the relevant tradition that makes governance possible need not be Islam, although he did not hesitate to assert that the Islamic tradition offers the best path to obedience to God and thereby to good governance.⁶⁴ Nonetheless, espousing the virtues of the Islamic tradition is not central to the larger, more pragmatic concerns among Muslim jurists for good and right governance. In fact, the later jurist Abu Hamid al-Ghazali (d 505/1111) held that whether a polity is governed Islamically or not, its longevity depends on the quality of justice that it upholds. Referring to a prophetic tradition, al-Ghazali wrote: 'Dominion [will] continue even if there is disbelief (*kufi*) but will not continue where there is oppression (*zulm*).'⁶⁵ Al-Ghazali's advice to rulers was meant to ensure that they are just; the importance of applying Shari'a was either assumed by al-Ghazali or was deemed separate from the question of good governance.⁶⁶

By linking core values to substantive doctrines, al-Mawardi and al-Ghazali recognized the inevitable relationship between rule of law and governance. Good, effective, and lasting governance requires a shared language of justice. That language may or may not be Islamic. The language will differ as we shift our attention to different systems of political ordering. Indeed, the underlying system of governance delineates and delimits the claim space of a rule of law tradition. As the governance system shifts, so too do the boundaries that define the space from which claims of justice are made.

The link between rule of law and governance is evident in the different ways by which Muslim jurists granted rulers discretionary power while also limiting the legitimate scope of their activity. For instance, as much as Muslim jurists may have attempted to articulate legal doctrines on as many issues as possible, they nonetheless recognized that inevitably, the political leader would need to make new rules to govern unanticipated situations. Although such discretionary rules may not be based on the epistemic methods sanctioned in the curriculum of legal study (to

⁶³ Mawardi, *Nasihah al-Muluk*, ed Fu'ad 'Abd al-Mun'im Ahmad (Alexandria: Mu'assasat Shabab al-Jami'a, 1988), 85.

⁶⁴ Mawardi, *Nasihah*, 88–9.

⁶⁵ Ghazali, *al-Tibr al-Masbuk fi Nasihat al-Muluk*, ed Muhammad Damaj (Beirut: Mu'assasat 'Izz al-Din, 1996), 148.

⁶⁶ Q 11:117 states that despite God's destruction of peoples in the past, those who are righteous will remain untouched: 'for never would your Lord destroy a town for being oppressive, while its people act righteously'. In his commentary on this verse, al-Qurtubi remarks that despite a people's disbelief in God (*shirk, kufi*), the people will not suffer God's wrath. Instead, he says, 'Sin brings one closer to the punishment of extermination in the world than disbelief [in God]'. But he is also careful to remind us that the punishment for disbelief is greater in the afterlife anyway. In other words, both injustice and disbelief in God will lead to punishment. But the latter alone is not a reason for ridding the world of them. Al-Qurtubi, *al-Jami' li'l-Abkam al-Qur'an* (Beirut: Dar al-Kutub al-Ilmiyya, 1993), 9:75–6.

be addressed below), such rules nonetheless are recognized as authoritative. Muslim jurists, although unable to determine the rules for such unanticipated situations, nonetheless used the law to delineate the arena of such discretionary legislative activity. Specifically, they developed the legal doctrines of *ta'zir* and *siyasa al-shar'iyya*.

Siyasa shar'iyya can be understood as 'Governance in accordance with the *shari'a*', and requires the 'harmonisation between the law and procedures of Islamic jurisprudence (*fiqh*) and the practical demands of governance (*siyasa*)'.⁶⁷ Ibn Taymiyya (d 1328) has often been associated with this jurisprudential topic; his interest was to theorize how governance can and should abide by the dictates of Shari'a, and not deviate from their demands. In this sense, his work reflected an interest in making rulers subservient to the law. Yet he also recognized that at times, there are zones of activity where Shari'a doctrines are silent. In such areas, the ruler must have discretionary authority to punish offenders, as long as he does so within the legally defined bounds of that discretionary authority.⁶⁸

Ta'zir is a term of art meaning 'discretionary punishment'; this vests authority with the ruler or his agents (such as judges) to punish offenders when their acts are not otherwise provided for by source-texts.⁶⁹ It is a type of discretionary punishment that jurists granted to the ruling authorities; not even Ibn Taymiyya could deny such authority given the finitude of source-texts and the infinite possibilities of human activity that will nonetheless be subject to governance and regulation. This is not to suggest that the discretionary authority was absolute. While granting the ruling authority limited discretionary authority, jurists still sought to limit how this authority could be utilized.⁷⁰

Siyasa shar'iyya and *ta'zir* are legal terms of art that jurists used to espouse the legitimating feature of Shari'a as rule of law and to juridify the zone within which the political leader could legitimately delineate new rules in light of new situations without recourse to the substantive doctrines of *fiqh*. Consequently, jurists knew their own limitations in delineating the *fiqh*, and used the law to empower those entrusted with the enterprise of governance to govern as they saw fit. Shari'a as rule of law contributes to the legitimacy of the enterprise of governance, and makes possible the discretion of the ruler to act he sees fit, given certain limitations as defined by the law. The jurists may not be able to determine the content of such discretionary regulations; but they can define the zone within which such regulations can legitimately arise. Defining that zone or boundary is a juridification of the acceptable scope of political discretion for those managing the enterprise of governance. But by granting the zone at all, the jurists utilized Shari'a doctrines to constitute and enable the very enterprise that they sought to regulate.

⁶⁷ C E Bosworth, I R Netton, F E Vogel, 'Siyasa', *Encyclopaedia of Islam, Second Edition*.

⁶⁸ Ibn Taymiyya, *al-Siyasa al-Shar'iyya fi Islah al-Ra'i wa al-Ra'iyya* (Beirut: Dar al-Kutub al-Ilmiyya, 1988), 101.

⁶⁹ M Y Izzī Dien, 'Ta'zir (a.)', *Encyclopaedia of Islam, Second Edition*.

⁷⁰ For more on *ta'zir* as a discretionary authority, see Emon, 'Huruq Allah and Huruq al-'Ibad', 386–90.

2. Rule of law, *qadis*, and governance

The received narrative of Islamic legal history regards Shari‘a as a mechanism by which rulers asserted the legitimacy of the enterprise of governance to their subjects. Jurists claimed authority to define the Shari‘a, to the exclusion of the ruling regime. As such, jurists could at one and the same time claim the independence of the Shari‘a from the politics of governance, and espouse the legitimating function of Shari‘a for the ruling regime. This claim of legal independence, often referenced in terms of autonomy or decentralization, is urged by some scholars as a defining feature of the premodern Islamic legal tradition. For instance, Jonathan Brockopp states:

It seems that the very methods of collecting hadith from many individual sources promoted view of legal authority which enshrined decentralization. This diffusion of authority among a broad base of individual jurists [*fugha*] made the work of the Umayyad and ‘Abbasid caliphs difficult, as they tried to establish a codified form of the law. Their attempts at political control, through appointments and inquisitions, ultimately failed and only served to demonstrate the power of the legal community in resisting centralization of authority.⁷¹

The received narrative generally holds that Islamic law and legal doctrines were developed outside the ambit of government, in a decentralized fashion. Those adopting the decentralization thesis should not be understood as insulating the jurist from his context, political or otherwise. Jurists may have debated the law in light of an ideal or normative vision of a governing regime, but that did not mean they were unmindful of the impact that institutions of governance could and did have on the intelligibility of their legal doctrines and disputes. Islamic legal historians such as Kristen Stilt have shown that jurists were fully aware of the imperatives of governance, and that government officials could have an effect on the application or experience of the law.⁷² Abou El Fadl’s study on rebellion shows that jurists participated in a corporate culture that was not immune from socio-political demands and realities.⁷³ In other words, when jurists developed their legal doctrines, they were mindful of the existence, organization, and demands of political society. By introducing Shari‘a as ‘rule of law’, though, the aim of this essay is to emphasize that the jurists’ mindfulness of the background factors of the

⁷¹ Jonathan E Brockopp, ‘The Essential Shari‘ah: Teaching Islamic Law in the Religious Studies Classroom’ in Brannon M Wheeler (ed), *Teaching Islam* (New York: Oxford University Press, 2003), 77–93, 81. See also, David Waines, *An Introduction to Islam* (2nd edn, Cambridge: Cambridge University Press, 2003), 100, who writes that jurists saw themselves as the ‘expositors of the prophetic message and the will of Allah to which even the Caliph like very ordinary believer, was ultimately subject’. Furthermore, he writes, while the caliph may provide various regulations in his capacity as ruler, such regulations are separate and distinct from Shari‘a ‘pure and simple’. Likewise, Abou El Fadl distinguishes between Shari‘a as the law articulated by jurists, and the administrative practices of the state. He writes: ‘By the fourth/tenth century, Muslim jurists had established themselves as the only legitimate authority empowered to expound the law of God’. Abou El Fadl, *Islam and the Challenge of Democracy* (Princeton: Princeton University Press, 2004), 14.

⁷² Kristen Stilt, *Islamic Law in Action: Authority, Discretion, and Everyday Experiences in Mamluk Egypt* (Oxford: Oxford University Press, 2012).

⁷³ Khaled Abou El Fadl, *Rebellion & Violence in Islamic Law* (Cambridge: Cambridge University Press, 2001).

enterprise of governance deemed them more than mere historical fact (whether inconvenient or not). Rather, the 'rule of law' frame holds that the jurists' mindfulness actually contributed to and helped constitute (and thereby limit) the boundaries of the claim space that was Shari'a.

One example will help illustrate this last point. The example concerns the issue of whether or not jurists should accept appointments to government offices, such as the position of judge (*qadi*), discussed above. As judge, the *qadi's* rulings were backed by the coercive force of the ruling regime.⁷⁴ Because of the *qadi's* link to the ruling authority, though, some jurists were wary of, if not absolutely opposed to, assuming such an office.⁷⁵ For them, the very independence and legitimacy of the law was at stake. They feared that an unprincipled executive could use his power of appointment to ensure that judges would resolve cases and articulate Shari'a doctrines in a manner favorable to the ruler. Indeed, they feared for the independence and integrity of the Shari'a as a claim space within which arguments of justice could be made against the ruling authority. Consequently, stories abound about premodern jurists avoiding any and all entanglements with the government.⁷⁶ Yet we also find a jurist such as the famous Shafi'i al-Mawardi (d 450/1058), a highly respected scholar, who assumed the office of *qadi*.⁷⁷

The inconsistency in historical practice parallels an inconsistency in traditions that counsel both options—to avoid or occupy judicial office. For instance, the Prophet is reported to have said 'No man judges except that God most high appoints for him two angels to direct, guide, and ensure his success. If he is unjust, [the angels] abandon him and ascend to heaven.'⁷⁸ Judging is not an easy matter, and it should not be taken lightly. But those who judge justly do so with the benefit of angels, thereby receiving a divine blessing that cannot be ignored or undervalued. The blessings that come with performing the judicial function are emphasized by the companion of the Prophet, Ibn Mas'ud, who said: 'Sitting to judge [a dispute] between people pursuant to the demands of truth is more pleasing to me than engaging in worship for seventy years.'⁷⁹

In other traditions, though, the Prophet warns against the harm that could arise by assuming the office of *qadi*: 'He who is made a judge shall be slaughtered without a knife.'⁸⁰ Such a tradition does not bode well for those who might occupy judicial office.⁸¹ Yet Ibn Abi al-Damm, a premodern jurist writing on the office of the *qadi*, recognized that traditions antagonistic to holding office could be interpreted to mean

⁷⁴ Hallaq, *The Origins and Evolution of Islamic Law*, 57–101.

⁷⁵ Benjamin Jokisch, *Islamic Imperial Law: Harun al-Rashid's Codification Project* (Walter de Gruyter, 2007), 285.

⁷⁶ See for instance, the biography of Sufyan al-Thawri, who refused to serve as judge in Kufa. Ibn 'Imad, *Shadharat al-Dhabb fi Akhbar man Dhabab* (Beirut: Dar al-Kutub al-'Ilmiyya, nd), 1:250. Likewise, Malik b Anas refused attempts by rulers to render his *Muwatta'* as a uniform law for the Islamic territories. Jalal al-Din al-Suyuti, *Ikhtilaf al-Madhabib*, ed 'Abd al-Qayyum Muhammad Shafi' al-Bastawi (Cairo: Dar al-'Itisam, 1404 AH), 22–3; Abou El Fadl, *Speaking in God's Name*, 10.

⁷⁷ C Brockelmann, 'al-Mawardi Abu 'l-Hasan 'Ali b. Muhammad b. Habib', *Encyclopaedia of Islam, Second Edition*.

⁷⁸ Ibn Abi al-Damm, *Kitab Adab al-Qada'*, ed Muhammad al-Qadir 'Ata (Beirut: Dar al-Kutub al-'Ilmiyya, 1987), 23.

⁷⁹ Ibn Abi al-Damm, *Kitab Adab al-Qada'*, 23.

⁸⁰ Ibn Abi al-Damm, *Kitab Adab al-Qada'*, 23.

⁸¹ Indeed, this was one way to read this tradition. Jokisch, *Islamic Imperial Law*, 285 n 23.

different things. In fact, he said that ‘slaughter’, as used in the above tradition, should be understood metaphorically to mean that the judge must put aside his own desires, and ‘slaughter’ his own perspective to ensure that he judges justly.⁸²

In an effort to account for the conflicting traditions, Ibn Abi al-Damm offered a particular insight into the contentious issue of assuming judicial office.

The *hadiths* supporting [holding office] are based on the benefit (*al-salih*) of adjudication, [one’s] ability to bear its burden, and uphold the obligation [to adjudicate]. The [*hadiths*] against [holding office] are based on [one’s] inability to do so. Based on that, ‘*ulama*’ will enter [the profession] or not. After [the Prophet’s death] . . . the first four caliphs continued [to adjudicate] . . . and adjudicated among the people in truth. Their entry into [the office] is principal evidence for the magnitude of its inescapability and the abundance of its reward. Those after [the four caliphs] followed their [practice], and thereafter the Muslim *imams* of the [next generations] upheld [the practice too].

Those who dislike entering [the profession] include *imams* of great merit, competence, and righteousness. [Their view] is based on an exaggerated [concern] for preserving their souls and for the ways to reach a state of blamelessness. Indeed the command to [adjudicate] is a significant matter, and perhaps they considered themselves weak or slack. Or [maybe] they feared a diminution in night time worship or study if they were to occupy themselves with [adjudication].⁸³

To view Shari‘a through the conceptual lens of ‘rule of law’ cautions against over-estimating the hard distinction often made in Islamic legal history between the jurists and the ruling authorities. While jurists certainly were scholar-authors of legal treatises and legal exponents of the law,⁸⁴ their authority to articulate the law, in contrast to the ruling elite, should not lead to the presumption that their legal doctrines did not also anticipate the existence of government administration. Consequently, the intelligibility of their legal discourses cannot be fully appreciated without also accounting for the background factors associated with the enterprise of governance, whether real or imagined. Certainly informal dispute resolution mechanisms existed in early Islamic history, as well as various jurists who offered non-binding legal responses to those who presented questions (eg *muftis*).⁸⁵ But those jurists existed alongside the institutional, and at times coercive, power of an enterprise of governance that both relied upon and helped constitute Shari‘a as a claim space from which claims of justice could be made.

For example, recall the hypothetical noted above by the Shafi‘i jurist Abu al-Ma‘ali al-Juwayni (d 1085) about a Hanafi husband and a Shafi‘i wife, both of whom were legal scholars or *mujtahids*. The husband declared to his wife in a fit of anger that he

⁸² Ibn Abi al-Damm, *Kitab Adab al-Qada’*, 23.

⁸³ Ibn Abi al-Damm, *Kitab Adab al-Qada’*, 23–4.

⁸⁴ For more on the jurist as scholar-author, see Wael Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2005).

⁸⁵ The *mufti* or juriconsult would issue responsa to those who made inquiries about the law. The *mufti*’s response, or *fatwa*, was deemed non-binding, in contrast to the decision of a *qadi*, who exercised the coercive force of the government. For studies on the *mufti*, and the relationship between the *qadi*, see Powers, *Law, Society and Culture in the Maghreb*. See also Muhammad Khalid Masud, Brinkley Messick and David Powers (eds), *Islamic Legal Interpretation: Muftis and Their Fatwas* (Harvard University Press, 1996).

divorces her. The question that arose for al-Juwayni was whether the spouses were divorced as a matter of law, since the Hanafis did not recognize a divorce pronounced in a fit of anger, whereas the Shafi'is did.⁸⁶ Al-Juwayni's resolution implicitly revealed how the background factor of the enterprise of governance informed his analysis of this particular hypothetical. The significance of this assumption can be determined by asking counter-factually how al-Juwayni would have resolved the issue were there no assumptions about an enterprise of governance at all. In such a case, he arguably would not have referred to the *qadi* at all, since the *qadi* would not have been a factor to incorporate into his analysis. He would have had to decide the conflict between the parties on other grounds, without having recourse to this particular institutional approach. What those alternative grounds might have been are hard to speculate on al-Juwayni's behalf. Nonetheless, the counterfactual illustrates how presumptions about the enterprise of governance not only contributed to, but also made certain legal outcomes intelligible.

Importantly, this is not to suggest that a 'rule of law' approach would collapse Shari'a into the realm of politics, or that Shari'a bears no autonomy whatsoever. Rather it is a reminder that any neat bifurcation between the jurists and the ruling elite becomes blurred. The arena of their work necessarily over-lapped. Not only did jurists assume offices of government, but they also took into account the reality of those governmental offices as they developed their jurisprudence and legal doctrines. It would be far too simplistic, if not naïve, to think that Shari'a and politics ever were or could be separable.

3. Curriculum and educational institutions (*madrasa*)

This section further elaborates on the boundaries of the claim space connoted by Shari'a if viewed in terms of 'rule of law' by focusing on curriculum and the institutionalization of education (ie the *madrasa*). These two factors contributed to defining what counted as a species of legal argument under a Shari'a as rule of law system. They give content to the rule of law concept by providing a disciplinary character to Shari'a discourses, thereby preventing Shari'a discourses from collapsing into mere politics. The educational institutions and curricula provided both form and content that defined and delimited the claim space that we are calling 'Shari'a as rule of law'. Indeed, educational curricula provided the touchstone that designated a given argument as legal, and thereby appropriate within the claim space of Shari'a as rule of law.

a. Islamic legal curriculum

Those who are considered to represent the Shari'a authoritatively have historically been called the '*ulama*' or jurists.⁸⁷ The tradition the jurists represented was made

⁸⁶ Juwayni, *Kitab al-Ijtihad*, 36–8. For a discussion of al-Juwayni's hypothetical, see Abou El Fadl, *Speaking in God's Name*, 149–50.

⁸⁷ For studies on the '*ulama*', see Cl Gilliot, R C Repp, K A Nizami, M B Hooker, Chang-Kuan Lin, J O Hunwick, "Ulama", *Encyclopaedia of Islam, Second Edition*; Muhammad Qasim Zaman, *The Ulama in Contemporary Islam: Custodians of Change* (Princeton: Princeton University Press, 2007).

tangible through the curriculum of legal study. The course of study to become a jurist generally included four years of training in religious law and ‘ten or more graduate years, leading to a “license to teach”. The graduate students were trained in the scholastic method’⁸⁸ and studied various topics in the course of becoming a jurist, such as the following:

- Qur’an: including interpretive sciences, exegesis, and the various readings of the text.
- *Hadith*: including the interpretive tradition, biographies of transmitters.
- Principles of Religion (*usul al-din*).
- Principles of Law (*usul al-fiqh*), ie the sources and methodologies of law.
- The legal doctrine of the school of law to which the student belonged.
- The divergent doctrines within one school and across legal schools.⁸⁹

This curriculum required the student to engage foundational sources of authority, some of which have a provenance that is understood within the jurisprudence to originate with God (ie Qur’an). Given the foundational role these and other sources play in Shari’a discourses, the curriculum offers a basis by which to inform the discipline of Shari’a, thus distinguishing it from the modalities of governance.

The fulfillment and satisfaction of curricular requirements would culminate in an *ijaza* or diploma of successful completion of a course of study, thus ‘guarantee [ing] the transmission of authoritative religious knowledge’.⁹⁰ An *ijaza* could be issued upon completing a single book or mastering an entire subject area. These diplomas could also authorize the recipient to teach and issue legal responsa (*ijaza al-tadris wa al-ifta*). The aim of the student entering the Islamic educational process was to receive such certification. Hence the *ijaza* assumed a central place within the system of education; it was a measure of accomplishment, and thereby provided a degree of transparency about a jurist’s training and capacity.⁹¹

b. The madrasa: institutionalizing legal education

Scholars of the premodern *madrasa* or Islamic law college have shown that it proliferated in part due to the efforts of wealthy individuals who created charitable trusts or *awqaf* (sing. *waqf*) to found educational institutions. The fact that these *madrasas* were privately endowed is often used to support the received narrative of the independence of Islamic law from the ruling enterprise.⁹² That narrative holds

⁸⁸ George Makdisi, ‘Baghdad, Bologna, and Scholasticism’ in J W Drijvers and A A MacDonald (eds), *Centres of Learning: Learning and Location in Pre-Modern Europe and the Near East* (Leiden: Brill, 2005), 144.

⁸⁹ Makdisi, *Rise of Colleges*, 80.

⁹⁰ Makdisi, *Rise of Colleges*, 140.

⁹¹ Although the scholars write about *ijazas* extensively, most of their information about the *ijaza* comes from biographical dictionaries. See Makdisi, *Rise of Colleges*, 140–52.

⁹² Khaled Abou El Fadl, *The Great Theft: Wrestling Islam from the Extremists* (New York: HarperOne, 2007), 35; Abou El Fadl, *Speaking in God’s Name*, 16–17; Coulson, *A History of Islamic Law*, 149–81. This view of the *madrasa* supports the decentralization thesis noted above.

that the independence of the *madrasa* contributed to the development of a scholarly ethic of disciplinary integrity that might cut against ruling regimes seeking to co-opt the learned elite to legitimate the regime's actions. Nonetheless, the efforts by the Seljuq vizier Nizam al-Mulk to endow some of the most wealthy and illustrious law colleges of his day suggest that we should use some caution when advocating the narrative of legal independence in the premodern period.

George Makdisi suggests that the *madrasa* was the end-result of an institutional development process that aimed to organize and administer the transfer of knowledge. The first institution in which knowledge was transmitted was the mosque (*masjid*). Principally considered a religious place of worship, the mosque became the center of learning in early Islamic history. Even after the birth of the *madrasa* in the 11th and 12th centuries,⁹³ the 'mosque preserved its primacy as the ideal institution of learning, and law, its primacy as the ideal religious science'.⁹⁴ While there were different types of mosques with varying terminology, there is significant agreement that early in Islamic history, most education took place in mosques where scholars would sit in teaching circles (*halqas*) with their students.⁹⁵

As students began to visit mosques for educational purposes in increasing numbers, the need for residential facilities arose, thus contributing to the development of the second institution: the *masjid-khan*, or mosque-residence. The *khan* or college was a residential complex associated with a mosque. 'Since the *masjid* could not serve as a lodging place for teaching staff and students . . . *khans* were founded next to the *masjids* to serve as lodging for students from out-of-town'.⁹⁶ The next institutional development was the *madrasa*. It combined the facilities for teaching, thus far characteristic of the *masjid*, with the residential complex introduced by the *masjid-khans*. The *madrasa*, therefore, was where students could both reside and study in a facility that catered to their specific needs.

Founders of *madrasas* often used trust law (*waqf*) to formalize their financial commitment and thereby arrange for the administration of institutional and curricular activities. The desire to create a charitable trust in the form of a *madrasa* as opposed to a mosque may have had much to do with the tax implications associated with such trust arrangements. To avoid paying taxes on accumulated wealth, a donor could create a charitable trust. Because the endowment consumed the capital, the donor was not subject to taxation. But by endowing a *madrasa*, for instance, the donor could nonetheless arrange to receive personal income from the

⁹³ J Pedersen and G Makdisi, 'Madrasa' in *Encyclopedia of Islam, Second Edition*, 1125–8.

⁹⁴ Makdisi, *Rise of Colleges*, 12. Many other authors stress that the subject matter taught in the masjids was the law, and that it is this early concern for the law which eventually gave the madrasa its character as a college of law. See, Jonathan Berkey, *Transmission of Knowledge in Medieval Cairo: A Social History of Islamic Education* (Princeton: Princeton University Press, 1992), 47; Pedersen and Makdisi, 'Madrasa', 1124. Notably, there is some disagreement on this point. See A L Tibawi, 'Origin and Character of *Al-Madrasah*' (1962) 25(2) *Bulletin of the School of Oriental and African Studies* 225–38. More on the curriculum will be discussed below.

⁹⁵ See for example, Berkey, *Transmission of Knowledge*, 7; Pedersen and Makdisi, 'Madrasa', 1123; Makdisi, *Rise of Colleges*, 10–23.

⁹⁶ Pedersen and Makdisi, 'Madrasa', 1124.

endowment by appointing himself as a salaried administrator.⁹⁷ Additionally, he could also appoint his heirs as future administrators of the trust. Effectively, the donor generated an income-producing investment for himself and his heirs in perpetuity while at the same time creating a tax shelter. On the other hand, if a donor endowed a *masjid*, he lost all rights to the property, including the power to appoint himself and his heirs to administrative posts.⁹⁸ The grantor could not thereby create for himself and his heirs an income stream for future support and maintenance, as that would impinge on the freedom of the trust. Trust doctrine, therefore, provided an incentive for some to endow *madrasas*, and thus contribute to the development of private endowments for institutions of legal learning.⁹⁹

As much as the *madrasa* was subject to private trust law, and the curriculum provided formalized, if not idealized, prerequisites of instruction and certification, the system of Islamic legal education was not immune from the efforts of government officials to tap into the authority that a legal education offered to those who would become the arbiters of the moral and legal order. Indeed, government officials also endowed *madrasas*. Some historians have suggested that these actions by government officials evinced an interest in harnessing the authority associated with the study of Shari'a to bolster the legitimacy of the enterprise of governance.¹⁰⁰ The political implications of endowing *madrasas* are often addressed with respect to the endowments of Nizam al-Mulk (d 1092), the vizier to the Seljuq Sultans Alp Arslan (r 1063–1073) and Malik Shah (r 1072–1092). Some suggest that Nizam al-Mulk founded the first *madrasa* in the Islamic world, the *Nizamiyya madrasa* in Baghdad in 1067. Other historians, though, suggest that *madrasas* existed much earlier.¹⁰¹ Regardless, an important inference drawn from Nizam al-Mulk's *Nizamiyya* colleges (located in Baghdad, Nishapur, Balkh, Mosul, Herat, and Marv) is that those in political power could leverage their wealth to gain control over the religious elite by endowing the most illustrious colleges and endowing the most impressive professorships. Makdisi states that Nizam al-Mulk 'founded his network of *madrasas* to implement his political policies throughout the vast lands of the empire under his sway'.¹⁰²

In fact, Tibawi argues that Nizam al-Mulk could not have founded his *Nizamiyya* as a private individual given the likelihood that he did not have the wealth to do so. Instead, he argues that Nizam al-Mulk built the *madrasas* in his capacity as a government official, thus situating the *madrasa* and curriculum of study as a feature

⁹⁷ Makdisi indicates, though, that under the Maliki school, such a possibility does not exist. The Malikis do not permit a donor to appoint himself or herself as the administrator of a *waqf*-based institution he or she endowed. Makdisi, *Rise of Colleges*, 238.

⁹⁸ Pedersen and Makdisi, 'Madrasa', 1128.

⁹⁹ Writing in 1980, Ulrich Haarmann noted that no comprehensive study of the beginnings of *waqf* was available. Ulrich Haarmann, 'Mamluk Endowment Deeds as a Source for the History of Education in Late Medieval Egypt' (1980) 28 *Al-Abhath* 31–47, 31.

¹⁰⁰ Waines, *An Introduction to Islam*, 85.

¹⁰¹ Pedersen and Makdisi, 'Madrasa', 1126.

¹⁰² George Makdisi, 'Muslim Institutions of Learning in Eleventh-century Baghdad' (1961) 24 *BSOAS*, reprinted in George Makdisi, *Religion, Law and Learning in Classical Islam* (Great Britain: Variorum, 1991), 1–56, 51.

of the mutually constitutive relationship between Shari‘a and the governing regime.¹⁰³ However, Makdisi counters that at least in premodern Baghdad, with its large number of *madrasas*, a single *madrasa* like the *Nizamiyya* could not exercise the kind of power that might be required to implement government-sponsored policies. In Baghdad, there were a variety of *madrasas* with different law school affiliations. Each had their own teachers and institutions for appointing faculty. While Makdisi would agree that the jurists constituted a significant political force, he shows that any attempts to control the ‘*ulama*’, or jurists, via the *Nizamiyya* were doomed to failure because of the diversity of schools, with their attendant diversity of opinions, in the vicinity.¹⁰⁴

Importantly, Jonathan Berkey suggests that the institutional setting of the *madrasa* was less significant to the education of a jurist than the informal relationship that a student had with his teacher. Berkey argues that the informality of teacher-student relationships, rather than the formality of *madrasa* institutions, characterized the premodern Islamic educational system, thereby making the political contest over the *madrasa* less significant. ‘[T]he institutions themselves played no actual role in Islamic education . . . Islamic education remained fundamentally informal, flexible, and tied to persons rather than institutions.’¹⁰⁵ Berkey bases his argument, though, on negative evidence. He argues that many deeds of trust for *madrasas* do not mention salaries to teachers or stipends for students, thus suggesting the *madrasa* itself was more form than content-determinative. Furthermore, he notes that biographical dictionaries generally do not mention the specific schools where scholars taught or studied. Berkey recognizes that none of this evidence suggests that teaching did not occur in such institutions. Rather, he argues that premodern contemporaries ‘considered the venue of instruction and education to be of secondary importance: what was critical was the character and knowledge of the individuals with whom one had studied’.¹⁰⁶

Between Tibawi, Makdisi, and Berkey, we find competing views about the significance of the *madrasa*, as both a site of legal education and a site of political contest. Often this difference plays into arguments about the autonomy and separation of legal learning from government manipulation or centralization. The more one emphasizes the personal relationship between the teacher and student, the more one implicitly supports the thesis of separation in early Islam between the jurists and the ruling elite. The more the institutional context of the teacher-student relationship matters, then the more the relationship may be embedded in a larger contest over the autonomy of Shari‘a from the ruling regime.

This historical debate has the potential to fuel contemporary debates about the nature of Shari‘a, and whether modern state efforts to codify Islamic law and nationalize Islamic legal academies are legitimate or authentic. This study remains agnostic on the different positions noted above about the site of legal education in the premodern period. Furthermore, even if Berkey is correct in asserting the priority of the teacher–student relationship, nothing denigrates the institutional

¹⁰³ Tibawi, ‘*al-Madrasah*’, 232.

¹⁰⁴ Makdisi, ‘Muslim Institutions’.

¹⁰⁵ Berkey, *Transmission of Knowledge*, 17–18.

¹⁰⁶ Berkey, *Transmission of Knowledge*, 18.

role of the *madrasa* in organizing and ensuring a system of licensing.¹⁰⁷ There is no prerequisite that one adopt either the thesis of informality or the thesis of institutional formality to accept that the jurists represented a tradition that conferred upon them an authority about which government officials were wary, or alternatively covetous.¹⁰⁸ The *madrasa* as endowed (whether by private individuals or government officials) the scholar as a licensed authority, and the curriculum as a disciplinary feature, helped to constitute the boundaries of legality for Shari'a as a claim space. The fact that the *madrasa* became a site of contest between the juristic class and government officials only reminds us of how a rule of law frame of analysis allows us to appreciate the sometimes uneasy, but nonetheless mutually constitutive, relationship between Shari'a and the governing regime.

D. Conclusion

This introduction to Islamic law is meant to do more than offer an overview of Islamic legal history. In conjunction with the introduction to international human rights law by Kathleen Cavanaugh and the other chapters in Part I of this book, the aim of this essay is to aid the reader to understand and embrace the analytic paradigm that the authors of this volume utilize, namely the paradigm of 'clearing ground' that was referred to in the editors' introduction to this volume. Before we can clear ground, we must first have an initial understanding of where and what that 'ground' is and what is erected on top of it. To that end, Sections A and B offered an overview of Islamic law: its history, sources, and development. Section B brought the story of Islamic law into the 19th, 20th, and 21st centuries, which witnessed colonialism, anti-colonial resistance, and finally the independence of Muslim-majority states, many of which apply some aspects of Islamic law while drawing extensively on European legal paradigms for many, if not most, areas of law and regulation.

This is not to suggest that Islam and Islamic law are unimportant in these countries. Rather, the modern story of Islamic law in Muslim states, when viewed through the lens of rule of law, is a story of extensive legal pluralism, where multiple legal traditions constitute and define the claim space that confers legality to arguments of justice. From the historical overview provided in Sections A and B a certain irony arises. Premodern Islamic law was characterized by a certain kind of legal pluralism—a pluralism within Islamic law. Modern reforms, in the effort to give a semblance of order to that premodern diversity, have led to a different kind of legal pluralism: the pluralism of legal traditions (Islamic, European, international)

¹⁰⁷ See also Richard Bulliet, *Patricians of Nishapur. A Study in Medieval Islamic Social History* (Cambridge: Harvard University Press, 1972), 50.

¹⁰⁸ The definition of the '*ulama*' and whether there is a strict correlation between scholars and legal education in the *madrasa* is a separate debate that is beyond the scope of this study. For scholarly accounts on this issue, see Bulliet, *Patricians of Nishapur*; Roy Mottahedeh, *Loyalty and Leadership in an Early Islamic Society* (Princeton: Princeton University Press, 1980).

in a modern administrative state that exists alongside other equal and sovereign states in an international system of global governance.

Notably, this shift from one pluralism to another, combined with the piecemeal implementation of Shari'a doctrines in the modern state, have led some commentators to espouse a tragic narrative of Islamic law. That tragic narrative is characterized as a story of the subordination, marginalization, and even death of Islamic law.¹⁰⁹ Yet those who adopt the tragic narrative also adopt a view of the 'good' and 'authentic' Shari'a as the premodern tradition taught in the premodern *madrassa*, pursuant to a curriculum that contributed to a disciplined mode of inquiry, and independent from the systems and structures of governance.

As suggested in Section C, though, the contribution of rule of law as an interpretive lens reveals that the view of premodern Shari'a as decentralized, independent, and outside the sphere of governance is arguably more ideal than real. To view Shari'a from the perspective of rule of law is to recognize that it was and continues to be positioned at the intersection of both legal discipline and governance. That positioning has not changed, even in today's context of the modern state. What has changed is the extent to which Shari'a confers legitimating conditions of legality in the modern state, given the state's immersion in an international system beset by a plurality of legal regimes, all of which in the aggregate constitute the claim space of justice for a modern state. This is not meant to deny the violence done to the status and systemic coherence of Shari'a in the colonial period. Instead, it illustrates that despite the alteration in the kind and degree of Shari'a's role in governance, it continues to play (along with other legal traditions) a legitimizing role in a highly complex system of governance.

To focus on the legitimating function of Shari'a discourses is to take important steps toward the goals of this volume, namely to 'clear ground'. Such steps will reposition and reorient the questions we may ask of Shari'a as a historical tradition that remains very much part of contemporary debate across the world. Today both state and non-state actors invoke Islamic legal arguments to serve their own respective ends. In some cases, those ends concern political legitimacy. Shari'a offers a language of legitimacy that moves across the religious, legal, and political domains. Shari'a offers different groups a discipline and language by which to claim authority, to attack the legitimacy of others who claim authority, and even to fashion community identity in opposition to a threat, whether real or perceived.

¹⁰⁹ Khaled Abou El Fadl, 'My Friend' in *Conference of the Books: The Search for Beauty in Islam* (Lanham: University Press of America, 2001), 159–62. See also Wael Hallaq, 'Can the Shari'a Be Restored?', 22.