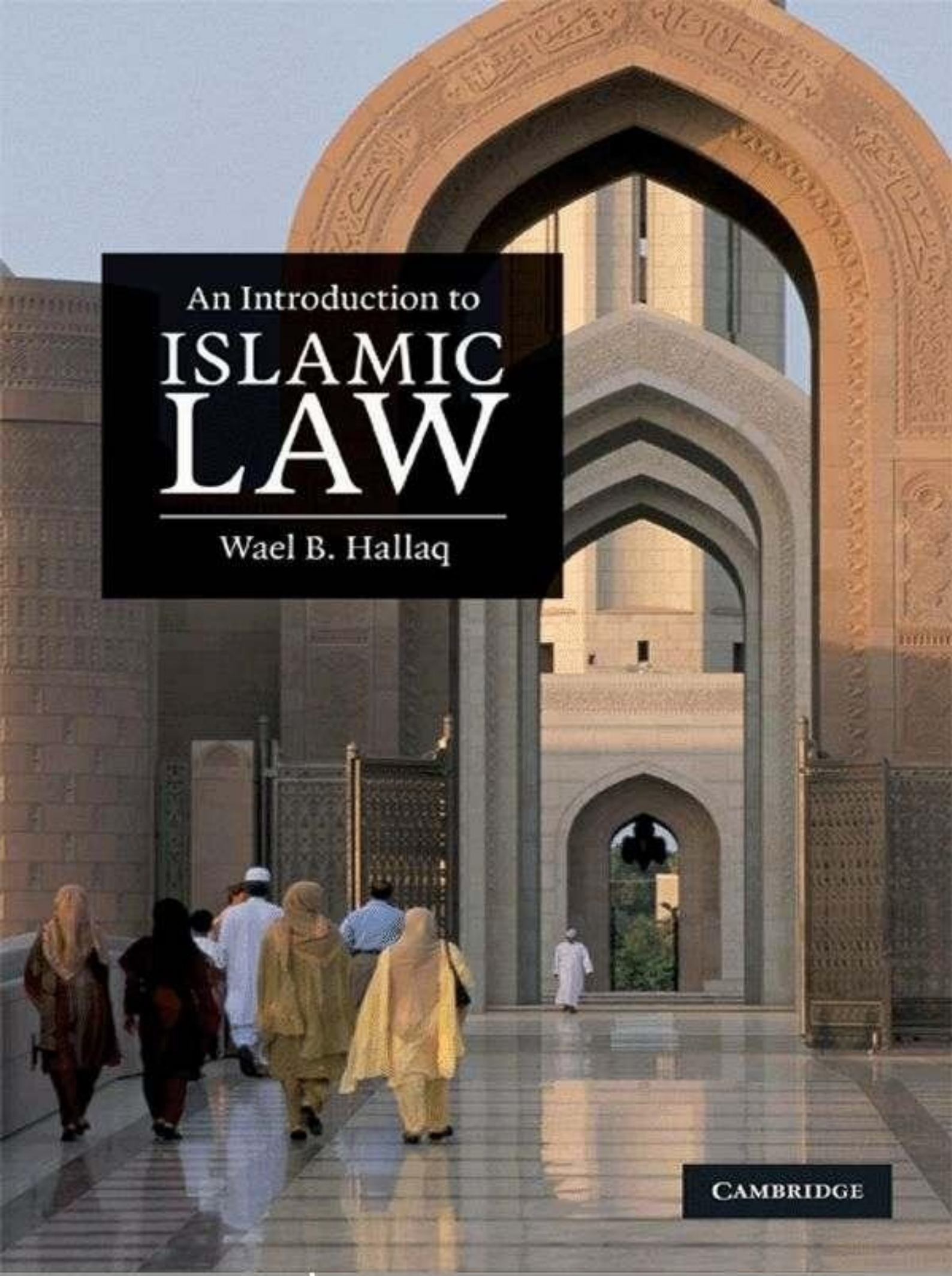

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An Introduction to Islamic Law

The study of Islamic law can be a forbidding prospect for those entering the field for the first time. Wael Hallaq, a leading scholar and practitioner of Islamic law, guides students through the intricacies of the subject in this absorbing introduction. The first half of the book is devoted to a discussion of Islamic law in its pre-modern natural habitat. The author expounds on the roles of jurists, who reasoned about the law, and of judges and others who administered justice; on how different legal schools came to be established, and on how a moral law functioned in early Muslim society generally. The second part explains how the law was transformed and ultimately dismantled during the colonial period. As the author demonstrates, this rupture necessitated its reinvention in the twentieth-century world of nation-states. In the final chapters, the author charts recent developments and the struggles of the Islamists to negotiate changes which have seen the law emerge as a primarily textual entity focused on fixed punishments and ritual requirements. The book, which includes a chronology, a glossary of key terms and lists for further reading, will be the first stop for those who wish to understand the fundamentals of Islamic law, its practices and its history.

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An Introduction to Islamic Law

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CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, Delhi
Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK
Published in the United States of America by Cambridge University Press, New York
www.cambridge.org
Information on this title: www.cambridge.org/9780521678735

First published in print format 2009
ISBN 978-0-511-72537-1 mobipocket
ISBN 978-0-511-72677-4 eBook (Kindle edition)
ISBN 978-0-521-86146-5 hardback
ISBN 978-0-521-67873-5 paperback

Dedicated to my students

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Introduction

One out of five people in our world today belongs to the Islamic faith. Yet we know very little about Muslims, about their culture, their religion, their history. Our bookstores are crowded with titles about Islam, mostly negative and nearly always concerned with "Islamic violence." Islamic law, or Shari'a, has in particular become an ugly term, as often associated with politics as with the chopping off of hands and the stoning of women. An endless array of popular books have distorted Shari'a beyond recognition, confusing its principles and practices in the past with its modern, highly politicized, reincarnations. Considering Shari'a's historical role as the lifeblood of Islam, we have little hope indeed – given these distortions – of understanding the history and psychology of as much as one-fifth of the population of the world in which we live.

This book attempts to correct misconceptions about Islamic law, first by giving a brief account of its long history and then by showing that what happened to it during the last two centuries made it what it has become. While, historically, it did its best to distance itself from politics and to remain an example of the rule of law, it has now ironically become a fertile political arena, and little else in terms of law. The book therefore attempts to provide the knowledge needed to explain why any mention of the Shari'a provokes distaste and even fear on our part. What brought this about? Was the Shari'a as harsh and oppressive as it is now depicted in the media? What were its doctrines and practices in history? How did it function within society and the moral community? Under what conditions did it coexist with the body-politic? How was it colonized and largely dismantled? And, finally, how were its remnants transformed into an oppressive regime, wielded above all by the relatively new nation-state (perhaps the most important factor in Shari'a's modern transformation)?

In order to explain how Islamic law worked, I begin, in chapter 1, with some introductory remarks about the people who made Islamic law what it was and about what they did as jurists and judges. In chapter 2, I discuss the ways and methods through which these jurists arrived at the law, showing the importance of interpretation in approaching the Quran and other sacred texts. In chapter 3, I explain how these jurists came to belong to different schools, but more importantly what these schools meant in terms of giving authority to the law (an authority that the modern state was to replace). In chapter 4, I turn to legal education, the means by which the juristic class reproduced itself over the centuries. This chapter offers a brief account of the workings of the "study circle" as well as of the law college, which has now become the infamous *madrasa*. The college, we will see, provided not only a point of contact between law and politics, but also an effective venue through which the ruling class

attempted to create and sustain political and religious legitimacy. Topics covered in this chapter are no doubt important in themselves, but they are also fundamental for understanding nineteenth- and twentieth-century developments where the appropriation of the Shari'a by the modern state was made possible through dynastic control of traditional legal education.

Chapter 5 takes into account the interaction between law and society, especially how the moral community constituted the framework within which the law court operated. Customary practices of mediation are shown to intersect with judicial practice and to complement it as well. Finally, this chapter provides a look at the place of women in the traditional legal system, a theme relevant to the arguments of chapter 8.

Closing our discussion of the pre-modern history of Islamic law, chapter 6 deals with the so-called "Circle of Justice," a long-standing Near Eastern culture of political management that employed the Shari'a not only for the purposes of acquiring political legitimacy by the ruler but also for achieving just rule as the ultimate realization of God's will. Governance according to the Circle of Justice represented one of the highest forms of the rule of law, where the "state" itself was subject to a law not of its own making (unthinkable in our modern state system).

With chapter 7, the book moves on to the modern period, not a chronological measure of time so much as a dramatic transformation in the structure of Islamic law. Hence, the "modern" takes off where and when such transformations occur, in British India, for example, at least half a century earlier than in most other Muslim countries. One of the major themes here is the negative impact brought about by the introduction into the Muslim legal landscape of the modern project of the state, perhaps – together with capitalism – the most powerful institution and feature of modernity. Thus, this chapter offers a historical narrative of legal colonization in key countries: India, Indonesia, the Ottoman Empire, Egypt, Iran and Algeria. The dominant theme throughout this chapter is how the Shari'a was transformed and, eventually, dismantled.

Chapter 8 continues the discussion of this transformation after World War I, focusing on two major themes: first, the methods through which changes in the law were effected at the hands of post-independence nationalist elites; and second, how the Shari'a was reduced to little more than a set of altered provisions pertaining to family law, and how the coverage of this sphere became a central concern of the state's will-to-power. Precisely because modern family law preserved the semblance of Shari'a's substantive law (claiming itself to be its faithful successor), it is of particular interest to examine how an oppressive patriarchal system, engineered by the state, came to replace another, arguably milder, form of traditional patriarchy.

This change in the structures and systems of Islamic law is indicative of the drastically different conditions that modernity came to impose on family life and matrimonial relationships, on legal institutions, and on society at large. Coupled with the emergence of oppressive modern states and a deep sense of moral loss, these changes have all combined (together with poverty and much else) to produce a social phenomenon that is predominantly political but also legal and cultural in orientation. This is the Islamist movement, which has been influencing much of what is happening in the Muslim world today. Chapter 9 therefore addresses the complex relationship

between the state, Islamists and the traditional religious establishment in a number of key countries – key, in that developments there have deeply affected most other regions in the Muslim world.

Finally, in chapter 10, I summarize some of the salient points of the book, especially those that show how the Shari'a was a living and lived system of norms and values, a way of life and a malleable practice. This in turn is contrasted with the manner in which the Shari'a has emerged in the modern world, namely, as a textual entity capable of offering little more than fixed punishments, stringent legal and ritual requirements, and oppressive rules under which women are required to live.

This book constitutes a select abridgment of my longer work *Sharī'a: Theory, Practice, Transformations*, recently published by Cambridge University Press. Unlike that longer work, intended for advanced readers, this book is not for specialists but rather caters for those who seek a simplified account of Islam and its law. Thus, in abridging the work, I have taken care to eliminate all theoretical and technical discussions and, as much as possible, specialized vocabulary. Those technical terms that I was compelled to retain here are mostly rendered in English – instead of Arabic – and have been wholly CAPITALIZED on first occurrence to indicate that they are defined and explained in the "Glossary of key terms," which the reader will find toward the end of the book. Because it frequently offers added information, and because it cross-references the entries, the Glossary perhaps deserves a reading on its own. In addition to a fairly expansive Chronology, I have also provided a list of "Suggested further reading," to be found at the end of the book as well.

Chapter 1, however, is mostly new, as are several paragraphs in chapter 2 and elsewhere. In the interest of economy of space, and partly because many of the sources I cited in the longer work were in Arabic, I have eliminated here all footnotes excepting those that support direct quotations from other authors. Readers who wish to examine my sources (or fuller arguments) will find them in the chapters of the longer work, corresponding to this book in the following manner: chapter 2 here corresponds to chapter 2 in the longer work; chapter 3 to section 7 of chapter 1; chapter 4 to chapter 3; chapter 5 to chapter 4; chapter 6 to chapter 5; chapter 7 to chapters 14 and 15; chapters 8 and 9 to chapter 16; and chapter 10 to chapter 18.

Part I
Tradition and continuity

1 Who’s who in the Shari‘a

In modern legal systems, judges, lawyers and notaries are unquestionably products of the legal profession. They are initially educated in elementary and secondary schools that are regulated by the state, and their education in the law schools from which they eventually graduate is no less subject to such regulation. They study the laws that the state legislates, although in some legal systems they also study the legal decisions of judges who are constrained in good part by the general policies of the state. The point is that the legal profession is heavily regulated by the state and its legal and public policies. It is difficult to think of any legal professional who can go on to practice law without having to pass some sort of exam that is directly or indirectly ordained by the state or its agencies. And when law students become lawyers, and lawyers become judges, their ultimate and almost exclusive reference is to law made by the state.

This situation would have been inconceivable in Muslim lands before the dawn of modernity. The most striking fact about traditional Islamic legal personnel is that they were not subject to the authority of the state, simply because the state as we now know it did not exist (in fact it did not exist in Europe either, its beginnings there going back to no earlier than the sixteenth century). Thus, until the introduction to the Muslim world – during the nineteenth century – of the modern state and its ubiquitous institutions, Muslims lived under a different conception and practice of government. (This is why we must not use the term “state” to refer to that early form of rule under which Muslims lived prior to the nineteenth century. Instead, we will reserve for that kind of authority such terms as “ruler,” “rule” or “government.”)

Pre-modern Muslim rule was limited in that it did not possess the pervasive powers of the modern state. Bureaucracy and state administration were thin, mostly limited to urban sites, and largely confined to matters such as the army of the ruler, his assistants, tax collection and often land tenure. People were not registered at birth, had no citizenship status, and could travel and move to other lands and regions freely – there being no borders, no passports, no nationalities, and no geographic fixity to residential status. A Cairene family, for instance, could migrate to Baghdad without having to apply for immigration, and without having to show documentation at borders, because, as I said, there were neither borders (not fixed at any rate) nor passports in the first place. And the farther people lived from the center of rule, the less they were affected by the ruler, his armies and his will to impose a certain order or even taxes on them. And the reason for this was simple: in order for the ruler to have complete control over far-away regions, he had to send armies and government officials whose cost of maintenance may not always have been covered by the taxes they levied from the populations under their control.

So, if there was no *state* to regulate society and the problems that arose in it, then how did people manage their affairs? The short answer is: self-rule. Communities, whether living in city quarters or villages, regulated their own affairs. If the civil populations felt it necessary to have a ruler, it was because of the specific need for protection against external enemies, be they raiding tribes, organized highway robbers or foreign armies who might wreak violence on them and play havoc with their lives. But the civil populations did not need the ruler to regulate their own, internal affairs, since such regulations were afforded by a variety of internal mechanisms developed over centuries by their own local communities. Customary law was an obvious source of self-regulation, but the Shar'ia was equally as important.

This is to say that the Shar'ia was not the product of Islamic government (unlike modern law, which is significantly the product of the state). It is true that the Muslim ruler administered justice by appointing and dismissing JUDGES, even defining the limits of their jurisdictions, but he could in no way influence how and what law should apply. So the question before us is: if the Muslim ruler did not create the law of the land, who did?

The answer is that society and its communities produced their own legal experts, persons who were qualified to fulfill a variety of functions that, in totality, made up the Islamic legal system. For now, we will speak – in a limited fashion and by way of an introduction – of four types of legal personnel who played fundamental roles in the construction, elaboration and continued operation of the Shari'a. These are the *MUFTI*, the AUTHOR-JURIST, the judge and the law professor. Of course there were other "players" in the legal system, including the notaries, the court witnesses and even the ruler himself (to be discussed in due course), but their role in the construction of the system and its continuing operation was not "structural" (by which I mean that the system would have remained much the same with or without their participation). But without the fundamental contributions of *mufti*, author-jurist, judge and law professor, the Shari'a would not have had its unique features and would not have developed the way it did. These four players, each in his own way, made the Shari'a what it was.

We begin with the *mufti* because of his central role in the early evolution of Islamic law and his important contribution to its continued flourishing and adaptability throughout the centuries. The *mufti*, performing a central function, was a private legal specialist who was legally and morally responsible to the society in which he lived, not to the ruler and his interests. The *mufti*'s business was to issue a *FATWA*, namely, a legal answer to a question he was asked to address. As a rule, consulting him was free of charge, which means that legal counsel was easily accessible to all people, poor or rich. Questions addressed to the *mufti* were raised by members of the community as well as by judges who found some of the cases brought before their courts difficult to decide. The first legal elaborations that appeared in Islam were the product of this question/answer activity. With time, these answers were brought together, augmented, systematized and eventually transmitted in memory as well as in writing as "law books."

The *mufti* stated what the law was with regard to a particular factual situation. As he was – because of his erudition – considered to have supreme legal authority, his OPINION, though non-binding, nonetheless settled many disputes in the courts of law. Thus regarded as an authoritative statement of law, the *fatwa* was routinely upheld and

applied in the courts. A disputant who failed to receive a *fatwa* in his or her favor was not likely to proceed to court, and would instead abandon his or her claim altogether or opt for informal MEDIATION.

*Mufti*s did not always "sit" in court, but this did not change the fact that they were routinely consulted on difficult cases, even if they resided at several days' distance from where the case was being decided. It was not unusual that a judge, say in Cairo, would send a letter containing a question to a *mufti* who lived, for instance, in Muslim Spain.

The authority of the *fatwa* was decisive. When on occasion a *fatwa* was disregarded, it was usually because another *fatwa*, often produced by an opponent, constituted a more convincing and better-reasoned opinion. In other words, and to put it conversely, it was rare for a judge to dismiss a *fatwa* in favor of his own opinion, unless he himself happened to be of a juristic caliber higher than that enjoyed by the *mufti* from whom the *fatwa* was solicited (in which case the judge himself would not seek a *fatwa* in the first place). All this is to say that the *fatwa* is the product of legal expertise and advanced legal knowledge, and the more learned the *mufti*, the more authoritative and acceptable his *fatwa* was to both the court and the public. (The level of a scholar's legal knowledge was determined through practice, not degrees or diplomas. The measure of a leading jurist was, among other things, the quality of his writings and *fatwa*s as well as his ability to win in scholarly debates with distinguished scholars.)

The central role of the *fatwa* in the Muslim court of law explains why the decisions of judges were neither kept nor published in the manner practiced by modern courts. In other words, law was to be found not in precedent established by courts of law (a notion based on the doctrine of *STARE DECISIS*), but rather in a juristic body of writings that originated mostly in the answers given by *mufti*s.

Thus, emanating from the world of legal practice, the *fatwa*s rather than court decisions were collected and published, particularly those among them that contained new law or represented new legal elaborations on older problems that continued to be of recurrent relevance. Such *fatwa*s usually underwent a significant editorial process in which legally irrelevant facts and personal details (e.g., proper names, names of places, dates, etc.) were omitted. Moreover, they were abridged with a view to abstracting their contents into strictly legal formulas, usually of the hypothetical type: "If X does Y under a certain set of conditions, then L (LEGAL NORM) follows." Once edited and abstracted, these *fatwa*s became part and parcel of the authoritative legal literature, to be referred to and applied as the situation required.

The great majority of Islamic legal works, however, were written not by the *mufti*, but rather by the author-jurists who depended in good part on the *fatwa*s of distinguished *mufti*s. The author-jurists' activity extended from writing short but specialized treatises to compiling longer works, which were usually expanded commentaries on the short works. Thus, a short treatise summing up the law in its full range usually came to about two hundred pages, and often elicited commentaries occupying as many as ten, twenty or thirty large volumes. It was these works that afforded the author-jurists the opportunity to articulate, each for his own generation, a modified body of law that reflected both evolving social conditions and the state of the art in the law as a technical discipline. The overriding concern of the author-jurists was the incorporation of points of law (for the most part *fatwa*s) that had become relevant

and necessary to the age in which they were writing. This is evidenced in their untiring insistence on the necessity of including in their works "much needed legal issues," deemed to be relevant to contemporary exigencies as well as those issues of "widespread occurrence."[1] On the other hand, cases that had become irrelevant to the community and its needs, and having thus gone out of circulation, were excluded. Many, if not the majority, of the cases retained were acknowledged as belonging to the "later jurisprudents" who had elaborated them in response to the emerging new problems in the community. Reflecting in their writings the "changing conditions of people and of the age,"[2] the author-jurists opted for later opinions that were often at variance with the doctrines of the early masters. It is also instructive that the *fatwa*s that formed the substance of later doctrine were those that answered contemporary needs and had at once gained currency in practice. On the other hand, those opinions that had ceased to be of use in litigation were excluded as weak or even irregular.

Many of the works written and "published" by the author-jurists served as standard references for judges, who studied them when they were students and consulted them after being appointed to the judiciary. Hence, if the authority of the law resided in the *mufti*'s opinions and the author-jurist's treatises, then the judge – unless he himself was simultaneously a *mufti* and/or an author-jurist – was not expected to possess the same level of expert legal knowledge. This is to say that a person who was a *mufti* or an author-jurist could usually function as a judge, although a judge who was trained only as a judge could serve neither in the capacity of a *mufti* nor in that of an author-jurist.

It is obvious that the business of a judge is to adjudicate disputes, which is indeed the chief task of a modern judge. But this task was only one of many other important duties that the Muslim judge, the *QADI*, had to undertake. The *qadi*, like the *mufti*, was a member of the community he served. In fact, Islamic law itself insists that a *qadi*, to qualify for the position, has to be intimately familiar with the local customs and way of life in the community in which he serves. With the help of his staff, which we will briefly discuss in due course, he was in charge of supervising much in the life of the community. He oversaw the building of mosques, streets, public fountains and bridges. He inspected newly constructed buildings and the operation of hospitals and soup-kitchens, and audited, among other things, the all important CHARITABLE ENDOWMENTS. He looked into the care afforded by guardians to orphans and the poor, and himself acted as guardian in marriages of women who had no male relatives. Moreover, the *qadi* oftentimes played the exclusive role of mediator in cases that were not of a strictly legal nature. Not only did he mediate and arbitrate disputes and effect reconciliations between husbands and wives, but he also listened, for example, to the problems dividing brothers who might need no more than an outsider's opinion.

Furthermore, the Muslim court was the site in which important transactions between individuals were recorded, such as the sale of a house, the details of the estate of a person who had died, or a partnership contract concluded between two merchants. At times a person might approach the court merely to request that it take note of an insult directed at him or her by another, this being equivalent to building a "history" in the event a future dispute erupted with that person.

Equally important was the social site in which the *qadi* and his court functioned.

Judges invariably sought to understand the wider social context of the litigating parties, often attempting to resolve conflicts in full consideration of the present and future social relationships of the disputants. Like mediators, but unlike modern judges, the *qadi*s tried hard, wherever possible, to prevent the collapse of relationships so as to maintain a social reality in which the litigating parties, who often came from the same community, could continue to live together amicably. Such a *judicial* act required the *qadi* to be familiar with, and willing to investigate, the history of relations (and relationships) between the disputants.

Finally, we must say a few words about the law professor. The beginnings of legal education in Islam can in fact be traced back to the *mufti*s who emerged during the last two or three decades of the seventh century as private specialists in the law. They did not have salaries and their interest in the study of law was motivated by piety and religious learning. Around each of these early *mufti*s gathered a number of students – and sometimes the intellectually curious – who were interested in gaining knowledge of the Quran and the biography of the Prophet Muhammad as an exemplary standard of conduct. These gatherings usually took place in the new mosques that were built in the various cities and towns that had come under the rule of Islam. Following the practice of Arab tribal councils when they assembled to discuss important issues, these scholarly gatherings took the form of CIRCLES, where the *mufti*/professor would literally sit on the ground, legs crossed, having students and interested persons sit to his left and right in a circular fashion. (This was also the physical form that court sessions took.) Students did not have to apply formally to study with a professor, although his informal approval to have them join his circle was generally required – as was proper decorum on the part of the student. There were no fees to be paid, except the occasional gift the professor might have received from students or their family members. There were no diplomas or degrees conferred upon graduation, only a license issued by the professor attesting that the student had completed the study of a book that he in turn could transmit or teach to others. The license was personal, having the authority of the professor himself, not that of an impersonal institution (as are the degrees granted by today's universities).

During the first two centuries of Islam, the distinction between a *fatwa* assembly and a teaching circle was not always clear-cut or obvious. In fact, to some extent, this situation continued to obtain even throughout the later centuries when a *mufti* sitting in a circle would announce the end of a *fatwa* session, would open another session for adjudicating cases – thus acting as a judge – and perhaps in the afternoon (at times after sharing a meal with his students) would set up yet another circle for teaching. (We often read in the sources that many JURISTS wrote their legal treatises during the night hours – and in seclusion – thereby acting in the capacity of author-jurists. It must be said that those who acted in all four capacities were usually regarded as among the most accomplished jurists.)

Some *fatwa*s encountered in a *fatwa* session might be discussed in the teaching circle, while some students who participated in the teaching or *fatwa* circle might act as witnesses when the circle was transformed into a court session. Thus, while these three activities or spheres were different from each other, they were interrelated in several ways, at both the level of student participation and that of professor. If a person could act as a *mufti*, then he could teach, and was certainly qualified to perform the

duties of a judge (provided, of course, that he had been appointed as *qadi* by the ruler or governor).

Judges, as government appointees, were financially remunerated by the ruler for their work, but not so *mufti*s or professors (with the partial exception of later OTTOMAN practice, which we will discuss in due course). Still, during the first four or five centuries of Islam, even judges did not hold such appointments full-time, and when they did not, had to find, like *mufti*s and professors, other sources of income. This is to say that until the legal profession was institutionalized, the jurists of Islam were not, in terms of gaining a livelihood, full-time legal professionals, however learned and skilled in the law they were. Thus, until the eleventh or twelfth century, the vast majority of jurists held other jobs, with many of them working as tanners, tailors, coppersmiths, copiers of manuscripts, and small merchants and traders. In other words, they generally belonged to what we call today the lower and middle, rather than the upper classes.

[1] Wael Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), 188–89.

[2] *Ibid*.

2 The Law: how is it found?

Introduction

The question that we need to address briefly at this point is: How did the *mufti*s and author-jurists derive the law from its sources? What, in other words, were the interpretive means and methods of reasoning through which the law was inferred? Before we proceed, however, an important point must be made.

Since the first century of Islam, Muslim legal thinking has had to wrestle with the problem of the extent to which human reason can guide humankind in conducting its material and spiritual affairs. Some philosophers thought that the leading intellectuals might be able to exercise their rational faculties in order to judge what is good and what is bad in the way we deal with each other as social beings, and with the natural world around us. They may know, thanks to their trained intellects, that a certain code of morality or a set of particular laws is *rationally* required for the orderly and civil functioning of society. They may even understand – given that they have all the facts at hand – that the natural environment around us must not be abused and that we are an integral part of this natural order. Damage that and we damage ourselves in the process.

Yet law is not relevant only to intellectuals, since it is essential to society at large, i.e., to the uneducated man or woman as much as to the highly learned. How can ordinary people come to understand the need to abide by certain patterns of conduct if they do not possess the means to think through life's intricate situations or the world's more complex problems? How can even the elite intellectuals determine the exact way in which we should behave properly? Thus, Islamic law and theology posed the central question: Does rational thinking, *on its own*, accomplish the job? Or, to put it differently, is rational thinking – even in its best forms – sufficient for Muslims to know precisely how to conduct themselves in their worldly and religious affairs? (To bring this point into sharp relief, and to continue with the aforementioned example about the natural order, one might consider that our best rational and scientific thinking has led us – during the last century or so – to the virtual destruction of our natural environment.)

The Muslim jurists and most Muslim theologians held the view that rational thinking is a gift from God and that we should fully utilize it – like everything else that He bestowed on us – in as wise and responsible a manner as possible. Just as His material blessings (the wealth some of us have come to possess) must be deployed for

good works, our intellects must likewise be exercised for good causes. But what are these good works and causes? What is their *content*? If God granted us precious intellects, by what measure do we think about the world, about its human, material and physical components? In other words, how do we determine what is good and what is evil, what is beneficial and what is harmful in both the short and long runs? In yet other words, it is not only precisely *how* we think but also, and equally important, *what substantive assumptions* must we make when exercising our processes of thought? For example, the content of our modern rationalist thinking about the natural environment may be our immediate concern with material welfare and physical comfort (leading, among other things, to heavy industrialization), but the consequences of this thinking and the ensuing actions could well lead us to an environmental disaster. On the other hand, if the positive content of our rationalist thinking were to be, say, the integrity of the natural order (as, for example, Buddhism teaches), then our conclusions and therefore resultant actions and effects would be entirely different, despite the fact that nothing in our rationalist methods *themselves* has changed. It was precisely this dilemma that Muslims encountered virtually from the beginning of their religion. And their solution was, as it continued to be for centuries, that, however precious, *rationalist thought on its own is insufficient*.

Islamic legal tradition adopted the position that, while our reason is to be exercised to its fullest capacity, the *content* of rational thinking must be predetermined, transcendental and above and beyond what we can infer through our mental faculties. Implied in this thinking was the assumption that humans simply do not understand all the secrets of the world, so that attempting to control it is to be vain and arrogant. God is the One who created the world and therefore the One who knows its secrets. We may exercise our intellects to their fullest capacity, but without His aid, we will overlook and misunderstand much. The content of rationality, in their thinking, must thus be predetermined by the all-knowing God, who has revealed a particular body of knowledge through the Quran and the Prophet. This combination, viewed as a marriage between reason and revelation, was the ultimate source of law. Law, put differently, was the child of this marriage.

Transmission of texts

With this background in mind, Muslim jurists proceeded to articulate a theory of law (*USUL AL-FIQH*) that reflected the concerns and goals of this “marriage.” The theory began with the assumption that the Quran is the most sacred source of law, embodying knowledge that God had revealed about human beliefs, about God himself, and about how the believer should conduct himself or herself in this world. This human conduct was the domain of law, and to this end the Quran contained the so-called “legal verses,” some five hundred in all (the others being theological, exhortative, etc.).

But God also sent down a prophet, called Muhammad, whose personal conduct was exemplary. Though not, according to Muslim tradition, endowed with divine qualities (as Jesus Christ is said to have been by Christians), Muhammad was God’s chosen

messenger; he understood God's intentions better than anyone else, and acted upon them in his daily life. Hence the exemplary nature of his biography, which became known in the legal literature as SUNNA – the second major source of law after the Quran. The concrete details of the Sunna – that is, what the Prophet had done or said, or even tacitly approved – took the form of specific narratives that became known as *HADITH* (at once a collective and a singular noun, referring to the body of *hadith* in general and to a single *hadith*, according to context). For example, the Sunna of the Prophet generally promotes the right to private property, but the precise nature of this right was not made clear until the pertinent *hadith*s became known. Thus, we learn in one such *hadith* that when the Prophet once heard that someone had cultivated plants on the land of his neighbor without the latter's knowledge, he said: "He who plants, without permission, in a lot owned by other people cannot own the crops although he is entitled to a wage [for his labor]." In the context of property rights, he also said: "He who unlawfully appropriates as much as one foot of land [from another], God will make seven pieces of land collapse on him when the Day of Judgment arrives." These two *hadith*s, along with many others, give a good idea of what the Prophetic Sunna – as an abstract concept – aims to accomplish in the vital area of property law.

One of the concerns of legal theory was to provide criteria by which the subject matter of the *hadith*s (which, in their entirety, exceeded half a million) might be transmitted from one generation to the next in a reliable manner. The application of these criteria finally resulted in the acceptance of only about 5,000 sound *hadith*s. Thus, a *hadith* that had been passed down via a defective or interrupted chain of transmitters, or by transmitters known to be untrustworthy, was held to lack any legal effect even though its language might be clear and unequivocal. For example, if I know that a *hadith* was transmitted to me from A, B, C, D and F on the authority of the Prophet, but the identity of E is unknown to me or, alternatively, I know him to have been untrustworthy, then I cannot use the *hadith* for reasoning about the law. If the *hadith* passes the test of sound transmission but consists of ambiguous words whose exact meaning I am unable to determine with any precision, then the *hadith* is also rendered useless as the basis of legal reasoning.

Even the Quran contains such ambiguous language, but in terms of transmission it is regarded as *wholly certain*, since the entire community of Muslims was involved in its conveyance from one generation to the next. This position stems from the theory of CONSENSUS, namely, that it is inconceivable for the entire Muslim community to conspire on a falsehood, including forging or distorting the holy Book. Thus, for a text to be deemed credible beyond a shadow of doubt (i.e., to have certainty), it must meet this requirement of multiple transmission, which we will here call RECURRENCE. For recurrence to obtain, three conditions must be met: first, the text must be conveyed from one generation to the next through channels of transmission sufficiently numerous as to preclude any possibility of error or collaboration on a forgery; second, the first class of transmitters must have had sensory perception of what the Prophet said or did; and third, the first two conditions must be met at each stage of transmission, beginning with the first class and ending with the last narrators of the report.

Any text transmitted through channels fewer than those by which the recurrent report is conveyed is termed SOLITARY, although the actual number of channels can

be two, three or even more. With the possible exception of a few, the *hadith* reports are generally considered solitary, and, unlike the Quranic text, they do not possess the advantage of recurrence. In fact, there were far more fabricated, and thus weak, *hadith*s than there were sound ones. But even these latter did not always engender certainty, since most were of the solitary type and therefore yielded only probable knowledge. If all this points to anything about Islamic law, it is its own acknowledgment that, as a practical field, religious law (mostly *hadith*-derivative) does not have to enjoy certainty. Certainty is necessary only when the issue at stake is either the status of one of the law's FOUR SOURCES or a higher order of belief, such as the existence of God himself. As a system of belief and practice, the law on the whole cannot be considered legitimate or meaningful if one or more of its sources rests on probable, and thus uncertain, foundations; or if God himself, the originator of the Law, is not known to exist with certainty.

As we intimated earlier, the trustworthiness of individual transmitters played an important role in the evaluation of *hadiths*. The attribute that was most valued, and in fact deemed indispensable and determinative, was that of being just, i.e., being morally and religiously righteous. A just character also implied the attribute of being truthful, which made one incapable of lying. This requirement was intended to preclude either outright tampering with the wording of the transmitted text, or interpolating it with fabricated material. It also implied that the transmitter could not have lied regarding his sources by fabricating a chain of transmitters, or claiming that he had heard the *hadith* from an authority when in fact he had not. He had also to be fully cognizant of the material he related, so as to transmit it with precision. Finally, he must not have been involved in dubious or "sectarian" religious movements, for if this were the case, he would have been liable to produce heretical material advancing the cause of the movement to which he belonged. This last requirement clearly suggests that the transmitter must have been known to be loyal to Sunnism, to the exclusion of any other community. The TWELVER-SHIʿIS had a similar requirement.

Transmitters were also judged by their ability to transmit *hadith*s verbatim, for thematic transmission ran the risk of changing the wording, and thus the original intent, of a particular *hadith*. Furthermore, it was deemed preferable that the *hadith* be transmitted in full, although transmitting one part, thematically unrelated to the rest, was acceptable.

The jurist may encounter more than one *hadith* relevant to the case he is trying to solve, or *hadith*s that may be contradictory or inconsistent with one another. If he cannot reconcile them, he must seek to make one *hadith* preponderant over another by establishing that the former possesses attributes superior to, or lacking in, the latter. The criteria of preponderance depend on the mode of transmission as well as on the subject matter of the *hadith* in question. For example, a *hadith* transmitted by mature persons known for their prodigious ability to retain information is superior to another transmitted by young narrators who may not be particularly known for their memory or precision in reporting. Similarly, a *hadith* whose first transmitter was close to the Prophet and knew him intimately is regarded as superior to another whose first transmitter was not on close terms with the Prophet. The subject matter also determines the comparative strength or weakness of a *hadith*. For instance, a *hadith* that finds thematic corroboration in the Quran would be deemed more weighty than