

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 *Shari‘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

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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.

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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**.

Muftis 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 *fatwas* 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 *muftis*.

Thus, emanating from the world of legal practice, the *fatwas* 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 *fatwas* 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 *fatwas* 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 *fatwas* of distinguished *muftis*. 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 *fatwas*) 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

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

acknowledged as belonging to the “later jurists” 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 *fatwas* 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.

² *Ibid.*