The Institute of Ismaili Studies

MUSLIM HERITAGE SERIES, 5

General Editor: Amyn B. Sajoo

This series explores vital themes in the civilisations of Islam – including the nature of religious authority, ethics and law, social justice and civil society, the arts and sciences, and the interplay of spiritual and secular lifeworlds. In keeping with the Institute's mandate, the series is informed by the plurality of communities and interpretations of Islam, as well as their locus in modernity and tradition.

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The Shari'a

History, Ethics and Law

Edited by
Amyn B. Sajoo

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The Institute of Ismaili Studies

The Institute of Ismaili Studies was established in 1977 with the object of promoting scholarship and learning on Islam, in the historical as well as contemporary contexts, and a better understanding of its relationship with other societies and faiths.

The Institute's programmes encourage a perspective which is not confined to the theological and religious heritage of Islam, but seeks to explore the relationship of religious ideas to broader dimensions of society and culture. The programmes thus encourage an interdisciplinary approach to the materials of Islamic history and thought. Particular attention is also given to issues of modernity that arise as Muslims seek to relate their heritage to the contemporary situation.

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1. Occasional papers or essays addressing broad themes of the relationship between religion and society, with special reference to Islam.
2. Monographs exploring specific aspects of Islamic faith and culture, or the contributions of individual Muslim thinkers or writers.

Introduction: A Multifaceted Venture

Amyn B. Sajoo

'Now we have set you on a clear religious path [shari'a], so follow it.'

Qur'an, 45:18[1]

'Ninety-nine per cent of shari'a is about ethics, worship, the hereafter, and virtue. Only 1 per cent of it is about politics; the rulers are supposed to think about that part.'

Bediuzzaman Said Nursi (1877–1960),
Risale-i Nur Kulliyati (Istanbul, 1909)

A dance of ethics, law and spirituality – immersed in local cultures – is featured in all the world's faith traditions. Monotheisms offer a scriptural stage for this dance: the Old and New Testaments, the Qur'an, as well as closely associated texts such as the Talmud and Hadith. And such a platform is not lacking in Buddhist, Hindu, Zoroastrian and other traditions: their body of canonical teachings likewise seeks to engage both the intellect and the spirit. Indeed, secular scriptures abound in the form of constitutions and human rights proclamations, where a constant rethinking of ethics, law and a deeper vein of truth is summoned up by citizens. A 'surplus of meaning' allows such texts to remain fresh and pivotal across the ages, as their readers engage in the remaking of a tradition.[2] So it is with the shari'a.

In its unfolding since the 7th century, an array of social, philosophical and mystical resources have come into play. When the Qur'an calls attention to this 'path' (45:18), it is manifestly the ethical

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[1] *The Qur'an*, trans. M.A.S. Abdel Haleem (Oxford, 2010), cited throughout this chapter. The verse addresses Muhammad ('you') and is dated to Mecca before his migration (*hijra*) in 622 CE to Medina.

[2] Paul Ricoeur, *Interpretation Theory: Discourse and the Surplus of Meaning* (Ft. Worth, TX, 1976).

teaching that defines it. This theme is revisited later in Muhammad's prophetic mandate, in the context of a shared Judeo-Christian-Muslim scripture:

> We have assigned a law and a path to each of you. If God had so willed, he would have made you one community, but he wanted to test you ... and he will make clear to you what you differed about. (Qurʾan, 5:48)

The reference to a religious/spiritual path here stakes a claim to transcendence, beyond the particulars of rites and rituals. Muslims would come to develop a legal discourse (*fiqh*) around the ethical and spiritual teaching in the decades ahead, one that flourished over centuries into a full-blown juridical tradition. But the Qurʾan itself was minimally concerned in this regard, with few verses offering legal imperatives.[3] Indeed, when legal discourses were felt by some influential thinkers in the medieval period to have become too dominant an aspect of Islam, they pushed back to reclaim the ethical, notably through the idea of *maslaha*, the public good. For the shariʿa was felt to be more than mere rules that commanded how to be Muslim; on the contrary, regarding it as such would shortchange its *moral* scope.

This introductory chapter engages with the three broad avenues – history, ethics and law – through which the shariʿa is approached in this volume, the fifth in the Muslim Heritage Series. It will do so first through the lens of 'perception and reality,' with regard to diverse communities of Muslims, and indeed non-Muslims. How and why is the shariʿa understood in the ways that it is today? This is followed by an outline of our contributors' responses to the myriad issues of form and substance about the shariʿa – in effect, the dance of the moral and legal through history, down to modernity. Earlier volumes in the series addressed the shariʿa in diverse contexts, including a fulsome treatment of its locus between modernity and tradition by Abdullahi An-Naʾim in the preceding volume, *A Companion to Muslim Cultures*. Yet the subject has surely earned a claim to a distinct volume, given the evolving place of the shariʿa in the civilisational heritages of Islam. Moreover, it is difficult to conceive of a subject, and a term, that is today more charged with contentious meaning, among Muslims as

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[3]   According to the noted Egyptian judge and authority on the shariʿa, Muhammad al-Ashmawy, some 200 Qurʾanic verses offer substantial legal detail – a miniscule fraction of the scriptural text: *Maʿalim al-islam* (Milestones of Islam) (Cairo, 1989), p. 182.

well as non-Muslims. In keeping with the mandate of this series, we seek to offer an *accessible* set of chapters, by scholars with considerable expertise in their particular areas of research, to sketch a rich portrait of the shariʿa in its varied expressions.

What the Shariʿa Is – and Is Not

As with the term *jihad*, the very mention of the shariʿa conjures associations and images that speak to the climate of 'political religion'. For Muslims and non-Muslims alike, much is read *into* the understanding of the shariʿa, with scant regard for its historical, cultural or theological underpinnings. The politics of identity, both secular and religious, that deeply inflects contemporary life has not spared the shariʿa. During the 2010–11 Arab Spring, for example, many activists in Egypt, Libya, Syria, Tunisia and Yemen sought to appropriate the shariʿa on behalf of their particular national project, on the premise of state custodianship and constitutional proclamation of this body of ethical and spiritual guidance. Many non-Muslim activists in the West have been equally certain about what the shariʿa stands for: an austere code of law that is inherently hostile to liberal values. Women and men across the Muslim-majority societies of Central-South Asia, West Africa and the Middle East differ on whether, and how, the shariʿa should shape legislation and public policy. In short, an abundance of heat and noise attends the idea, in striking contrast to the evidence of its locus in the lives of Islam's earliest communities. What would they make of these modern sentiments? It is time to address head-on the mythology around the shariʿa today, with further elaboration in the following chapters.

Myth 1: The Shariʿa Is a Framework of Divine Law

Muslims have from the outset regarded the Qurʾan as the word of God revealed to the Prophet Muhammad, who duly conveyed every detail to individuals and to clusters of the faithful in Mecca and Medina between 610 and 632 CE. 'If divine guidance is needed, it is for the purpose of setting human life in good order,' notes Wael Hallaq; Muslims took this to be about how to find peaceful accord with oneself, with society and with the world at large.[4] It was the quest to understand that guidance that gave birth to the shariʿa: daily acts were categorised as 'required' (*wajib*), 'recommended' (*mandub*), 'disapproved' (*makruh*), 'forbidden'

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[4] W. Hallaq, *Shariʿa: Theory, Practice, Transformations* (Cambridge, 2009), p. 84.

(*haram*) and 'neutral' (*mubah*). Inspired by the Qur'an as well as the teachings and conduct of the Prophet (*Sunna*), the five categories are evidently both moral and legal in their tenor. They have remained authoritative for the faithful through the ages, applying far beyond the small stock of legal imperatives that are set forth in the text of the Qur'an. But these distinctive categories are not part of 'revelation'; they appear neither in the Qur'an nor the Sunna. Likewise, what are deemed to be the essential objectives (*maqasid*) of the shariʿa – the safeguarding of religion, life, intellect, lineage and property – emerged historically as interpretations. They underscore the fact that the shariʿa was a mortal endeavour to come to terms with divine guidance in particular social and historical settings; as such, the endeavour has not ceased since its founding age. To confuse the shariʿa with the Qur'an is hardly a light matter for Muslims; nor should it be for non-Muslims. Further, since the Qur'an, like any scripture, has always been subject to diverse readings, one expects the shariʿa, as a derivative framework of ethical-legal guidance and governance, to be highly pluralist in sensitivity to place and time.

Yet a significant number of Muslims regard the shariʿa as a divine legal code, one that is comparable to modern European ones.[5] This is borne out by a Pew Centre survey, in which majorities ranging from 75 to 81 per cent in the Middle East and South Asia (including Afghanistan) held this view, with smaller majorities of 44–69 per cent in Central and Southeast Asia.[6] The minority view was that the shariʿa was a human endeavour based on/inspired by the word of God. Opinion is more evenly divided as to whether the shariʿa is open to diverse interpretations, including in the Middle East and Southeast Asia, but a majority in South Asia hold to a single interpretation. Strong majorities in the latter, and more modest ones in the Middle East and Southeast Asia, as well as in much of West Africa, favour enacting the shariʿa as the law of the land.[7] The findings are consistent with a more specific survey by the Merdeka Centre in ethnoculturally diverse Malaysia, where there is a 'substantial disjuncture between popular consciousness and core epistemological commitments'

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[5]   A. Amanat and F. Griffel, ed., *Shariʿa: Islamic Law in the Contemporary Context* (Stanford, CA, 2007), Introduction, p. 13; A.A. An-Naim, *Toward and Islamic Reformation* (Syracuse, NY, 1990), pp. 11–12; J. Esposito and D. Mogahed, *Who Speaks for Islam: What a Billion Muslims Really Think* (New York, 2007), pp. 52–55.

[6]   The Pew Research Centre, *The World's Muslims: Religion, Politics and Society* (Washington, DC, 2013), pp. 42–43: accessible at http://www.pewforum.org/2013/04/30/the-worlds-muslims-religion-politics-society-beliefs-about-sharia/.

[7]   Ibid., pp. 44–46.

in classical shariʿa and Islamic law.[8] Ironically, such populist views are increasingly shared among non-Muslims in the western diaspora, with campaigns against 'shariʿa law' and its supposed imposition on secular national codes.[9] Nearly one-third of Americans opined in a *Newsweek* survey that the imposition of Islamic law was viewed sympathetically by President Barack Obama.[10] Anxieties among Muslims and non-Muslims alike about identity and governance underpin these stances amid a host of isms: post-colonialism, secularism, orientalism, globalism, terrorism. Wherefore, then, the quest for a moral compass that impelled the shariʿa in the first place?

Myth 2: The Shariʿa Is Ritual and Social Regulation

The shariʿa is commonly seen as a code of regulation for Muslims, governing matters that range from private devotion (affirming faith, modes of prayer, fasting, charity, pilgrimage) to communal conduct (family life, modes of dress, responsibility towards the poor/vulnerable, economic transactions, upholding the law, defending the faith). This relates to the oft-invoked Qurʾanic injunction 'Be a community (*umma*) that calls for what is good, urges what is right and forbids what is wrong' (3:104). Typically, the shariʿa is divided into the domains of *ʿibadat* or ritual devotion (closely tied to revelation, hence unchanging) and *muʿamalat* or social relations (rooted in revelation but more amenable to adaptation). That both domains are pursuits of the 'good' surely underscores the scope of the shariʿa as encompassing belief, intention and actual practice; one's relationship with God (*ʿibadat*) and one's relationship with one's fellow humans (*muʿamalat*) were ethically intertwined. But the popular idea that the shariʿa serves as a regulatory code means that *ʿibadat* and *muʿamalat* are subject to the scrutiny of standards which are essentially juridical (and patriarchal). 'What is right' is thence reduced to what is lawful. And if this is tied to what is divine, then the shariʿa is readily turned into a rigid code to be enforced by the powers that be, notably the modern state, on behalf of a transcendent

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[8] T. Moustafa, 'Islamic Law, Women's Rights, and Popular Consciousness in Malaysia', *Law & Social Inquiry* 38 (2013), pp. 168–188.

[9] D. DeKok and T. James, 'Protesters Rally Against Islamic Law in Several US Cities', *Reuters*, 10 June 2017: accessible at http://www.reuters.com/article/us-usa-islam-protests-idUSKBN1910RC; M. Humphrys, 'Sharia Law in the West' (dedicated to anti-shariʿa campaigns in Europe and North America): accessible at http://markhumphrys.com/sharia.west.html.

[10] Accessible at http://nw-assets.s3.amazonaws.com/pdf/1004-ftop.pdf.

authority.[11] This stands in stark contrast to the spirit of the historical shari'a, which sought to foster socioeconomic life in 'the interests of the communities of believers, not those of the ruler (or ruling class)'.[12]

Without its moral and spiritual vitality, the shari'a becomes nothing more than another corpus of law, albeit more 'intrusive' in its scope than a standard secular code. All the more so where its ethical authority, which necessarily relies on *voluntary* submission with regard to ritual and social matters alike, is treated instead as coercive regulation. Classical Islam was filled with communities, eminent teachers and whole traditions that thrived on this fuller appreciation of the shari'a; their legacy lives on in Shi'i and Sunni practice across the Muslim world and the diaspora today. Of the essence here is the 'esoteric and intuitive reading of the Qur'an,' which makes the shari'a part of the search for wisdom (*ma'rifa*) and, ultimately, the truth (*haqiqa*).[13] Consistent with the Qur'anic reminder of the pluralistic message of revelation itself (5:48), the shari'a is here conceived as one among many paths to God. But what of the argument that fiqh, as the vast legal 'expression' of the shari'a, is a fastidious regulatory corpus that commands compliance because of its link to the authority of the Qur'an and the Sunna? This still misses the mark: fiqh, like the shari'a, is not only the outcome of human interpretation in shifting contexts but is also a pursuit of understanding (the literal meaning of fiqh). In turn, this 'legal' pursuit yields particular rules or *ahkam* with regard to proper practice. The fallibility of this venture is brought out in Intisar Rabb's seminal account of the place of doubt (*shubha*) in Islamic legal reasoning from the outset; both the Prophet and Ali ibn Abi Talib (ca. 599–661), his closest companion as well as the fourth caliph, are reported to have adjudicated against scriptural punishment where there was ambiguity in the available evidence of criminality.[14] For Muslim jurists, 'the interpretive

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[11]   On the modernist appetite for codification, see Hallaq, *Shari'a*, pp. 367–370; A. Emon, 'Codification and Islamic Law: The Ideology Behind a Tragic Narrative', *Middle East Law & Governance* 8 (2016), pp. 275–309.

[12]   Ibid., p. 366.

[13]   For a succinct account, see S. Zubaida, *Law and Power in the Islamic World* (London, 2003), pp. 35–39.

[14]   I. Rabb, *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law* (Cambridge, 2015), pp. 1–4, 25–27. See also Hallaq, *Shari'a*, pp. 308–312, noting that the handful of original shari'a punishments – for disruptions of social order around acts such as murder, theft and fornication – were tied to deterrence by an omniscient presence that 'knew each and every particular of human conduct', p. 309. Hence comparisons with the punitive apparatus of the secular state are deeply flawed.

process used to deal (or duel) with doubt was a constant across all schools of Islamic law, concludes Rabb.[15] Whether in social, ritual or juridical settings, reducing the shari'a to a rigid code of conduct simply will not do.

Myth 3: The Shari'a Is Incompatible with Modernity

What do Muslims want when they ask for the shari'a, and what do non-Muslims, particularly in the West, think that Muslims want in this regard? Taking the shari'a seriously is an intrinsic part of one's Islamic faith, and the relationship between faith and identity has become especially complex in modernity's secular age. There have been major initiatives to integrate the shari'a into secular systems of governance in the Muslim world, from the Ottoman civil code, the *Mecelle* (1869–1876), to civil codes drawn up across the Middle East by Abd al-Razzaq al-Sanhuri (1895–1971), to the more theocratic enterprises of Saudi Arabia and Iran, and various attempts in between, including 'constitutionalising' the shari'a during the Arab Spring.[16] Militant movements such as Ansar al-Shari'a, Boko Haram, Daesh, al-Qaeda, al-Shabab and the Taliban, which aimed to impose their radical version of fiqh in the guise of shari'a compliance, have all failed. Western liberal societies have also grappled with accommodating fiqh rules in family and commercial matters, along with less formal arbitration by Muslim-minority communities.[17] What these assorted initiatives have in common is the state-centred nature of modern discourse about the shari'a, regardless of location or political ideology. Perhaps not surprisingly, the shari'a is often seen as being in tension with the secular orientation of modernity, where the state is mandated to advance equal citizenship through law and public policy in separation from the institutions of faith. In this narrative, the shari'a is no less than the

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[15] Ibid., pp. 317–318. In Shi'i and Sunni practice, Rabb notes, the jurisprudence of doubt was curtailed by the western advent of codification in the 19th century, a hallmark of legal modernity (pp. 320–321).

[16] See A. An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a* (Cambridge, MA, 2008); R. Hefner, ed., *Shari'a: Law and Modern Muslim Ethics* (Bloomington, IN, 2016).

[17] See M. Rohe, 'Reasons for the Application of Shari'a in the West', pp. 25–46; A. Saeed, 'Reflections on the Development of the Discourse of *Fiqh* for Minorities and Some of the Challenges It Faces', pp. 241–255, in M.S. Berger, ed., *Applying Shari'a in the West* (Leiden, 2013).

Other of liberal society: what Muslims want is an alternative to the legal, political and social ethos of modernity. Within the western diaspora, this also puts the shari'a at odds with other faith traditions, more amenable to reasonable accommodation in pursuit of the 'overlapping consensus' which civic identity properly demands.[18] Among the pitfalls of this narrative is to assume an exclusive global brand of modernity, with its own trademark liberal secularism, of which all progressive individuals and societies must be willing consumers.

Surveys where Muslims broadly ask for the shari'a also show that they strongly favour democracy over authoritarian rule, oppose religious leaders having a large influence in politics, and support freedom of religion; most see no conflict between science and religion, or between piety and modern life.[19] Lately, amid the economic and social turmoil of the Arab Spring, a majority of Muslim youth in the Middle East have favoured stability over democracy, which surely reflects concern about the quality of governance.[20] A recent study of the shari'a in Nigeria offers potent insight into what Muslims want in practical terms when they ask for the shari'a: institutional accountability, equity and integrity.[21] That they expect this of the shari'a, rather than of secular forms of governance, is a measure of the level of corruption and inequity associated with their experience of the latter. It also recalls the strength of cultural and religious affinity for the authority of an ideal shari'a as pictured in the context not just of heritage but of everyday reality as well. Paul Kahn famously observed that the rule of law is about 'a way of being in the world', which calls on 'our imagining its meanings.'[22] The conceit of modernity's dominant story is that liberal secular imaginings are blessed with a rationality that trumps the 'herd mentality' of other

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[18]   B. Turner and J.T. Richardson, 'Islam and the Problems of Liberal Democracy', in Berger, *Applying Shari'a in the West*, pp. 47–64; D. Gozdecka, *Rights, Religious Pluralism and the Recognition of Difference* (New York, 2016), pp. 144–146, 14–23. More generally, see S. Hamid, *Islamic Exceptionalism: How the Struggle Over Islam is Reshaping the World* (New York, 2016), pp. 238–268.

[19]   See Pew, *The World's Muslims*; Esposito and Mogahed, *Who Speaks for Islam*, further noting that 'political freedom and liberty, and freedom of speech, is what they admire most about the West', p. 34.

[20]   'Arab Youth: Look Forward in Anger', *The Economist*, 6 August 2016: accessible at http://www.economist.com/news/briefing/21703362-treating-young-threat-arab-rulers-are-stoking-next-revolt-look-forward-anger.

[21]   Sarah Eltantawi, *Shari'ah on Trial: Northern Nigeria's Islamic Revolution* (Oakland, CA, 2017).

[22]   P. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago, 1999), pp. 36, 84.

ways of being. Yet populism and nativism, among other less than rational isms, have not spared liberal societies, past or present. Even as one challenges the historical and ethical rectitude of some claims about the shari'a (as a divine, purely regulatory, monolithic code), it bears acknowledging that this mythos is part of a wider tension around the plurality of secularisms/modernities in which religion and the citizen are engaged.[23]

History, Ethics and Law: This Volume

'While I may claim as a Muslim that moral rules emanate or originate from God, I cannot claim that any set of laws that attempt to implement or give effect to this moral commitment are divine,' observes Khaled Abou El-Fadl in setting forth the historical and philosophical arc of the shari'a (Chapter 2). This flows from a core aspect of the venture since the 7th century: the ideals of the Qur'an with regard to justice and the human condition can only be imperfectly understood and realised in practice. The shari'a 'is not a path in which believers submit their will, reason, and autonomy to God, and in return, are shepherded to the heavenly pastures' but rather a relationship of trust (*khilafat*) with the divine in which 'the autonomy of choice' is vital. This trust and autonomy are, for El-Fadl, fatally compromised where the modern state becomes the custodian and enforcer of the shari'a. Doing so is to make the moral into the political, and wilfully to forget the historical contingency of official interpretations of the shari'a as one endeavour among many. How then is the shari'a relevant to societies and communities today? The answer for El-Fadl is not fundamentally different from what the shari'a has been since its inception: 'reasoning with God' is what Muslims are enjoined to strive for through the shari'a, and the plurality of legal guilds across history is a reminder that none enjoyed a universal claim to truth.

How then do the particulars of 'reasoning with God' – as compared with plain reasoning – work out? Ebrahim Moosa (Chapter 3) upends the kind of legal-centric response that has become so dominant in the context of the modern shari'a. 'What is called Islamic law could effectively be described as a vibrant tradition of translating norms into lived societies,' he observes, which effectively makes it an exercise in ethics. Moosa illustrates this with 'Imrana's Case' from 2005, where

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[23]   See C. Taylor, 'How to Define Secularism', pp. 59–78; A. Stepan, 'Muslims and Toleration: Unexamined Contributions to the Multiple Secularisms of Modern Democracies', pp. 267–296, in A. Stepan and C. Taylor, ed., *Boundaries of Toleration* (New York, 2014).

a family rape sparked conflicting readings of Hanafi rules in India. If
those rules were treated as 'law', the ensuing conflict with the most basic
sense of human dignity would be impaired, in violation of the raison
d'être of the shari'a. Those rules, he argues, are about 'discernment'
(fiqh), without which the purposes of the shari'a plainly cannot be
realised. Indeed, even when the shari'a historically conferred political
legitimacy on the ruler, the underlying idea was to subject governance
to the constraints of fiqh and its attendant values, not merely to
empower caliphal (or de facto) rule.[24]

As for the continuing and ubiquitous relevance of the shari'a to
Muslim societies and communities, Karim H. Karim pursues a prag-
matic line of enquiry, anchored again in ethical purpose (Chapter 4).
Governance in the broadest sense, from high politics to the effec-
tive working of social institutions, has long drawn inspiration from
the principles of accountability, equity and compassion that are at the
core of the shari'a. In this vein, the shari'a is effectively 'a guide to the
entirety of life,' notes Karim, finding sustained expression in charity
and social welfare, medicine and learning, ecological stewardship and
cultural renewal. In short, what the Aga Khan Development Network
(AKDN) calls the 'social conscience of Islam through institutional
development' is the flipside of the shari'a as moral commitment.[25] The
roots of this claim go back to the earliest days, when the shari'a was
about 'a communal ethos of mutual support' coupled with the 'public
good' for Muhammad and his companions. Today, civil society is the
vital space for that ethos, exemplified by the work of Shi'i and Sunni
organisations as wide-ranging in scope as the Edhi Foundation in
Pakistan, Hizmet in Turkey, the Canadian Council of Muslim Women
and the global AKDN.

But what drives these commitments to ethical values and their
expression in governance, law and civic culture? Why should Muslims
take the moral framework of the shari'a seriously, beyond complying
with the rules and practices that are associated with it? For Sa'diyya
Shaikh it is nothing less than 'the spiritual landscape of the human
condition' that serves as the rationale for having a shari'a at all
(Chapter 5). Qur'anic fundamentals and their rich esoteric readings
by Sufi traditions suggest a threefold struggle of the human spirit:

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[24]   As Noah Feldman notes with regard to the reasoning of the key classical
figure on constitutionalism, Abu al-Hasan al-Mawardi (972–1058): *The Rise and
Fall of the Islamic State* (Princeton, 2008), pp. 36–40.
[25]   Aga Khan Development Network: accessible at http://www.akdn.org/about-
us/akdns-approach-development.

first, against its baser instincts (*nafs al-ammara*), then to a level of striving for the good (*al-nafs al-lawamma*), and finally the attainment of a state of tranquillity (*al-nafs al-mutma'inna*). In this progression towards what Ibn Arabi (1165–1240) described as *al-insan al-kamil*, the archetypal human in Sufi praxis, the shari'a plays a guiding role. There is also a vital practical aspect here, notes Shaikh, in that these teachings have 'subverted traditional patriarchal religious anthropology'. A transcendent spiritual landscape, after all, can hardly be captive to gender difference. In this regard, the legacy of the celebrated female Sufi master, Rabia al-Adawiyya (ca. 717–801), whose acolytes in Basra included eminent males, still inspires the spiritualist shari'a critiques of modern scholars such as Asma Barlas and Amina Wadud, as well as Shaikh.

The tension between ethical values and the practical sociocultural settings in which they unfold historically is a classic challenge for all great traditions, religious as well as secular. Ziba Mir-Hosseini (Chapter 6) draws on this inescapable reality in seeking to 'unveil the theological and rational arguments and legal theories' around gender in the shari'a.[26] Patriarchal assumptions, she argues, are embedded in the thinking of all the major schools of Islamic law, notably on marriage and divorce, and women's covering and seclusion. The encounter with colonial modernity and European legal systems brought fresh challenges to traditionalist fiqh approaches, but the former were hardly always liberal when it came to the status of women. In matters of inheritance and property ownership, for instance, Muslim women enjoyed superior rights. More broadly, however, the 19th century witnessed the rise of Islamic feminist critiques of shari'a-centred patriarchy, in law and public policy. Some 'neo-traditional' stances were and are defensive in their outlook, perceived as cultural assaults on Muslim identity; but others were and are more radical in their 'unveiling' of pre-modern assumptions. 'Rather than searching for an exclusively Islamic genealogy for gender equality, human rights and democracy (which was the concern of earlier reformers),' notes Mir-Hosseini, 'the new thinking emphasises how religion is understood and how religious knowledge is produced.' Yet these more trenchant critiques situate themselves within Islam: the shari'a, then, remains relevant in a thoroughly contemporary context where secular and sacred are fully entwined.[27]

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[26] See especially in this regard Leila Ahmed's landmark historical exposition in *Women and Gender in Islam* (New Haven and London, 1992), Chapter 3.

[27] As shown, for example, in Marwa Sharfeldin's account of Egyptian feminist activism: 'Islamic Law Meets Human Rights', pp. 163–196, in Z. Mir-Hosseini, M. Al-Sharmani and J. Rumminger, ed., *Men in Charge?* (Oxford, 2015).

No less conspicuous in rethinking the shari'a in everyday practice is the burgeoning field of 'Islamic finance' – products and services for commercial transactions small and large, now global in scope. In their aspiration to be compliant with the shari'a, a key concern is the traditional norm regarding *riba* or usury. Should the norm be taken as a blanket prohibition on charging interest, or is that a reductive reading of a principle about exploitative conduct? In a parallel with the new feminist critiques noted above, financial propriety is being rethought to serve Islamic ethical objectives in the light of today's commercial realities. 'That may require abandoning pietistic adherence to the opinions of premodern jurists,' it is argued, 'but it may also be seen as following their example more closely.'[28] Mohamed M. Keshavjee and Raficq Abdulla (Chapter 7) extend this perspective to matters of family law from divorce to child abduction. In Muslim-majority societies and the western diaspora alike, family law issues must contend with the demands for gender equity and also with contemporary standards in administering justice, whether in courts, alternative dispute resolution or public policy at large. The upshot: a bold retrieval of the role of *maslaha* (the public good) in orienting the shari'a as a 'purposive' quest that serves the evolving needs of Muslims, beyond rigid rule enforcement in the name of tradition.

The drive to rethink the shari'a ultimately engages personhood: the place of individual autonomy in the scheme of familial and social existence. From choices about reproductive technologies (fertility, surrogacy, abortion) to organ donation, stem-cell therapy and euthanasia, the deepest human values are at stake. Indeed, bioethics has been a central aspect of the negotiation of virtue from the earliest days of the shari'a, as Amyn B. Sajoo shows (Chapter 8). Aristotle's character-centred stance on the virtues was keenly embraced in those early days, as in Ibn Miskawayh's (932–1030) landmark *Tahdhib al-Akhlaq* (*The Refinement of Character*), which laid the foundations of both Shi'i and Sunni ethical thought. Yet this had to compete, as already noted, with a juristic mode of reasoning that deeply influenced the development of the shari'a, including in matters of public health. With personal autonomy steadily emerging as the dominant facet of bioethics in the modern period, the enabling framework of governance has been legal,

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[28]   M.A. El-Gamal, 'Incoherence of Contract-Based Islamic Financial Jurisprudence in the Age of Financial Engineering', *Wisconsin International Law Journal*, 25:4 (2008), pp. 605–623. The tension between rule observance and equity is especially evident in the expansion of 'Islamic banking' to poorer sectors in Africa: 'Saharan Sharia', *The Economist*, 15 July 2017, pp. 63–64.

and the mode of reasoning guided by rules or 'principlism'.[29] This latter sits quite comfortably with traditionalism in the shari'a, which prizes the *fatwa* as a tool of juristic decision-making.[30] But what of autonomy, amid a traditional leaning in favour of communal (and patriarchal) entitlements? Sajoo argues that *maslaha* can balance collective public and individual entitlements, while resisting the logic of utilitarianism, as part of its own heritage. At the same time, the evidence from a range of biomedical and social practices discussed in the chapter suggests that finding the balance will be a long struggle; for it is entangled with perceptions of identity, particularly in an age of secular globalisation.

Identity in its various guises has never been far removed from the shari'a, whether in adhering to or straying from its ideals. Affiliation with a specific school of fiqh, gender, minority status (Muslim and non-Muslim alike) and locus in the social hierarchy have all had implications in this regard. There is also the overarching identity of rulers, local and regional, where this is attached to custodianship of the shari'a. This was certainly the case with the Ottoman Empire, which spanned large tracts of the Middle East, North Africa and the Balkans over several centuries. Amaan Merali (Chapter 9) shows how the political legitimacy of the Ottoman sultanate in Istanbul drew on its stewardship of the legal, social and ethical expressions of Sunni orthodoxy – a coupling of power and identity that was sure to affect minorities, especially Shi'i ones. The latter were also drawn into the imperial rivalry with Iran under the Safavids (1501–1736), whose Shi'i identity of recent vintage gave sectarian colour to Ottoman politics. The sultanate not only assigned to itself the status of a caliphate in order to acquire religious authority, but also merged secular and Islamic laws into an imperial system of governance, engineered by the jurists Kemal Pashazade (1469–1535) and Ebussu'ud (1490–1574). The institutionalisation of the judiciary, and the subjection of government officials to the authority of *qadi*, or judicial, courts (rather than extrajudicial *mazalim* tribunals that commonly prevailed in the Muslim Middle East to which the public could appeal against abuses of power by the ruler), certainly garnered respect.[31] The Hanafi school of fiqh became that of the empire, though

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[29]   T. Beauchamp and J. Childress, *Principles of Biomedical Ethics*, 6th edn (New York, 2009); A. Hinkley, 'Two Rival Understandings of Autonomy, Paternalism, and Bioethical Principlism', pp. 85–95, in H.T. Engelhardt, ed., *Bioethics Critically Reconsidered: Having Second Thoughts* (Dordrecht, 2012).

[30]   Critiqued broadly in Tariq Ramadan, *Radical Reform: Islamic Ethics and Liberation* (Oxford, 2009), pp. 113–155.

[31]   Hallaq, *Shari'a*, pp. 208–209.

legal pluralism flourished in Ottoman domains, at least among Sunni, Christian and Jewish subjects. When it came to Shiʿi communities such as the Ismailis and Nusayris in Syria, however, persecution was rife, both from Istanbul and by local governors. No matter how small, such communities 'were nonetheless integral to the development of an Ottoman identity, if only as a foil for defining orthodoxy', observes Merali.

In our time, the intersection of state and social identities in the life of the shariʿa has a fresh twist. Nationalism, where 'imagined communities' strive for a shared identity, readily spills beyond its secular origins.[32] Its rise in Europe was fuelled by the Reformation's capitalist and literacy drives in the 16th century, which put nationalist sentiment in competition with traditional religion. And nationalism's success in the 19th and 20th centuries effectively put the secular state in control of religious institutions, including those of the minorities. Channelled into claims of statehood and sovereign power, or the aspirations of social movements and individual citizenship, nationalism can wash over and under religious sentiments. Turkey is exemplary on this score: republican identity was wary of ethnoreligious difference in the nationalism of Kemal Ataturk (1881–1938), and it has remained so under his less secular political successors today. Where does all this leave the shariʿa, in the wake of its earlier custodianship under more diffused entities? Not surprisingly, given the contours of the modern state, public law is the site of sharp contestation between civic and religious identities, whether at the highest levels of the constitution or in local governance.

Is there a proper place for the shariʿa in national constitutions, and, if so, on what terms?[33] Since the 2010–2011 Arab Spring the answers have varied drastically, even for Egypt's and Tunisia's respective Muslim Brotherhood movements, let alone for the Middle East at large.[34] Similar tensions prevail in the world's largest Muslim

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[32]   B. Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (London, 1983), especially pp. 48–58. For an illustration of this in sectarian contexts, see A. B. Sajoo, 'Modernity: The Ethics of Identity', pp. 349–370, in F. Daftary, A. B. Sajoo and S. Jiwa, ed., *The Shiʿi World: Pathways in Tradition and Modernity* (London, 2015).

[33]   See C. Lombardi, 'Constitutional Provisions Making Sharia "a" or "the" Chief Source of Legislation: Where Did They Come From? What Do They Mean? Do They Matter?', *American University International Law Review* 28 (2013), pp. 733–774.

[34]   R. Owen, 'Egypt and Tunisia: From the Revolutionary Overthrow of Dictatorships to the Struggle to Establish A New Constitutional Order', pp. 257–272, in F. Gerges, *The New Middle East: Protest and Revolution in the Arab World* (New York, 2014); M. Zeghal, 'Constitutionalizing a Democratic Muslim State

society, Indonesia. In the aftermath of a century of secularist Dutch colonial and post-colonial governance, Carool Kersten (Chapter 10) traces the ups and downs of public Islam, down to the conspicuous 'conservative turn' today. For decades, quietist movements such as the Muhammadiyah and Nahdlatul Ulama mobilised millions in the cause of an Islamic consciousness that also upheld *Pancasila*, the official doctrine of pluralist national consciousness. But this is now contested by a 'bottom-up' tendency of Islamisation, *perda syariah*, in which local legislation (especially in the restive Sumatran province of Aceh) proclaims adherence to shari'a principles. While designed to placate assorted quarters of the population that demand a more overt assertion of orthodox Islam, with robust influences from abroad, this trend is growing, Kersten finds. The most recent evidence of this comes from cosmopolitan Jakarta, where elections for the governor gave way to crude identity politics with judicial support, which in turn provoked an executive crackdown on 'extremism'.[35]

If the locus of the shari'a in public law and policy is in flux in diverse Muslim-majority domains, this has increasingly become the case in the Euro-North American diaspora as well. In the shadow of 9/11, the matter is readily linked to issues of national security and extremist violence. But what is at stake here runs deeper, as Rex Ahdar and Nicholas Aroney observe (Chapter 11):

> The existence of shari'a within the West is, for many, a confronting issue – perhaps a litmus test of the capacity of western liberal-democratic states to accommodate religious difference. This is because shari'a is much more than a matter of personal piety and private religious practice. It is, at its core, a vision of the good of life, expressed culturally and collectively, in private and in public. For many it regulates all manner of domains generally assumed in western societies to be differentiated and compartmentalised: marriage and family life, personal hygiene and etiquette, food and diet, trade and finance, taxation, crime and war.

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without Shari'a: The Religious Establishment in the Tunisian 2014 Constitution', in Hefner, *Shari'a*, pp. 107–134.

[35] J. Cochrane, 'Christian Governor of Jakarta Is Found Guilty of Blasphemy', *The New York Times*, 10 May 2017, p. A11; J. Cochrane, 'Jakarta Protest, Tied to Faith, May Have Deeper Links to Secular Politics', *The New York Times*, 13 November 2016; J. Emont, 'Decree Frees Indonesia to Curb Islamist Group', *The New York Times*, 12 July 2017, p. A10. On external support and incitement of 'radicalism' in Indonesia, see S. Kinzer, 'Saudi Arabia is Destabilizing the World', *Boston Globe*, 11 June 2017.

Where public religion seeks exemption from law of general application, such as the wearing of Sikh turbans in place of motorcycle helmets required for safety, or the donning of headscarves in neutral spaces such as courts, accommodation is usually achieved within the ambit of liberal pluralist ideology. Anglo-American law and policy have inclined towards greater elasticity in this regard than the French and other European systems. Tensions run higher still when the accommodation sought is the 'enforcement of transactions governed by religious norms', Ahdar and Aroney argue, especially when it comes to marriage and family life where the larger vision of the shari'a might be at stake.[36]

For Jennifer A. Selby (Chapter 12), this is ultimately about 'variances in the marking out of secularism': in the modern liberal context, after all, 'the secular consistently defines and manages religion.' In her comparison of recent episodes in Canada and France where Muslim family law and practice were particularly engaged, Selby finds that the public/private division of space, which is so central to traditional liberalism in its approach to religious accommodation, has consistently framed the shari'a debate. Yet the core liberal claim of state neutrality in public space has been shifting in its meaning for some time; historically, it has been inconsistent when it comes to Christian claims of accommodation, as with regard to state funding of Catholic and Protestant schools in Canada. Furthermore, debates about family matters promptly shift into the politics of gender, where religion is typically seen as conflicting with the secular claims of human rights. 'Policing Muslim women in the name of gender equality is not a new phenomenon,' notes Selby, with a long colonial history that today calls for a more reflective approach.[37] Why assume that a faith-based vision of the good life is necessarily incompatible with a robust commitment to equal citizenship?

The good life as a daily pursuit is captured in a multitude of ways in Muslim cultural expression. In the 16th-century Persian illustration

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[36] See J. Waldron, 'Questions About the Reasonable Accommodation of Minorities', pp. 103–113; A. Shachar, 'State, Religion, and Family: The New Dilemmas of Multicultural Accommodation', pp. 115–133, in R. Ahdar and N. Aroney, ed., *Shari'a in the West* (Oxford, 2013). More broadly on Muslim minority citizenship in western contexts, including perceived tensions arising from state custodianship of the shari'a, see A. March, *Islam and Liberal Citizenship: The Search for an Overlapping Consensus* (Oxford, 2009).

[37] L. Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven, 1992); L. Abu-Lughod, 'Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and its Others'. *American Anthropologist* 104 (September 2002), pp. 783–790.

which graces this volume's jacket, the perennial locus of water in that pursuit is recalled: court activities and nature alike share a dynamic existence around its sustaining presence. From oases and wells to garden fountains and streams, a recurrent theme is the pathways that lead to and from such waters, a theme that can be found in Muslim architecture and design, sketches and paintings, poetry and colourful prose.[38] It is also the core metaphor of the shari'a as an ongoing human quest to grasp the substance of divine guidance in the conduct of devotional, social and economic life, including how one relates to the natural environment. Law and less formal norms of behaviour are necessarily vital to navigating the pathways at stake; rule-based frameworks offer the attractions of firmness in guidance and distinctiveness in identity. But they hardly define, much less exhaust, the shari'a. To return to our jacket image, there is only so much in the dense creative and natural activity that can fit into a universe of rules alone, or for that matter that can be subject only to an external (exoteric) measure of the good. The illustration is based on the poet Jami's work, *Haft Awrang* (The Seven Thrones), which contrasts the delights of the profane with those of the spiritual/mystical.[39] We are reminded, then, of the limits even of the refined sociopolitical order of the royal court.

Is the call of the shari'a beyond the legal and political still audible in our time? In *The Impossible State*, Wael Hallaq sees no tenable future for a state-centric shari'a in the 'moral quest' that is central to modernity; Saba Mahmood is sceptical that secularism as a 'statist project' can deliver on equality for faith communities.[40] Governance, institutions and the public sphere do matter, of course, as they always have for upholding the values of the shari'a. Yet the role of a pluralist civil society in this regard is critical in balancing the ever-growing claims which modern states can make on the lives of individuals and communities. The chapters in this volume offer much evidence, in diverse settings, of why treating the shari'a as part of the political enterprise of governments of any stripe is fraught. This is about not only the actual historical record

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[38] S. Blair and J. Bloom, ed., *Rivers of Paradise: Water in Islamic Art and Culture* (New Haven, CT, 2009).

[39] R. Davis, 'Jami', in J. Meri, ed. *Medieval Islamic Civilisation: An Encyclopedia*, vol. 1 (New York, 2006), p. 412.

[40] W. Hallaq, *The Impossible State* (New York, 2014), pp. 167–170; S. Mahmood, *Religious Difference in a Secular Age* (Oakland, CA, 2016), pp. 208–213. See also A. El-Affendi's *Who Needs An Islamic State?* 2nd edn (London, 2008).

of governments and official actors but also the very idea of the shariʿa as an ethical enterprise – one that stakes its claim primarily on the conscience of Muslims, in private and public.

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