



Shari'ah: From Diverse Legal Discourse to Colonial Misrepresentation

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Introduction

Just over a century after the Prophet's passing, Ibn al-Muqaffa', the well-known Persian secretary and vizier to the second Abbasid caliph al-Manşūr, penned his famous *Risāla fī al-Şahāba* (*Epistle Concerning the Entourage*), advising the caliph on how to confront the political troubles of his caliphate.¹ Among his handful of recommendations, Ibn al-Muqaffa' suggested that the caliph codify the growing corpus of what constituted Islamic law. Although the Caliph al-Manşūr did not ultimately undertake Ibn al-Muqaffa's proposal, he did have another idea: why not simply use the respectable Imam Malik's legal compendium, *al-Muwatta'*, as a standardized legal code?² When the caliph summoned Imam Malik to propose this idea, however, Imam Malik did not hesitate to reject the proposition. Using the *Muwatta'* as the only source of law, the scholar explained, would interfere with the legal diversity that had been uniquely produced throughout every region.³

The notion that Islamic law is inconsistent with too many opinions on any given issue has persisted until today.⁴ In the 1949 United States Supreme Court case of *Terminiello v. Chicago*, Justice Felix Frankfurter scoffed at the proceedings by retorting, "We do not sit like a *kadi* under a tree dispensing justice according to considerations of individual expediency."⁵ In other words, decisions should be determined by a set of rules unhindered by the subjective interpretations of the judge. His bigoted attitude aside, the Supreme Court Justice's remark reflects the

¹ Najm al-Din Yousefi, "Islam without Fuqahā': Ibn al-Muqaffa' and His Perso-Islamic Solution to the Caliphate's Crisis of Legitimacy," *Iranian Studies* 50, no. 1 (2017): 9.

² Tarek Elgawhary, "Restructuring Islamic Law: The Opinions of the 'Ulamā' Towards Codification of Personal Status Law in Egypt" (PhD diss., Princeton University, 2014), 18.

³ Jonathan A. C. Brown, *Misquoting Muhammad: The Challenge and Choices of Interpreting the Prophet's Legacy* (England: OneWorld Publications, 2014), 35.

⁴ Since it is not compatible with their conceptualizations of religion (i.e., Western Christianity), Orientalists have long had difficulty understanding Islamic traditions and law. Their constant juxtaposition of the Shari'ah with Western Christianity left many Orientalists and colonizers with the ostensible notion that Islamic law was a closed system that had 'a grip of iron from which there was no escape.' This systematic demonization of the Shari'ah could be described as a type of legal Orientalism. See Ebrahim Moosa, "Colonialism and Islamic Law," in *Islam and Modernity: Key Issues and Debates*, eds. Muhammad Masud, et al. (Edinburgh: Edinburgh University Press, 2009), 162ff.

⁵ Cited in Anver Emon, "To Most Likely Know the Law: Objectivity, Authority, and Interpretation in Islamic Law," *Hebraic Political Studies* 4, no. 4 (2009): 415-440. Weber, too, coined the term *Kadijustiz* to describe the supposed capriciousness and irrationality of Islamic law; see Ahmed F. Ibrahim, "School Boundaries and Social Utility in Islamic Law: The Theory and Practice of *Talfiq* and *Tatabbu' al-Rukhas* in Egypt" (Ph.D. Diss., Georgetown University, 2011), 10.

often-held assumption that Islamic law was a little too vast for its own good, with the undesirable result of scholars and judges ruling based on their own personal biases.

So how, then, did scholars navigate the corpus of legal diversity and thought? In the following paper, I begin by offering an overview of how Islamic law was traditionally practiced at a communal level, as well as how scholars and laity alike took advantage of the diversity offered within the Shari'ah. I then discuss the legal methods scholars employed in order to ensure consistency and reliability within the law, prior to briefly concluding with reflections on the modern codification processes that began in the disintegrating Ottoman empire and lasted well beyond the colonial period. At a time when even some Muslims associate the Shari'ah with harshness and regression, it is extremely important for us to learn about these historical moments in order to see the value the Shari'ah held in maintaining flourishing communities, before exploring the significant changes inflicted upon Islamic law over recent centuries that have led to its ineffective and distorted practice today.

The Shari'ah in Practice

Before delving into a discussion on how law was practiced, it is necessary to take a step back and identify the general key players in society: the ruler, the *'ulamā'* (or scholars), and the common people. The ruler, although early on in Islamic history governed the community's religious and social affairs, was primarily responsible for the political and economic governing of his dominion.⁶ In short, he protected

⁶ In his book, *Politics, Law and Community in Islamic Thought*, Ovamir Anjum proposes two dominant visions of community organization. The first is a community or *umma*-centered vision, which prevailed during early Islamic caliphates and held the ruler directly accountable to the Muslim community (i.e., the *umma* had the authority to challenge the ruler in the event that he strayed from religious expectations). This is in contrast to the ruler-centered vision, which vested authority in the ruler himself rather than the community. The point in mentioning these visions is to note that, as Anjum argues, neither ever gained full legitimacy and variants of both were practiced throughout different periods; hence, under certain caliphates, sultanates, etc., the ruler sometimes took on a concern for religious affairs and was involved in the implementation of *shar'ī* rulings. By and large, however, after the failure of the *miḥna* and the consequential rise in power of the *'ulamā'*, we find the ruler using his authority vis-a-vis the scholarly elite to gain support for and legitimize his rule, or occasionally as a result of his acceptance of religious law as the principal form for governing. See Ovamir Anjum, *Politics, Law and Community in Islamic Thought: The Taymiyyan Moment* (New York: Cambridge University Press, 2012); Ira Lapidus, *A History of Islamic Societies*, 3rd. Ed. (New

those under his rule from foreign threats and collected taxes, among other “political” responsibilities. The *‘ulamā’*, on the other hand, were the bearers of religious knowledge and the embodiment of its teachings. But beyond simply enforcing the law or acting as its advisors, the *‘ulamā’* played a significant role in organizing the social, religious, and economic affairs of the community. For example, they ensured the institution and maintenance of the *awqāf*, or religious endowments, which in turn funded religious education and public establishments and ensured continuous flow of monetary funds within the community.⁷ Finally, we have the commoners or laity (i.e., average Muslims like you and I). The laity had the option of choosing which scholar they wanted to follow and were not confined to a single *madhhab* (school of law).⁸

The flexibility in choosing one’s scholar for adjudication is most often articulated through the example of married women. In the event that a woman’s husband went missing, for example, the dominant Ḥanafī opinion held that the wife must wait a lifetime (e.g., approximately 80-90 years) before a divorce was issued to her through the courts. Hence, most women approached Shāfi‘ī or Mālikī judges, who required only a four-year waiting period to finalize their divorce in order for them to remarry.⁹ Likewise, the Shāfi‘ī, Mālikī, and Ḥanbalī *madhhabs* allowed for women who were abandoned by their husbands (e.g., their husbands were delayed unintentionally on business or travel) to complain to a judge when the funds (i.e., *nafaqa*) their husbands left behind were depleted. Judges consequently often ruled that a woman could take a loan out in her husband’s name that was sufficient for maintaining herself and children and suitable for their economic status. Ḥanafī judges, on the other hand, required that a husband and wife submit a claim *prior* to his departure in the event of a delayed trip. If not previously requested, the wife could not later complain when her living stipend was exhausted.¹⁰ Hence,

York: Cambridge University Press, 2014), 174; Wael Hallaq, “Juristic Authority vs. State Power: The Legal Crisis of Modern Islam,” *Journal of Law and Religion* 19, no. 2 (2003): 252-4.

⁷ Wael Hallaq, “Juristic Authority,” 246.

⁸ Anjum, 268.

⁹ Brown, *Misquoting Muhammad*, 51.

¹⁰ Kenneth M. Cuno, “Reorganization of the Sharia Courts of Egypt: How Legal Modernization Set Back Women’s Rights in the Nineteenth Century,” in *Law and Legality in the Ottoman Empire and Republic of Turkey*, ed. K. Schull, M. Saraçoğlu, and R. Zens (Bloomington: Indiana University Press, 2016), 101-104.

most women in these cases, who were typically adherents of the Ḥanafī school, took advantage of the diversity of opinions and turned to scholars from other schools for recourse.

One Question, Many Answers

Forum-Shopping

But wait, does that mean *fatwa*-shopping is allowed? The legality and morality of asking around for different opinions has always been subject to debate. Scholarly positions on the issue can be categorized as one of three approaches. On one end of the spectrum, we have the position promoted by ‘Izz al-Dīn Ibn ‘Abd al-Salām (d. 1262), who permitted laypeople to choose freely among muftis and their rulings. If one intentionally chooses to follow the easiest opinion, however, he or she should know that they are only harming themselves and will have to answer to God.¹¹ On the other end of the spectrum, we find the position that required Muslims to choose one authority (i.e., *madhhab*) to consistently follow on any given issue. Advocates of this approach also strongly discouraged muftis from issuing *fatwas* that were contrary to the most prominent opinion (e.g., *mashhūr*, *rājiḥ*, *aṣaḥḥ*, etc.) of their school. In other words, choosing between opinions from *within* the same school was disliked. Finally, we have what can be considered on this spectrum the middle-ground approach that promoted following one school of law but allowed a person to switch positions if another school or scholar had stronger evidence *or* in the event of a legitimate need (*ḥāja*) or necessity (*ḍarūra*). This third approach, however, did not permit crossing school boundaries if it was in pursuit of illegitimate desires (*ittibā‘ al-hawā*).¹²

What’s interesting for us to note here is that, in the cases of women mentioned earlier who were seeking divorce, it was often times the Ḥanafī judges themselves who would transfer their jurisdiction of the wife’s case to a judge from another

¹¹ Jonathan A. C. Brown, “Reaching into the Obscure Past: The Islamic Legal Heritage and Reform in the Modern Period” in *Reclaiming Islamic Tradition: Modern Interpretations of the Classical Heritage* (Edinburgh: Edinburgh University Press, 2016), 104.

¹² This position only allowed for switching positions amongst the established schools of law and, even so, did not allow mixing schools if it led to transgressive combinations (*talfīq*); Brown, “Reaching into the Obscure Past,” 105.

school when they knew it would better help her situation.¹³ Despite the strictness of written rules, scholars were much more flexible in reality. This isn't because they were not committed to the established doctrines of their schools, but because they creatively interpreted the texts in light of the plaintiff's particular circumstances and customs.¹⁴ In fact, the eminent Hanafi scholar Ibn 'Ābidīn (d. 1836) was resolute about this matter and proclaimed:

*The rigidity of the mufti and the judge in following [only] the apparent meaning of the reported text (ẓāhir al-manqūl), while neglecting custom ('urf) and context (al-qarā'in al-wāḍiḥa), and his ignorance of the [actual] circumstances of the people necessarily entails the loss of numerous rights and [results in] injustice for numerous people.*¹⁵

Theological Debates

The plurality of legal answers, on the other hand, begs the question: how did scholars accept the *possibility* that there could be more than one answer? Were all legal answers legitimate? These questions opened a Pandora's box of theological debates on the will of God: if the law represents God's will, how can there be different but equally correct answers to the same issues? Does that imply that God does not have a specific will? Or does He have a will that we as finite human beings cannot understand? How then do we know what the Shari'ah is supposed to be?¹⁶ Over time, a principal question was posed to solve this debate: is every jurist correct (*hal kullu mujtahidin muṣīb*)? In the event that there was a difference of opinion on the same matter, was one opinion right and the other(s) wrong? Two main groups emerged in answering this theological quandary: the fallibists (*muṣawwiba*), who held that every jurist was correct in their legal conclusions, and the infallibists (*mukhaṭṭi'a*), who believed that only one jurist could possibly be correct.¹⁷

¹³ Muhammad Qasim Zaman, *The Ulama in Contemporary Society: Custodians of Change* (Princeton: Princeton University Press, 2007), 19.

¹⁴ Ibid, 18-9.

¹⁵ Cited in Ibid., 19.

¹⁶ Anver Emon, "To Most Likely Know the Law: Objectivity, Authority, and Interpretation in Islamic Law," *Hebraic Political Studies* (2009): 431-2.

¹⁷ Ibid., 432.

The heart of the debate rested on a narration of the Prophet ﷺ that says, “When a judge decides on a legal ruling and gets the right answer, he receives two rewards. If he adjudicates, but gets the wrong answer, he gets one reward.” Based on this hadith, the *mukhaṭṭi’a* understood that a *right* and *wrong* answer can clearly exist, even if we as humans may never truly know which is answer is correct.¹⁸ Hence, jurists must remain humble in their epistemology and recognize that their interpretation may be subject to reconsideration. The *muṣawwiba*, on the other hand, understood the hadith to imply that a jurist is always rewarded for their sincere efforts and are, subsequently, always correct. Their concern, moreover, was less about right and wrong, and more focused on ensuring that jurists were making their claims with a high degree of confidence, or *ghalabat al-ẓann* (a preponderance of opinions).¹⁹

Despite their differences on the probability of the outcome of legal reasoning (*ijtihād*), both groups came together to recognize that the results (i.e., the laws)—even though there was more than one answer—are all *valid* because they were created within a *system* that is certain.²⁰ That is to say, both the *mukhaṭṭi’a* and the *muṣawwiba* agreed on the concept and methodology of legal reasoning; since the framework of the jurisprudence was accepted, then differences within the system were also accepted. In this way, scholars were able to reconcile the *possibility* of a range of different legal answers.

Case Studies

Mamluk Sultanate

Regardless of these scholarly debates, by the Mamluk period in the 13th century, legal subjects were allowed to pursue whatever school or scholar would best

¹⁸ Emon, “To Most Likely Know the Law,” 434.

¹⁹ Ibid., 435.

²⁰ Aron Zysow, *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory* (Atlanta: Lockwood Press, 2013), 3.

benefit them.²¹ In fact, the entire legal system was built upon the notion that all established schools of law (i.e., Mālikī, Ḥanafī, Shāfi'ī, and Ḥanbalī) were equally authoritative and valid. This acceptance of legal pluralism enabled the Mamluk Sultan Baybars (d. 1277) to appoint four chief *qāḍīs* in Egypt—one representing each of the four schools of law.²² Whereas beforehand the Shāfi'ī school dominated the Mamluk sultanate and was exclusively entitled to authorize legal rulings, Baybars' institution of the quadruple legal system sanctioned the verdicts of all four schools.²³ Hence, when constituents of the military elite, who were often Ḥanafī, sought to purchase or sell endowments, they turned to the Ḥanbalī *qāḍī*, who was the only one permitted (by his school) to authorize such transactions.²⁴ The chief *qāḍīs* themselves acknowledged the advantages of a legally pluralistic society and, hence, allowed for the deferral of some cases to judges from other schools.²⁵

Ottoman Empire

Four chief *qāḍīs*, however, did not exist in every empire in Islamic history.²⁶ From the 15th century (if not earlier), the Ottomans adopted a particular version of the Ḥanafī *madhhab* as the official school of the empire.²⁷ Yet, although the chief judges in the major districts in the Ottoman Empire were Ḥanafī, in smaller towns where the population included followers of other *madhāhib*, deputy judges (*nā'ib*,

²¹ Fekry, 28.

²² Academics have varied in their interpretations of why Baybars may have decided to create this system. Some have said it was a response to demands of the growing population and the need to accommodate refugees from all four schools of law, while others have said it was an attempt to renew the authority and legitimacy of the Mamluks as the guardians of orthodoxy. For more, see Yossef Rapoport, "Legal Diversity in the Age of Taqlīd: The Four Chief Qāḍīs under the Mamluks," *Islamic Law and Society* 10, no. 2 (2003), 211.

²³ With the exception that the Shāfi'ī school held exclusive authority in matters of the public treasury and orphans' property; Rapoport, 210.

²⁴ Ibid., 222.

²⁵ Ibid., 227.

²⁶ Although the Mamluks are often credited for establishing the quadruple legal system, Ahmed F. Ibrahim interestingly points out that the Fātimids beat them to it almost a century prior when the vizier Ibn al-Afḍal appointed Mālikī, Shāfi'ī, Ismā'īlī, and Imāmī chief judges; see A.F. Ibrahim, "Al-Sha'rānī's Response to Legal Pluralism: A Theory of Legal Pluralism," *Islamic Law and Society* 20, no 1/2 (2013): 115-116.

²⁷ Guy Burak, "The Second Formation of Islamic Law," *Comparative Studies in Society and History* 55, no. 3 (2013): 582.

nuwwāb) from those schools were additionally commissioned.²⁸ As a result, in Ottoman provinces throughout the Levant where the Shāfi'ī *madhhab* was popular, we find Shāfi'ī deputy judges, while in North Africa, Mālikī deputies were appointed to serve the needs of the predominantly Mālikī population. As for Cairo in particular—the home of Baybārs' quadruple legal system—four chief *qadis* continued to be equally authoritative even under the Ottomans.

Mughal Empire

Another case in point is Mughal India. Under the reign of Aurangzeb 'Alamgir in the late 17th century, the emperor called for a compilation of the most prominent opinions in the Hanafī school of law into what became one of the most famous legal compendia in South Asia, the *Fatāwā al-Hindiyya* or *Fatāwā-i 'Alamgiriyya*.²⁹ In his desire for this code, Aurangzeb actually intended to extract the most widely accepted opinions within the Hanafī legal tradition, thereby dismissing the lesser known opinions. Ironically, however, authors of this compendium hardly attempted to systematize the vast array of opinions. In fact, the *Fatāwā* include an array of differing opinions on a number of issues—providing judges with a variety of choices when dealing with legal cases. The author-jurists even note that, when clear guidance within the Hanafī legal tradition is unavailable and later scholars disagree on a matter, the judge has the authority to make a legal judgment based on any of the opinions he or she deems most fitting.³⁰ Put differently, judges had the right to exercise their own legal judgment unique to each situation.

Legal Determinacy

So if anyone could just choose whatever opinion worked most conveniently for them, how was there any way to have consistency and reliability in the legal system? Well, first of all, judges were limited to ruling by the accepted and established schools of law. One of the major discussions in legal texts that preoccupied jurists was fueled by a very similar question: which opinion—out of

²⁸ Kenneth M. Cuno, 96-7.

²⁹ Zaman, 19-20.

³⁰ *Ibid.*, 20.

all of these opinions *within* our school—is the most authoritative?³¹ In order to answer this question, jurists embarked on a mission to determine which opinions were the soundest or most authoritative within their *madhhab*. They too understood the dire need for consistency and predictability and, thus, established techniques in order to maximize legal determinacy.

One such mechanism is referred to as *tarjīh*, or the process of weighing and comparing evidence that is ostensibly conflictual.³² In the case of *tarjīh*, we are not simply referring to the juxtaposition of a Qur'anic verse and a saying of the Prophet ﷺ that was used as evidence in making a claim; the *methods* of interpretation were crucial as well. In other words, it was necessary to take into consideration linguistic and speculative reasonings, among other factors, that were used to deduce a legal norm. If one scholar had stronger evidence and methods for their claim, then their legal conclusion would hold more weight. *Tarjīh*, furthermore, was only applied to probable (*ẓannī*) cases and not those that were certain (*qat'ī*). For example, the fact that a person who breaks their oath is required to fast three days (if he cannot pay the expiatory penance) is not open to *tarjīh* because the Quranic verse referencing this command explicitly says “three days”—nothing more, nothing less.³³

After weighing the evidences that take into account revealed texts, consensus, analogical reasoning, inferential thought, etc., scholars would conclude that one of the many opinions that existed within their doctrinal tradition was *rājiḥ* (preponderant) or *aṣaḥḥ* (most sound).³⁴ Through this process of gradation, scholars identified the single most authoritative opinion that could hold weight in issuing *fatwas* or court verdicts, and hence demanded that both muftis and *qāḍīs*

³¹ Wael Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge: Cambridge University Press, 2004), 126.

³² Ibid., 127.

³³ Qur'an 5:89.

³⁴ Some scholars used the concepts of *rājiḥ* and *aṣaḥḥ* interchangeably, while others differentiated between the two. Al-Nawawī, for example, used the term *aṣaḥḥ* to distinguish between two equally *rājiḥ* (preponderant) opinions. For others like Ibn al-Ṣalāḥ, *tarjīh* was the process by which one arrived at the *ṣaḥīḥ* opinion. See Hallaq, *Authority*, 133ff. Although Mālikīs also used the process of *taṣḥīḥ* frequently, they preferred the term *mashhūr* to describe the most authoritative opinions. See Ibid., 147ff.

not deviate from those opinions.³⁵ As early as the 7th/13th centuries, these preponderant opinions were collected into *mukhtaṣars*, or “abridged” books—a form of codified law, as Dr. Mohammed Fadel argues—as a means to provide easy and direct access to the school’s main ruling on any given inquiry.³⁶ This conscious decision to limit legal rulings to the four main schools of law was not intended to restrict the flexibility and plurality of Islamic law. Rather, it was an opportunity for stability and legal continuity within a doctrinal system that served as a reservoir for generations’ worth of legal discourse.³⁷

What Went Wrong?

Beginning as early as the 17th century, the Ottoman Empire was confronted head-on by not only plenty of internal political strife, but a growing number of military losses to the rapidly growing military and economic strength of the Europeans as well.³⁸ Despite reforms targeting the military at the beginning of the 1800s, the 19th century was not spared from an onslaught of defeats at the hands of various Western powers.³⁹ By 1839, with the transition of power to Abdülmecid I, members of the Ottoman ruling elite acknowledged the need for more to be done. Their weakness, they assumed, stemmed from internal conflicts and lack of sufficient reforms, leading to a call for renewed administrative organization as they sought to match the West’s ever-growing success. These factors, in addition to mounting pressure to change from the West itself, culminated in a series of reforms known as the *Tanzimat* (i.e., the era of “organization”).⁴⁰ Apart from the countless financial and military changes enacted during the *Tanzimat*, this era witnessed a set of legal and constitutional reforms that sought to centralize and unify the legislation.

³⁵ Hallaq, *Authority*, 138-9, 147.

³⁶ Mohammed Fadel, “The Social Logic of Taqlīd and the Rise of the Mukhtaṣar,” *Islamic Law and Society* 3, no. 2 (1996): 197.

³⁷ Hallaq, *Authority*, 239.

³⁸ Wael Hallaq, *Shari‘a: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 357.

³⁹ Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton: Princeton University Press, 2005), 59.

⁴⁰ *Ibid.*, 60.

In order to initiate these amendments, Ottoman officials turned to existing Western conceptions of constitutional norms for inspiration. Under this framework, the state itself is considered to be the primary source of authority and it alone should determine the laws of the land. A key marker of this state was the standardization and simplification of its laws in order for the state to actively supervise the legal realm; hence, the Ottomans were soon convinced of the need to codify all areas of the law.⁴¹ This was premised on the Western notion that law as was traditionally practiced (i.e., with a plethora of opinions that were spread across schools and, in our case, *fiqh* manuals) was too “chaotic and inaccessible” while codification represented the pinnacle of a modern (and organized) civilization.⁴² Based on these assumptions, the Ottomans moved forward with not only modernizing the prevailing (Islamic) laws, but also adopting Western law codes like the Commercial Code of 1850 and the Penal Code of 1858 (based on the French system).⁴³ Later, after the fragmentation of the Ottoman Empire and the rise of nation-states in its place, a large number of these new Muslim-majority countries established legal codes based partially or often entirely on Western models.⁴⁴

There’s a lot more that could be said to describe the devastating effects that ensued from the creation of nation-states in the “Muslim world” and the concurrent colonial project. Like the fact that the very ideologies that fueled the rise of the State (e.g., industrialism, nationalism, capitalism, etc.) were organically created to solve problems inherent to the West, while the rest of the world was coerced into following these terms and renouncing their own traditions and history.⁴⁵ Or the fact that, under this system, law was stripped from the hands of the jurists and co-opted exclusively by the state.⁴⁶ The resulting legislative interference, unlike in traditional Islamic societies where the ruler’s intervention was strongly limited, allowed the state to infringe on the legal realm and even take control of the public

⁴¹ Rudolph Peters, “From Jurists’ Law to Statute Law or What Happens When the Shari’a is Codified,” *Mediterranean Politics* 7, no. 3 (2002): 88.

⁴² *Ibid.*, 88.

⁴³ Peters, 88; Feldman, 61.

⁴⁴ Felicitas Opwis, “Changes in Modern Islamic Legal Theory: Reform or Reformation?” in *An Islamic Reformation*, eds. M. Browers and C. Kurzman (New York: Lexington Books, 2004), 32.

⁴⁵ Wael Hallaq, *The Impossible State: Islam, Politics, and Modernity’s Moral Predicament* (New York: Columbia University Press, 2013), 3-4.

⁴⁶ Opwis, 32.

endowments (*awqāf*) that served as educational institutions, formerly supervised by the *'ulamā'*.⁴⁷ Consequently, the state could dictate what curriculum was to be taught, placing the scholarly tradition under tight surveillance. Or the fact that an elite class of Muslim lawyers (and in many cases, non-Muslims) educated in Western institutions began to replace the *'ulamā'*, despite the fact that their training in the Shari'ah was limited to the decontextualized readings of a handful of classical legal treatises that had been selectively translated into European languages.⁴⁸ But I will leave these discussions for another paper.

What I would like to focus on is how the disjointed and incomplete attempts to codify the Shari'ah impacted the image of flexibility and leniency within the law that was presented earlier on—so much so that we too as Muslims engage in legal Orientalism and are guilty of associating the Shari'ah with rigidity and severity. Traditionally, as discussed earlier, rules throughout the various schools of law could and *did* differ on a range of issues—all while maintaining legal validity. Codification, or the reduction and systemization of the laws, on the other hand, meant that only one opinion could be formally selected.⁴⁹ When officials who were Western-trained and hence limited in their legal capacities relative to the traditional *'ulamā'* were tasked with the responsibility of codifying Islamic personal status laws, they selectively identified either the most prominent opinion of the Ḥanafī school or the most convenient opinion from one of the other schools of law. These processes, known as *takhayyur* (selection) and *talfīq* (patching), resulted in a hodge-podge of laws that was to make up the official Ottoman family law codes, which in turn served as the archetype for personal status codes in Egypt, Syria, Jordan, Tunisia, and many other countries that, in some cases, remain in effect today.⁵⁰

⁴⁷ Wael Hallaq, "Can the Sharī'a be Restored?" in *Islamic Law and the Challenges of Modernity*, eds. B. Stowasser and Y. Haddad (Walnut Creek: Altamira Press, 2004), 22-3.

⁴⁸ Feldman, 69; Moosa, 168.

⁴⁹ Feldman, 66. Consider one simple example: Islamic law had a range of potential punishments for the person who committed homicide, while colonial laws only had one: the death penalty. Moosa, 167.

⁵⁰ Judith Tucker, *Women, Family, and Gender in Islamic Law* (Cambridge: Cambridge University Press, 2008), 20.

Conclusion

Although the modernization project as a whole generated positive change in certain respects, the nature of Islamic law was forever transformed. A plethora of opinions and alternatives was reduced to a single legal ruling, depleting the vast legal discourse that has existed throughout most of Islamic history.⁵¹ Admittedly, Islamic law as we know it today, or rather as we *see* it playing out in the Middle East, is more often than not a form of Islamic law that was first significantly reduced and then diluted by nothing short of Western law.

What does this mean for you and I and why should it matter so much to us? First of all, we oftentimes hear of laws being enacted in a Muslim country and we assume that is the *only* way Islamic law has been understood or could be understood. In reality, legal opinions were selectively chosen from amongst an array of options; we need to appreciate the diversity and flexibility of the Shari'ah. Secondly, we almost always assume that a law that is being implemented in Egypt or Pakistan is derived from the Qur'an or Sunnah. Honor killings, for example, are amongst the most notorious accusations against Muslims, when in fact—as Dr. Jonathan Brown demonstrates in his Yaqeen publication on this topic—they originated from Western law.⁵² Hence, we need to be more careful when we associate the practices of Muslims to Islamic law and the values of the Shari'ah and, more importantly, we need to make an effort to learn more about these differences in order to have confidence in the perfection and completeness of God's laws and regain the pride that Muslims throughout Islamic civilization have had in the Shari'ah.

⁵¹ Ibid., 223.

⁵² <https://yaqeeninstitute.org/jonathan-brown/islam-is-not-the-cause-of-honor-killings-its-part-of-the-solution/>