PLENARY: BASICS OF ISLAMIC LAW

1. The Sources of Islamic Law

Sherman Jackson
University of Michigan, Ann Arbor

The Formative Period

I. Obvious starting point for contemplating a properly constituted "Islamic life" is the Qur'ân and the explanatory and supplementary addenda of the Prophet Muhammad, the so-called Sunna

A. Qur'ân and Sunna considered equal in terms of authority

B. But the identity of the Sunna differs from that of the Qur'ân in that the attribution of individual reports about the Prophet's words and actions, reports known as hadith, remain open to debate
   1. each individual in the chain of transmission subject to critique
   2. in the early period, the Sunna of the Prophet was not always distinguishable from local practice of the various centers, especially that of the Prophet's city of Medina

C. The spread of Islam outside Arabia further complicated this matter by augmenting the number of local practices that could be conflated with Prophetic Sunna and credited with the authority of religious law

D. This gives rise to the first "revolution" in Islamic law

II. Prior to late 2nd/8th century, legal deliberations had been proceeded on the basis of the primary sources mediated through local custom (sometimes accurately and sometimes inaccurately equated with Prophetic Sunna) and an Arab nativist practical reasoning. This would all change with the famous jurist, Muhammad b. Idris al-Shâfi'î, who laid the foundations for a formal legal theory and emphatically separated Prophetic Sunna from local practice

A. Al-Shâfi'î's contribution was two-fold:
   1. He imposed formal strictures on the enterprise of legal argument, identifying both the sources of law and the acceptable methods of interpreting them
      a. His efforts in this regard eternalized the following as the four universally agreed upon sources of Islamic law
         i. Qur'ân
         ii. Sunna
         iii. Unanimous Consensus (Ijmâ')
         iv. Analogy (Qiyâs)

   2. He vehemently argued that only the Sunna or established practice of the Prophet Muhammad was probative as a source of law
      a. His efforts in this regard are reflected in the chronological development of the canonical collections of hadith

i. al-Shâfi‘î dies in 204/819
ii. All of the authors of the so-called Six Sound die between the middle and the end of the 3rd/9th century

B. Al-Shâfi‘î’s efforts also resulted (indirectly and unintentionally) in the rise of legal formalism as the established method of interpretation

1. Meaning limited to the observable features of the Arabic language

2. Legal formalism leveled the playing field between Arab nativists and the Arabicized non-Arab Muslims from the conquered territories, as the history, social customs and non-linguistic indicators of meaning to which the Arabians had direct access, are marginalized

a. Full-blown Islamic legal theory basically a compromise between al-Shâfi‘î and the legal formalists

III. Disputed sources and methods

A. Excesses of formalism recognized. This confers recognition upon certain controls and countervailing methods carried over from the pre-theory period:

1. Istihsân / Equity
2. Maslahah / Public Utility
3. ‘Urf / Custom

The Post-Formative Period

I. Ijtihâd, or independent interpretation, both on the basis of the sources and practical reasoning of the pre-theory years and on the basis of methodologies enshrined by the full-blown formal theory produces authoritative figures and transform interpretive communities or madhhabs into sources of legal authority

A. Formal theory confers prima facie authority upon all views that could be vindicated on the basis of the recognized methodology. This inaugurates the post-formative period of Islamic law and the regime of taqlîd or “following precedent”

1. Four equally orthodox, equally authoritative schools: Hanafî, Mâlikî, Shâfi‘î and Hanbalî schools

B. With the “settling down of the madhhabs,” legal interpretation evolves to the point that it now begins with the doctrines, precepts and precedents of the established schools rather than the primary sources

1. Basis of authority shifts from the individual jurist to the school of law as a whole. Whereas the jurist in the formative period gave a fatwâ or legal opinion in his own name, he now issued fatwâs primarily in the name of the school to which he belonged. Where his own views diverged from those of his school, he had now either to bring the school over to his way of thinking or disguise his view as that of the school

2. Legal precepts / Qawâ’id (what American Constitutional law refers to as “tests”) replace the primary sources, i.e., Qur’ân, Sunna, as the starting point of legal deliberation

a. E.g., “oscillation between loan and price”

II. Ijtihâd, i.e., reverting to the primary sources, now the exception and must be justified.

A. Taqlîd (a cognate of stare decisis) now the norm and diverging from it must be justified

B. This tension between ijtihâd and taqlîd, the individual jurist and the collective madhhab and the primary sources and legal precepts define Islamic law from the high classical period right down to modern times

2. The Characteristics of Islamic Law

John Makdisi
St. Thomas University School of Law, Miami

I. The Function of Islamic Law
   - A. Individual Self-Definition
   - B. Justice, Not Morality
     1. Subject Matter Jurisdiction
     2. Qualifications of Legal Acts
   - C. Law Above the State
   - D. Individualism
   - E. Freedom of Contract
   - F. Impartial Judge
   - G. Res Judicata
   - H. Judge as Blank Slate
   - I. Passive Judge
   - J. Privilege Against Self-Incrimination
   - K. Fairness over Truth
   - L. Individual Autonomy

II The Structure of Islamic Law
   - A. Untrained and Transitory Decisionmakers
   - B. Overlap of Testimonial and Adjudicative Tasks
   - C. Judge as Moderator, Supervisor, Announcer, and Enforcer–not Adjudicator
   - D. No Appeal
   - E. Dissent
   - F. Day in Court
   - G. Prosecution for Perjury
   - H. Oral Testimony

3. The Islamic Legal System

Frank E. Vogel
Harvard Law School

How did the law described so far get translated into a functioning legal system?

I. First, does the Qur'an lay down "law"?

A. Some Qur'anic texts
B. Accounts about Prophet Muhammad as ruler and judge
C. Accounts about his early companions' legal activities

II. At least as understood by the classical Sunni tradition, the Qur'an and Sunna adumbrate two distinct ideal types of implementation or enforcement:

A. First type: *ijtihad* – effort to learn from revealed texts God's command as to a particular action

1. *Ijtihad* of individual, seeking to know God's law in order to follow it in conditions of uncertainty
    a) Few are capable of this effort; emphasis on knowledge of the revelation and on piety naturally leads to reliance (*taqlid*) on others who possess greater knowledge or piety

2. *Ijtihad* of judge, seeking to know God's law to apply it to others in conditions of uncertainty
    a) Early accounts and source texts on *ijtihad*
    b) *Ijtihad* as the process that legitimates enforcing on others one's imperfect judgment as to what God's law is
    c) All judges should be capable of *ijtihad*
    d) Adaptations of divine law enabling it to be applied as law by judges:
        (1) Though law indissolubly moral as well as legal, judges consider only matters having tangible legal consequences
        (2) Judges are concerned only with the outward manifestation of parties' claims and of witnesses' statements (the "*zahir*," or "manifest," apparent; not the "*batin*," the inner, subtle); it is not *forum interior*

B. Second type: command of ruler (caliph, commander of the faithful, sultan)

1. Qur'an declares,
Obey God, and obey the Apostle and those from among you who have been entrusted with authority; and if you are at variance over any matter, refer it unto God and the Apostle, if you believe in God and the Last Day. [4:59]

2. Qur'an lays down injunctions only a state or ruler may fulfill; for example:
    a) War

b) Taxes
c) Criminal punishments
d) Justice as fairness among the community

3. Succeeding the Prophet as head of state, the caliph monopolizes power as to material means; to what extent does he also possess authority over religious truth?

4. All state officers wielding authority are considered delegates of ruler
a) Including judges; hence judges have a second face – a scholar, but one wielding the authority of the ruler

III. Which of these two cardinal modes of law's application – by scholar or ruler – is dominant? Across Islamic history the two modes are unable either to make peace with, or to dispense with, each other. They remain in tension, continually vying for constitutional position. Historically, the ruler model began as dominant, but within a few centuries the *ijtihad* model gains ascendance ideologically, and eventually is able to recast the whole legal system in its own image. But, the tension is intrinsic and the war never over. Myriads of historical variations, in theory and in practice, occur.

IV. A theoretical formulation (by scholars) of the tension, articulated in the 14th century, remains influential until today. According to it the two modes are complementary and should coexist in cooperation.[1] This late synthesis theorizes the two systems as follows (I here focus solely on the power to fix the legal rules actually applied, i.e., legislation):

A. *Fiqh* – found by scholars through their interpretive method (described by earlier speakers)

1. Jurists' law is grounded in texts, is formulated by private pious conscience, is justified in religious knowledge, is independent of the state, has as object individual conscience and acts, aims for transcendent truth, but is aware of multiple possible alternative estimations of that truth, enforces one in specific cases while acknowledging the potential truth of others. (This is the ideal; in actual implementation, law is determined and evolves within the semi-official institutions of the legal schools)

B. *Siyasa* – a ruler may take any action, even issue laws, if they serve the general utility and do not "contradict *Shari'a*." The latter test – which has many possible meanings – is to be administered by scholars through the ruler's consulting them. The ruler is presumed not to possess authority to practice ijtihad himself

1. Ruler's law is based in utility, arises from the state as state, relies on knowledge of the needs of the community, concerns the collectivity, responds to contingencies, and makes no truth claims beyond avoiding contradiction with Islamic law. (This is again highly conceptual or theoretical; in practice, customs, dynastic traditions, and bureaucratic expertise play a major role)

C. Examples of cooperation and competition of fiqh and siyasa, jurists' law and ruler's law.

[1] Ibn Taymiyyah, etc.

V. Relevance of this late medieval model to today's world

A. Late medieval systems abruptly dismantled in colonial era – in India, Ottoman Empire, Persia, chiefly during 19th century

B. Survived only in a few backwaters –Arabian peninsula; Arabian gulf principalities; Afghanistan

C. But in another sense the model underlies the semi-secular nature of most Muslim countries. Its lingering influence enables them to maintain that their legal systems and laws, though almost entirely western-inspired, are still consistent with Islam

D. What about more radically Islamic states like Iran, Sudan or Taliban Afghanistan? And various Islamist movements seeking to establish similar states? The states and movements seem no longer to acknowledge the old model (according to which the state and its law are contingent and compromised while still Islamically valid), but instead to aspire to the ideal mythic state of the companions of the Prophet

Glossary

siyasa	policy, governance, administration
fiqh	lit. understanding or perceptiveness; the science of the divine law, the sum of man's knowledge of the Sharia'a, Islamic law or jurisprudence
Sultan	lit. power or authority; sultan, ruler
Khalifa	lit. successor, vicegerent; caliph
taqlid	relying upon the opinion of another, not practicing *ijtihad*, the individual search for a ruling from the divine law

PLENARY: CASE STUDY: GOVERNMENTAL ACCOUNTABILITY

Anna D. Wuerth, University of Richmond, Richmond, Virginia
Mohammed H. Fadel, Sullivan & Cromwell, New York, New York

I. Islamic Law and Holding Governmental Agents Accountable for Illegality

A. Revelatory foundation of the Islamic law of torts

B. Muslim jurists did not distinguish between the intentional torts of private individuals and those of government agents.

1.Intentional torts and causation

(a) Intentional injury and Excuse

(i) Each person in the chain of command is liable, even if cause in fact of the injury is command of a superior;

(ii) Only the actual person inflicting the injury is legally liable if he willingly carries out the injury;

(iii) Only the actual person committing the injury is liable, if he is under a duty to disobey the unlawful command;

(iv) Only the person commanding the injury is liable, if he threatened the actual person inflicting the injury with death if he did not carry out his command; and

(v) Neither the actual person inflicting the injury nor the person giving the command is subject to retaliation, but the person giving the unlawful command is monetarily liable.

2. Negligent torts

(a) Government monetarily liable, not agent, if action undertaken in good faith; and,

(b) Judges are not liable for honest mistakes.

II.Holding Governmental Agents Accountable in Egypt and Yemen

1. Convention Against Torture

2. Constitutional provisions in Egypt

(a) Art. 42: prohibits torture of detainees and establishes an exclusionary rule

(b) Art. 57: declares that no statute of limitations applies to claims of torture

3. Constitutional Provisions in Yemen

(a) Art. 47: prohibits torture and its use to obtain a confession; individual victims have right to compensation; establishes no statute of limitations for claims of torture

4. Penal provisions in Egyptian penal code

(a) Art. 126

(i) Definition of torture: use of force with purpose of obtaining a confession;

(ii) If victim dies, perpetrator liable for premeditated murder

(iii) Art. 126 does not apply if torture applied to person other than a suspect or for a purpose other than to extract a confession

(b) Other relevant provisions

(i) Art. 129 (prohibition against cruelty)

(ii) Art. 236 (deadly assault)

(iii) Art. 280 (prohibition against illegal detention)

(iv) Art. 282 (illegal detention combined with forgery and infliction of bodily harm)

5. Yemeni penal provisions

(i) Art. 166 (prohibition of using torture in the course of exercising public authority)

(ii) Art. 168 (prohibition against cruelty)

(iii) Art. 234 (prohibition against premeditated murder, with provision for deadly assault)

III.Remedial Mechanisms

A. Prosecutorial discretion

1. complaints are filed with public prosecutor's office in both Egypt and Yemen

(a) state monopoly of forensic evidence in Egypt

(b) forensic evidence in Yemen can be provided by state or other physicians

B.Standing of victim or victim's next of kin

(a) Egyptian litigants have no private standing to pursue torture case

(b) Yemeni prosecutor has no discretion to decline a charge of penalty could entail capital punishment (Yemeni Code of Criminal Procedure, Art. 26)

(c) Victim and kin are parties to case

PLENARY: WOMEN'S RIGHTS AND ISLAMIC LAW

Azizah Y. Al-Hibri
University of Richmond

Abstract

For the last two decades, the state of Muslim women's rights in the Third World has raised a great deal of concern among various NGOs, especially American ones. The assumption was that the situation of Muslim women in the U.S. is basically fine. Research, as well as day-to-day experience, reveal a different fact. The situation of immigrant Muslim women in the U. S. is often rooted in the laws and practices of their country of origin. Dealing with these problems requires cultural and legal knowledge of that country. Further, there are specificities to the American social and judicial systems that, combined with the other factors, often result in the resolution of issues in ways that are unfair towards women. The presentation will point these problems out and suggest ways to improve the status of Muslim women in the community and within the American court system.

Outline

I. Introduction to the State of American Muslim Women
- A. General overview
  - (i) ethnic distributions and historical background
  - (ii) types of problems facing Muslim women
- B. Background information
  - (i) Islamic law
    - a. Basic Islamic texts
    - b. The role of interpretation in the formulation of the law
  - (ii) Relevant aspects of the laws of various countries from which immigrants have arrived.

II. Problem Areas
- A. Pre- 9/11 type of problems.
- B. The impact of 9/11 on Muslim women
  - (i) within the family
  - (ii) other problems (CLEAR ACT, NSEER, raids, detentions, etc...)

III. Family Law
- A. An overview of Islamic family law
- B. Three areas of concern and the various interpretations
  - (i) The marriage contract
    - a. Case law in the US
    - b. Recurring problems under American law
      1. The effect of the separation of Church and State
      2. The case of the unqualified witness
      3. Unequal access to the legal system
      4. Understanding the terms of the marriage contract
      5. What is a *mahr*?

c. Recurring problems under Islamic law as applied in the US
    1. Determining the governing school of thought
    2. The impact of changed circumstances on the law
    3. The effect of the Muslims' minority status on the law

(ii) The law of *khul'* as used in the US
    a. History of the *khul'* laws
    b. The impact of Egyptian developments on the U.S. Muslim community
    c. The problem of enforcement

(iii) Domestic violence
    a. Rise in incidence since 9/11
    b. Islamic law on the matter
    c. Cultural views and practices

IV. Conclusion — Solving the problems

Glossary

Ayah: (plural. Ayat) a Qur'anic verse.
Fatwa: a thoughtful opinion given by a qualified scholar, a mufti, concerning a legal/religious issue.
Fiqh: Islamic law as developed by Muslim jurists. The term is often confused with *Shari'ah*, however, they are different. *Shari'ah* refers to the divine revelation contained in the Qur'an and hadith, whereas fiqh is human interpretation of *Shari'ah*.
Hadith: literally, conversation or narration. In the Islamic law context it refers to the collected sayings and reported deeds of the Prophet Muhammad; and it is sometimes extended to cover his silent tacit approvals. It was passed down through a sophisticated oral tradition based on chains of narrators and later on compiled and classified by Muslim scholars into major books of hadith.
Ijtihad: jurisprudential interpretations.
'Illah: the cause or "raison d'etre"
Khul': a form of divorce in which the wife returns the mahr to the husband in order to end the marriage.
Madhahib: (plural form of *Madhab*) schools of thought/jurisprudence in Islam.
Maslahah: public interest.
Mahr: tangible or intangible symbol of commitment and gesture of good will given by a Muslim man to a Muslim woman upon entering into marriage.
Nikah: Islamic Legal marriage contract.
Qiwamah: Usually interpreted as meaning the state of being "guardian" or "head of the family."
Qur'an: The holy book of Islam revealed to the Prophet Muhammad through the angel Gabriel.
Shari'ah: Islamic canon law as revealed in the Qur'an and through the Sunnah.
Shart: (plural. *shurut*) stipulation in a contract.
Sunnah: the example of the Prophet's life, his sayings, his deeds, and his silent approvals. It is the second source of *Shari'ah*.
Shi'ah (or Shiite): one of the five major schools of thought/ jurisprudence in Islam. The Shi'ah divided from the Sunnis on the issue of the right of Ali (the Prophet's cousin and son in law) and his descendants to the leadership of the Muslim community.

Shura: consultative democracy.
Sunni: the major division of Islam, comprised in four schools of thought/jurisprudence; the *Maliki*, the *Hanafi*, the *Shafi'i*, and the *Hanbali*.
Surah: (plural. *Suwar*) a chapter of the Qur'an.
Tafseer: A commentary on the Qur'an, explaining what the exegete thinks is the meaning of its verses.
Talaq: repudiation, divorce initiated by the husband.
Tawhid: the belief in one God, the central doctrine in Islam.
Wilayah: authority, guardianship. In this context, a form of guardianship that a father (or one who stands in his shoes)has over his daughter in matters of marriage. It is compulsory under some jurisprudential theories but merely advisory under others.

Select Bibliography

Asma Afsaruddin, Ed., Hermeneutics and Honor (Hcmes, Harvard University, 1999
Leila Ahmed, Women and Gender in Islam (Yale University Press, 1992)
Taha Jabir Al-'Alwani, 'Usul Al- fiqh al-islami: Source Methodology in Islamic Jurisprudence (International Institute of Islamic Thought, 1990)
N. J. Coulson, A History of Islamic Law (Edinburgh, 1964)
Dawoud Sudqi El Alami and Doreen Hinchcliffe, Islamic Marriage and Divorce Laws in the Arab World (London: Cimel and Kluwer Law International, 1998)
Obaidul Huq Chowdhury's Hand Book of Muslim Family Laws (Dhaka: Al Afsar Press, 1997)
Isma'il Al Faruqi, Al-tawhid (The International Institute of Islamic Thought, 1992)
----------, Islam (International Graphics, 1984)
Nicholas Heer, Islamic Law and Jurisprudence (University of Washington Press, 1990)
Azizah Al-Hibri, Ed., Special Issue on Islam, Journal of Law and Religion (Fall, 2001)
----------, Ed., Women and Islam (Pergamon, 1982); Variety of Articles
Keith Hodkinson, Muslim Family Law: a Sourcebook (London: Croom Helm, 1984)
Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Cambridge, Islamic Texts Society, 1991)
Fatima Mernissi, Islam and Democracy: Fear of the Modern World (Addison-wesley Publishing Co., 1992).
Tariq Ramadan, Western Muslims and the Future of Islam (Oxford University Press, 2003)
Joseph Schacht, an Introduction to Islamic Law (Clarendon Press, 1986)
George Sfeir, Modernization of the Law in Arab States (Austin & Winfield, 1998)
Barbara Freyer Stowasser, Women in the Qur'an, Traditions, and Interpretation (Oxford, 1994).
Amina Wadud, Qur'an and Woman (Oxford University Press, 1999)
Gisela Webb, Ed., Windows of Faith (Syracuse, 2000)
Selections from <Www.karamah.org/articles>

PROPERTY LAW AND PROCEDURE

The Islamic Action for Recovery of Land

John Makdisi
St. Thomas University School of Law, Miami

I. Property Right Established by Possession
- A. Prior Possession Prevails over Usurper
- B. Possessor with Color of Title Prevails over Prior Possessor
  1. Manucaption (Actual)
  2. Enjoyment as an Owner under Claim of Ownership (Hostile)
  3. Absence of Contestant (Exclusive)
  4. Possessor & People Attribute Property to Possessor (Open and Notorious)
  5. Duration for 10 Months (Continuous)
- C. Prior Possessor with Color of Title Prevails over Possessor with Color of Title
- D. Possessor by Adverse Possession Prevails over Prior Possessor with Color of Title
  1. Five Requirements for Possessor with Color of Title but for 10 Years
  2. Characteristics of Plaintiff
     a. Presence
     b. Knowledge
     c. Pubescence
     d. Capacity
     e. Absence of Impediment
     f. Silence Kept during Whole Duration of Possession

IV. Possession Established by Proof of Facts Through Witnesses
- A. Prescription
  1. Usurpation
  2. Detention at Will
  3. Origin of Possession Unknown
- B. Transfer
  1. Inter Vivos
  2. Devise
  3. Intestate Succession

V. Proof Established by Burdens Imposed on Parties by Judge
- A. Pleading
  1. Who is Plaintiff and Defendant
  2. Delays
  3. Default and Nonsuit
- B. Methods of Proof
  1. Acknowledgment
  2. Oath
  3. Testimonial Proof
     a. People
        (1) Two Honorable Witnesses
        (2) Twelve Good Witnesses

b. Testimony
(1) Direct
(2) Common Report
(3) Hearsay
c. Writing

C. Plaintiff's Proof
D. Defendant's Rebuttal
E. Defendant's Proof
F. Plaintiff's Rebuttal
G. Solution to Conflict of Proofs
1. Preference
a. Date of Possession
b. Honorability of the Witnesses
c. Witness over Oath
d. Origin of the Property
e. Ownership over Possession
2. No Preference

ISLAMIC FAMILY LAW

1. In Legal Texts

Asifa Quraishi
Harvard Law School SJD candidate

Overview: to highlight the classical Islamic jurisprudence that forms the background for and continues to play a role in contemporary family law litigation, legislation, and legal discourses.

I. Marriage
- A. Consent to marriage
  - 1. of bride/groom
    - a. obligation to obtain bride/groom's consent to marriage?
      - i. virginity, age of majority, gender factors
    - b. nullification of marriage after the fact if conducted without consent?
      - i. virginity, age of majority, gender factors
  - 2. of parent/guardian
    - a. right to marry without consent of parent/guardian?
      - i. virginity, age of majority, gender factors
      - ii. "suitability" of spouse chosen
    - b. parent/guardian power to nullify marriage after the fact if conducted without consent?
      - i. virginity, age of majority, gender factors

- B. Dower (mahr/sadaq)
  - 1. quality/quantity of dower
  - 2. deferred and prompt amounts
    - a. implications of deferred dower – advantages/disadvantages to quantity
      - i. possible purposes (deterrence of talaq, substitute for alimony/maintenance, bride's financial protection in case of talaq, etc.)
  - 2. exclusive ownership by bride
    - a. option of waiver by bride
  - 4. implied dower if not specified
    - a. status/suitability issues

- C. Polygamy
  - 1. consent of existing wife necessary?
  - 2. divorce options for existing wife

- D. Obedience
  - 1. Qur'anic discussion and analysis
  - 2. link to husband's support obligation
  - 3. obligation to do household chores?
  - 4. domestic violence issues

II. Divorce

A. Talaq – husband's unilateral divorce option

1. revocable/irrevocable

B. Khul' – mutual consented divorce

1. restitution issues and repayment of mahr

C. Faskh – third-party adjudicated divorce

1. harm as a ground by either party

D. Gender issues

1. wives "stuck" in marriage vs. wives unexpectedly divorced
2. talaq as groom's opt-out option if married in unconsented child marriage

III. Child Custody

A. age and gender of child categories

B. custody vs. guardianship (decision-making power) issues

2. Contemporary Positive Legislation

George N. Sfeir
Library of Congress

1. A Word of Explanation: Why Islamic and Positive?

Contemporary legislation in the field of domestic relations is a by-product of the 19th and 20th century process of legal modernization and codification in Arab/Muslim countries. But while all other fields of the law in this process (constitutional, commercial, criminal) greatly benefitted from borrowed European law, which ended in displacing much of traditional Islamic law, domestic relations were completely left out of what has otherwise proved to be a highly successful process of reform.[2]

Whether for fear of antagonizing religious leaders over matters closely associated with the faith, or because of the difficulty of unifying and codifying the diverse religious canons both Muslim and non-Muslim, given their disparate and scattered sources, the codification failed to 'secularize' family law by making it part of the civil code, as is the case with its European counterpart.[3] This has created a major cause of discordance within the emergent modern legal system, whose attributes are unity, equality, and autonomy.

2. The advantages and disadvantages of this codification?

(a) The codification helped to consolidate and systematize the disparate and scattered classical sources of Islamic law, particularly those of the major Islamic schools of jurisprudence. However, the positive legislation we now have is essentially a restatement of the Koranic rules as formulated by major schools of jurisprudence in the 8th and 9th centuries. It is becoming increasingly clear that the law in this area is lagging far behind social change, as evidenced by the growing popular pressure for meaningful reforms, and the readiness of some governments to respond, as the Moroccan authorities have recently declared they would do.

(b) Under the positive legislation, Muslims would continue to be governed by Islamic law, while non-Muslims who are members of the Christian and Jewish faiths, or Peoples of the Covenant (Ahl Al-Kitab), as they have been traditionally known in Islam, will remain subject to their own canon laws and ecclesiastical authorities for matters of domestic relations. A form of confessional sectarian division of society, considered desirable in a religiously oriented state, such as it was in the Ottoman millet system, has become, in today's modern territorial state, a divisive and incongruent anachronism.[4]

(c) By essentially reflecting the traditional patriarchal family organization and marital relations, the new positive legislation created a conflict with some of the basic constitutional provisions pertaining to individual rights and freedoms. One can even say an indelible contradiction has established itself in the newly emergent legal system, given the fact that the secular and religious laws do not draw for their legitimacy on the same enabling sources. The problems created by this disjointed sources of legitimacy, was demonstrated in the famous case of Nasr Hamid Abu Zaid in Egypt, a Professor of hermeneutics who was accused of apostasy and forced to be divorced from his wife despite the constitution's guarantee of freedom of speech,

expression, and scientific research.[4]

(d) This conflict has also had its impact on the Arab states' ability to conclude, without reservation, international treaties regulating a growing number of humans rights safeguards, from child adoption to women's rights, the former being illegal and the latter highly restrictive, under Islamic law. To get around the inevitable confrontation between domestic Islamic law and the international treaties' provisions, the Arab states have often found themselves forced to make their endorsement of these treaties subject to a reservation which read in effect, "provided the relevant treaty provisions are not contrary to Islamic Sharia," as was the case with treaties on the rights of women, including the elimination discrimination against women,[5] or by introducing a substitute Islamic term or concept, even if not quite compatible, with the undesirable treaty provision, as actually happened with the introduction of the concept of kafala, in lieu of adoption, in treaties relating to foster care or adoption, and the rights of the child generally.[6]

3. The Nature and Scope of Contemporary Legislation

Except for a few Arab states in the Gulf region which continue to apply the disparate sources of Islamic law and jurisprudence unchanged, most Arab states' rules of domestic relations are today codified in statutes, usually referred to by the nomenclature, ahwal Shakhsiyah or laws of personal status, covering marriage, divorce, paternity, custody, guardianship, inheritance, and their related and ancillary matters.

The first attempt at codification came in the 1917 Ottoman Law of Family Rights. Based on Hanafi jurisprudence, it continued to apply even after the demise of the Ottoman Empire, in a number of Arab states, until replaced in the second half of the 20th century by new legislation. It remains today the law of the Muslim Sunni communities in Lebanon, and in the Palestinian and Israeli legal systems. The new legislation in the Arab states, with which I am more familiar, includes that of, Syria (1953), Tunisia (1956), Morocco (1958, Iraq (1959), Jordan (1976),Yemen (1978), Kuwait (1984), Algeria (1984), Sudan (1992). Egypt which began legislating in this field in 1920, continued to add and amend its legislation up to 1985, following a failed attempt at an advanced comprehensive law in 1980, which was abrogated after its adoption on a technicality to the great joy of its conservative opponents.

Being of divine origin however, this legislation is, understandably, quite limited and eclectic. Whatever 'reforms' were introduced to meet social and economic changes, were mostly of administrative and procedural nature to reduce or frustrate the incidence of such traditional occurrences as child-marriage, polygamy, and the husband's unilateral repudiation of marriage. Such measures include showing cause and financial ability to take a second wife, as well the need to appear before a judge to repudiate a marriage, as the Syrian and Iraqi laws require. In other words, the legislation acted more to perpetuate the status quo than to provide an instrument of social policy and change in the traditional patterns of family organization and marital relations. A recent proposal, for example, by the President of Lebanon to legalize civil marriage in order to enable persons of different religious faiths to wed and end the sectarian divisions that religion has fashioned in Lebanese society, created a flurry of excitement in intellectual circles, only to be shelved by Parliament and the media when the heads of all religious communities spoke out against it.

The only glimmer of hope so far has come from court decisions in the more liberal states, such as Jordan and Tunisia, where matters not at the heart of the institution of marriage, such as the right of the wife to travel and hold a job, have found support from these courts.

This is not to say that there have been no attempts in positive legislation to break loose of the total hold that traditional Islamic rules of domestic relations have exercised since the 7th century. In fact the spectrum of family law varies from those with total reliance on the traditional

sources of Islamic law, without the benefit of codification, as is the case in some of the Gulf states, to those which deviate considerably from conventionally accepted interpretation of these sources. The Iraqi law, for instance, successfully united, for the first time, the Sunni and Shia rules. But the primary case of substantial reform in Arab legislation is the Tunisian 1956 law which abolished polygamy, validated child adoption, and declared marriage a "community of life," in which the spouses are mutually bound to cooperate in assuring the "moral and material direction of the family." It is indeed a concept of marriage not unlike that adopted by Western Europe only in the1970's, as the culmination of a historic movement there since the 18th century, towards an "individualistic, egalitarian, and secularizing trend."[7]

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[1] I have detailed the transition from traditional Islamic law to modern, European-based law in my book, MODERNIZATION OF THE LAW IN ARAB STATES, San Francisco, London, Bethesda (1998).

[2] The leading author of the Arab civil code, Egyptian jurist Abdel-Razzaq Al-Sanhhuri, justified this failure by saying that doing otherwise would have thrown "insurmountable obstacles and confusion into the [drafting] of the code," and saddled the drafting committee with "obvious difficulties." *Al-Wasit fi Sharh al-Qanun al-Madani al-Jadid* [The Intermediate Work on the Interpretation of the New Civil Code], Cairo (1952), vol. I, p. 26-27.

[3] It should be noted here that Islamic law does not give cognizance to other religious communities, who are not considered among the Peoples of the Covenant, to organize and practice their rites, as was demonstrated by a case concerning the *Baha'i* community before the Supreme Constitutional Court of Egypt. The court distinguished between individual freedom of faith which is guaranteed by the constitution, and communal rites which is denied by Islamic law.

[4]See my article on this case, "Basic Freedoms in a Fractured Legal Culture: Egypt and the Case of Nasr Hamid Abu Zaid," in Middle East Journal, vol. 52, No. 3, Summer 1998.

[5] See Declaration on the Elimination of Discrimination Against Women, proclaimed by General Assembly resolutrion 2263 (XXII) of 7 November 1967.

[6] See Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, adopted by General Assembly resolution 41/85 of 3 December 1981, and the United Nations Convention on the Rights of the Child of 1989. The term *kafala* originates in the law of obligations. Known in French law as *stipulation pour autrui*, it found its way into the Arab civil code. It permits a person to enter into a contract committing one's self to certain undertakings in favor of another party if that person has a material or moral interest in such undertaking. But *kafala* does not exactly conform with the Western concept of adoption which conveys on the foster child all rights accruing to a natural child, including family name and inheritance. While such an arrangement is legitimate in some Arab states, it does not confer on the child the rights of name and inheritance. This discrepancy has created undue difficulties for immigration cases in the United States.

[7] See Mary Ann Glendon, THE TRANSFORMATION OF FAMILY LAW: State Law and Family in the United States and Western Europe, Chicago (1989), p. 292.

ISLAMIC CRIMINAL LAW

Sadiq Reza, New York Law School
David F. Forte, Cleveland State University

Taken in its broadest sense, the Islamic law on crimes includes the classifications within the juristic Shari'a, the ordinances established by the "state," the practices of the police (*shurta*), tribal law, the "morals police" (*hisba*), and the customs of self-enforcement among the people. Within the Shari'a, the law on crimes is one of the least developed portions, in large part because various caliphs appropriated criminal jurisdiction to the state and relieved the qadi of exclusive control.

Nonetheless, the law of crimes within the Shari'a remains critical for a number of reasons. It had great influence on how the numerous Islamic regimes formulated and enforced its own criminal law. The *ulama*, the elite that guarded and was the advocate of Shari'a, had particular sway within certain regimes, such as the Ottomans. The Shari'a was the "written" law that Western imperial powers naturally turned to in varying degrees when they established indirect rule over North Africa, the Near East and the Asian subcontinent. The Shari'a, and in particular its criminal elements, have become emblematic of modern Muslim regimes seeking to assert an Islamic identity over the populace. Modern Islamist movements, including revolutionary parties, have made the Shari'a the substance of their politicized version of Islam. As such, some elements of the Shari'a are apparently in conflict with the modern system of international human rights law.

The Shari'a categorizes crimes primarily according to a schedule of penalties: (1) *hadd* crimes for which there is a fixed penalty; (2) *ta'zir* crimes for which the penalty is variable, and (3) *jinayat*, corporal interpersonal crimes for which the penalty is retaliation or a fixed compensation.

Hadd crimes

These crimes are called "Qur'anic offenses," although the penalties for some have come to be different from those declared in the Qur'an. Repentence or reparation by the convicted person cannot derogate from the severity of the sentence.

Zina

The offense of **unlawful intercourse** consists in having sexual relations with any person not one's lawful spouse or concubine. Strictly speaking, Islamic law has no general conception of adultery as a violation of the marital contract between two persons. The punishment for *zina* is either death by stoning or a specified number of lashes. For conviction, Islamic law requires either the testimony of four eyewitnesses, instead of the normal two, or the confession of the accused. Some jurists require that the confession must be repeated four times. The pregnancy of an unmarried woman can be sufficient proof against her.

Qadhf

Anyone who is competent and adult, whether male or female, Muslim or not, slave or free, is liable if he **falsely charges another person with unlawful intercourse** if the slandered party is free, adult, competent, Muslim, and not previously convicted of unlawful intercourse. False

accusation (*qadhf*) occurs also when one is charged with being illegitimate. Only those who are the objects of the slander or their heirs may bring a charge of *qadhf*. The *hadd* punishment for *qadhf* is eighty lashes for free persons or forty lashes for a slave.

Shurb al-Khamr

The punishment for **drinking intoxicants** or for drunkenness is eighty lashes for a freeman and forty for a slave. The punishment is not prescribed in the Qur'an but was established later and analogized from the punishment for the *qadhf*. The Shafi'i school limits the punishment to forty and twenty lashes, respectively. In many cases, the schools extend the prohibition to other intoxicating substances, such as drugs. Besides proof by a retractable confession, evidence can be given by two male adult Muslims who saw the accused drinking an intoxicant, smelled the odor of alcohol on his breath, or saw the accused in a state of drunkenness.

Sariqa

The *hadd* punishment for **theft** is the amputation of a hand. To be guilty of theft, one must be a competent adult and have the mental intention to steal. The act must consist of the removal by stealth from a secure place of a certain kind of item of a minimum value that is owned by another person.

Qat' al-tariq

Two kinds of offenses are covered by the prohibition against **highway robbery**: robbery of travelers who are far from aid and armed entrance into a private home with the intent to rob it. Both Muslims and non-Muslims are protected from robbers by this law. The punishment is amputation of the right hand and left foot for the first offense and amputation of the left hand and right foot for the second offense. If murder took place during an attempted robbery, the punishment is death by the sword. If there was murder accompanied by an actual theft, the penalty is crucifixion.

Baghi

Rebellion against a lawful leader consists in seeking his death or overthrowing the established order. The punishment is beheading.

Ridda

Apostasy or a falling away from Islam is punishable by death. The evidence for apostasy need only be circumstantial. Impious behavior, such as failing to pray or offending Islamic morals, can be taken as evidence of apostasy. In the Hanafi school, the male apostate is given three days to recant before being executed. The female apostate is imprisoned and beaten until she recants. In all schools, the killing of an apostate does not engender liability for retaliation or compensation. He is literally an outlaw.

Ta'zir crimes

All non-*hadd* crimes engender discretionary punishment by the judge depending on the circumstances of the crime, the offender, and his level of remorse or purpose of amendment.

The punishments cover a range of severity:
(1) private admonition to the guilty party, sometimes by letter;
(2) public reprimand in court;
(3) public proclamation of the offender's guilt;
(4) suspended sentence;

(5) banishment;
(6) fine;
(7) flogging;
(8) imprisonment;
(9) death.

Some crimes, such as blasphemy, are not included in the *hadd* crimes, but can incur the death penalty and can, especially in modern times, be used against non-Muslims. Under the Shari‘a, *ta‘zir* crimes are not defined, and hence there is a problem of fair notice and due process. In fact, most crimes will have been defined by the Islamic state through its own legislation or decrees.

Jinayat offenses

The attitude of Islamic law toward homicide and bodily harm straddles the areas of tort and of crime.

Three kinds of punishments can be permitted in cases of proven homicide or bodily harm: retaliation (*qisas*), blood money (*diya*), and penitence (*kaffara*). Where retaliation (*qisas*) is applied, the guilty party is liable to the same degree of harm as he inflicted on his victim. In the case of homicide, the nearest kinsman of the victim performs the retaliation. Where there is bodily harm, the victim himself is entitled to perform the act of vengeance. In all schools except the Hanafi, the general rule is that retaliation is allowed only in cases in which the victim was equal or superior to the attacker in terms of freedom and religion.

The second form of punishment is blood money. The *diya* is sometimes an alternative to retaliation, at the option of the nearest relative of the slain person or of the wounded victim. At other times, depending on the circumstances of the crime, *diya* and forgiveness are the only options available.

The third form of punishment is penitence (*kaffara*), but penitence is never the sole required punishment. When imposed, it is attached in certain kinds of cases to the payment of *diya*. An act of penitence consists in freeing a Muslim slave or, if one has no slaves, in fasting during daylight hours for two consecutive months.

David F. Forte

1. Islamic Contract Law

Frank E. Vogel
Harvard Law School

I. Some Basic Characteristics of Islamic Contract Law

A. While much of its substance derived from pre-existing laws, this matter was reconceptualized along lines of Qur'anic and prophetic precepts. These precepts give it its systematic unity and most of its distinct traits

B. Law of discrete contracts, not a law of contract; but it is unified by above-mentioned overarching principles derived from religious revelation

C. Law of sale the basic or default model, drawn upon whenever analogy permits

D. Generally pragmatic and sophisticated, certainly for its time; unique chiefly due to a few pervasive stringencies owed to religion

II. Glimpse of a Few Formative Revealed Texts

A. Sanctity of property

B. Sanctity of contract

C. Approval of trade and of the market

D. *Riba*, or usury

E. *Maysir*, or gambling

F. *Gharar*, or risk and uncertainty

III. Some Characteristic Resultant Rules

A. Consequences specifically of prohibition on *riba* or usury

1. Categorical prohibition on default penalties
2. Loan is charitable. Cannot require any benefit in return for a loan
3. Credit sales are generally permissible, even with mark up for credit term, unless both counter-values are gold, silver, government-issued currencies, or certain staple commodities
4. Cash sales are categorically permissible at contractual price so long as counter-values constitute different genera, e.g., gold for silver, dollars for riyals, even at a market premium

B. Consequences specifically of prohibition of *gharar* or uncertainty or risk

1. Valid contract requires that consideration be definite at time of contract, e.g., insurance prohibited
2. Cannot sell property prior to its "existence", e.g., unripe fruit
3. Generally cannot sell property not in possession of seller
4. Conditional or option contracts generally prohibited; e.g., derivative contracts

C. Sale generally understood as exchange of property, not of promises or obligations; has consequences for remedies

1. Usual remedies are specific performance or rescission
2. Ordinarily no damages for breach per se, excluding expectation and reliance damages; no lost profits
3. However, damages if breach assimilated to a tort causing actual, out-of-pocket losses

D. Transactions in obligations or "debt" (*dayn*), as opposed to concrete specific property (*'ayn*), pose special problems

1. As general rule, cannot exchange debt for debt, except at par
2. A binding transaction usually requires immediate actual or obligatory performance on one side; bilateral executory contracts not binding
3. Cannot discount debts, at least to third parties

E. Many contracts (termed *ja`iz*) intrinsically cannot be made prospectively binding

1. This because countervalues in these contracts are not susceptible to being known and defined ab initio
2. Examples are partnership, agency

F. Partnership is affected by certain basic requirements

1. Profits must be shared according to pre-agreed percentage shares, not in fixed or guaranteed amounts
2. Cannot guarantee, or take collateral for, profits
3. Losses are borne solely by capital; those providing services lose only their labor

Glossary

'ariya	gratuitous loan of nonconsumable property; the gift of usufruct
'ayn	an existent, tangible thing considered as unique and individual; a thing (Lat. *res*) as opposed to its usufruct
bay'	sale

daman	(1) contract of guarantee (also called *kafala*); (2) one of two basic relationships toward property, entailing bearing the risk of its loss
dayn	generic property; property defined or contracted for only by its genus, species and other characteristics (usually fungibles); any property, not an *'ayn*, that a debtor owes, either now or in the future; such property when due in the future
gharar	risk, uncertainty
ijara	contract of lease and hire; sale of usufruct
ja'iz	(1) permissable, lawful, licit, valid; (2) term designating contracts as to which one party or both has the right to terminate the contract at any time with prospective effect
lazim	(1) binding; (2) term applied to contracts insofar as they bind a party, or impose legal obligations on that party
maysir	games of chance (Q 5:90)
qard	loan of fungible, to be repaid in kind
riba	usury as forbidden in the Qur'an; interpreted by classical jurists as including interest and various other forms of gain in contract
sharika	partnership; modern company or corporation; applied also to ownership in common

2. Islamic Finance

Mohammed H. Fadel
Sullivan & Cromwell, LLP, New York, New York

I. Why Islamic Finance?

A. Supply of capital
   1. Islamic banks have greater than $100 billion in assets to invest
   2. 10% annual projected growth rate of deposits

II. Permissible Credit Transactions in Islamic Law

A. Cost plus markup sale (murabaha): generally used for short-term trade finance
   1. Merchant wishes to purchase a commodity. Offers financial intermediary a fixed profit over its costs if it will purchase commodity and re-sell to merchant. Financial intermediary must bear risk of loss, even if only momentarily, to satisfy requirement that it owns property that it is selling to merchant.
   2. Substantial amounts of Islamic banks deposits currently used to finance *murabaha* transactions

B. Credit sale (*bay‘ mu’ajjal or bay‘ bi-thaman ajil*): credit sale
   1. Seller sells to buyer commodity; buyer agrees to pay sometime in the future
   2. Title transfers upon conclusion of contract, not buyer s payment of price
   3. Seller must deliver immediately
   4. Seller entitled to charge mark-up for deferral based on time-value of money

C. Forward sale (*bay‘ salam*): purchase price is advanced by buyer against obligation of seller to deliver a generic good in the future.
   1. Used generally to finance production of fungible commodities, e.g., wheat, and hedge commodity price risk
   2. Object of sale must be generally available in market at time and place of delivery
   3. Buyer must may price roughly at time of contract, or else contract is void as bilateral executory contract
   4. Buyer, according to majority rule, cannot resell until she takes delivery; minority rule allows resale so long as commodity is other than food
   5. Cannot be used for trade of gold and silver or governmental currencies

D. Contract of Manufacture (*istisna‘*): distinguished from forward sale in that latter involves fungible goods, while contract of manufacture involves custom designed goods. It is also more flexible than forward sale:
   1. Immediate payment by purchaser not required
   2. Obligation considered tangible property (*‘ayn*), not a generic debt (*dayn*) and therefore, saleable property
   3. Subcontracting permitted, allowing for straightforward financial intermediation:

      (a) Host contracts with FI for construction of project; FI subcontracts with sponsor for performance of its obligation.

(b) Because obligation is deemed to be tangible property (*'ayn*), payment terms can be flexible, and possibility for re-sale in secondary market.

E. Lease (*ijara/iktira'*)

1. A lease is defined as the sale of a usufruct
2. Both rent and usufruct must be determined with sufficient specificity at time of lease to survive scrutiny for prohibition against speculative contracts
   (a) Floating rate leases, often indexed to LIBOR, however, routinely used
3. Lessor as matter of law cannot shift risk of loss to lessee, except for losses caused by lessee
   (a) Financial practice of Islamic banks has either been to ignore this requirement or require lessee to purchase casualty insurance naming lessor as beneficiary
4. Lessee has right of rescission in certain circumstances when future events lessen value of leased property
5. Often combined with option to purchase at end of lease (*ijara wa iqtina*)
   (a) although such option is of doubtful Islamic validity, lessor routinely performs for reputational or other non-Islamic law reasons
6. Functionally used as equivalent of secured loan

F. Guaranty Contracts (*daman*):

1. valid so long as guarantor does not profit from guaranty
2. viewed as type of gratuitous contract for which no profit can be earned

G. Permissible Option Contracts in Islamic Law

1. Down Payment Option (*bay al-'urbun*):
   (a) Majority rule rejects this transaction, but permissible according to minority of jurists; use limited to non-fungible goods
   (b) Minority rule upheld in KSA
   (c) Features not well-developed, but similar to concept of earnest money or liquidated damages:
      (i) Buyer under obligation to buy, but if she fails to pay balance, down payment is forfeited to compensate Seller for failed transaction
      (ii) Buyer might bear risk of loss until exercises implied option to rescind contract of sale
2. Reward Contract (*ji'ala/ju'l*):
   (a) Payment earned only upon completion of specified task
   (b) Optionee s performance is at will;
   (c) Difference of opinion as to whether offer can be withdrawn prior to optionee s completion of performance or whether initiation of performance renders offer binding

HI. Equity Structures

1. Joint Venture (*musharaka*):

   (a) Comparable to common law partnership
   (b) Partnership return fixed by capital contribution
      (i) Cash

(ii) Property, real or personalty
(iii) Labor

(c) Partners control rights proportional to capital contribution
(d) Partnership interest in principle cannot be sold; partner must seek dissolution and accounting

2. Limited Partnership (*mudaraba/qirad*):
   (a) Investors (*rabb al-mal*) contribute capital
   (b) Entrepreneur (*al-mudarib/al-'amil*) provides management
   (c) Entrepreneur and investors split profit according to contractual formula
   (d) Entrepreneur cannot guarantee return of investors capital, but investors capital must be returned before entrepreneur is entitled to share in investment s revenue and therefore shares features of preferred stock
   (e) Interests of investors saleable property at market value if assets of venture are substantially real assets, e.g., plant, realty and tangible personalty
   (f) If assets substantially cash or debt, then sale of investor interests governed by rules regarding sales of currency and debts
3. The entrepreneur is permitted to enter another limited partnership with the investors funds (*al-mudarib yudarib*) and/or enter into joint ventures as a full partner

IV. Islamic Law and the Islamic Financial Industry

A. Shari'a committees
1. Islamic banks/investment funds generally include committee of Islamic law experts who pass on Islamic validity of contracts
2. Will often opine only on Islamic portion of deal, and ignore other pieces of deal.
   (a) If limited partnership prospectus includes guaranty of limited partners capital, it will be held invalid, but if subsequent to creation of limited partnership, the entrepreneur enters into a guarantee, that will not vitiate limited partnership agreement.
3. Islamic investors rely on reputation of Shari'a committee in determining whether deal is Islamic
4. Because of the room for interpretive difference of opinion among jurists, different Shari'a committees may and do react differently to similar contractual provisions
5. Some rules seem to be ignored in practice, e.g., requirement that lessor bear risk of casualty loss throughout lease, and prohibition of commercial insurance

B. Dispute resolution mechanisms
1. often include mandatory arbitration provisions with choice of British law (and maybe New York in recent deals?) to extent consistent with Islamic law
2. KSA probably different because Hanbali school of Islamic law applied by government s courts
3. KSA acceded to New York Convention on the Recognition and Enforcement of Arbitral Awards of 1958 in 1994

(a) Foreign judgments and arbitration awards enforced upon showing that foreign jurisdiction would enforce judgments of KSA courts and that award not inconsistent with Islamic law

C. Remedies for violating strictures of Islamic contract law
   1. Reformation, if practicable, not rescission, preferred remedy
      (a) If contract found to include interest bearing loan, debtor still required to return principle
   2. No criminal penalties for including unenforceable contractual terms
      (a) Parties oftentimes rely on reputation to insure performance in contexts where law does not require it
         (i) Islamic banks will make voluntary capital calls to provide depositors a return equal to passbook rate offered at conventional banks

D. Islamic law in area of banking and finance is in flux
   1. Convergence: market pressure to offer products whose risk/return profile is similar to those offered by conventional financial industry
      (a) Many proposals to create new Islamic law compliant financial products that mimic conventional financial products by extending features of classical contracts, e.g., transforming a forward sale into a futures contract, or allowing sale of debts in limited circumstances to create secondary markets, thereby increasing liquidity of Islamic investments
   2. Divergence: market pressure to be sufficiently distinctive from conventional banking and finance to justify label Islamic

Bibliography for Islamic Contract Law and Finance

Ahmad, Khurshid. "Elimination of Riba; Concept and Problems". In Institute of Policy Studies (ed.) *Elimination of Riba from the Economy*. Islamabad: Institute of Policy Studies. 1994

Asad, Muhammad, *The Message of the Qur'an,* Gibraltar: Dar al-Andalus, 1984

Chapra, M. Umer, *Towards a Just Monetary System,* Leicester: Islamic Foundation, 1985

Coulson, Noel J., *Commercial Law in the Gulf States*, London: Graham and Trotman, 1984

Council of Islamic Ideology, *Consolidated Recommendations on the Islamic Economic System,* Islamabad: Council of Islamic Ideology, 1983

Iqbal, Zamir, "Islamic Financial Systems," June 1997, http://www.worldbank.org/fandd/English/0697/articles/0140697.htm

Jordan Islamic Bank (JIB), JIB, *al-Fatawa al-Shar`iyyah*, Amman: JIB, 1984

Khan, Mansoor H., "Designing an Islamic model for project finance," International Financial Law Review, June 1997, 13

Mallat, Chibli. "The Debate on Riba and Interest in Twentieth Century Jurisprudence" in Chibli Mallat (ed.) *Islamic Law and Finance.* London: Graham & Trotman. 1988

Mawdudi, Abu al-A`la, *Towards Understanding the Qur'an,* trans. Zafar Ishaq Ansari, Leicester: Islamic Foundation, 1988

McMillen, Michael J.T., "Essay: Islamic Shari'ah Compliant Project Finance: Collateral Security and Financing Structure Case Studies," 24 Fordham Int'l L.J. 1184 (2001) (describing structure of Islamic financings completed both in the U.S. and Saudi Arabia)

Rahail Ali, “Banking on Islamic finance for projects,” 195 Project Finance International 52 (2000)
Rahman, Fazlur, “Riba and Interest”, *Islamic Studies*, March 1964
----------, “Islam: Challenges and Opportunities”, in *Islam: Past Influence and Present Challenge*, Welch and Cachia (ed.), Edinburgh University Press, 1979
Rayner, S.E., The Theory of Contracts in Islamic Law, London: Graham and Trotman, 1991
Saeed, Abdullah, *Islamic Banking and Interest*, Leiden: E J Brill, 1996
Saleh, Nabil, *Unlawful Gain and Legitimate Profit in Islamic Law*, 2nd ed., Boston: Graham and Trotman, 1992; 1st ed., Cambridge: Cambridge University Press, 1986
Sanhuri, `Abd al-Razzaq, *Masadir al-Haqq fi al-Fiqh al-Islami*. Beirut: al-Majma` al-Arabi al-Islami. 1967
Siddiqi, Muhammad Nejatullah, *Banking without Interest*, Islamic Foundation, Leicester, 1983
----------, *Issues in Islamic Banking: Selected Papers*, The Islamic Foundation, 1983
Uzair, Mohammad, “Impact of Interest Free Banking”, *Journal of Islamic Banking and Finance*, Autumn 1984
----------, *Interest-Free Banking*, Royal Book Company, Karachi, 1978
Vogel, Frank E. and Samuel L Hayes, III, *Islamic Law and Finance*, The Hague: Kluwer Law International, 1998
Warde, Ibrahim, *Islamic Finance in the Global Economy*, Edinburgh: Edinburgh University Press, 2000

CONFLICT RESOLUTION

1. Representation of Muslim Clients in Divorce Proceedings

Naima Said*
Columbia, Maryland

More often than not, the initial concern by my Muslim female clients seeking representation in divorce cases is that I too, am Muslim and female.[5] Once gender and religion are out of the way, the next question is usually about my ethnicity. If the client is not so direct about my ethnicity, the follow up question to gender and religion is whether I speak Hindi, Urdu, Arabic or perhaps, Amharic? My language skills are usually an indication of my ethnicity. Why is my ethnicity important? "Because you can understand my problems better," the client responds. And so, this is usually how the attorney-client relationship starts in my office.

The couples that come into my office are a potpourri of ethnicities: some are foreign-born Muslim/American-born Muslim, foreign-born Muslim/non-Muslim or the couple may both be American-born Muslims. This last group may include converts. With the first and second combination, the common problem that faces the marriage relates to cross-cultural issues, usually with the American-born plaintiff complaining that the foreign-born spouse is verbally abusive and controlling and the foreign born Muslim complaining that the wife is not obedient enough. American-born convert females also complain that the husbands who are born into the religion tend to be less steadfast in their religious practice and over time, this, along with other cultural differences, becomes the reason to terminate the relationship.

By the time some clients in a foreign-born/convert relationship seek representation before civil courts, many have already been granted the *sharia* divorce. The civil divorce then becomes a matter of formality meant only to tidy up loose ends. The *sharia* divorce usually addresses all the issues and civil proceedings often proceed uncontested. Sometimes, however, complications arise. For example, the *sharia* divorce may fail to comply with State-issued guidelines on child support. The issue is then revisited in civil courts. In addition, parties sometimes find that they are unable to enforce *sharia* orders such as returning the dowry to the husband or providing financial support to the wife during her *Iddat* period. Legal representation during the *sharia* divorce proceedings is not commonplace although women may have a male guardian present. Female converts are usually not represented by a guardian during the *sharia* divorce proceedings where she happens to be the only convert in the family. A common experience among women in *sharia* divorce proceedings is that men dominate the proceedings and that men benefit the most when it comes to tangible property. Both parties may sign a document during the *sharia* divorce proceedings that is subsequently merged into a binding separation agreement to be made part of the record of a civil divorce case. When the female party retains counsel to represent her in the civil divorce proceedings, she often finds out for the first time that she may have been entitled to a greater share of marital property if she had sought relief in the civil system instead. For

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* Naima Said is a member of the Maryland and New York bars. She completed her Masters degree at Harvard Law School in 1990 and has since been in private practice. Her practice includes immigration and domestic law. Ms. Said also provides consultation in criminal cases for clients who may potentially face adverse immigration consequences.

[5] The cases and situations described here are drawn on the author's experiences and experiences of other attorneys in the author's office relating to divorce cases involving Muslim parties.

obvious reasons, male parties prefer *sharia* law over civil courts when it comes to distribution of tangible property. Women may sometimes also give up more in tangible property to mitigate any threats of withholding a *sharia* divorce.

American convert couples typically do a *sharia* divorce only to terminate the marriage. In cases where the couple did not take the extra step of registering the *nikah* with the State, no civil proceedings are filed.

Whether the parties are born Muslim or are converts, custody is always an issue but the degree of litigation varies depending on the make up of the couple. Marriages between foreign-born/American-born couples in divorce proceedings will have little regard for the *sharia* if it means being in a disadvantaged position when it comes to the issue of children. Couples who contest every issue are likely to file civil proceedings first to secure a more favorable position before seeking a *sharia* divorce. The *sharia* is very specific about custody and parties are usually aware of the outcome of the decision before the commencement of proceedings. A party who finds herself in an unfavorable position will seek to institute civil proceedings to secure a more favorable position with respect to custody and restricted or supervised visitation within the United States only. In these cases, the *sharia* divorce becomes the formality.

Muslim male clients generally do not contest physical custody of young children and most often, will give sole custody to the wife until the children reach the age of puberty in keeping with the majority opinion of Muslim scholars. However, the non-custodial father usually wants to be involved in all the decisions relating to the children. Muslim fathers who do contest physical custody are usually those married to women who never converted to Islam. The main concern at the time of the divorce is that the child will lack an Islamic upbringing if the mother gets sole physical custody. Interestingly, in these situations, the Muslim fathers were never steadfast in their observance of religion during the marriage but the issue of the child's religion becomes a paramount issue at the time of divorce. In one case, a male Muslim defendant offered his entire share of his business that he owned jointly with his non-Muslim wife in exchange for sole custody and upbringing of their young daughter in his country of origin. In another case, involving two foreign-born Muslim couples, the wife refused to give her husband visitation outside the United States. Her trepidation arose from the fact that her husband had become more religious during their marriage and she feared that the children would not be returned after a visit outside the United States where both sets of grandparents lived. In yet another case, a non-Muslim wife vehemently objected to visitation of her ten-year old son with his father in Saudi Arabia where the non-custodial Muslim husband was employed. Her apprehension stemmed from the possibility that her husband may abduct their son and that the Saudi Arabian government would be less inclined to return a child to a non-Muslim mother. Maryland State courts ruled in her favor against established precedent and in absence of any evidence that the father wanted physical custody. The father had remarried a French Canadian national and testified that he would probably follow his wife to Canada when their work visas in Saudi Arabia expired. During the divorce proceedings and despite her fears that the husband would abduct the child, the non-Muslim wife would give written consent to the father to visit with the child in Canada in consideration of a generous monetary gift. In this case the court attached great weight to the fact that Saudi Arabia was not a signatory to an international treaty relating to the return of children to the custodial parent. It is not uncommon for the non-Muslim or American-born Muslim mothers to make allegations of threats of abductions to influence the court on issues of custody and visitation.

While a common complaint among many custodial parents is the nonpayment of child support, Muslim men who are steadfast in their religious beliefs will adhere to *sharia* law and will meet their obligations as prescribed by the Quran. In one case, a client voluntarily supported his wife for a year after the *sharia* divorce, well beyond the *Iddat* period. In another case, a foreign-born Muslim father made timely voluntary child support and mortgage payments to his foreign-born Muslim wife following a negotiated settlement by respected members of the community. In yet another case, a foreign-born Muslim father provided child support and mortgage payments for the house that his pre-teen daughter resided in for many years following the final divorce. In this last case, the Muslim convert mother allowed exercise of visitation by the child outside the United States to Saudi Arabia where the child's father was employed.

Cases involving Muslim couples, whether converts or not, and whether or not children are involved, usually proceed as uncontested matters in the *sharia* divorce stage and civil proceedings. Cases involving foreign-born Muslim/non-Muslim couples without children are less complicated and each party will cooperate with a view to facilitating the final divorce. However, cases involving foreign-born Muslim/non-Muslim couples with children are the most expensive and time-consuming regardless of the foreign-born parent's adopted United States citizenship and long-term residence in the United States as this combination of couples are often very positional on the issues of custody and visitation.

2. Views of Muslim Americans

Excerpts from a Research Study of Mosque Members
in the Washington, D.C. Metropolitan Area

Sponsored by
KARAMAH: Muslim Women Lawyers for Human Rights

Amr Abdalla, Ph.D.
George Mason University

This research project was initiated and conducted under the auspices of KARAMAH: Muslim Women Lawyers for Human Rights, a U.S. based non-profit organization, and with funding from the Pluralism Project in Harvard University. The project emerged in response to the expansion of the Muslim community in the United States. This expansion, naturally, was accompanied by increase in the number and types of conflicts that community members face. Recent studies showed for example that the divorce rate among Muslims living in the United States increased to 30% in the recent years. In addition, the sprouting of mosques in most cities and towns was also accompanied by increased conflicts among mosque members regarding how to run the affairs and activities of their mosques.

Within this context, KARAMAH's Dispute Resolution Board decided to conduct research with members of the Muslim community in the Washington, D.C. area. The purpose of the research project was to assess community members' perspectives on the prevalence of certain conflicts in their communities; how they are handled; and how could models of professional Islamic mediation contribute to the effective resolution of such conflicts. Data was gathered from six Imams, and from 28 mosque members in seven different mosques.

This research highlighted several themes regarding conflicts within the Muslim communities of the Washington, D.C. area, and the views of the community members regarding establishing an Islamic model of mediation. An important theme was that the community realizes that part of its "growing pains" is the increase in quantity and quality of conflicts among community members. Family, marital and mosque-related conflicts are most prevalent. Parties to conflicts usually seek the intervention of family and friends in most conflicts, and also seek the help of Imams. Reliance on the state authority to resolve conflicts is regarded with caution and as a last resort. Culture, emotions and generational gaps were all cited as major sources of conflict, or causes for problematic interaction, or as obstacles to reaching resolutions.

The role played by Imams in resolving conflicts included a combination of techniques from counseling, to religious preaching to arbitration. Imams seemed to effectively utilize community members to establish balance between conflict parties, to provide support to women, and to rely on the knowledge of those with experience and credibility to provide advice. Imams in general seemed to be inclined towards determining, or suggesting, solutions to parties based on their knowledge of Islamic Shari'a and principles. Most Imams were open to working with other professionals such mental health professionals, and with state authorities.

As for the proposed Islamic model of mediation, the vast majority of respondents seemed to be very supportive of the idea. They also suggested that it was needed due to the increase in the number and types of conflicts. Respondents obviously preferred to see good practicing Muslims, trusted, credible, well-trained individuals to carry out that task. Cross-training in conflict resolution fields, and knowledge of Islamic Shari'a and principles was the major criteria required of such mediators. Respondents strongly suggested that Muslim mediators work with Imams and establish their credibility, based on their Islam, among community members. Some respondents suggested that those Muslim mediators would function more effectively if they were well known to the community, and not strangers to it.

The major concerns that respondents had regarding an Islamic system of mediation was maintaining privacy and confidentiality. Other concerns included bad reputation or poor training. Respondents expressed a strong desire to see models of conflict resolution that are inclusive of everyone, give voice to all parties, and aim at restoring harmony among community members, and avoid division and splintering of communities.

Based on the results of this research, the following recommendations are suggested for establishing models of Islamic mediation:

1. There is definitely a great need in the community for the establishment of Islamic mediation models and systems.
2. Due to the strong involvement of family and friends in the process of conflict resolution, wide, grass-root training on conflict resolution skills is needed for community members in general. This should not be confused with the design and implementation of an Islamic model of mediation for those who want to become professional Muslim mediators.
3. The training of Muslim mediators must combine knowledge from fields related to conflict resolution, and from Islamic Shari'a.
4. The Islamic model of mediation could hardly be based on the classic principles of the professional North American model of mediation, especially as it relates to family and inter-personal conflicts. This is because an Islamic model will often rely on community involvement in the process and resolution stages, and will encourage solutions based on religious principles and morals, not necessarily individually-based interests.
5. In order to avoid the confusion over what the term "mediation" means, it may be more effective to use the term "Islamic conflict resolution." This is because an Islamic model will include more techniques than just "mediation" as understood in an American context.
6. The content of training of Muslim conflict resolution professionals must be based on a careful assessment of conflict resolution principles as established in the field of conflict analysis and resolution, and in Islam. Those educated and trained in both areas must conduct this task.
7. Muslim experts on the American legal system must be consulted on various aspects of the training and certification of Muslim conflict resolution professionals. They also must provide training on certain prevalent aspects of the legal system that conflict resolution professionals must be aware of.
8. Imams must be consulted on the proposed model of Islamic conflict resolution training, both for community members at large, and for Muslim conflict resolution professionals.
9. The implementation of an Islamic model of conflict resolution at mosques must occur in coordination with Imams, who must be an integral part of that model in terms of referrals, consultations, and involvement in the resolution process.
10. The selection of candidates to be Muslim conflict resolution professionals must be based on a well-developed criterion that include elements of reputable Islamic character, education in Islamic Shari'a, and education or training in conflict resolution-related fields.
11. Develop research processes to examine some of the technique used by Imams for resolving conflicts such as engaging family members, or credible community members, and to incorporate them into the Islamic professional conflict resolution models.
12. In training community members, and Muslim conflict resolution professionals, pay special attention to cultural and generational issues, and negative effects of emotional expressions, on conflicts taking place between members of the Muslim community.
13. The Islamic conflict resolution models must incorporate processes that allow for inclusion of all parties involved, and giving voice to all. They must also aim at restoring community harmony as a goal, and preventing community division and splintering.
14. Special attention must be paid to ensuring privacy of parties and confidentiality of the conflict resolution processes, especially when such processes take place in mosques.

Towards Developing Islamic Models of Dispute Resolution

Excerpts from "Abdalla, A. (2000). Principles of Islamic Interpersonal Conflict Intervention: a Search Within Islam and Western Literature. Journal of Law and Religion,15. 101-134.

In developing models for dispute resolution within the Islamic setting, it is important to recognize two methodological parameters. First, the discussion of dispute resolution within the Islamic setting removes the focus of the research from the realm of jurisprudence to the realm of inter-disciplinary research, from legality to morality, from the letter of law to its spirit, and from application of law to the pursuit of justice. The focus of such research no longer remains to be legal interpretations and precedents, which have been labored over and documented by legal scholars over the centuries and are known in the Islamic heritage as Fiqh. Fiqh becomes only a part of a larger research which encompasses culture, history, sociology, and psychology. For example, the Qur'an provides several rules related to divorce situations and conditions. Usually these Qur'anic verses include four elements: 1) a description of a divorce situation; 2) a rule related to a certain aspect of the divorce (i.e., financial arrangements as a result of the divorce, custody or nursing children); 3) a description of the civility and mannerism which parties should maintain during the process of divorce; and, 4) a reminder to the parties that they are accountable to their Creator for their actions. Fiqh usually focuses on the first two elements: the situation and the rule; together they make the Islamic law. Dispute resolution, on the other hand, attempts to maximize the benefit to the parties of applying not only the first two elements, but also the third and forth elements which relate to morality, justice and accountability. Dispute resolution, thus, attempts to operate within the larger Islamic world view, not just within its traditional legal system.

The second methodological parameter emphasizes the social justice and social change functions of dispute resolution in relation to Islamic theory and Islamic culture. It is necessary to distinguish between Islamic theory consisting of the main sources of Islam, Qur'an and Sunnah, and the Islamic culture which has developed over centuries of integrating the Islamic theory with cultural and traditional practices in different parts of the world. This distinction is vital because Islamic culture does not necessarily follow its sources in the Islamic theory. The mixing of Islamic theory with elements of existing cultures has often led to depriving Islam of its egalitarian, democratic drive. Abuses of power by Islamic rulers, and abuses against women and minorities at times, were triggered by inherent tribal and traditional norms, which overshadowed the pure Islamic message, or forced extreme interpretations of the sources in order to justify these practices. If the dispute resolution as a social movement is considered to be an agent for social change[1], it will be the responsibility of Islamic dispute resolution professionals to restore the Islamic principles of equality, justice and freedom through their practice. Therefore, it will be necessary to adhere only to Islamic sources, using interpretations which are consistent with the spirit of Islam. For example, in interpreting several of the Qur'anic verses and Hadith related to women, it is fundamentally important to recognize the Qur'anic emphasis on the equality of gender in terms of creation, action and accountability.[2] This foundation sets the stage for a proper understanding of several matters which have been, for centuries, patriarchally misinterpreted. For example, several Islamic scholars tended to emphasize certain segments of Qur'anic verses while almost ignoring others, resulting in subjugating women and reinforcing male domination. Interpretations which loosely licensed polygamy, and which excluded women from public life, are abundant in Fiqh books. It is not sufficient, nor is it acceptable, to generate dispute resolution models in the Islamic setting which will only maintain the status quo described above, or impose western models without careful review of their advantages and their limitations. The challenge for Islamic dispute resolution professionals is to restore justice and equality by liberating Islam from the doctrine and cultural elements which subjugated its followers to political and social oppression.

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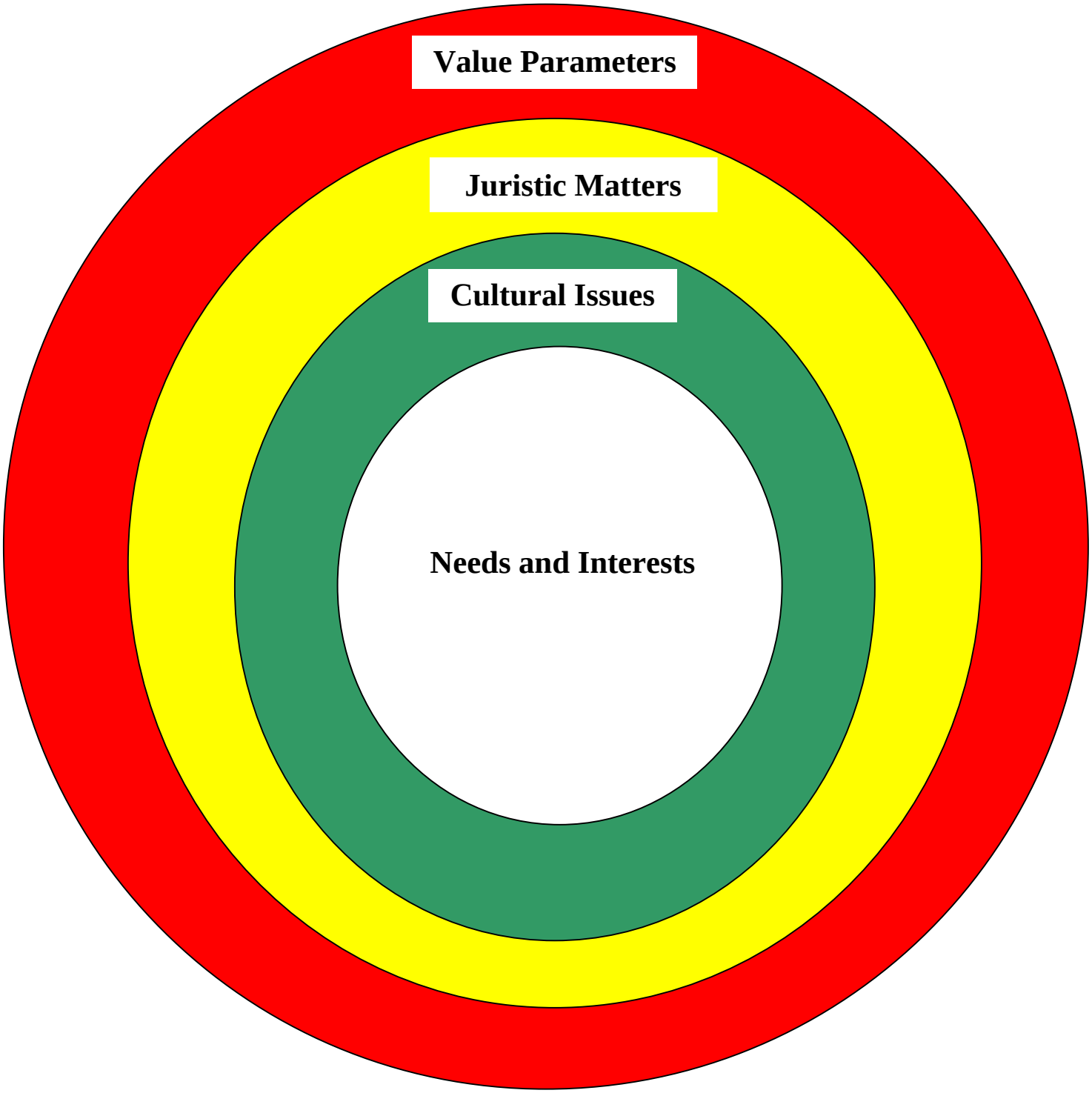
[1]. Jim Laue and Gerald Cormick. *The Ethics of Intervention in Community Disputes.* In The Ethics of Social Intervention. Bermant, G. et al (eds). Halsted Press. 1978. D.C., p.219

[2]. Amina Wadud-Muhsin, Qur'an and Women. Penerbit Fajar Bakti Sdn. Bhd. 1992. Malaysia, p.34-36.

The Islamic Wheel of Conflict



Principles of Islamic Conflict Intervention

1. Restoring to Islam its messages of justice, freedom and equality.
2. Engaging the community in the intervention and resolution processes.
3. Adjusting the intervention techniques according to the conflict situation, and its stages.

Islamic Conflict Intervention Techniques

Setting Islamic Value Parameters: Mediator declares a certain behavior to be in total violation of Islamic values (i.e., alcohol and drug use, gambling, adultery).

Assisted Interpretation: Mediator provides interpretations of Quran and Sunnah to help parties recognize the proper Islamic implementation of disputed values.

Value Disengagement: Mediator assists parties in clarifying the mix up of Islamic values with values or norms derived from other value systems, especially traditional.

Shura Jury: A process of self-education and community involvement in which parties, assisted by the mediator, conduct research in Islamic sources of specific conflict issues. At the same time, a group of their peers (Shura Jury), selected from a volunteer group of Muslims in the community, are asked by the mediator to conduct a similar research. Upon completing their research, the parties present their findings to the Shura Jury. In case of disagreement, a majority vote is taken. The Shura Jury decision is not binding to parties or to other cases.

Islamic Arbitration Council: A process that can be used when an issue of great legal concern needs to be addressed. The council will consist of Muslim scholars and other professionals who are knowledgeable about the particular issue that is presented. This forum can also be resorted to when mediation has been utilized, but was not sufficient to address some of the issues introduced by the parties.

Negotiation of Issues: Mediator conducts private or open sessions to assist parties discuss their interests, needs, emotions and goals as they relate to a certain aspect of the conflict, and help them generate resolution options.

New Process Models: Models that are geared towards developing and institutionalizing processes that are based on Islamic values of justice, equality and freedom. For example, the inclusion of traditionally excluded parties such as children and the socio-economically disadvantaged.

Community Involvement: Mediator engages members of the community, known and respected by the parties, to provide emotional support and conflict escalation reduction during the mediation process.

Professional Help: Mediator suggests a type of professional help (i.e., therapy, drug rehabilitation, marriage counseling) that could assist parties.

INTERNATIONAL LAW

1. Islamic Law and International Law

Abdullahi Ahmed An-Na'im
Emory School of Law

The premise of this presentation is that the relationship between Islamic law and international law should be seen in terms of a more inclusive approach to the latter, rather than conflict or competition between the two. In my view, there can only be one international law, but it has to be truly international by incorporating relevant principles from different legal traditions, instead of the exclusive Euro-centric concept, principles and institutions of international law as commonly known today. When the essential nature and purpose of international law are clarified in the present global context, I will argue, one will find that Islamic law can be fully supportive of the *possibility* of international law.

But this view of the relationship between these two legal systems need to be founded on a clear understanding of differences in the nature and development of these two legal systems, as well as appreciation of the political and sociological context in which they operate. In view of those differences, I will suggest, it is not surprising to find some normative and institutional tensions on both sides, which are probably true of the legal traditions of other societies in relation to international law, rather than being peculiar to Islamic law or Islamic states as such.

Accordingly, I will argue that there are serious concerns with the legitimacy and practical efficacy of international law, which face all human societies with the need to re-examine their own assumptions and practices in the field. That is, the normative and institutional and/or practical difficulties facing international law today are neither due to its inherent inconsistency with Islamic law as such, nor attributable to Islamic societies alone. However, the willingness and ability of Islamic societies to positively confront the theoretical and practical challenges facing their own traditions will depend on a similar corresponding engagement by other societies.

To clarify and develop these themes, I will first attempt to clarify and elaborate on might be called the normative and institutional limitations of traditional international law, especially in the face of the challenges of intensified globalization that are diminishing the territorial sovereignty of the state. This is clearly illustrated, I will suggest, by a critical examination of challenges from a variety of non-state actors, including those engaged in international terrorism, as well as the present "colonization" of Iraq by the United States and its allies. The underlying question in this part of the presentation is about the legitimacy and credibility of the *idea* of international law itself. I conclude this part of the presentation by affirming the imperative need for a credible and effective international law, despite its present limitations and practical risks.

The second part of the presentation will examine possibilities of cooperation and confrontation with the Islamic tradition at large, whether called *Shari'a* (the religious law of Islam), or *fiqh* (Islamic jurisprudence). In this part I will try to clarify the normative and epistemological differences between Islamic law and international law, including the

nature and sources of legal authority for each of the two legal systems, and consequent tensions in their institutional framework and normative content.

Against that background, the last section of the presentation will explore ways of promoting a positive and mutually respectful interaction between Islamic law and international law. Given the premise and objectives of the presentation as a whole, I will raise in this section questions about the terms and mechanisms of interaction between the two legal systems, while emphasizing the primary of international law as the sole legal framework for international peace and security, trade and economic relations, diplomatic relations, inter-governmental organizations and other aspects of international relations in the present global context.

2. "'As-Salamu 'Alaykum?': Humanitarian Law in Islamic Jurisprudence"

Karima Bennoune
Rutgers School of Law, Newark

This talk will examine Islamic legal doctrine in the field of humanitarian law and consider the historical contributions made by Islamic law to contemporary international humanitarian law (such as the Geneva Conventions of 1949). Humanitarian law has been defined by the International Committee of the Red Cross, its modern guardian, as the "international rules… specifically intended to solve humanitarian problems arising from international or non-international armed conflicts and which… limit the methods and means of warfare." The goal of this talk is neither to unfairly attack nor to apologize for Islamic law in this area, but to attempt a fair overview of Islamic humanitarian precepts vis-à-vis armed conflict. The perspective offered will be that of a specialist in contemporary public international law, rather than of a specialist in Islamic law.

The following central questions will be considered: What is the nature of the Islamic law of nations (*as-siyar*), of which its version of humanitarian law is a component? What protections does Islamic legal doctrine offer to those we today would call civilians or prisoners of war and to others in time of conflict? Does it otherwise limit the conduct of hostilities in significant ways? Some general comparisons will be made between Islamic humanitarian law and its contemporary international counterpart (with an awareness of the historical problems such a comparison inevitably raises). The talk will argue that the history of contemporary international humanitarian law must be revised to include the contributions made by Islamic civilization.

As commonly written, the history of contemporary international humanitarian law is a relatively short one, and drawn solely from the European tradition. A leading expert in Islamic international law, Majid Khadduri, noted that "[T]ext writers on the modern law of nations, although appreciating the value of comparative method, have drawn almost exclusively on Western experience." (Majid Khadduri, The Islamic Law of Nations: Shaybani's Siyar xii (1966)). The approach he describes neglects the historical reality that Islamic law constitutes one of the earliest attempts to institutionalize humanitarian limitations on the conduct of conflict.

Specific prohibitions on the methods of warfare were first elaborated in detailed instructions given by the Prophet Muhammad, and later by the first Caliphs, to Muslim warriors being sent into battle. Women, children, and other noncombatants were recognized as a separate category of persons entitled to various degrees of immunity from attack, a development that may be seen as the birth of the "civilian." Prisoners of war were not to be executed and elaborate instructions for their care were developed. Fighters who breached these rules were supposed to be punished. Even the environment was not to be subjected to unlimited onslaught. There were also more negative aspects of the rules, starkly visible in light of contemporary norms, which cannot be overlooked either. For example, prisoners of war could be enslaved in certain circumstances, the definition of combatants was less generous than the modern definition, and not all jurists accepted that noncombatants were to be spared.

Still, the Islamic rules of war were far ahead of their time. Shaybani, a foundational writer in the area, wrote in the 8th century A.D., while Grotius, whom the Europeans consider "the father of international law" did not attempt to codify the law of war until the early seventeenth century.

Ultimately, claiming sole authorship of contemporary humanitarian law is absurd for any legal or cultural tradition. What is crucial is the recognition of the multicultural roots of this body of law, including its important roots in the Islamic legal tradition.

Arabic Terminology:

siyar: the Islamic version of public international law

Suggested Bibliography:

Abdullahi An' Naim, Toward an Islamic Reformation (1990).

Cherif Bassiouni, "The Protection of Diplomats Under Islamic Law," 74 American Journal of International Law 609 (1980).

Karima Bennoune, "'As-Salamu 'Alaykum?': Humanitarian Law in Islamic Jurisprudence," 15 Michigan Journal of International Law 605-643 (Winter 1994).

Mohammed Draz, "Le Droit Internationale Public et L'Islam," 1 Revue Internationale de la Croix Rouge 194 (1952).

Maryam Elahi, "The Rights of the Child Under Islamic Law: The Prohibition of the Child Soldier," 19 Columbia Human Rights Law Review 259 (1988).

Majid Khadduri, War and Peace in the Law of Islam (1955).

----------, The Islamic Law of Nations: Shaybani's Siyar (1966).

Hans Kruse, The Foundation of Islamic International Law (1956).

Ibrahim Shihata, "Islamic Law and the World Community," 4 Harvard International Law Journal 101 (1962).

LEGAL REASONING

1. *Ijtihad* (Independent Legal Reasoning) and its Relationship to the Four Canonical Sources of Law in Sunni Jurisprudence

Bernard Freamon
Seton Hall University

I. THE *SHARI'A*: A THEOCENTRIC COMMUNITARIAN SYSTEM OF LAW AND ETHICS

A. Islamic Faith, Theology, Ethics, and Law—all intersecting in a comprehensive and robust system of thought and way of life
B. The *Shari'a*---the corpus of Islamic law and ethics--- prescribes a behavioral path that will lead the believer to salvation
C. Jurisprudence (*fiqh*)(literally "understanding" or "comprehension") and the foundations of jurisprudence (*usul al fiqh*)(literally "the roots of understanding")----often viewed as the "roots" and the "branches" of the *Shari'a*.
D. The Five Purposes of the *Shari'a*: protection and advancement of: (1) Religion; (2) Life; (3) Intellect or Reason; (4) Lineage; and (5) Property

II. THE FOUR CANONICAL SOURCES OF THE *SHARI'A*

A. THE PRIMARY SOURCES

1. The *Qur'an* (the "recitation"--The Revelational Text)
    a. First and most authoritative source of law and ethical guidance for all Muslims[6]
    b. Confirms validity of all other sources
    c. Revelation generally divided into two broad classifications, classed in accordance with the time of revelation:
        a) Meccan verses--first 13 years of Prophet's mission
        b) Medinan verses--last 10 years of the Prophet's mission
    d. Most (but not all) of the revelation having legal significance are Medinan
    e. Source of a vast body of jurisprudential discourse and literature

2. The *Sunnah* (The "clear path" or "beaten track")[7]
    a. The precedential and normative example given to us by the Prophet Muhammad

[6] MOHAMMED HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 14-43(1991)(1989)
[7] *Id.* at 44.

b. Functions like a by-law to the *Qur'an*—interprets, clarifies, explicates or complements the revelational text
c. *Hadith* (a "story")---a factual account or narrative of an event in the life of the Prophet Muhammad
    1. *hadith* (plural: *ahadith*) are the individual building blocks of the *Sunnah*
    2. *ahadith* are narrations of doings, sayings, and tacit approvals of the Prophet whereas the *Sunnah* is the law deduced from those doings, sayings, and tacit approvals[8]
    3. The sciences of *hadith*---also a vast body of jurisprudential, historical, and evidential literature and discourse on the integrity, authenticity, and applicability of *ahadith* to daily life, politics, war, etc.

B. THE SECONDARY SOURCES

1. *Ijma'* ("consensus" or sometimes, "agreement")
    a. A basis for legitimizing points of Islamic law
    b. Forms an essential part of law-making process in any true Islamic society
    c. "[E]nsures the correct interpretation of the *Qur'an*, the faithful understanding and transmission of the *Sunnah*, and the legitimate use of *ijtihad*."[9]
    d. Can have "consensus" of scholars and, in certain matters, "consensus" of the religious community
    e. "Consensus" may only be employed when the point is not unambiguously resolved by a definitive text of the *Qur'an* or *Sunnah*, although "consensus" may be useful in confirming widely agreed-upon interpretations of texts, methods of recitation, questions of religious practice, diplomacy, charitable dispensations, and other issues of importance to the religious community
    f. Classical law requires that "consensus" of scholars be unanimous before it will rise to the status of a source of law—must have the "unanimous agreement, after the death of the Prophet, of all learned scholars [in a generation] having the capacity of independent and original legal reasoning or thinking [*mujtahideen*—those qualified to perform *ijtihad*] or of all people having the power to *loosen and bind*, i.e., the leading personalities having the power of

[8] *Id.* at 47.
[9] *Id.* at 171.

decision-making, on any matter of religion or worldly affairs."[10]

2. *Qiyas* ("measuring"---usually translated as "reasoning by analogy")
    a. Involves reasoning from principles established in an original case decided under the revealed texts and applying those principles, typically--but not always--by analogy, to a new case not contemplated in the sources.
    b. Recourse to analogy is only warranted if the solution of a new case cannot be found in the *Qur'an, Sunnah,* or a definitive *Ijma'*.[11]
    c. Commonly used example—prohibition of drinking of grape wine contained in *Qur'an* extended by analogy to all intoxicants
    d. Use of *Qiyas* does not involve just textual interpretation but rather concerns the application of principles of logic, practical reasoning, and jurisprudential fidelity to the purposes and objectives of the law[12]
    e. Classical methodology of *Qiyas* always involves four elements:
        1. Original case (*asl*) contained in text
        2. New case (*far'*)
        3. Effective Cause (*'illah*)—common feature or attribute of both original case and new case; this is similar to the notion of *ratio decidendi* in Anglo-American law
        4. Rule (*hukm*) ("judgment" or "legal norm") governing original case is extended by analogy or other form of reasoning to the new case[13]

C. OTHER MODES OF REASONING SOMETIMES DESCRIBED AS SOURCES OF LAW
    1. Equitable Discretion (*istihsan*)
        a. Authorizes departure from the command of a textual rule or *ijma*' or judgment reached by analogy (positive law) when application of the rule will result in injustice or hardship
        b. Important aspect of *ijtihad* and plays a vital role in growth of Islamic law because it encourages flexibility and reasoning with a view toward achieving justice and right reason rather than slavish and absurd adherence to texts.

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[10] Mohamed Abdel-Khalek Omar, *Reasoning in Islamic Law: Part One,* [1997] ARAB LAW QUARTERLY 148 at 185

[11] KAMALI, *supra* note 1 at 197.

[12] *Id*. at 198.

[13] *Id*. at 200. *See also* Wael B. Hallaq, *Non-Analogical Arguments in Sunni Juridical Qiyas* in WAEL B. HALLAQ, LAW AND LEGAL THEORY IN CLASSICAL AND MEDIEVAL ISLAM (1995) (arguing that *a fortiorari*, *reductio ad absurdum*, and syllogistic forms of reasoning are also used in *Qiyas*)

2. Public Interest (*maslahah mursalah* or sometimes just *maslahah* or *istislah*---"interests")
    a. Considerations that secure a benefit or prevent a harm and are simultaneously harmonious with the objectives and purposes of the *Shari'a*[14]
    b. Often used to justify or invalidate governmental regulation and provision of services or judicial decision-making in areas where there is no specific textual authority or guidance (e.g., civil regulation of marriage, zoning regulations, administration of prisons, certain forms of taxation, regulation of the medical and legal professions, etc.)[15]

3. Custom (*'urf* or *'urf wa adah*-- "custom and usage")
    a. Formulation of a rule of decision or mode of interpretation or determination of "consensus" on the basis of a general or local model of behavior, social understanding, or mode of expression that is generally accepted by the population and does not contradict a definitive rule of the *Shari'a*.[16]
    b. The classical and medieval jurists spent much of their time on issues concerned with ascertaining the existence of custom, determining its validity in light of the *Shari'a*, and determining what weight a valid custom should have in the juridical decision-making of Islamic governments and by individuals in commercial and family matters

III. *Ijtihad*---INDEPENDENT LEGAL REASONING

A. DEFINING *IJTIHAD* AND DETERMINING ITS PROVINCE

1. The word *ijtihad* is derived from the Arabic trilateral root verb *jahada*, meaning "to endeavor; to strive; to exert; to seek to achieve a goal." In Arabic, there are many words derived from the root verb *jahada*, including the word *jihad*. Although the word *ijtihad* is related to this concept (meaning "effort" or "diligence" or "industry"), it has acquired a technical, juridical meaning.
2. Juridically, *ijtihad* describes the intellectual effort engaged in by an Islamic jurist in order to infer, deduce, or derive, with some degree of certainty or probability, the rules of the *Shari'a* from the *Qur'an*, the *Sunnah*, and established consensus, using *Qiyas* or other methods of legal reasoning.

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[14] *Id*. at 267.
[15] *See, generally,* KAMALI, *supra* note 1 at pp. 267-282.
[16] Omar, *Reasoning in Islamic Law: Part One*, *supra* note 5 at 191-2

3. The province of *ijtihad* is to enable the jurist to arrive at a sound judgment with respect to interpretation and applicability of speculative or ambiguous texts and established consensus. *Ijtihad* is not called for in cases where the text is clear, definitive, and unambiguous.
4. *Ijtihad* is often described as a "source" of Islamic law.[17] This is probably inaccurate. It is, instead, a methodology of interpretation of texts and of legal reasoning. In that sense it is of tremendous importance because it is the vehicle that enables the jurist to harmonize the commands of the revelation with the dictates of reason. The methodology also requires that jurists understand and evaluate "changing conditions of the Muslim community in its aspirations to attain justice, salvation, and truth."[18]
5. In the Sunni tradition, the methodology of *ijtihad* developed out of the emergence and maturation of the four canonical "schools of law" (Maliki, Hanafi, Shafii, and Hanbali). Each of these "schools of law" is named after a master jurist who lived during the formative period of Islamic law and perfected and taught particular interpretations of texts, modes of reasoning, interpretive strategies, and solutions to legal problems.
6. Not every jurist is qualified to exercise *ijtihad*. A jurist who is so qualified is called a *mujtahid*. He or she must: (1) have a good knowledge of the *Qur'an*; (2) have a good knowledge of the *Sunnah*, including the rules for ascertaining authenticity of *ahadith* and for critical analysis of them; (3) know the principles of abrogation and be aware of the texts that are considered to be abrogated; (4) know what has been settled by consensus of scholars or by the community and have knowledge of how to ascertain the existence of a consensus; (5) be aware of the opinions of other *mujtahids* and be able to critically analyze them; (6) be able to apply *Qiyas, Istihsan, Maslahah, 'Urf*, and other methods of legal reasoning; (7) have a good command of the Arabic language, its grammar, syntax, style, rhetoric, and other related linguistic and philological characteristics; (8) be conversant with the rules and principles of the science of the foundations of jurisprudence (*usul al fiqh*); (9) have knowledge of the ends and purposes of the *Shari'a* and be able to reason from those ends; (10) be a person of good character, with good common sense, an ability to engage in practical reasoning, and capable of careful and discerning deliberation.[19]

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[17] *See, e.g.*, KAMALI, *supra* note 1 at 366 (describing *Ijtihad* as the most important "source" of Islamic law after the *Qur'an* and *Sunnah*)

[18] *Id.*

[19] Mohamed Abdel-Khalek Omar, *Reasoning in Islam Law: Part Two* [1997] ARAB LAW QUARTERLY 353, 359-365. Wael Hallaq suggests that good character is only required of *mujtahids* who perform public

7. The *mujtahid* must be independent. The classical and medieval Islamic scholars ranked jurists, in accordance with their level of theoretical knowledge, skill in reasoning, and command of the sources. The rank of *mujtahid*, i.e., one qualified to practice *ijtihad*, is reserved for those who are capable of giving a sound and reasoned opinion on a question of law without resorting to imitation or emulation of the opinions of others and without fear of condemnation or criticism by other *mujtahids* or the government of the day. He or she should guard against "complacency in favor of friends and bias against enemies."[20]

B. THE METHODOLOGY OF *IJTIHAD*: A VERY BRIEF SYNOPSIS[21]

1. Classifications of Textual Language in the effort to ascertain meaning
   a. Words with clear meaning
      1) The manifest and clear
      2) The unequivocal and perspicuous
   b. Words which do not convey clear meaning
      1) Obscure meanings
      2) Difficult meanings
      3) Ambivalent meanings
      4) Intricate meanings
2. General versus specific patterns of language in the coverage of texts
3. Unqualified (absolute) application and qualified (limited) application of textual provisions
4. The literal and the metaphorical
5. Inferences derived from texts:
   a. Explicit meaning derived from theme and purpose of text
   b. Alluded meaning derived from comparison of subject text with other texts on same subject and rational investigation
   c. Inferred meaning derived from use of analogy
   d. Meaning required by supplementation with other texts
   e. Divergent meanings specified in other texts
6. Other devices and doctrines used in deriving a rule of law from the sources
   a. Commands and Prohibitions
   b. The role of abrogated texts
   c. Analogy

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functions (*muftis* or "jurisconsults"). WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES 118 (1999)(1997).

[20] Omar, *Reasoning in Islamic Law: Part Two*, *supra* note 14 at 366.

[21] This synopsis is, in large part, an outline of the methodology put forward by Mohamed Hashim Kamali in KAMALI, *supra* note 1, at pp. 86-282.

d. Equity
e. The Public Interest

7. Other important factors:
   a. The historical context giving rise to the Revelation
   b. The degree of certainty in regard to the authenticity of the text
   c. The practice of the Companions of the Prophet and of the "Rightly Guided Caliphs"
   d. Other unusual factors

IV. TWO EXAMPLES OF *IJTIHAD*—ONE EASY, THE OTHER DIFFICULT

A. THE PROBLEM OF THE CONDUCT OF GOVERNMENTAL AFFAIRS OR EDUCATIONAL DUTIES AT THE TIME OF FRIDAY PRAYER

1. The text in the *Qur'an* is not clear. It provides:

"O ye who believe!
When the call is proclaimed
To prayer on Friday
(The Day of Assembly)
Hasten earnestly to the remembrance of Allah (God), and
Leave off business (and traffic)
That is best for you If ye but knew!" (*Qur'an* 62:9)

2. Query: Does this mean that municipal governments must cease regulation of traffic or that schools must suspend classes at the time of Friday prayer?

3. The translation of the Arabic word used for "business" in the text literally means "buying and selling." However, by using *Qiyas* we see that the "effective cause" of the rule can be derived from the verse: buying and selling at the time of the Friday Prayer is prohibited so that people can remember God. Such behavior distracts from the remembrance of God.

4. Is the same true of the examples we have asked about? In the case of educational projects the question is clearly yes. In the case of municipal regulation the answer is also yes, but perhaps the rule might be tempered by considerations of public interest.

B. WAR WITH POLYTHEISTS

1. Should Muslims make war with polytheists in a defensive posture only or should there be aggressive, unlimited war until they are all converted to Islam?

2. The text seems to say that such war is unlimited. It provides:

"But when the forbidden months are past,
Fight and slay the pagans wherever ye find them,
And seize them, beleaguer them, and lie in wait for them
In every stratagem (of war); But if they repent,
And establish regular prayers and practice regular charity
Then open the way for them;
For Allah (God) is Oft-forgiving, Most Merciful" (*Qur'an* 9:5)

3. There are other verses (e.g., 22:39-40) that suggest only limited defensive warfare. A number of eminent scholars, especially those in the formative period and in medieval times, have taken the position that this verse abrogates those verses that call for limited warfare. One should note, however, that there is a historical context that appears to dominate the revelation of this verse. This is the classic "sword verse" that was revealed near the close of the Prophet's mission when his new Islamic state in Medina was confronted with military difficulties and treachery on the part of the recalcitrant pagan Arab tribes in the newly conquered Arabian territory. The verse provided for a four-month grace period, after which there would be a state of unmitigated war with non-believers.

4. Modern interpretations suggest, however, that a constant state of warfare is not consistent with the intent and purpose of the *Qur'an*.[22] These interpreters dispute the abrogating effect of verse 9:5 and, seeking to hold it to its context, they cite other verses that appear to command a regime of peaceful relations with non-Muslims, so long as they "fight you not for (your) faith, nor drive you out of your homes…." In such case, Muslims are commanded to deal "kindly and justly with them: for Allah (God) loveth those that are just." *Qur'an* 60:8

[22] *See, e.g.*, KHALED ABOU EL FADL, THE PLACE OF TOLERANCE IN ISLAM 18-21 (2002). *See also* LOUAY M. SAFI, PEACE AND THE LIMITS OF WAR: TRANSCENDING CLASSICAL CONCEPTION OF JIHAD (2001).

2. In the Opinions of a Contemporary Muslim Jurist

Aron Zysow
Harvard University

I. Who is Yusuf al-Qaradawi?
   A. Yusuf al-Qaradawi (b. 1926) is probably the most famous Muslim jurist of our day.
   B. Born and educated in Egypt, he has long been a resident of Qatar, where he serves as Dean of the Faculty of Shariah and Islamic Studies of the University of Qatar
   C. Al-Qaradawi has a long career as a writer, and some of his many works have been Islamic bestsellers.

II. Al-Qaradawi and the modern media:
   A. Al-Qaradawi has become a celebrity through tapes and broadcasts, including frequent appearances on al-Jazeerah.
   B. His legal opinions *(fatawa*) are now also available on the internet, particularly through www.Islam-online.net and www.Qaradawi.net.

III. Al-Qaradawi sees himself and is seen by many Muslims as a moderate.
   A. He has stated that Islam and democracy are compatible.
   B. He has taken liberal positions on a number of social issues.
   C. He was among the forefront of Muslim leaders to condemn that attack on the World Trade Center.

IV. Al-Qaradawi has not been able to avoid controversy.
   A. He was arrested and imprisoned in Egypt while a student for his association with the Muslim Brothers,
   B. He has consistently called upon Muslims to unite to destroy Israel, in a conflict that he regards as a war between Islam and Judaism.
   C. He has endorsed the use of “suicide bombing” or as he would term it “martyrdom operations” against Israeli civilians.
   D. al-Qaradawi has been *persona non grata* in the United States since 1999 for his support of Hamas.
   E. He has been denounced by certain more conservative Muslims as excessively liberal and branded by them as morally unfit to serve as an authority on Islamic law.

V. Kinds of legal decision making (*ijtihad)* that al-Qaradawi has identified as crucial in modern times:
   A. Selective *ijtihad*, involving a choice among inherited discordant legal opinions,
   C. Creative *ijtihad,*, which yields a novel opinion on an old or new question.

VI. Al-Qaradawi's *ijtihad***:**

A. his appeal to social factors, a feature central to his so-called "jurisprudence of lived reality"
B. his attention to the essential human interests (*maslaha*) protected by the law.

VII. Al-Qaradawi's legal theory (*usul al-fiqh*):

A. He has called for a renewal *(tajdid*) of this traditional field of study.
B. He has not written a comprehensive treatise on legal theory.
C. He would undoubtedly consider the theoretical elements in his legal writings as a critical first step toward this goal.

VIII. Al-Qaradawi is an exemplar of the new Muslim jurist.

A. He lacks the intensive formal education in Islamic law formerly regarded as mandatory for legal expertise (his Azhar study was focused on theology and Prophetic precedent [*sunna]*).
B. He has taken a stance independent of the traditional Sunni schools of law (*madhahib*), in what he sees as a necessary step to circumvent the endless rigidities of school doctrine that have accumulated over the centuries and obscured the essential flexibility of Islam.
C. Coming out of an activist background that urges Muslims to accept the "Islamic solution" to their personal, social, and political problems, he has explicitly defined his role as jurist in the widest possible terms.
D. "The truth," he has written, "is that in responding to questioners I regard myself as a jurist-respondent (*mutfti*), a teacher, a reformer, a healer, and a guide."
E. His present role as media personality is entirely consistent with his vision of the mission of the jurist in our day.

Bibliography

Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence*, Islamic Texts Society, Cambridge, 1991.

Hallaq, Wael B., A *History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh*, Cambridge University Press, Cambridge, 1997.

ISLAMIC LAW IN MUSLIM MAJORITY COUNTRIES

1. Afghanistan

Mariam Nawabi
Dechert LLP, Washington, D.C.

Located in Central Asia at the crossroads between Europe, East Asia, and the Indian subcontinent, Afghanistan has been at the crossroads of civilizations for thousands of years. Urban civilization in the areas included in present day Afghanistan began as early as 3000 to 2000 B.C. Afghanistan's location has been a blessing at times, as evidenced by the flourishing trade that existed during the time of the silk road, as well as a curse, as differing political systems and ideologies in the region have sought to exert their influence in the country, leading to destabilization and conflict.

Islam in Afghanistan

Islam was introduced to the area in 642 A.D. Prior to the introduction of Islam, Buddhism was prevalent and the giant statutes of two Buddhas destroyed by the Taliban in 2001 are remnants of that history. Former Afghan rulers founded the central Islamic Kingdom of India and the Moghul Empire. It was from Afghanistan that Islam found roots in what is currently India and Pakistan.

Today, Afghanistan is a majority Muslim country, with 99% of the population Muslim -- 84% Sunni (primarily following the Hanafi school) and 15% Shiite (primarily following the Imami school). The remaining 1% includes primarily Hindus and Sikhs. A small population of Jews existed in Afghanistan, but most emigrated and left by 1985. Islam is a unifying factor in Afghan society despite the existence of sectarian differences and variations in Qur'anic and legal interpretations.

Afghanistan has strong roots in *Sufism* (from *suf*, Arabic for wool; possibly referring to woolen robes worn by early ascetics), a mystical order. The great Sufi orders or *tariqa* (brotherhoods) were first established in the twelfth century. Sufi practices are found today among both Sunni and Shiite communities in Afghanistan, although it tends to be more widespread among Sunnis. Sufis describe their personal experiences in a vast variety of poetic expression. The poetry of the Sufis is considered one of the most notable of all poetic styles in the world. Universally acclaimed Afghan Sufi poets include Ansari (11^{th} century) and Jami (15th century) of Herat, Sanayi of Ghazni (12th century) , and Rumi of Balkh (13th century), the founder of the order of whirling dervishes.

Role of Islam and Islamic Law in the Afghan State

In order to understand the current role of *shariah* (Islamic law) in Afghanistan, a historical perspective is needed. The state of Afghanistan as it is known today was founded in 1747 by Ahmad Shah Durrani. His rule extended from Mashad in the west

(now in Iran) and Kashmir and Delhi to the east (now in India) and from the Oxus River in the north to the Arabian sea in the south. Ahmad Shah, who ruled Afghanistan until 1773, had absolute power. The courts were in the hands of the *ulama* (religious scholars), but the death penalty had to be approved by the king or a governor. Ahmad Shah's administration drafted a legal code, although it was not enacted. Although *shariah* courts existed in urban centers after Ahmad Shah's rule, the primary judicial basis for the society remained in the tribal code of the *Pashtunwali* (Pashtun code of conduct) until the end of the nineteenth century. Sporadic *fatwas* (formal legal opinions) were issued. Due to the absence of formal legal mechanisms in most tribal Pashtun areas, the *Pashtunwali* continues until today to exert an enormous influence on legal and social decisions.

In the 19th century, the expanding British and Russian Empires significantly influenced Afghanistan in what was termed "The Great Game." British concerns over Russian advances in Central Asia culminated in two Anglo-Afghan wars, the first from 1839-42 and the second from 1878-80. Both times, Afghans fought off British colonial rule.

The first systematic use of Islam as an instrument for state-building was introduced by Amir Abdur Rahman (1880-1901) during his drive toward centralization. The "Iron Amir," as he was known, claimed temporal and spiritual powers, and the only restraint on his rule was the obligation to conform to the rules of Islamic law. He decreed that all laws must comply with Islamic law and thus officially elevated the *shariah* over customary laws embodied in the *Pashtunwali*. Islam continued to have an important role in state affairs, but the religious establishment remained essentially non-political, functioning as a moral rather than a political influence. Nevertheless, when the religious leadership considered themselves severely threatened, some religious leaders used Islam to rally groups in opposition to the state. At times, tribal revolts were often lead by *ulama*, who purported to represent the interests of the people.

A process of secularization began with King Amanullah (1919-1929), who proclaimed a constitution in 1924 that enumerated the prerogatives of the ruler and the rights of the ruled. Amanullah moved to end Afghanistan's traditional isolation in the years following the Third Anglo-Afghan war. He established diplomatic relations with most major countries and, following a 1927 tour of Europe and Turkey, during which he noted the modernization and secularization advanced by Ataturk, he introduced several reforms intended to modernize Afghanistan. Some of these, such as the abolition of the traditional veil for women and the opening of a number of co-educational schools alienated many tribal and religious leaders.

This reform period formed the basis for democratization under Zahir Shah (1933-1973), whose reforms culminated in the promulgation of the 1964 constitution. However, reform efforts were impeded by the country's poverty and illiteracy. Universal education, envisioned by the constitution, was a goal rather than a reality and Afghanistan remained largely illiterate. The introduction of secular schools, in addition to the traditional mosque system, produced two intellectual groups. These groups continue to debate the course Afghanistan should take, including the new constitution and legal system.

In 1973, Muhammad Daud, a cousin of the king, staged a coup and proclaimed a republic. Daud set up a one-party government, a "democracy based on social justice." His constitution, promulgated on February 14, 1977, was intended to give power to the majority--farmers, workers, and youth. Land reforms were to be carried out and cooperatives were to be encouraged. When Marxist followers overthrew Daud in 1978, reformist policies were continued, but became brutal as political executions were used to stifle opposition.

After the Soviet invasion in 1979 and during the resistance period (1979-1989), the dynamic of politicized Islam in Afghanistan was strengthened when *mujahideen* (freedom fighters) defended the country against the Soviet invaders. Politicized Islam represented a break from past Afghan traditions. The Islamist Movement originated in 1958 among faculties of Kabul University, particularly within the Faculty of Islamic Law which had been formed in 1952, but it was not able to command enough support to gain political power until after the Soviet defeat. It was from this base of professors and students that many of the *mujahideen* leaders emerged.

Although the *mujahideen* were ultimately successful in driving out Soviet forces, they were not able to construct a political alternative to govern Afghanistan after their victory. In 1992, the Islamic State of Afghanistan came into being and represented the first time that religious specialists officially exercised state power. Unfortunately, because of rivalries between *mujahideen* groups, a civil war ensued, further destabilizing the country from 1992-1994.

It was during this anarchic period that initial support for the *Taliban* (students of Islam) was attained, as the Taliban promised to bring about greater security and an end to the civil conflict. The majority of the Taliban were comprised of young Afghan refugees trained in Pakistani *madrassas* (religious schools), especially those run by the Jamiat-e Ulema-e Islam Pakistan, the conservative Pakistani political religious party. After their emergence, the Taliban captured about two-thirds of the country and established a theocratic regime. For the first time in its history, much of Afghanistan was ruled as a pure theocracy. Mullah Muhammad Omar proclaimed himself "Commander of the Faithful," and a government was established in which the leaders were members of the *ulama.*

The Taliban's harsh interpretation of Islam was largely based upon Wahhabism that emanated from Saudi Arabia, a form of Islam that was foreign to Afghanistan. The Taliban were supported by foreign elements and as institutions and the economy crumbled, the country became increasingly weakened. As we all know too well after the horrific events of 9/11, its weakness allowed it to become a haven for Islamic extremists from around the world. Throughout this time, the *Northern Alliance* (opposition forces) fought the Taliban, later with U.S. intervention in October 2001 until the signing of the Bonn peace agreement in December 2001.

The Role of Islamic Law in Afghanistan's Legal System

Thus, ever since the modern state of Afghanistan was formed, it has been ruled both by the sword and by Islamic law. As a result, Afghanistan's legal system is a mixed one that consists of Islamic law, state enacted legislation, and customary and tribal laws. In this mix, Islamic law has played an important role, although the form and extent of its role has varied. Islamic law has been traditionally administered by *ulama* and has to some extent been incorporated as part of the law of the state.

The varying role of Islamic law is reflected in the constitutions that have been promulgated by successor regimes in the country. The 1931 Constitution made Hanafi jurisprudence the state religion, while the 1964 Constitution simply prescribed that the state should conduct its religious ritual according to the Hanafi school. The 1977 Constitution declared Islam the religion of Afghanistan, but did not require that the state ritual be Hanafi.

State enacted legislation during the 1960s and 1970s increased in many different areas. The Penal Code (1976) and Civil Code (1977), covering the entire field of social justice, represented major attempts to strengthen secular law. Under the 1964 Constitution, courts were enjoined to consider cases first according to secular law, resorting to *shariah* only in areas where secular law did not exist. Thus, Islamic law was meant to fill "voids" when interpreting and applying state-mandated legislation, but was not the sole source of legislation.

As of the writing of this outline, the new draft constitution for Afghanistan contains a greater official role for Islam and Islamic law than any other past Afghan constitution. Part of the Preamble states "With firm faith in God Almighty and relying on His mercy, and Believing in the Sacred religion of Islam." Article One states that "Afghanistan is an Islamic Republic, independent, unitary and indivisible state." Article Two provides that "The religion of Afghanistan is the sacred religion of Islam. Followers of other religions are free to perform their religious ceremonies within the limits of the provisions of law." Article Three states, "In Afghanistan, no law can be contrary to the sacred religion of Islam and the values of this Constitution." Further articles provide that the state shall abide by the UN Charter and international treaties and conventions which Afghanistan has signed, but how this will be interpreted is an open question. Islam has been given a wider role in education as Article 17 requires that the state adopt measures to promote education, including the development of religious education, organizing and improving the conditions of mosques, madrassas and religious centers.

As Afghanistan enters a new stage in its political and legal development, Islamic law and its interpretation will become even more important due to the numerous provisions in the new constitution recognizing and requiring the implementation of Islamic law. Deciding what is contrary to Islam will no doubt lead to great tension and debate and it will be the ability of the new structure of government and process of decision-making that will determine the success or failure of the new constitution.

Application of Islamic Law in Afghanistan

Given the importance of Islamic law in Afghanistan, there are several layers of analysis in determining its past and potential future application in the country. These layers are all interrelated and addressing these factors will be crucial as judicial reform measures take place.

- First, Afghanistan's mixed legal system has been characterized by many non-state and informal dispute resolution mechanisms -- namely *jirgas* (councils) and private mediators that have decided disputes brought before them. Most legal disputes are thus decided outside of the formal legal system.
- Second, a dichotomy has always existed in the formal and informal legal system between application of customary law and Islamic law, with the latter increasingly relegated to the sphere of family and criminal law.
- Third, even though statutory laws exist, in practice, judges generally apply Islamic law and not statutory laws. Even before the Soviet invasion of 1979, Afghanistan's framework of constitutional and statutory laws played only a minor role in the administration of justice. A Law of the Jurisdiction and Organization of the Courts was passed in 1968 and established a structure for the formal court system. It established the general Courts, which include the Supreme Court, the Court of Cassation (an administrative court of appeal), the High Central Court of Appeal, provincial courts, and primary courts. It also created specialized courts that included juvenile courts, labor courts and other specialized courts established by the Supreme Court when needed. Outside of urban courts or specialized courts that had access to relevant legal material, in practice and legal reality, Afghanistan's courts have been applying Islamic and customary laws.
- Fourth, the lack of institutions and capacity has limited the application of most written laws, whether based on secular or Islamic law leading to a wide gap between laws and legal reality.
- Fifth, due to the past 23 years of conflict and changing regimes, it is difficult today to ascertain even *which* of the past laws enacted apply.
- Sixth, legal institutions, if they exist, face a host of problems. Courts are understaffed and ill equipped. Neither judges, lawyers nor educational institutions have adequate access to applicable statutes and legal materials, most of which were destroyed during the past 23 years of conflict. Basically, many judges and mullahs issuing legal decisions or verdicts do not have access to or are not even aware of Afghanistan's secular laws.
- Seventh, there are no clear guidelines on the qualifications or selection procedure for lawyers and judges. Although a transitional government has assumed leadership of ministries, the Supreme Court Justice and most of the 4,700 judges appointment during the Taliban time are still in place.
- Eighth, lack of resources, materials and education have lead to legal decisions being issued purportedly based upon Islamic law, but in reality, based upon cultural practices or *Pashtunwali.*
- Ninth, there has been uneven application of secular and Islamic law throughout the country, with an urban-rural divide. The inability of successive governments

to implement statutory laws in a uniform manner across the country reflects not only underdevelopment, but political constraints since regional leaders are wary of giving up control to state institutions.

- Tenth, a new dynamic of Islamic groups or organizations (or those who call themselves as such) becoming politicized due to the lack of political plurality or as a result of the quest for power and legitimacy in times of instability has lead to a greater importance for the role of Islamic law in the legal system. Most of the parties vying for power in the June 2004 elections identify themselves as Islamic parties.

Conclusion

Faith is an important part of most Afghan's lives and when questioned by the Constitutional Review Commission this fall, most agreed that Islam should have a role in the new legal system. However, most citizens lack the understanding to determine what that means and how it should be implemented.

Due to Afghanistan's recent history and the Soviet invasion, which lead to a strengthening of religious parties, there is little doubt that the current Afghan government will not be able to survive on a purely secular, non-Islamic basis. This is even more true due to the loss of millions of the country's population and the influx of a mainly conservative rural population into urban areas. With this movement, conservative values have been brought into areas that had formerly been more open to change. The balance between religion and the state and how Islamic law is interpreted will be key.

When people seek to survive in harsh environments, they many times cling to the only thing they have left -- their faith. Those individuals who endured hardship in Afghanistan will likely give Islam and Islamic law a much greater role in the legal system and governance than existed in the past. The only effective way to thus shape legal reforms in Afghanistan is to address it with reinterpretations of Islamic law itself, not by ignoring its presence.

Bibliography

Adamec, Ludwig. *Historical Dictionary of Afghanistan.* London: Scarecrow Press (1997).

Amin, S. *Law, Reform, and Revolution in Afghanistan: Implications for Central Asia and the Islamic World* (3rd rev. ed. 1993).

Constitutional Review Commission, *The Constitution of Afghanistan, Year 1382* (2003), available at http://www.constitution-afg.com/draft_const.htm as of December 1, 2003.

Dupree, Louis. *Afghanistan.* Princeton: Princeton University Press (1973).

Esposito, John L., ed. *Voices of Resurgent Islam.* New York and Oxford: Oxford University Press (1983).

Kamali, M. *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary* (1985).

Lau, Martin. *Islamic Law and the Afghan Legal System.* International Commission of Jurists (2003), available at www.bglatzer.de/arg/arp/lau.pdf.
Marty, M. and R. Appleby, eds. *Fundamentalisms and the State: Remaking Polities, Economies, and Militance* (1993)
Roy, Olivier. *Afghanistan: From Holy War to Civil War.* Princeton: Darwin Press (1995).
Rubin, Barnett R. *The Fragmentation of Afghanistan: State Formation and Collapse in the International System.* New Haven and London: Yale University Press (1995).
Vafai, Gholam H. *Afghanistan: A Country Law Study*. Washington: Library of Congress (1988).
U.S. Department of State, *Background Note: Afghanistan*, available at http://www.state.gov/r/pa/ei/bgn/5380.htm.

2. Indonesia

Mark Cammack
Southwestern University

- **Introduction**
    - With about 200 million Muslims, Indonesia is largest Muslim country in the world.
    - Though not an "Islamic state," the state enforces Islamic doctrines of marriage, inheritance, and charitable foundations through separate court system.
    - Repeated efforts to establish constitutional requirement of "state enforcement of shariah" have failed for lack of support.
- *Indonesian Islam*
    - Islam arrived in Southeast Asia in 13^{th} – 17^{th} centuries.
    - Character of SEAsian Islam shaped by, i.a., pre-Islamic history and local social cultural values. Much of region had long history of Indian influence.
    - The character of SEAsian Islam also influenced by configuration of political power.
    - There is also significant diversity within the region among Indonesian Muslims.
    - In a predominantly agricultural economy, SEAsian women have generally enjoyed higher social and legal status than other parts of Muslim world. Most common kinship structure is bilateral. Region also includes patrilineal groups, and the world's largest matrilineal society.
- **Indonesian interpretations of Islamic Law**
- *Local interpretations of Islamic Law shaped by awareness of difference between Southeast Asia and Arabia.*
- Two illustrations of awareness of difference among Southeast Asian Muslims. Both illustrations from Minangkabau in North Sumatra. Minangkabau reckon descent and inheritance based on female blood lines. Also among the most devout Muslims in Indonesia.

- First illustration unselfconscious childhood memoir about growing up in a Minangkabau village. *Village Childhood* by Muhamad Radjab.

    - Tells of studying the rules about how to perform the ablutions before praying.

    - Describes reaction to learning rule that when praying in the desert with no water to wash, it is permissible to use sand. Questions relevance of rule in tropical Minangkabau, where water is plentiful.

- Second illustration from argument by prominent scholar, Sayuti Thalib, for a more contextual approach to interpreting original sources of the law.

    - Thalib argued that the inheritance rules of orthodox Islamic doctrine were shaped by patrilineal Arab society in which they developed. Used matrilineal Minangkabau to illustrate how categories of social perception shape interpretation.

    - For Minangkabau the word for female is simply “child,” but male children are referred to as “banana children.” The term banana child has its source in the way bananas reproduce. The fruit of a banana tree does not contain seeds, and a new banana tree does not grow from the fruit of a mature tree. The new tree grows from a root that is off to the side of the parent tree. The term “banana child” refers to the fact that male children are not regarded as direct descendants of the parent stock, and do not belong to the parents’ clan. A female child, however, is simply a “child,” indicating that she is the offspring of her parents, and part of the clan.

    - The Koran grants certain inheritance rights to “children.” Within Arab society, in which descent is reckoned through males and the tribe is composed of all male relatives related to a common ancestor through male blood lines, male children and children related through males were regarded as simply “children.” It is understandable, therefore, that the term “child” in the Koran is understood to refer to males, and that it is males alone who are entitled to the inheritance rights of children. If the Koran had been revealed to the Minangkabau, Thalib argues, they would have interpreted it based on the categories of their social world, and females and relatives related through females would have been the primary heirs.

- *Positive law less progressive than debate*
    - It has long been argued that law should reflect Indonesian values, but progress toward development of Indonesian school of Islamic doctrine has been slow.
        - For example, in mid-eighties inheritance rules were codified. Proposal to equalize the inheritance rights of male and female heirs opposed by Islamic establishment because of conflict with apparently unambiguous language in the Koran.
        - When completed and implemented in early 1990s, code preserved rule that the share of a son is twice that of a daughter.
    - There is movement, albeit slow and tentative, toward a more gender neutral inheritance law.
    - One potentially significant Supreme Court decision from eastern Indonesian island of Lombok in 1994 indicates the possible direction of future change.
    - The case, *H. Nur Said*, reduced to conflict between the deceased's daughter and his brother.
- *Sunni inheritance doctrine*
    - Solution of most inheritance questions under Islamic law requires determination of rights of two categories of heirs.
    - First, the Koran designates certain relatives as entitled to a fixed fractional share of the deceased's estate.
    - The group of Koranic sharers are mostly those who were not entitled to inherit under pre-Islamic Arab customary law.
    - Second, after the "Koranic sharers" have received their shares, the remainder of the estate goes to the nearest male relative related through male blood lines.
    - The nearest male agnate, who is a residuary heir under Islamic law, was the sole heir under pre-Islamic tribal law.
- *H. Nur Said*
    - Lower courts in *H. Nur Said* decided the case in line with orthodox doctrine.

- Applicable Koranic provision makes the inheritance rights of collateral relatives dependent on absence of "child." Although Arabic word commonly refers to both male and female children, orthodox doctrine grants collateral relatives inheritance rights only in the absence of a son.

- Thus, in the absence of any son, a single daughter receives one-half of the estate. Deceased's full brother, as nearest male agnate, takes remainder.

- Indonesian Supreme Court in *H. Nur Said* gave the entire estate to the daughter on the ground that collaterals come into inheritance only in the absence of any child, son or daughter. Only reason given for decision was citation to view of companion of Prophet that the Koranic term embraces both male and female children.

- But the Court's decision to adopt this minority position clearly influenced by its conception of social justice.

- **Conclusion**

- As elsewhere in Muslim world, there is a lively debate among Indonesian Muslims regarding the future development of Islamic law.

- While extremist elements have recently attracted attention of outside world, hard line Muslim political parties fared badly in 1999 elections, and are expected to do little better in 2004.

- Efforts around the country to implement strict social codes have more to do with the distribution of political power and assertion of local identity against centralist control than Islamic doctrine.

Select Bibliography

Daniel S. Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions* (1972)

John R. Bowen, *Islam, Law and Equality in Indonesia: An Anthropology of Public Reasoning* (2003)

3. Legal Theory in Post-Colonial Egypt

Lama Abu-Odeh
Georgetown University Law School

My paper explores the development of legal theory in Egypt after the promulgation of the Egyptian civil code of 1949. The paper argues that Sanhuri's attempt to incorporate the concerns of the two projects of critical theory, that were brewing at the time he set out to draft his code, namely, Islamic critical theory, with its concern with identity, and French critical theory with its concern with distribution has essentially failed. The first part of his project failed because Sanhuri sought in the incorporation of the insights of French critical theory to liberate Egypt from its historic dependence on mainstream French jurisprudence and to trigger an autonomous Egyptian jurisprudence that has its roots in critical theory. This never seems to have happened as post World War 2 Egyptian jurists continue to write as distant participants in a mainstream debate on law taking place in France. It seems to also have failed because the incorporation in the code of the tools of sociological jurisprudence, as French critical theory had advocated, to advance progressive legislation has fallen victim to the surviving conceptual structure of mainstream jurisprudence which seems to have undermined the progressive bent of these devices. The second part of the Sanhuri project failed because Sanhuri's claim that his code was Islamic because it was not un-Islamic remains disputed among those who see themselves as modernizers of Islamic law. For the latter, for a law to be Islamic it has to be more positivistically so by being grounded in either sources or jurisprudence that are identifiably Islamic. These modernizers continue authoring works of legal theory that continues, or builds upon, or comes up with variations of, the Abdu-Rida critique of Islamic jurisprudence.

In a nutshell, the works of theory in contemporary Egypt today that exist outside the regular commentary on the Code consist of two competing camps that write about Islamic law. The first, see themselves as the progeny of Sanhuri and write on Islamic law to argue for the legitimacy of the contemporary Egyptian legal system by continuing Sanhuri's argument that what is not un-Islamic is Islamic. The second writes to argue that the contemporary legal system is un-Islamic and offers reconstructive projects on how to turn it into an Islamic one.

ISLAMIC LAW IN NON-MUSLIM MAJORITY COMMUNITIES

Christina Jones-Pauly
Harvard University

Lawyers and judges are gaining a new consciousness about the application of Islamic law in modern western industrial societies, not only on account of Muslim migrants who have permanent residence but also on account of an increasing number of citizens who become Muslim or migrants who become citizens. How to treat Islamic law within an established legal system based on categorization of law into public, criminal, and private is a major legal question with which the courts have had to grapple. The range of categories where Islamic law may be considered or applied is controversial. Should it be applied in all areas or only limited to private family law? The talk will rely on vivid examples from the case law, including decisions from the European Court of Human Rights. Misunderstandings of Islamic law shall be emphasized. The talk will end with reflections on theoretical issues of how legal systems conceptualize themselves in relation to other systems.

This talk will be divided into the following eight issues:

- Islamic law as the law of nationality and citizenship of Muslim non-citizens and its conformity to *ordre public*, constitutional, or human rights standards
- Islamic law as a religious law enforceable by the state
- Islamic law as an internally applied private law (arbitration by which institutions, by which persons?)
- Trumping Islamic law with the law of domicile
- Islamic law as part of blasphemy law
- Application of Islamic law as a cultural value system or tradition
- Pragmatic questions of how to determine what is the applicable Islamic law rule
- Islamic law and the need for a theory of legal pluralism and hierarchization or a new configuration of conflict of laws

PLENARY: DEBATES IN ISLAMIC CONSTITUTIONALISM

Abdullahi Ahmed An-Na'im, Emory University
Azizah Y. Al-Hibri, University of Richmond
Tariq Ramadan, University of Fribourg and College of Geneva, Switzerland
Moderator: Noah Feldman, New York University Law School

The discussion of Islamic constitutionalism will organize itself around several key themes; each theme leaves room both for theoretical discussion and the consideration of practical instances and examples.

1. **The relationship between constitutional democracy and classical Islamic sources**. Whether there exist precedents for the mechanisms of electoral democracy in Islamic law, theory, and historical practice remains a major topic of discussion among both practitioners and critics of Islamic constitutionalism. Sources that are typically considered include the Qur'an, *hadith*, the political/diplomatic practices of the Prophet (e.g., the "constitution" of Medina), and the constitutional design of the caliphate (e.g., the role of *ahl al-hall wa-l-'aqd*, the representatives of the Muslim community who act on its behalf in appointing and deposing a ruler). The discussion of this theme will discuss not only the substantive sources that underlie the debates but also the intellectual and conceptual conditions for the debates themselves.

2. **The protection of basic rights, especially rights to equality for non-Muslims and women**. Defining such rights in an Islamic constitutional context may be achieved by a range of possible means, including textual commitments to international legal conventions, the adoption of neutral constitutional language, and the adoption of language derived expressly from Islamic tradition. This theme further raises the associated question of institutionalizing guarantees that appear in constitutional texts, and of the judicial or other mechanisms best suited to such protection.

3. **Practical instances of successful constitutionalism in the Islamic context**. What counts as success? What countries are worth emulating in certain respects? What lessons are relevant to present cases of constitution-writing, such as Afghanistan and/or Iraq?

GENERAL BIBLIOGRAPHY OF ISLAMIC LAW

Anderson, J.N.L., *Law Reform in the Muslim World*, London 1976
An-Na'im, Abdullahi Ahmed,*Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law*, Syracuse 1990
Bassiouni, M. Cherif, *The Islamic Criminal Justice System*, Oceana, 1982
Brown, N., *The Rule of Law in the Arab World: Courts in Egypt and the Gulf*, Cambridge 1997
Burton, J., *An Introduction to the Hadith*, Edinburgh 1994
----------, *The Sources of Islamic Law: Islamic Theories of Abrogation*, Edinburgh 1990

Calder, N., *Studies in Early Muslim Jurisprudence*, Oxford 1993
Coulson, N.J., *A History of Islamic Law*, Edinburgh 1978, 1964
---------- , *Succession in the Muslim Family*, Cambridge 1971
El Alami, D.S., and Doreen Hinchcliffe, *Islamic Marriage and Divorce Laws in the Arab World*, London 1998
Forte, D., *Studies in Islamic Law: Classical and Contemporary Application*, Lanham 1999
Gleave, R., *Inevitable Doubt: Two Theories of Shi'i Jurisprudence*, Leiden 2000
Hallaq, Wael B., *Authority, Continuity and Change in Islamic Law*, Cambridge 2001
----------, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh*, Cambridge 1997
Heyd, U., *Studies in Old Ottoman Criminal Law*, ed. V.L. Menage, Oxford 1973
Hill, E., *Sanhuri and Islamic Law*, Cairo 1987
Johansen, B., *Contingency in a Sacred Law: Legal and Ethical Norms in the Islamic Fiqh*, Leiden 1999
----------, *The Islamic Law of Land Tax and Rent*, London 1988
Juynboll, G.H.A., *Muslim Tradition: Studies in Chronology, Provenance and Authorship of Early* hadith, Cambridge 1983
Kamali, M.H., *Principles of Islamic Jurisprudence*, 2nd ed., London 1991
Liebesny, H.J., *The Law of the Near & Middle East: Readings, Cases & Materials* Albany 1975
Mallat, Chibli, with Jane Connors (eds.), *Islamic Family Law*, London 1990
---------- (ed.), *Islamic Law and Finance*, London 1988
Masud, Khalid et al. (eds.), *Islamic Legal Interpretation: Muftis and Their Fatwas*, Cambridge, Mass. 1996
Mir-Hosseini, Z., *Marriage on Trial*, London 1993
Piscatori, J., *Islam in a World of Nation States*, Cambridge 1986
Powers, D.S., *Studies in Qur'an and hadith: The Formation of the Law of Inheritance*, Berkeley 1986
----------, *Law, Society and Culture in the Maghrib, 1300-1500*, Cambridge 2002
Schacht, J., *The Origins of Muhammadan Jurisprudence*, Oxford 1950
----------, *An Introduction to Islamic Law*, Oxford 1964
Stewart. D., *Islamic Legal Orthodoxy: Twelver Shiite Responses to the Sunni Legal System*, Salt Lake City 1998
Tyan, E., *Histoire de l'organisation judiciaire en pays d'Islam*, Leiden 1960
Vogel, F.E., *Islamic Law and Legal System: Studies of Saudi Arabia*, Leiden 2000
----------, and S.L Hayes, III, *Islamic Law and Finance: Religion, Risk and Return*, The Hague and Boston 1998
Weiss, B.G., *Studies in Islamic Legal Theory*, Leiden 2002
----------, *The Spirit of Islamic Law*, Athens, Georgia 1998
Yamani, Mai (ed.) *Islam and Feminism*, London 1995

GLOSSARY OF ISLAMIC LEGAL TERMS

adat	Indonesian customary law
ahkam	legal rules, judgments (sg. *hukm*)

ahwal shakhsiyya	laws of personal status
‘amal	judicial practice
aya	a Qur’anic verse
‘ayn	a tangible thing, equivalent to Latin *res*
bay‘	sale; a *bay‘ mu’ajjal* is a credit sale, a *bay‘ salam* a forward sale, whereby payment is made at time of contract and item is delivered at later, specified date; *bay‘ al-‘urbun* is a sale with option of down payment
bid‘a	innovation; a belief or practice for which there was no precedent in the Prophet’s time
daman	civil liability; in suretyship, contract of guarantee
dayn	generic property; debt
diya	a specified amount of money or goods due in cases of homicide or other injuries to physical health unjustly committed upon the person of another; it is the substitute for the law of private vengeance, *qisas*
faqih	a specialist in religious law; a jurist (pl. *fuqaha’*)
faskh	the dissolution of a contractual bond; annulment of a marriage open to the wife or her relatives, adjudicated by a third party
fatwa	an opinion by a religious-legal scholar, mufti, on a point of law
fiqh	lit. understanding; the corpus of the Islamic jurists’ doctrines, or Islamic substantive law
fuqaha’	see *faqih*
furu‘	lit. branches; the body of positive rules of law, derived from the sources of legal knowledge, the *usul al-fiqh*
gharar	risk, uncertainty
hadd	see *hudud*

hadith	an account of what the Prophet said or did, or of his tacit approval of something said or done in his presence (pl. *ahadith*); the corpus of Tradition that is the Sunna
halal	lawful, permitted, permissable
haram	prohibited, forbidden, illicit
hudud	certain major crimes defined in the Qur'an and assigned specific punishments (sg. *hadd*)
hukm	see *ahkam*
'ibadat	ritual practices, acts of worship
'idda	the woman's waiting period of three menses, during which there is sexual abstinence, after a divorce or death of the husband
ijara	contract of lease and hire
ijma'	consensus, the unanimous doctrine and opinion of the recognized authorities at any given time; the third of the sources of legal knowledge, the first two being the Qur'an and Sunna
ijtihad	the use of independent reasoning to advance a legal opinion in cases where the Qur'an and Sunna are not definitive; its opposite is *taqlid*
ikhtilaf	difference of opinion among the authorities of law
'illa	cause; raison d'être
istisna'	a contract providing for manufacture and purchase of specified item
kafala	an institution corresponding to the surety bond
kaffara	Qur'anic term for an expiatory and propitiatory act that grants remission for faults of some gravity
khul'	a divorce by the wife, with permission by the husband, whereby the wife forfeits maintenance and dower still owed to her, and pays back the dower paid upon marriage
madhhab	legal doctrine, the Islamic school of law

mahr	a dower or gift given to the wife by the husband upon marriage, also known as *sadaq*
mal	property
maslaha	the concept of “public interest” or “the general good” that is used as a basis of legal decisions
mudaraba	limited partnership, also known as *qirad*, whereby some partners contribute capital and others labor
mufti	a religious-legal scholar qualified to issue an authoritative legal opinion, or fatwa
mujtahid	one who practices independent reasoning, or *ijtihad*
mulla	a religious scholar
murabaha	sale at a percentage mark-up
musharaka	partnership or company
nikah	marriage (properly, sexual intercourse)
qabd	possession; taking possession of
qadhf	a slanderous accusation of unlawful fornication, *zina*, or of illegitimate descent (which amounts to accusing the mother of *zina*)
qadi	a judge
qat’ al-tariq	highway robbery, or robbery with violence, which in certain circumstances is punishable by death
qisas	see *diya*
qiyas	analogical reasoning; the fourth source of legal knowledge, following Qur’an, Sunna, and consensus (*ijma‘)*
rahn	a pledge, collateral
ra’y	personal opinion, or human reasoning, used to arrive at a legal decision
riba	interest, unjust enrichment, usury

ridda	apostasy, the act of turning away from Islam
sadaq	see *mahr*
sariqa	theft, for which the Qur'an prescribes cutting off the right hand.
Shari'a	the divine, revealed law
shart	a condition, term, stipulation (in a contract)
Shi'a	a sect of Islam, contrasting with the orthodox Sunnis, comprising approx 10% of the Muslim population. Shi'is differ from Sunnis in that they hold that leadership of the community pertains to the direct descendants of the caliph 'Ali and his wife Fatima, the Prophet's daughter
shura	consultation; consultative assembly
shurb al-khamr	the drinking of wine, or other intoxicants
siyar	field of law concerned with the rules of war and of dealings of non-Muslims, apostates, and rebels; international law
siyasa	policy, governance, administration
Sunna	the normative example of the Prophet; the corpus of reports known as *hadith*s
Sunni	the major sect of Muslims, those holding that leadership of the Muslim community is not restricted to the direct descendants of the Prophet
sura	a Qur'anic chapter
tafsir	exegetic interpretation; commentary on the Qur'an
talaq	(unilateral) divorce by the husband, repudiation
taqlid	the acceptance of recognized authoritative opinion or doctrine, the opposite of independent reasoning, or *ijtihad*
tawhid	the belief in one God

ta'zir	discretionary punishment meted out by a judge in cases not covered by *hudud* penalties
'ulama', ulema	religious-legal scholars (sg. *'alim*)
usul	lit. roots (sg. *'asl*), the sources of law, viz. the Qur'an, the Sunna, consensus, and analogical reasoning, as opposed to *furu'*; short form for *usul al-fiqh* (works of) legal theory, methods of deriving positive law
wali	a guardian, curator
waqf	a domain constituted into a pious endowment, charitable trust
wilaya	guardianship over a minor; authority of a father or relative in marriage of his ward
zakat	obligatory alms, a tax on both landed and moveable property, one of the five pillars of Islam, the others being the confession of faith, prayer, fasting, and pilgrimage
zina	unlawful fornication, punishable by penal law if the partners are not married to each other or united by the bond of ownership

Planning Committee, Plenary and Concurrent Session Speakers

ABDALLA, AMR M., Prof., Sr. Fellow, Peace Operations Pol. Prog., George Mason Univ., Arlington, Virginia. B.A., 1977, Ein Shams Law Sch., Egypt; M.A., 1992, George Mason Univ.; Ph.D., 2001. *Admitted:* Egypt, 1978. Prosecuting Att'y, Egypt Att'y Gen., Cairo, Egypt, 1978-87; Res. Dir., Cntr. For Advancement of Public Health, George Mason Univ., 1990-2001; Prof, Sr. Fellow, Peace Operations Pol. Prog., since 2001. Teaches in peace operation policy program and at the Grad. Sch. of Islamic and Social Sciences. Conducts training and evaluation of conflict resolution programs in Egypt, Switzerland, Burundi, Sierra Leone, Liberia, Italy. He is also pioneering the efforts to develop a conflict resolution training manual for the Muslim communities in the U.S. Member: Bd. Mem., Dispute Resolution, KARAMAH, since 2000.

ABU-ODEH, LAMA, Assoc. Prof. Georgetown. b.1962. LL.M., 1985, Bristol, U.K.; S.J.D., 1993, Harvard. *Subjects: Comparative Law, (S); Criminal Law;* Islamic Law, (S).

AL-HIBRI, AZIZAH Y., (F) Prof. Richmond. b.1943. B.A., 1966, American, Beirut,; M.A., 1968, Wayne State; Ph.D., 1975, ; J.D., 1985, Pennsylvania. Ed.-in-Ch., J. of

Comp. Bus. & Cap. Market L.; Ed'l Bd., J. of L. & Religion. *Admitted:* NY, 1986; DC, 1988. Ass't Prof., Texas A&M Univ., 1975-83; Vis. Assoc. Prof., Wash., St. Louis, 1981-82; Vis. Scholar, Harvard Divinity Sch., 1985; Assoc., Sullivan & Cromwell, NY, 1986-87; Assoc., Debevoise & Plimpton, NY, 1987-92; Assoc. Prof., Richmond, since 1992; Jesse Ball duPont Fellow, Nat'l Humanities Cntr., Res. Triangle Park, NC, 2000; Fulbright Scholar, Qatar Univ., 2000-01; Scholar-in-Res., Library of Cong., DC, spring 2001. *Subjects:* Corporate Finance; Corporations, (S); Corporations; Islam, Law & Society, (S); Securities Regulation. Deontic Logic, 1978; Technology and Human Affairs (with Hickman), 1981; Women and Islam, 1982; Hypatia Reborn: Essays in Feminist Philosophy (with Simons), 1990. *Member:* Soc. for Women in Phil.; ASIL; Int'l Law Ass'n (Am. Branch). Founder & Pres., Karamah: Muslim Women Lawyers for Human Rts.; Consult., Sup. Coun. of Family Affrs., Qatar, spring 2000; Mem., The Const. Prof., since 2002.

AN-NA'IM, ABDULLAHI AHMED, (M) Charles Howard Candler Prof. Emory. b.1946. LL.B., 1970, Univ. of Khartoum, Sudan; Dip. in Criminology, 1973, Univ. of Cambridge, Eng LL.B., 1973, ; Ph.D., 1976, Univ. of Edinburgh, Scotland. Lect. & Assoc. Prof., Univ. of Khartoum, Sudan, 1976-1985; Vis. Prof., U.C.L.A., 1985-87; Ariel F. Sallows Prof., Univ. of Saskatchewan Coll. of Law, Saskatoon, Canada, 1988-91; Olof Palme Vis. Prof., Uppsala Univ., Dep't of Law, Sweden, 1991-92; Scholar-in-Res., The Ford Fdn., Middle East & No. Africa, Cairo, Egypt, 1992-93; Exec. Dir./Africa, Human Rts. Watch, DC, 1993-95; Prof., Emory, since 1995. *Subjects:* Comparative Constitutional Law; *Criminal Law; International Human Rights Law, (S);* International Law; *Islamic Law.* Sudanese Criminal Law, 1986; Toward an Islamic Reformation, 1990; Human Rights in Africa (with Deng), 1990; Human Rights in Cross-Cultural Perspectives, 1992. *Member:* Cairo Inst. for Human Rts. Studies (Bd. of Trustees, since 1996); Inst. for Human Rts. & Dev. in Africa (since 1998); The Pop. Coun. (Bd. of Trustees, since 1998). Adv'y Bd., Urban Morgan Inst. of Human Rts., Univ. of Cincinnati Coll. of Law, since 1995; Mem., Res., Action & Info. Network for the Bodily Integrity of Women, since 1995; Int'l Adv'y Coun., INTERIGHTS, London, since 1998.

BASSIOUNI, M. CHERIF, (M) Prof. & Pres., Int'l Human Rts. Law Inst. DePaul. b.1937. J.D., 1964, Ind., Indianapolis; LL.M., 1966, John Marshall; S.J.D., 1973, Geo. Wash.; LL.D., 1981, Univ. of Torino; LL.D., 1988, Univ. of Pau, et al. *Admitted:* DC, 1967; IL, 1967. Prof., De Paul, since 1964; Fulbright-Hays Prof. of Int'l Crim. Law, Germany, 1970; Vis. Prof., New York Univ., 1971; Guest Scholar, Woodrow Wilson Int'l Cntr. for Scholars, 1972; Dean, Int'l Inst. of Higher Studies, Italy, 1976-88; Vis. Prof., Univ. of Cairo, 1979; Pres., Int'l Inst. of Higher Studies, Italy, since 1988; Pres., Int'l Human Rts. Law Inst., DePaul, since 1999. *Subjects:* Comparative Law; Conflict of Laws; *Criminal Law; Criminal Procedure;* International Criminal Law; *International Law.* Statute of the International Criminal Court: A Documentary History, 1998; Crimes Against Humanity in International Criminal Law, 2d ed. 1999; International Criminal Law, 3 vols., 2d ed. 1999; International Extradition in U.S. Law and Practice, 4th ed. 2002. *Member:* Am. For. Law Ass'n; ASIL; Ass'n Internationale De Droit Penal. Consult., 5th, 6th, 7th & 8th U.N. Cong. on Crime Preven., 1975, 1980, 1985; Consult., Dep't of St., 1979; Mem. & Rapporteur, Comm. of Experts Established Pursuant to Sec.

Coun. Res. 780 (1992) to Investigate Violations of Int'l Law in the Former Yugoslavia, U.N., 1992-93, Chrm., 1993-94, Chrmn., Drafting Com., Diplomatic Conf. on Establishment of Int'l Crim. Ct., 1998.

BENNOUNE, KARIMA E., (F) Ass't Prof. Rutgers, Newark. b.1967. M.A., 1994, ; J.D., 1994, Michigan. Exec. Arts. Ed., Mich. J. of Int'l L. *Admitted:* MI, 1995. Legal Adv'r, Amnesty Int'l, London, 1995-99; Vis. Scholar, Cntr. for Int'l & Comp. Law, Michigan, 1999-00; Vis. Prof., spring 2002; Ass't Prof., Rutgers, Newark, since 2002. *Subjects: International Law, (S);* Women & the Law. *Member:* ASIL (Exec. Coun.). Standing Com. on the Mandate, Amnesty Int'l, Consult., Legal & Int'l Prog., since 2001; V-Chair, Women's Rts. Sub-Com., ABA, since 2002.

CAMMACK, MARK E., (M) Prof. Southwestern. b.1955. B.A., 1979, Brigham Young; J.D., 1983, Wisconsin. *Admitted:* WI, 1983; NY, 1986. Grad. Study, Wisconsin, 1980-83. Clerk, Just. Roland Day, WI Sup. Ct., Madison, 1983-84; Fulbright Fellow, Jakarta, Indonesia, 1984-85; Ass't D.A., NY Cty. D.A., NYC, 1985-88; Assoc. in Law, Columbia, 1988-90; Assoc. Prof., Southwestern, 1990-94; Prof., since 1994. *Subjects: Comparative Law;* Criminal Justice; Criminal Procedure; *Evidence.* Advanced Criminal Procedure in a Nutshell (with Garland), 2001. *Member:* COIF; Law & Soc. Assn. Observer, Indonesian Human Rts. Ct. for East Timor, U.N., 2002.

DEMLEITNER, NORA V., (F) Prof. Hofstra. b.1966. B.A., 1989, Bates Coll.; J.D., 1992, Yale; LL.M., 1994, Georgetown. Symp. Ed., Yale L.J. *Admitted:* MA, 1993; NY, 1993. Jud. Clerk, Judge Samuel A. Alito, Jr., 3d Cir. Ct. of Apps., Newark, NJ, 1992-93; Ass't Prof., St. Mary's, 1994-97; Ed., Fed. Sentencing Rptr., Vera Inst. of Just., San Antonio & NYC, since 1994; Assoc. Prof., St. Mary's, 1997-98; Prof., 1998-03; Vis. Prof., Michigan, fall 1999; Vis. Prof., Hofstra, 2001-03; Prof., since 2003. *Subjects:* Comparative Law; *Criminal Justice (Criminal Law); Evidence; Human Rights, (S); International & Comparative Women's Rights;* International Criminal Law; *Sentencing, (S).* Sentencing (with Berman, Miller & Wright), 2003. *Member:* Phi Beta Kappa; Am. Soc. of Comp. Law (Dir. & Ed.). Ed., Fed. Sentencing Rptr., since 1995; Bd. Mem., Human Rts. Com., ABA. since 1998; Task Force, Crim. Just. Sect., ABA, 2001.

FADEL, MOHAMMED H., Assoc., Sullivan & Cromwell, LLP, New York, NY. B.A., 1988, Univ. of Virginia; Ph.D., 1995, Univ. of Chgo. Articles Dev. Ed., Virginia L.Rev. *Admitted*: NY, 2000. Clerk, Southern Dist. of Georgia, Brunswick, GA, 1999-2000; Clerk, Fourth Cir. Ct. of Appeals, Baltimore, MD, 2000-01.

FELDMAN, NOAH R.,* (M) Ass't Prof. New York Univ.. b.1970. A.B., 1992, Harvard; D. Phil., 1994, Oxford Univ.; J.D., 1997, Yale. Book Revs. Ed., Yale L.J. *Admitted:* NY, 1998. Clerk, Ch. Judge Harry T. Edwards, DC Cir., 1997-98; Clerk, Just. David H. Souter, U.S. Sup. Ct., DC, 1998-99; Jr. Fellow, Soc. of Fellows, Harvard, 1999-02; Ass't Prof., New York Univ., since 2001. *Subjects: Administrative Law;* Constitutional Law; Jurisprudence; Legal History. After Jihad: America and the Struggle for Islamic Democracy, 2003. On lv., fall 2003.

FORTE, DAVID F., Prof. Cleve.-Marshall. b.1941. A.B., 1963, Harvard Coll.; M.A., 1965, Univ. of Manchester, Eng.; Ph.D., 1974, Toronto; J.D., 1976, Columbia. *Admitted:* OH, 1986. Instr., Skidmore Coll., Saratoga Springs, NY, 1969-74; Assoc. Prof., Cleve.-Marshall, 1976-81; Prof., since 1981; Ch. Counsel, Legal Affrs., U.S. Mission to the U.N., NYC, 1985-86; Assoc. Dean, Acad. Affrs., Cleve.-Marshall, 1986-88; Bradley Resident Scholar, Heritage Fdn., DC, spring 1992; Salvatori Fellow, Free Cong. Fdn., DC, 1993-94; Vis. Scholar, Liberty Fund, Indpls., 1998-99. *Subjects: Constitutional Law; First Amendment;* Human Rights & International Law; Islamic Law, (S); Theories of Justice. Supreme Court in American Politics (ed.), 1972; Natural Law and Contemporary Public Policy, 1998; Studies in Islamic Law: Classical and Contemporary Appllications, 1999. *Member:* AMINTAPHIL; Phila. Soc.; Nat'l Ass'n of Scholars. Consult., Legal Affrs., U.S. Mission to the U.N., 1984; Chair, Prof'l Ethics Com., Cleve. Bar Ass'n, 1989; Consult., Pontifical Coun. for the Fam., Vatican.

FREAMON, BERNARD KENNETH, (M) Prof. Seton Hall. b.1947. B.A., 1970, Wesleyan Univ.; J.D., 1974, Rutgers, Newark; LL.M., 2002, Columbia. *Admitted:* NJ, 1974. J.S.D. Cand., Columbia. Att'y, Essex Legal Servs., Orange, NJ, 1974; Proj. Dir., ACLU, Newark, NJ, 1974-76; Clin. Lect., Rutgers, Newark, 1976-79; Ass't Prof., Seton Hall, 1979-82; Dir., Clin. Progs., 1981-91; Assoc. Prof., 1982-98; Assoc. Prof., Univ. of Nairobi, Kenya, 1985-87; Dir., Cntr. for Social Just., Seton Hall, 1991-93; Dir., Seton Hall Sum'r Prog., Study of Law in Middle East, Cairo, since 1996; Vis. Prof., Wash. & Lee, fall 1998; Prof., Seton Hall, since 1998. *Subjects:* Clinical Teaching, (S); Constitutional Law; *Evidence; Islamic Jurisprudence, (S); Jurisprudence;* Legal Medicine; *Prisoner's Rights, (S); Professional Responsibility.* Evidence: Cases and Problems (with Raitt, Bodensteiner & Bracy), 1993, 2d ed. (with Raitt, Bodensteiner, Bracy & Klebba). *Member:* Al Azhar Al Sharif (Spec. Student, Cairo, Egypt, 1993-94); Int'l Law Ass'n, Am. Branch (Com. on Islamic & Int'l Law); Am. Res. Cntr. in Egypt. Ed'l Bd., NJ Law Jour.; Samuel Golieb Fellow in Legal Hist., New York Univ., 1998-99.

JACKSON, SHERMAN A., Assoc. Prof. of Arabic and Islamic Studies, Dept. of Near Eastern Studies, Univ. of Michigan, Ann Arbor, Michigan. B.A., 1982, Univ. of Pennsylvania; M.A. 1986; Ph.D., 1990. Instr., Sch. of Arabic, Middlebury Coll., 1985-86; Escort-Interpreter, Language Serv. Div., U.S. Dept. of State, 1985-86; Tchg. Ass't of Arabic, Univ. of Pennsylvania, 18985-87; Exec. Dir., Cntr. For Arabic Study Abroad (CASA), 1987-89; Inst. To Ass't Prof. of Arabic and Islamic Studies, Univ. of Texas, Austin, 1989-92; Ass't Prof. of Arabic and Islamic Studies, Indiana Univ., Bloomington, 1992-96; Assoc. Prof. of Arabic and Islamic Studies, Dep't of Near Eastern Languages and Culture, Indiana Univ., Bloomington, 1996-97; Assoc. Prof. of Arabic and Islamic Studies, Dep't of Near Eastern and Asian Studies, Wayne Stat Univ., 1996-97; Adj. Prof. of Law, Univ. of Michigan, since 2001; Assoc. Prof. of Arabic and Islamic Studies, Dep't of Near Eastern Studies, Univ. of Michigan, since 1997. Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi, 1996; The Boundaries of Theological Tolerance in Islam: Abu Hamid al-Ghazali's Faysal al-Tafriqa, Bayna al-Islam wa al-Zandaqa, 2002. Mem., Ed'l Bd., The Journal of Islamic Law and Culture, DePaul Univ., Chgo, since 2002; Mem. Ed'l Bd. Quill Pub., Houston, TX, 1997-2000;

Pres., Shari'ah Scholars Assoc. of N. Amer., Royal Oak, MI, 1997-99; Mem. Bd. of Trustees, The N. Amer. Islamic Trust, Plainfield, IN, 1994-99.

JONES-PAULY, **CHRISTINA,** Distinguished Islamic Law Res. Scholar, Harvard. Maguire Fellowship, Vassar; Ph.D., Univ. of London. Access to Justice: Role of Court Administrators and Lay Adjudicators in the African and Islamic Contexts, 2002. Recipient, Ford Foundation for New East and African Studies Award; Sheldon Fellowship, Harvard; Distinguished Islamic Law Res. Scholar

MAKDISI, JOHN, (M) Prof. St. Thomas. b.1949. B.A., 1971, Harvard; J.D., 1974, Pennsylvania; S.J.D., 1985, Harvard. *Admitted:* PA, 1974; OK, 1992. Grad. Study, Univ. of Paris II, 1976-78. Fellow, Am. Res. Cntr., Cairo, Egypt, 1979-80; Ass't Prof., Cleve.-Marshall, 1981-85; Assoc. Prof., 1985-88; Prof., 1988-91; Assoc. Dean, 1988-91; Dean, Tulsa, 1991-94; Prof., 1991-96; Dean & Prof., Loyola, New Orl., 1996-99; Prof., St. Thomas, since 1999; Dean, 1999-03. *Subjects:* Evidence; *Property; Torts.* Ladner on Conveyancing in Pennsylvania, 4th ed. 1979; Estates in Land and Future Interests, 3d ed. 1999; Introduction to the Study of Law, 2d ed. 2000. *Member:* Am. Inns of Ct.

NAWABI, MARIAM A., ESQ., Assoc., Dechert LLP, Wash., D.C. B.A., 1995, George Mason; J.D., 1999, Georgetown. Sr. Staff Mem., Law and Policy In Intl. Bus. *Admitted:* VA, 1999; DC, 2000, CA. Res. Assoc. & Bus. Mgr., Performance Assessment Res. & Statistical Analysis (PARSA), Falls Church, VA; Assoc., Dechert, LLP, Wash., DC. *Member*: Phi Alpha Delta, 1996; Chambers Global: World's Leading Lawyers, 2003. Legal Adv'r, Women's Rights in New Constitution of Afghanistan, United Nations Legal Affrs. Working Grp., 2002; Coordinating Att'y, Afghanistan Transitional Commercial Law Proj., Cntr. for Intl. Mgt. Educ. and ABA Asia Law Initiative, 2001; Adv'r, Adv'y Bd., Children of War, 2001.

QURAISHI, ASIFA B., J.D. Cand., Harvard Law Sch. B.A., 1998, Cal., Berkeley; J.D., 1992, Cal., Davis; LL.M., 1998, Columbia. Res. Ed., Cal., Davis, L. Rev. *Admitted:* CA, 1992. Jud. Clerk, Judge E. D. Price, East Dist., Fresno, CA, 1993-94; Death Penalty Law Clerk, US Ct. of Appeals Ninth Circ., San Fran., 1994-97. Pub. Articles in the fields of Islamic and comparative law, including gender issues. Bd. Mem., Karamah: Muslim Lawyers for Human Rts.; Advisor, Muslim Women's League, since 1993; Founding Mem., MuslimLD, NAML's predecessor org. *Member*: Natl. Assoc. of Muslim Lawyers, since 2000.

RAMADAN, TARIQ, Prof., Islamic Studies, Univ. of Fribourg, Fribourg, Switzerland; Prof., Phil., Coll. of Geneva, Geneva, Switzerland.

REZA, SADIQ, (M) Assoc. Prof. New York L.S.. b.1964. A.B., 1986, Princeton; J.D., 1991, Harvard. Arts. Ed., Harv. Int'l L.J. *Admitted:* DC, 1993; PA, 1993. Fellow, Cntr. for Arabic Study Abroad, American Univ. in Cairo, 1987-88. Clerk, Hon. Stanley A. Wegel, U.S.D.C., N.D. CA, 1991-92; Staff Att'y, Public Defender Serv. for DC, 1993-97; Assoc., Arnold & Porter, DC, 1997-99; Assoc. Prof., New York L.S., since 1999. *Subjects: Comparative Criminal Procedure, (S); Criminal Law; Criminal Procedure.*

Contract Att'y, Am. Muslim Coun., 1993; Contract Att'y, Am.-Arab Anti-Discrim. Com., 1993.

ROSEN, LAWRENCE, Princeton Univ., Princeton, New Jersey, Ph.D., 1968, Chgo.; J.D., 1974. Teaches courses on law and anthropology, comparative religious systems, the Amer. Indian and the law, and the theory of cultural systems. The Amer. Indian and the Law (editor), Meaning and Order in Moroccan Society (coauthor), Bargaining for Reality: The Construction of Social Relations in a Muslim Community; The Anthropology of Justice: law as Culture in Muslim Society; Other Intentions: Cultural Contexts and the Attribution of Inner States (editor). Recipient, Presidential Dist. Teaching Award, 1997; Phi Beta Kappa Vis. Scholar, 1997-98.

SAID, NAIMA, Att'y at Law, Naima Said & Assoc., Columbia, MD. B.A., 1979, Univ. of Nairobi, Kenya; M.A., 1990, Harvard Law Sch. *Admitted*: NY, 1991; MD, 1991. Att'y at law, Naima Said & Assoc., Columbia, MD, since 1991. Member: Amer. Immigration Lawyers Ass'n, 1994; Natl. Ass'n of Muslim Lawyers, 2000.

SFEIR, GEORGE N., Former Sr. Legal Specialist on the Arab States and Islamic Law, Law Library of Congress, Wash., DC. Cert. in Intl. Fin. Mgmt, 1979, Cntr. for Educ. in Intl. Mgmt, Geneva, Switzerland; LL.M., 1952, Chgo; D.C.L., 1958. Res. Analyst & Area Spec. on the Middle East/N.Africa, U.S. Govt. & Library of Congress, Wash., DC, 1957-63; Counsel & Ass't Gen. Mgr, NY branch, Intra Bank, S.A., New York, 1963-67; Various responsibilities, United Nations Agencies of the United Nations System, 1967-80; Amer.-Saudi Arabian Joint Venture Proj., 1980-84; Legal Consult., on the Middle East, 1984-92; Former Sr. Legal Specialist on the Arab States and Islamic Law, Law Library of Congress, Wash., DC, starting 1993. Modernization of the Law in Arab States, 1998; Fiction in Several Languages, 1968.

VOGEL, FRANK EDWARD, (M) The Custodian of the Two Holy Mosques, Adj. Prof. of Islamic Legal Studies & Dir., Islamic Legal Studies Prog. Harvard. b.1949. A.B., 1972, Harvard; J.D., 1975, American; Ph.D., 1993, Harvard. Am. U.L. Rev. *Admitted:* DC, 1975. Clerk, Hon. George L. Hart, Jr., U.S.D.C., DC, 1975-76; Assoc., Shaw, Pittman, Potts & Trowbridge, DC, 1976-78; Att'y, Jones, Day, Reavis & Pogue, Riyadh, Saudi Arabia, 1986-87; Ezra Ripley Thayer Lect. on Law, Harvard, 1987-91; Ass't Prof., 1991-00; The Custodian of the Two Holy Mosques Adj. Prof. of Islamic Legal Studies, since 2000; Dir., Islamic Legal Studies Prog., since 2001. *Subjects:* Comparative Law: Systems of Adjudications; Contracts; Human Rights & Islam; *Islamic Contract Law, (S); Islamic Legal System.* Islamic Law and Finance: Religion, Risk and Reform (with Hayes), 1998; Islamic Law and Legal System: Studies of Saudi Arabia, 2000. *Member:* ASIL; Middle East Studies Ass'n; Am. Oriental Soc. Standing Com., Cntr. for Middle Eastern Studies, Harvard, 1991-92; Standing Com., Com. on South Asian Studies; Chair, Islamic Law Com., Int'l Law Ass'n, since 1998.

WUERTH, ANNA D., Vis. Ass't Prof, Univ. of Richmond, Richmond, VA. M.A., 1992, Free Univ. of Berlin, Berlin, Germany; Dr. Phil, 1998. Fellow, Researcher, Human Rights Watch, Wash., DC, 2000-02; Consult., German Inst. For Human Rights, Berlin,

Germany, 2002-03; Vis. Ass't Prof., Univ. of Richmond, Richmond, VA, since 2003. Dialogue with Islam As Conflict Prevention?, 2003;

ZULFIQAR, MONA, Sr. Partner, Shalakany Law Office, Cairo, Egypt. B.Sc., 1969, Cairo Univ.; LL.B., 1980, Mansoura Univ. Economic Analyst and Office Mgr., Shalakany Law Office, 1976-78; Partner, 1978-87; Sr. Partner, since 1987; Chairperson, Executive Committee, since 1995. Heads Banking and Capital Markets Group at the Firm. Specialist in major financial, industrial and other contracts required by some of the most important joint ventures in Egypt. Member: Egyptian Bar Assoc.; Intl. Bar Assoc.; Egyptian Soc. for Economics, Statistics and Legislation; Egyptian Soc. for Intl. Law; Drafting Team of the new Capital Market Law and Regulations of Egypt; Drafting Com. of the new Telecom Law of Egypt; Drafting Team of new Spec. Econ. Zones Law of Egypt; Natl. Com. on Social Legislation, Egypt, 1997. Bd. Mem., Banque Du Caire, Cairo; Mem., Egypt-U.S. Business Council, 2002; Co-Chair, External Gender Consultative Grp, World Bank, since 1999; Ch., Women's Health Improvement Assoc., Egypt; Mem., Natl. Council for Women; Mem., Intl. Human Rts. Council; Mem.,Council of Advisers of the World Bank for Middle East & N. Africa Region, since 2000;Vice Ch., Natl. NGO Com. for Population and Dev., 1993-96; Mem., Intl. Steering Com., UN Intl. Conf. on Population and Dev., 1994; Bd. Mem., Population Comm. Intl, New York, 1996-2002; Gender Advisory Panel, WHO Special Res. Proj. on Human Reproduction, WHO Geneva (1996-99); Bd. Mem., Egyptian Federation for Voluntary Assoc. and Foundations, 2000; Bd. Mem., New Civic Forum; Friends of Children with Cancer Assoc.; Natl. Rural Women's Comm., Egypt, since 1996; Bd. Mem., Sawiris Foundation for Social Development, 2001.

ZYSOW, ARON, Res. Assoc., Islamic Legal Studies Prog., Harvard.

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