Introduction

Islamic Legal Theory in Context

This first volume of the Ashgate Islamic Law series contains scholarly essays relating to Islamic legal theory (usūl al-fiqh), otherwise called principles of Islamic jurisprudence or, literally, the roots or foundations of the law. Islamic jurists consider Islamic legal theory as the basis of Islamic jurisprudence and thus a most essential aspect of Islamic law generally. In his classical work on the subject, al-Mustasfā fī ‘ilm al-usūl, Al-Ghazālī (1996, p. 4) noted that Islamic legal theory is one of the most venerable fields of Islamic science, combining transmitted (naqlī) and rational (aqīlī) knowledge, and whose specialists enjoy the highest respect among Islamic scholars. However, Islamic legal theory is a complex and sometimes mind-numbing subject which has been described as ‘yawn-inducing’ even for seasoned scholars (Ahmed, 2012, p. 1). The ingenuity of any expert on the subject is usually measured by the ability to convey its in-depth understanding in a simplified manner. In selecting the materials contained in this volume, quality, clarity, variety and critique have been the major considerations to ensure an in-depth and engaging yet easy understanding of what is normally a highly theoretical subject.

The need for a good understanding of Islamic legal theory is bolstered by the obvious influence of Islamic law in different parts of the world today and the need for its evolution in response to contemporary challenges. Islamic law is applied today in one form or another in countries of the Middle East, Asia and Africa, and it also has a strong influence among Muslim communities globally, including in the Western world. From its humble beginnings as part of the Islamic religious and social transformation of seventh-century Arabia, Islamic law has, more than fourteen centuries later, evolved today into a complex system of law that is often misunderstood, especially in the West. Since the 11 September 2001 (9/11) terrorist attacks in the USA and their notorious link to Islam, global inquisitiveness about Islam generally and Islamic law in particular has increased enormously. In response, more universities and academic institutions in the West now have one or another Islamic law course on offer for the increasing number of students interested in the subject. Also, the volume of literature on Islamic law has expanded rapidly post-9/11. But critical scholarly journal essays remain the key academic literature providing necessary analyses that foster in-depth and better understanding of the complexities of Islamic law both in theory and in practice.

Both before and since 9/11, large numbers of English language scholarly essays have been written by both renowned and emerging experts on Islamic law in different academic journals providing diverse insightful analyses on theoretical and practical aspects of Islamic law. However, students and researchers often face two main difficulties in relation to the large number of academic materials available on Islamic law today. First, especially for students, is the problem of ‘separating the wheat from the chaff’ among the many materials available, while the second difficulty is that the most useful essays on Islamic law are usually dispersed

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in different academic journals and are not always easily accessible to students and researchers. Collectively, the three volumes of this Ashgate Islamic Law series are aimed at alleviating those two difficulties by providing carefully selected scholarly essays on different aspects of Islamic law as a readily accessible and convenient source of materials on both the theoretical and the practical aspects of Islamic law.

What is Islamic Law?

The question ‘what is Islamic law?’ demands both an etymological and a conceptual analysis of Islamic law. The conceptual analysis requires examining the nature of Islamic law, which, in turn, depends largely on the conclusion drawn from its etymological analysis. Basically, Islamic law is a system of law founded on Islamic religious sources and juristic traditions that have evolved over time. Its religious foundation makes it a very complex system of law and generates important jurisprudential questions that we will return to later below. The etymological connotation of the question requires an exploration of the meaning of the phrase ‘Islamic law’ and an evaluation of its terminological value within both traditional and modern Islamic legal theory. The terminological enquiry is not merely semantic but has important implications for how we understand the nature of Islamic law, particularly in the West where this phrase is mostly used. It is also fundamental to the jurisprudential question about whether Islamic law is really ‘law’ in the true sense of the word, as will be discussed in the next section. Thus, the jurisprudential engagement with Islamic law begins, necessarily, with learning to appreciate the different terminologies used, sometimes confusingly, in reference to it. This is evident in both classical and modern books of Islamic legal theory, whereby the relevant terminologies are often clarified first before delving into the substantive jurisprudential issues.

Calder has noted that the term ‘Islamic law’ is a ‘Western designation of the Muslim juristic tradition [that] led to the emergence, perhaps in the late nineteenth century’, of the Arabic calque al-qānūn al-Islāmī, which is now part of Islamic legal vocabulary in Muslim countries, alongside other traditional phrases such as al-sharī‘ah al-Islāmiyyah and al-fiqh al-Islāmī (1995, p. 450). In all these phrases the terms qānūn, fiqh and sharī‘ah are often used loosely to simply mean ‘law’ in conjunction with the term Islāmiyyah to denote ‘Islamic law’. The phrase qānūn sharī‘, literally meaning sharī‘ah-based law or sharī‘ah-based regulation, is also sometimes used in contemporary works of Islamic legal theory (see, for example, Khallāf, n.d., p. 46). While the terms fiqh (literally meaning ‘understanding’ and technically meaning ‘jurisprudence’) and sharī‘ah (literally meaning ‘path to water’ and technically meaning ‘prescription’) are original Arabic terminologies and were used in reference to Islamic law by the earliest Islamic jurists in their jurisprudential works, the term qānūn is considered to be an Arabized term, of Greek or Roman origin, literally meaning ‘scale’ and technically meaning ‘regulation’, and used in that technical sense later by some of the classical and post-classical Islamic jurists in their jurisprudential writings even before the nineteenth century (see, for example, al-Ghazālī, 1996, p. 11; al-Qarāfī, n.d., p. 264; Ibn Rushd, 1988, vol. 2, pp. 42, 148, 155, 175). Although the term qānūn is mostly used today in the modern Muslim world technically in reference to enacted positive or codified laws (for example al-qānūn al-jinā‘ī and qānūn al-ahwāl al-shakhsīyyah in reference to codified criminal law and personal status
law respectively), the phrase al-qānin al-İslāmī is used routinely as the literal translation for the English phrase ‘Islamic law’.

However, the two phrases al-sharī’ah al-İslāmiyyah and al-fiqh al-İslāmī remain the most commonly used, both traditionally and conventionally, in general reference to Islamic law in most parts of the Muslim world today. But careful juristic distinction is often made between the terms sharī’ah and fiqh whereby the phrase al-sharī’ah al-İslāmiyyah refers specifically to the fundamental sources of Islamic religious, moral, social, economic, political and legal norms, namely the Qur’ān and the sunnah (but sometimes also including its jurisprudence), as will be elaborated further in the section on the sources of Islamic law. Conversely, the phrase al-fiqh al-İslāmī refers specifically to Islamic jurisprudence — that is, the human juristic understanding of the sharī’ah. The ruling or law (that is, hukm, plural: ahkām) that is derived from the sharī’ah (as the source) through fiqh (as its jurisprudence) is known as hukm sharī’ (that is, sharī’ah ruling). Islamic jurists therefore often talk of ahkām sharī’iyyah, meaning sharī’ah rulings or sharī’ah law (that is, rulings derived from the sharī’ah), when they are referring to applied Islamic law. Thus, applied Islamic law emerges from the sources (sharī’ah) through human juristic understanding (fiqh) using different well-defined rules of Islamic legal theory (usūl al-fiqh) formulated by Islamic legal theorists and jurists over time.

Based on the above specific juristic distinctions, the English phrase ‘Islamic law’ often encounters etymological complexity regarding which of the three Arabic connotations it may be referring to at any particular time. Irshad Abdal-Haq (Chapter 1 in this volume) has noted that ‘[s]ome writers use the terms Islamic law, Sharī’ah and/or fiqh interchangeably. This easily could result in confusion for readers seeking to sort out the significance of each concept’ (p. 8). Calder has also noted that although the phrase ‘Islamic law’ applies to Muslim juristic traditions (fiqh) as a whole, it ‘carries many of the connotations of “legal system” in a Western sense, related to the bureaucratic structures of a nation-state ... Such ideas have now permeated much Muslim thinking about the law’ (1995, p. 450).

From the above analysis it becomes clear that in relation to Arabic terminologies the term ‘Islamic law’ can functionally connote any of three meanings, namely (i) Islamic law as ‘legal system’, in which case it will refer in general to the entire system of Islamic law and jurisprudence (that is, al-sharī’ah al-İslāmiyyah); (ii) Islamic law as ‘Islamic jurisprudence’, in which case it will refer only to the jurisprudential aspect of Islamic law (that is, al-fiqh al-İslāmī); and (iii) Islamic law as ‘applied law’, in which case it will refer to the rulings or law derived from the sharī’ah (that is, ahkām sharī’iyyah). In view of this etymological complexity, many contemporary English language writers on Islamic law have adopted the necessary practice of defining what their reference to ‘Islamic law’ means in their writings.

Contextually, Islamic law understood broadly as ‘legal system’ shares similar characteristics with other legal systems (see, for example, Baderin, 2010; Glenn, 2010). It is a system of law that consists of theoretical, substantive and practical aspects in a similar manner to other

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2 It must be noted, however, that ahkām (rulings) can also occur in a non-legal context. See, for example, Kamali, who notes that ‘[t]he ayāt al-ahkām are of three types: those that relate to belief, known as ahkām i’tiqādiyyah, those which relate to morality, known as ahkām khulqīyyah, and the practical legal rules, known as ahkām ‘amaliyyah’ (2003, p. 26).

3 Cf. the analysis by Baderin of the various possible uses of the term ‘sharī’ah’, in Chapter 3 in this volume.
systems of law. The theoretical aspect is the subject of Islamic legal theory, which engages with the jurisprudential rules relating to the nature, sources, methods and principles of Islamic law as well as its legal hermeneutics, juristic methodologies and approaches. The substantive aspect is the subject of Islamic substantive law and covers the textual provisions and juristic rulings relating to specific substantive matters such as Islamic family law, Islamic property law, Islamic law of finance, Islamic criminal law and so forth. The practical aspect is the subject of Islamic law in practice and covers matters relating to the practical application of Islamic law as a functional system of law. Although reference to ‘Islamic law’ in Western literature is often focused on issues of Islamic legal theory, a holistic understanding of Islamic law as a full system of law requires coverage of all of the three aspects identified above.

The essays in the three volumes of this Ashgate Islamic Law series have been carefully selected and structured to cover all three aspects of Islamic law. This first volume, *Islamic Legal Theory*, provides a compilation of scholarly essays relating to the principles of jurisprudence and juristic techniques of Islamic law, the second volume, *Issues in Islamic Law*, contains essays on selected substantive matters in Islamic law while the third volume, *Islamic Law in Practice*, contains essays relating to examples of the practical application of Islamic law today in selected countries of the world. Thus, the three volumes collectively offer a comprehensive coverage of scholarly materials to provide a holistic understanding of Islamic law in theory and practice.

**Purpose and Scope of Islamic Legal Theory**

Muslim jurists assert that Islamic legal theory existed in some rudimentary form soon after the Prophet’s death, and that it was initially used informally, for example in the application of the *shari‘ah* provisions to new questions and situations that had no clear-cut answers from either the Qur’an or the *sunnah*. Reference is often made to one of the Companions of the Prophet, Abdullah ibn Mas‘ūd, who is reported to have given an opinion that the waiting period (*‘iddah*) of a pregnant widow ended when she gave birth to the child in her womb. However, there are two apparently conflicting Qur’anic verses on the matter. On the one hand, Q2:234 provides that ‘Those who die leaving widows behind, they [the widows] shall observe a waiting period of four months and ten days’, while, on the other hand, Q65:4 provides that ‘for pregnant women, their [waiting] period is until they deliver their pregnancy’. Abdullah ibn Mas‘ūd is said to have reconciled the apparent conflict between the two verses by stating that as Q65:4 was the later revealed verse, it superseded and modified Q2:234 in respect of the ruling about pregnant widows. This was obviously an application of the juristic principle that a later Qur’anic verse repeals or modifies an earlier verse on the same subject, even though Abdullah ibn Mas‘ūd did not expressly refer to that principle in his ruling. There are other examples of such informal application of principles and rules relating to Islamic legal theory by the Companions of the Prophet from a very early stage of the development of Islamic law (see Hasan, 1993, pp. 15–16).

Against that background, Islamic legal theory was formally developed as a specific juristic science alongside Islamic jurisprudence (*fiqh*) very much later in response to the need for coherent and consistent legal rules for engaging with jurisprudential questions relating
to ascertaining the sources and purpose of Islamic law as well as the methodologies of
discovering and applying the law.⁴ Islamic legal theory therefore deals with rules of Islamic
legal hermeneutics, the nature and structure of Islamic law, and the methodology that must
be used for discovering and applying the law. It does not deal with substantive law (fiqh)⁵ per se, but with understanding the methodology of the law and imparting the required
skills of independent juristic and legal reasoning necessary for deriving specific rulings from
the established sources of the law. Thus, it is concerned essentially with the techniques of
the law.⁶ Distinction is usually made between Sunni legal theory (see Hallaq, 1997; Kamali, 2003)
and Shi‘a legal theory (see Baqi al-Sadr, 2003) with regard to some theoretical differences
between the two jurisprudential systems. Nevertheless, there is similarity in their approaches
and methodologies generally.

In relation to the purpose of Islamic legal theory, it is relevant to note the remarks of
the twelfth-century Islamic jurist Ibn Rushd in his classical work on comparative Islamic
jurisprudence (‘ilm al-khilaf), Bidayah al-Mujahid wa Nahayah al-Muqtasid:

We have designed the book in such a way that with the help of its methodology [the student] may
attain the status of ijtihad [independent reasoning] if he has acquired what is sufficient of ‘ilm al-
nahw (grammar), language, and the methodology of usul al-fiqh ... It is by learning the relevant
issues, and being equipped with these tools, that he deserves to be called a jurist (faqih), not by
merely learning too many details of fiqh, even if he has memorized the maximum that is possible
for a human being. We find the (so called) jurists of our times believing that the one who has
memorized the most opinions has the greatest legal acumen. Their view is like the view of one
who thought that a cobbler is he who possesses a large number of shoes and not one who has the
ability to make them. It is obvious that the person who has a large number of shoes will (some day)
be visited by one whose feet the shoes do not fit. He will then [have to] go back to the cobbler who
will make shoes that are suitable for his feet. This is the position of most of the faqis [jurists] of

This analogy indicates that the study of Islamic legal theory involves not merely religiously
memorizing the law but engaging critically with the context of the law and understanding
its rules, methodology, principles and technique to enable its future evolution. It imparts
the skills and ability to derive the law from its sources and the capacity to understand its objective
and application. Nabil Shehaby has also observed (in Chapter 13 in this volume) that

[The] usefulness of usul al-fiqh lies primarily in its being an indispensable source for understanding
the views of a large and important segment of Muslim thinkers who used the subject as a vehicle

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⁴ The specific date of the formal adoption of usul al-fiqh as a specific jurisprudential science is
controversial, but many legal historians date it to the eighth century.

⁵ Islamic substantive law is covered in Volume II of this series.

⁶ There is, however, a necessary link between Islamic legal theory and Islamic substantive law as
metaphorically illustrated by al-Ghazâlî’s depiction of the former as the ‘roots’ of the law and the latter
as the ‘fruits’ of the law. See also Hallaq for the observation that Islamic legal theory ‘was in fact more
than a methodology of juridical reasoning and interpretation, for some of its doctrines functioned in a
double-edged manner’ (1997, p. 155).
for their opinions on various topics ... nowhere else do we find the same kind of concern for identifying the logical structure of the arguments used in the religious and rational sciences. (p. 307)

Thus, the greatest value of Islamic legal theory for modern times can be best demonstrated through its use by contemporary Islamic jurists and scholars, in emulation of the prowess of the classical Islamic jurists, to transport Islamic law effectively into the future in response to the needs of the time within the flexible limits of its established sources. Efforts in that regard have been recognized, starting with Muhammad ‘Abduh from the second half of the nineteenth century, whereby contemporary Muslim jurists and scholars have striven to evolve a new theory of Islamic law out of the traditional rules in response to the social realities that confront Islamic law in modern times (see, for example, Hallaq, 1997, pp. 207–54; Hallaq, 2009, pp. 500–542).

Due to interactions with and the challenges of Western legal scholarship, the scope of Islamic legal theory has expanded even further today. Apart from its traditional scope, it is now confronted with new theoretical questions in Western discourse, such as whether Islamic law is really law at all, as well as critical engagement with its classical theories. Against that background, the materials in this volume do not merely restate the traditional rules of Islamic legal theory, but also engage critically with relevant traditional views to enable a diagnostic understanding of the different issues. Some of the essays also present Shi‘ī perspectives on some of the issues for comparison. The essays are grouped under five main sections, namely ‘Nature of Islamic Law’; ‘Sources of Islamic Law’; ‘Methods of Islamic Law’; ‘Principles of Islamic Law’; and ‘Legal Reasoning (Ijihihād)’, providing a structured understanding of the main issues of Islamic legal theory. I will now briefly summarize the jurisprudential questions covered in the five sections of this volume starting with the nature of Islamic law.

Nature of Islamic Law

The necessary entry point for a good conceptual understanding of Islamic law is to first understand its nature. Due to its religious foundation, the nature of Islamic law has been subjected to different conceptual debates. One of the fundamental issues in that regard is the contention that Islamic law is essentially a religious and moral system, and thus the tendency to conflate it generally with Islamic theology, ethics or morality. This contention has led legal scholars, particularly in the West, to question whether Islamic law can actually be conceived as ‘law’ in the true legal sense. It is an intriguing jurisprudential question that subtly interrogates the nature and application of Islamic law and which has become more relevant to the study and understanding of Islamic law in modern times in two main contexts. The first context relates to the integration of aspects of Islamic law as part of state law in many modern Muslim-majority states today (see, for example, Otto, 2010) and debates for an accommodation of some aspects of it as part of state law in some Muslim-minority secular states in the West (see, for example, Williams, 2013). The second context relates to the increased introduction of the teaching of Islamic law from a purely legal perspective in the law schools of many universities today as
opposed to teaching it strictly from a theological perspective in the theology departments of universities.

On one side of the debate are scholars who propose that Islamic law cannot really be considered as ‘law’ in the true sense, just a system of religious ethics not meant to be enforced as ‘law’ in the legal sense. The crux of the argument of most scholars on this side of the debate is reflected in the observation of one writer that Islam only dictates ‘an Islamic code of ethics according to which pious Muslims must conduct themselves; but it will not justify any kind of “Islamic law” [because] … law is coercive, and if Islam must not be coercive [as stated in Qur’an 2:256, ‘Let there be no compulsion in religion’], then there can be no “Islamic law”’ (Hassan, 1994). Other leading scholars, including Schacht (1984, pp. 11ff.), have also proposed that the Qur’an, which is the principal source of Islamic law, was not initially intended to be a source of ‘law’ per se but a religious document which was only bestowed with legal connotations very much later after its revelation. Different scholars of Islamic law subscribe to this view in different contexts. It is notable, however, that most of the ‘non-law’ perceptions of Islamic law are often presented in the specific context of the modern nation-state, which is considered to be a modern political institution unknown within classical Islamic jurisprudence for the enforcement of Islamic law. Thus, the argument tends to suggest that if the modern nation-state, which was unknown in classical Islamic jurisprudence, has now become the established model of governance, including legislation and law enforcement, in the modern world, then Islamic law cannot, by its nature, be adapted as ‘law’ in the true legal sense enforceable by states today. This perception can be contradicted on the grounds that the nature of Islamic law as ‘law’ should not necessarily be based on the assumption that ‘law’ can only exist in the context of the coercive powers of the modern nation-state. It also suggests that early Islamic society had moved from a pre-modern ‘stateless’ condition with no formal ‘laws’ to a ‘state’ with formal ‘laws’ in the modern political sense, which is also contradictable (see, for example, Donner, 1986).

The alternative view can be divided into two. First, on the other side of the debate are scholars who are of the view that Islamic law is ‘law’ applicable legally in the true sense of the word. Empirically, they make reference to the historical accounts of the practical application of Islamic law as ‘law’ by the Prophet Muhammad as the political head of the early nascent Islamic polity in the seventh century, followed by the succeeding Caliphs as rulers of the Islamic polity after him. They also refer to the theoretical classification of the development of Islamic law into different periods from the Prophetic era to the modern era (see, for example, Izzi Dien, 2004; Qadri, 1986, pp. 43–88). Coulson has observed in this regard that ‘[t]he Shari’a may now be seen as an evolving legal system, and the classical concept of law falls into its true historical perspective’ (1964, p. 4). Today, aspects of Islamic law are applied in different forms as part of state law in different countries of the Middle East, Asia and Africa. Islamic law is also taught in the law faculties of universities in the Muslim world where prospective Islamic lawyers and judges are trained. Islamic courts that apply Islamic law as ‘law’ also exist in different parts of the Muslim world today. It has, however, been contended against this empirical argument, inter alia, that the fact that some modern Muslim-majority states ‘claim to be Islamic is not sufficient reason to concede the claim’ and that ‘whatever the
state enforces is not shari’a (An-Na’īm, 2013, pp. 239–40). Second, on the other side of the debate, there are scholars who argue that Islamic law does not actually distinguish between law and morality and thus the superiority of Islamic law lies specifically in its blending of the legal with the moral, unlike other legal systems that have divested law of its necessary moral content. The assertion from this perspective is that having moral content or having evolved from an ethical or religious foundation does not necessarily divest Islamic law of the nature of being ‘law’ properly so called. Khadduri has observed that ‘[u]nlike positive law, [Islamic law] is regarded as the ideal legal order; but, like positive law, it mirrors the character of the society in which it developed’ (1987, pp. 3–4).

A careful study of classical Islamic jurisprudential sources would actually indicate that while Islamic theology and ethics do influence Islamic law significantly and are not separable from it in theory, Islamic law, as applied law, is evidently distinct from Islamic theology or ethics in practice. On the one hand, the early Islamic jurists, in their jurisprudential works, carefully distinguished between (i) acts of ibādāt (worship), which are strictly theological and have no immediate worldly legal repercussions, (ii) acts of ākhlāq (ethics), which are strictly ethical and may only attract worldly moral but not legal repercussions, and (iii) acts of mu‘āmalāt (worldly transactions), which relate to diverse human social dealings that attract legal repercussions and thus are juridically regulated and enforced as ‘law’ under Islamic law. On the other hand, the jurists also classified the jurisprudential evaluation of human acts into the five value categories of wājib (obligatory), mandāb (recommended), mubah (permissible), makrūh (reprehensible) and harām (prohibited). Worldly transactions (mu‘āmalāt) that fall within the two value categories of wājib (obligatory) and harām (prohibited) are mostly regulated legally as ‘law’ in the real sense of the word, while those falling within the two value categories of mandāb (recommended) and makrūh (reprehensible) are regulated as moral acts. The value category of mubah (permissible) represents the middle category of permissibility of all acts except where specifically prohibited. While Coulson considered these five value categories as ‘a scale of moral evaluation’, he nevertheless observed notably that ‘Law and morality, however, are not fully merged and integrated within the Sharī’i’, citing the example that ‘unilateral repudiation (talaq) of a wife by the husband is morally reprehensible or makrūh but, even when pronounced in a particularly disapproved form called bid’a (“innovation”), is none the less legally valid and effective’ (1964, pp. 83–84). It is equally noteworthy that the classical Islamic jurist Ibn Rushd had also noted in the chapter on judicial office (kitāb al-aqdiyyah) in his Bidāyah al-Mujtahid wa Nihāyah al-Muqtasid that shari‘ah rulings (al-ahkām al-shar‘iyyah) are divided into two categories, namely those rulings that are adjudicable as law by judges and those not adjudicable as law by judges, which are mostly in the category of recommended acts (mandāb) (1988, vol. 2, p. 475).

Pragmatically, the engagement with the question of whether or not Islamic law is really ‘law’ depends on what is really meant by ‘law’. Is it the legislation, legal process, judicial decisions or all these combined? Apparently ‘law’ is a matter of social fact and every society

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7 See also Hamoudi, who argues, inter alia, that ‘shari‘a’ in the modern Muslim state is only meaningful to the extent that the state chooses to make it so, and no reasonably developed state, no matter how Islamic it purports to be, seeks to incorporate shari‘a in any sort of comprehensive fashion’ (2009–2010, p. 294).

8 Also literally translated as ‘The Book of Judgements’.
has its criteria for identifying what qualifies as ‘law’ (see, for example, Raz, 1979, p. 37). Hallaq has rightly observed that ‘cultural and conceptual ambiguities related to this term [‘law’] … are responsible for a thorough and systematic misunderstanding of the most significant features of the so-called Islamic law’ (2009, pp. 1–2). The Islamic perspective of what is meant by ‘law’ can be appreciated from Coulson’s observation that while the focus of his book *A History of Islamic Law*

is confined to law properly so called, the moral scale serves as a reminder of the essentially religious character of the Shari‘a and of the fact that we are here dealing with but one part of a comprehensive guide to conduct, all of which is ‘law in the Islamic sense and the ultimate purpose of which is to secure divine favour both in this world and in the hereafter’. (1964, p. 84; emphasis added)

In Western legal theory the debate about what is ‘law’ is itself stuck in controversy. Basically, there are, *inter alia*, the positivist, naturalist, realist and functionalist conceptions of law, each of which perceives law differently, and each respective perception of law has also evolved differently over time. Hart’s *The Concept of Law* (1994), which is generally considered as the standard starting-point for considering the conceptions of law in Western jurisprudence (Twining, 2009, p. 88), proposes that ‘law’ can be said to exist under five main conditions, namely that (i) ‘This law satisfies the criteria of validity of the legal system of which it is a part’, (ii) ‘This legal system is formed of a combination of primary and secondary rules’, (iii) ‘These rules derive their validity from a basic rule of recognition’, (iv) ‘The rule of recognition is as a matter of social fact accepted as such by the officials of the system’, and (v) ‘The legal system is effective in the society to which it belongs’ (Twining, 2009, p. 89). This is, conceivably, an objective criterion for every system of law, which Islamic law does evidently satisfy. Also, in a comparative perspective with relevant traditional Islamic jurisprudential perceptions of the nature of Islamic law, it can be argued relatively that Islamic law would qualify as ‘law’ properly so called, whether viewed from a positivist, naturalist, realist or functionalist jurisprudential perspective, particularly from the context that Islamic law is itself evolutionary by nature, has evolved over time and is, indeed, still evolving in response to contemporary social realities.

Another related fundamental issue about the nature of Islamic law is the presumption that Islamic law is completely and strictly divine, immutable and static without any possibility of change or evolution. This again results from a non-distinction between the divine sources and the human methods of Islamic law. Thus again, distinguishing between *shari‘ah* and *fiqh* is very significant on this point. In the strict jurisprudential sense *shari‘ah* refers to the corpus of the revealed text of the Qur’an and the authentic *sunnah* of the Prophet Muhammad. In this sense it differs from *fiqh* because it (*shari‘ah*) refers here to the primary sources of the law, which are divine and textually immutable. *Fiqh*, on the other hand, refers to methods of the law – that is, the human understanding and application of the *shari‘ah*, which may change according to time and circumstances. ‘Abd al ‘Atî has noted that ‘confusion arises when the term *shari‘ah* is used uncritically to designate not only the divine law in its pure principal form, but also its human subsidiary sciences including *fiqh’* (1977, p. 14). He further noted that
those who subscribe to the divine origin and the unchangeable essence of Islamic law seem to mistake the general for the variant, that is to view the whole legal system ... as identical with shari'ah in the strict pure sense [and] those who subscribe to the ... human character of Islamic law seem to view the whole system as identical with one part thereof, that is fiqh which, strictly speaking is human and socially grounded. (‘Abd al-‘Ati, 1977, p. 14)

The main significance of this distinction in relation to Islamic legal theory is that it clarifies that by its nature Islamic law consists of two component parts: (i) immutable divine revelation termed shari‘ah and (ii) mutable human interpretation of the shari‘ah termed fiqh.

The three essays in this section of the volume contain analyses of different relevant issues relating to the nature of Islamic law. First, in Chapter 1, ‘Islamic Law: An Overview of its Origins and Elements’, Irshad Abdul-Haq gives an introductory but comprehensive overview of the nature of Islamic law and its relevance in today’s world, including in the USA, followed by a comprehensive analysis of its origins and elements. He notes that a ‘distinctive characteristic of Islam is its remarkable synthesis of all aspects of human social interaction and endeavor into a single value system – a system of law. Throughout the entire history of Islam, Islamic law has remained a prime focus of intellectual effort and recognized by Muslims as a religious duty to uphold and protect’ (p. 5). He highlights the fact that ‘Islamic values are delineated through Islamic legal principles’ (p. 6) and then discusses the definition of Islamic law, noting the necessary distinction between shari‘ah and fiqh. The essay provides a detailed discussion of the Qur’an and the sunnah as elements of the shari‘ah as well as an analysis of the methodologies and branches of fiqh. It also discusses other issues of jurisprudence, such as the science of interpretation of the Qur’an (tafsir) and principles of ijtihad, as well as the different schools of Islamic jurisprudence. It thus serves as a comprehensive general overview of Islamic law that whets the appetite for the specific analyses of the different issues in the essays that follow.

Kevin Reinhart, in Chapter 2, ‘Islamic Law as Islamic Ethics’, provides an analysis of the relationship between Islamic law and Islamic ethics, observing that among the different Islamic intellectual disciplines ‘only Islamic law is both practical and theoretical, concerned with human action in the world, and (strictly speaking) religious’, and thus argues that ‘Islamic law and legal theory must be the true locus of the discussion of Islamic ethics’ (p. 59). Reinhart analyses the link between Islamic law and Islamic ethics and proposes that studying Islamic law can actually contribute to a better understanding of Islamic ethics and that ‘properly understood, Islamic law is not merely law, but also an ethical and epistemological system of great subtlety and sophistication’ (p. 60). He also engages with the three terms fiqh, shar‘ and shari‘ah, as well as Islamic legal theory and the different principles therein. He discusses the categorizations of hukm in the context of the relationship between Islamic law and Islamic ethics, analysing three different types of hukm under Islamic legal theory, namely hukm al-qādī or hukm al-muṣṭīf (determination of judicial fact),9 hukm al-wad‘ī (determination of validity)10 and hukm al-taṭlīf (determination of a moral status).11 Based on the connectivity between law and ethics in Islamic jurisprudence, the essay concludes with the submission that ‘Islamic

9 Also translated as ‘judicial decision’ or ‘jurist opinion’ respectively.
10 Also translated as ‘declaratory law’.
11 Also translated as ‘defining law’.
law stands as a significant example of a moral and legal theory of human behaviour in which initial moral insights are systematically and self-consciously transformed into enforceable guidelines and attractive ideals for all human life’ and thus ‘[t]he sophistication, discipline, and moral aspiration of Islamic law may … evoke our admiration’ (p. 72).

Mashood Baderin’s short essay ‘Understanding Islamic Law in Theory and Practice’ (Chapter 3) presents a concise analysis of the nature of Islamic law. After also highlighting the distinction between sharī‘ah and fiqh, Baderin analysis the different possible connotations of the term sharī‘ah, namely its generic religious context, general legal context and specific context distinct from fiqh. He then proposes that jurisprudentially ‘Islamic law is better understood as consisting of three main elements, namely, sources, methods and principles’ (p. 78), each of which is briefly explained, setting the ground for the specific materials provided on each of these three main elements of Islamic law in the following sections.

Sources of Islamic Law

In every legal system the sources of the law constitute the foundation from which the law draws its validity. Similar to other legal systems, Islamic law has its established sources (al-masādīr) that serve as the foundation for the law. Ascertaining the sources of the law is the first major objective of Islamic legal theory as the sources hold the fundamental proofs (al-adillah) for the law. Traditionally, Islamic law is conceived, under Sunni legal theory, as having four sources, namely the Qur’an, the sunnah, ijmā‘ and qiyās, with some slight variations among the jurists and between the four established Sunni schools of Islamic jurisprudence with regard to the scope of application of ijmā‘ and qiyās. The Qur’an and the sunnah are often classified as the primary sources, while ijmā‘ and qiyās are often classified as subsidiary sources. Similarly, in Shi‘i legal theory, the traditional four sources are the Qur’an, the sunnah, ijmā‘ and ‘aql (intellect) instead of qiyās (analogical deduction), with some slight variations in the scope of their application between the Rationalists (Usūlí) and the Traditionists (Akhlāṣí). This traditional perception of four sources of Islamic law can, however, be confusing and can inadvertently conflate the immutable divine sources with the mutable human methods of the law. Thus, in a clearer sense, as structured in this volume, Islamic law is better conceived as having two sources, namely the Qur’an and the authentic sunnah of the Prophet, while ijmā‘ and qiyās constitute methods of Islamic law as will be discussed in the following section. Both ijmā‘ and qiyās may, however, only represent non-divine ‘sources’ in a limited sense for a muqallid (layperson) who does not have the qualification or ability to practise ītihād but merely follows the opinion of a mujtahid without question.

Thus, the Qur’an is the principal source of Islamic law believed by Muslims to be a divine and gradual revelation from God to the Prophet Muhammad as a source of general guidance to humanity. The verses of the Qur’an cover diverse matters ranging from religious worship to ethics. However, the Qur’an also contains law-related verses relating to worldly transactions such as trade, inheritance, crimes and so forth. There is a wide disparity between Muslim jurists and Western scholars about the scope of law-related verses in the Qur’an, principally because of fundamental disagreements on the moral versus legal nature of the different Qur’anic verses.
While most Muslim jurists generally hold that the role of the Qur’an as the principal source of Islamic law was established from the Prophet Muhammad’s time, there is a view in Western scholarship, proposed by Schacht, that the role of the Qur’an as a source of Islamic law developed much later, almost a century after the death of the Prophet, and that the Qur’an can hardly be called the first and foremost basis of early legal theory in Islamic law. This significant contention regarding the role of the Qur’an as a source of Islamic law is addressed by Wael Hallaq in Chapter 4, ‘Groundwork of the Moral Law: A New Look at the Qur’an and the Genesis of Shari’a’. Hallaq challenges Schacht’s claim, as well as those of other Western scholars that advance similar propositions regarding the role of the Qur’an as a source of Islamic law. He also engages with the related question of the scope of legal provisions in the Qur’an and challenges Coulson’s perception of the number of law-related verses in the Qur’an as being highly Austrian. Hallaq also engages jurisprudentially with the question of the ‘legal’ and the ‘moral’, arguing that ‘to understand when and how the Qur’an played a role in fashioning an Islamic legal ethic, we must begin by shedding our own modern biases, especially about distinctions between, and conceptual categories of, law and morality’ (p. 94). He further argues that ‘to appreciate the “legal” role that the Qur’an came to play from the first moment that the Prophet began to receive it, we must rid ourselves of the notion of boundaries and lines of separation between what is legal and what is moral. The boundaries did not exist in any of the ways we have come to draw them in this modern world of ours’ (p. 103, emphasis in original text). The essay concludes, based on extensive evidence from the Qur’an itself and jurisprudential analyses thereof, that ‘the Qur’an was a source of Islamic law since the early Meccan period when the Prophet Muhammad began to receive the Revelation’ (p. 85).

Chapter 5, ‘Law in the Qur’an – A Draft Code’, by Tahir Mahmood, provides what he describes as a ‘collection of those verses of the Holy Qur’an which directly and clearly relate to what in modern times is termed as “law”’ (p. 127). Mahmood notes that the collection is ‘confined to the verses that clearly and plainly speak of “law” in the modern sense of the term [and] … confined in its scope to what is termed as municipal law [because] verses containing principles of international law, war and peace have not been included in it’ (p. 127). The verses are presented in the form of a draft code divided into different chapters ranging from ‘Law of Marriage and Family’ in Chapter I to ‘Law of Society and Government’ in Chapter V. The apparent objective of the essay is to demonstrate that there are indeed verses in the Qur’an that serve as sources of ‘law’ in the true legal sense. While there are indeed many specific law-related verses provided in the essay, some of the verses listed as being ‘directly and clearly [related] to what in modern times is termed as “law”’ may, however, be contested from a strict positivist perspective as not really ‘law’ in the practical legal sense. Some examples of such verses listed in the essay and claimed to ‘clearly and plainly speak of “law” in the modern sense of the term’ are the verses on kindness to parents (p. 141) and the verses on repentance (p. 149). Critically, these verses, when considered even in the context of Islamic law as applied law, are more ‘directly and clearly’ related to the ethical than the legal per se. Nevertheless, such verses could, jurisprudentially, still serve indirectly as the ethical basis for legal rulings in Islamic law and may thus be considered by Muslim jurists as not being merely ethical but also indirectly (rather than directly) related to the legal.

As legal provisions under every legal system require interpretation for their application, relevant rules of interpretation are normally required to ensure some level of consistency.
The Prophet Muhammad provided the required interpretation and elaboration of the Qur’anic verses during his lifetime, but after him the science of Qur’anic interpretation (‘ilm al-tafsīr) was developed to ensure consistent rules of Qur’anic interpretation. To aid their appropriate interpretation, the verses of the Qur’an are classified variously, under Islamic legal theory, into those that are unambiguous in nature (mufassar), perspicuous in nature (muham), intricate in nature (mutashābih) or ambivalent in nature (mujmal). Other legal classifications of Qur’anic verses include, inter alia, the definitive (qat‘ī), the speculative (zannī), the general (‘āmm), the particular (khāṣṣ), the abrogated (mansūkh) and the abrogating (nāsīkh). Most of the law-related verses of the Qur’an are identified by the jurists as being generally of the zannī type and thus requiring interpretation and supplementary elaboration. Islamic legal theory identifies different approaches of Qur’anic interpretation ranging from the literal or textual to the contextual, which are still applicable today for the continued evolution of Islamic law.

In Chapter 6, ‘Some Reflections on the Contextualist Approach to Ethico-legal Texts of the Quran’, Abdullah Saeed notes that ‘in order to understand and interpret the ethico-legal content of the Quran and relate that content to the changing needs and circumstances of Muslims today, it is important to approach the text at different levels, giving a high degree of emphasis to the socio-historical context of the text’ (p. 159). However, ‘[i]n the classical tafsīr this emphasis on socio-historical context was not considered important, particularly in the interpretation of the ethico-legal texts, despite the frequent use of asbāb al-nuzūl literature’ (p. 159). While he sees the contextualist approach to Qur’anic interpretation as becoming increasingly popular in response to the changing needs and circumstances of Muslims in different parts of the world, Saeed observes that the ‘debates on the meaning of the Qur’an are complex and often controversial’ (p. 159). He loosely groups these debates into three main categories – Textualists, Semi-textualists and Contextualists – which ‘give a useful insight into the general trends of today’s qur’anic interpretation’ (p. 159). Saeed analyses each of the identified categories of interpretation but with an in-depth focus on the contextualist approach and its application in modern times. He concludes that ‘[c]ontextualists are reawakening the Islamic tradition of debate and offering Muslims a range of ways in which to remain true to the core teachings of Islam, whilst fully engaging in the modern world’ (p. 175).

The sunnah of the Prophet is the second source of Islamic law after the Qur’an. The sunnah is normally conveyed through authentic narrations of the Prophet’s practices in the form of his sayings, actions and tacit approvals in reports called hadīth (plural: hadīthī). Due to the emergence of fabricated ahādīth which were attributed to the Prophet after his death, the science of hadīth authentication and classification according to soundness of content and reliability of transmitters was developed from the second century of Islam. From that process emerged the so-called six canonical Sunnī compilations (al-sahīḥ al-sittah) of ahādīth, namely Sahīh al-Bukhārī by Imām al-Bukhārī (d. 870 AD), Sahīh Muslim by Imām Muslim (d. 875 AD), Sunan Abū Dāwūd by Imām Abū Dāwūd (d. 888 AD), Sunan al-Nasā‘ī by Imām al-Nasā‘ī (d. 915 AD), Jāmi‘ al-Tirmidhī by Imām al-Tirmidhī (d. 892 AD) and Sunan Ibn Mājah by Imām Ibn Mājah (d. 886 AD), which serve as sources of recorded authentic sunnah for Islamic law today in Sunnī legal theory. It is well appreciated by Islamic jurists that from the early classical period of Islam up to the present time, the most important question that has been associated with the sunnah as a source of Islamic law is in relation to the authenticity of ahādīth as the vehicle for the sunnah and its proper attribution to the Prophet.
Joseph Schacht’s ‘A Revaluation of Islamic Traditions’ (Chapter 7) is an example of early Western scholarship that critically engages with the question of the authenticity of the *sunnah* as a source of Islamic law. It calls for a fresh and more objective evaluation of *ahādīth*. Schacht’s position is that, as a source of Islamic law, *ahādīth* must be presumed unauthentic until proven otherwise. The essay begins with reference to Goldziher’s view that ‘the traditions from the Prophet and from his Companions do not contain more or less authentic information on the earliest period of Islam to which they claim to belong, but reflect opinions held during the first two and a half centuries after the hijra’ (p. 177). Schacht asserts that ‘the great mass of legal traditions which invoke the authority of the Prophet, originated in the time of Shāfī‘i and later [and that] … legal traditions from the Prophet began to appear, approximately, in the second quarter of the second century A.H.’ (p. 179). He argues generally that *ahādīth* were arbitrarily back-projected to the Prophet in ways that were not theoretically objective or historically reliable. After critically engaging with different classical materials on the subject, he suggests an abandonment of what he considers ‘the gratuitous assumptions that there existed originally an authentic core of information going back to the time of the Prophet, that spurious and tendentious additions were made to it in every succeeding generation, that many of these were eliminated by the criticism of *isnāds*’, as claimed by the early Islamic jurists (pp. 180–81). He concludes with the submission that, jurisprudentially, ‘the “sunnah of the Prophet”, based on formal traditions from him, developed out of the “living tradition” of … the ancient schools of law, the common doctrine of its specialists [and that] … [t]he imposing appearance of the *isnāds* in the classical collections of traditions ought not to blind us to the true character of these traditions, which is that of a comparatively recent systematization of the “living tradition”’ rather than practices that can be authentically linked back to the Prophet as often claimed (pp. 187–88).

Schacht’s contentions about the *sunnah* have been challenged jurisprudentially in other scholarly works such as Al-Azami’s *On Schacht’s Origins of Muhammadan Jurisprudence* (1996) and Hallaq’s ‘The Authenticity of Prophetic Hadith: A Pseudo-problem’ (1999), which could not be reproduced in this volume due to copyright limitations. In this essay Hallaq observes that ‘[t]he most central problem associated with Prophetic *hadith* has undoubtedly been their authenticity. This issue occupied Muslim specialists since the early classical period, and has continued to command the intense attention of western scholars since the middle of the last century’ (1999, p. 75). He identifies that it was indeed Goldziher ‘who inaugurated the critical study of the *hadith*’s authenticity … [and] concluded that the great majority of the Prophetic *hadith* constitute evidence not of the Prophet’s time to which they claim to belong, but rather of much later periods’ (Hallaq, 1999, p. 75). Hallaq notes that since Schacht’s publication on the subject in 1950, ‘scholarly discourse on this matter has proliferated’ (1999, p. 76). He identifies three camps of scholars: ‘one attempting to reconfirm his conclusions, and at times going beyond them; another endeavouring to refute them; and a third seeking to create a middle, perhaps synthesized, position between the first two’ (Hallaq, 1999, p. 76). He then submits that despite the different approaches adopted by the three camps of scholars, they all share one fundamental assumption, namely, that the early and medieval Muslim scholars espoused the view that the Prophetic *hadith* literature is substantially genuine, and that despite the relatively large scale forgery that took place in the early period, the literature, at least as it came
to be constituted in the six so-called [Sunni] canonical collections, has been successfully salvaged and finally proven to be authentic. (Hallaq, 1999, pp. 76–77)

Hallaq clarified that his own perception, through which he rebuffed the arguments advanced by Schacht, ‘is derived from a familiar field of Islamic traditional discourse, a field that has escaped the attention of modern hadith scholarship, [namely] legal methodology, properly known as usul al-fiqh’ (1999, p. 88).

The Shi‘ah also have their own different collections of hadith, otherwise called akhbār, which serve as the second source of Islamic law under Shi‘ī legal theory. The fundamental principle is that the akhbār transmitted by Shi‘ī-recognized Imamīs are regarded as the most authentic source of the sunnah in Shi‘ī legal theory. The four main recognized so-called akhbār compilations are al-Kāfī fi ‘Ilm al-Dīn by al-Kulaynī (d. 939 AD), Man lā yahduruhū al-Faqīh by Ibn Bābūya (d. 991 AD) and Tahdīb al-akhām and al-Istibsār fi mā uktulīfa minhu al-akhbār by al-Tūsī (d. 1067 AD) (see, for example, Gleave, 2001).

There have, however, been contentions about the origins of Shi‘ī hadith as a source of Islamic law. Ron Buckley’s ‘On the Origins of Shi‘ī Ḥadīth’ (Chapter 8) examines the development of Shi‘ī hadith as a source of law, arguing that ‘the first major impulse towards identifying a coherent and comprehensive set of Shi‘ī religio-legal norms distinct from those of the majority of Muslims occurred during the time of the first Abbāsid’ (p. 189). In analysing the development of hadith as a source of law, he notes that ‘there are indications that prior to the efflorescence of interest in Ḥadīth and the Islamicization of the law, at least some traditions were being written down quite early, perhaps even during the time of the Prophet’ (p. 191), but ‘available evidence points to the early Abbāsid period as the time when a specifically Shi‘ī corpus of doctrinal and legal norms first began to emerge’ (pp. 192–93). The essay examines the reasons for this, the form they took and their general development. Buckley concludes that ‘[a]lthough the canonical collections of Shi‘ī Ḥadīth appeared at a relatively late date … it can be seen that Shi‘ī collections of legal traditions began at approximately the same time as those of the Sunnis’ (p. 206).

On the contention between Muslim and Western scholars about the authenticity and role of hadith as a source of Islamic law, it is relevant to note Hourani’s observation that up to the present, the fundamental researches of Goldziher and Schacht on the Traditions of Islam have had little impact on the thinking and writing of Muslim scholars. There is thus … a great gap between the attitudes of western and Muslim scholars, the one party not counting the Traditions ‘Muhammadan’, [and] the other still quoting them as authorities for shari‘a law, without considering the grave doubts that have been cast upon them. (1964, p. 59)

The extent of the impact of Arab culture on the sources of Islamic law is a topical one and is an important aspect of contemporary debate on Islamic legal theory. This is addressed by Chapter 9, John Hursh’s ‘The Role of Culture in the Creation of Islamic Law’. In relation to both the Qur’an and the sunnah, there is a strong claim in Western scholarship of ‘cultural influence in the formation of Islamic law and the refutation of these claims by Islamic scholars inside the tradition’ (p. 209). Hursh analyses the debate and endeavours to respond to the different perspectives. Starting with a discussion of how law and culture create meaning, he proceeds
to analyse the transition from pre-Islamic to Islamic law and the role culture played in that transition. He also examines contemporary legal and cultural debates over the reinterpretation of the origins of Islamic law and finally offers strategies for implementing liberal reform to Islamic law without disputing the divine authority of the sources or denying the influence of culture on Islamic law. He proposes a mediating position that ‘while the Qur’ān is the infallible word of God and the sunna is the legitimate collection of the Prophet’s example, the transmission of these words into law was a cultural enterprise’ and concludes that ‘[t]his mediating position allows for liberal reform inside the Islamic tradition without questioning the legitimacy of the divine sources of Islamic law’ (p. 231).

**Methods of Islamic Law**

*Ijmāʿ* (consensus) and *qiyyās* (analogical deduction) constitute the main methods (*turuq*) of Islamic law. The Prophet’s death brought an end to both Qur’ānic revelations and the development of new *sunnah* from his practices. With the passage of time and in response to different legal questions raised by many new cases that were not specifically covered by the Qur’ān or the *sunnah*, the early Muslim jurists had to devise some consistent method for moving Islamic law forward. This caused protracted debates among the pre-classical *Sunnī* jurists, with the Traditionists (*ahl al-hadīth*) and the Rationalists (*ahl al-ra’y*) holding differing strong views on the particular role of human reason as a tool of Islamic law. Eventually, through the process of *ijtihād*, the concepts of *ijmāʿ* and *qiyyās* were ascertained as formal methods to facilitate the coherent extension of the two divine sources to answer new legal questions that arose after the Prophet.

The interplay between the sources and methods of Islamic law is a very significant aspect of Islamic legal theory. Al-Shāfi‘ī, often referred to as the father of Islamic jurisprudence, is considered to be the jurist who systematized the relationship between the sources and methods of Islamic law in his effort to resolve the jurisprudential differences that arose between the Traditionists and Rationalists around the eighth century. Through his work *al-Risālah fī Usūl al-Fiqh*, a classical treatise of Islamic legal theory, he established the jurisprudential hierarchy of the sources (that is, the Qur’ān and the *sunnah*) and the methods (that is, *ijmāʿ* and *qiyyās*) of Islamic law with relevant evidences. Coulson has observed that al-Shāfi‘ī’s ‘genius did not lie in the introduction of any completely novel concepts, but in giving existing ideas a new orientation, emphasis and balance, and in forging them together, for the first time, into a systematic scheme of the “roots” of law’ (1964, p. 61).

In Chapter 10, ‘Al-Shāfi‘ī’s Role in the Development of Islamic Jurisprudence’, Ahmad Hasan critically engages with al-Shāfi‘ī’s views on the various doctrines and principles of Islamic jurisprudence. He starts with the observation that al-Shāfi‘ī ‘stands at the turning point in the history of Islamic Jurisprudence’ (p. 235), but questions whether al-Shāfi‘ī was indeed the first jurist to introduce Islamic legal theory, concluding that there had been scholars before al-Shāfi‘ī who had addressed the issue of Islamic legal theory in their writings. He then analyses al-Shāfi‘ī’s important role in the development of Islamic legal theory with reference to his book *al-Risālah*. Hasan observes that al-Shāfi‘ī’s biggest challenge was with regard

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12 For an English translation, see Khadduri (1987).
to the concept of the *sunnah* and the application of *ahādīth*, especially the recognition of solitary *ḥadīth* (*khabar al-wāḥid*) as a source of Islamic law. He discusses the uniqueness of al-Shāfī‘ī’s approach and his views on the various doctrines and principles of Islamic legal theory, such as his view on the position of the Qur’an, the *sunnah*, *ijmā‘*, *qiyyās*, *ijtihād* and *istihlās*, among others. The essay thus provides a general analysis of al-Shāfī‘ī’s views on the interplay between the sources and methods of Islamic law and highlights his theoretical assertions in support of his position. Hasan concludes, *inter alia*, that while al-Shāfī‘ī ‘introduced a methodology which produced an integrated legal system and brought about its stability … this formulation arrested the freedom of *ijtihād* and subsequently annihilated the spirit of originality and creativity’ (p. 266).

On the one hand, *ijmā‘* as a method of Islamic law consists of the consensus of qualified Muslim jurists on a particular issue that is not specifically covered in the Qur’an or the *sunnah*. When any new issue arises and qualified Muslim jurists unanimously agree on a ruling based on their understanding of the Qur’an and the *sunnah*, such juristic consensus becomes binding and authoritative on that particular issue. Although traditionally *ijmā‘* is considered to be as binding as a provision of the Qur’an or the *sunnah*, it can, however, unlike the Qur’an and the *sunnah*, be modified or changed by another valid *ijmā‘* of a similar class. This method of Islamic law has been justified by reference to relevant Qur’anic verses and relevant *ahādīth* that enjoin Muslims to hold together as a community and also to obey those in authority. Particular reference is often made to a *ḥadīth* in which the Prophet is reported to have said: ‘My community shall never agree (i.e. reach a consensus) on an error’ as justificatory evidence for the validity of *ijmā‘*. There is, however, considerable tension between the theoretical connotation and the practical feasibility of *ijmā‘*, which has been variously debated by the early Islamic legal theorists and jurists as part of the development of Islamic legal theory from around the eighth century, suggesting that there is practically no consensus among the jurists on the nature and scope of *ijmā‘* itself (see generally Hasan, 2009). As highlighted by Hourani in a critical essay on the authoritativeness of *ijmā‘* (*hujiyyah al-ijmā‘*), some of the jurisprudential questions that have been raised by both classical and contemporary scholars regarding the nature and scope of *ijmā‘* include the following:

What was the constituting group whose unanimous opinion was binding: the entire community or the learned? On whom was consensus binding: on all future generations of Muslims or something less than that? On what subjects: religious practice or doctrine or both? Was ‘independent’ consensus authoritative, i.e. consensus which went beyond interpretation of the sacred texts to make new rulings not derived from them? What sanctions should enforce conformity to consensus? (1964, p. 17)

Hourani has critically engaged with the views of both classical and modern Muslim and Western scholarship on the subject and observed that al-Shāfī‘ī himself had a lukewarm

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13 For the different juristic views on this, see, for example, Hasan (2009, pp. 153–57). See also Qadri (1986, p. 206).
14 Reported in *Sunan Ibn Mājah*.
15 Hourani’s essay could not be included in this volume due to its long length and copyright limitations.
attitude to ījmāʿ, but because it was ‘too well entrenched in his time to be rejected (and he may never have thought of that), he accepted it with qualifications and sought to justify it by proofs within the framework of his system’ – that is, by reference to the Qurʾan and sunnah (Hourani, 1964, p. 22; see also Calder, 1983).

While ījmāʿ is recognized as a valid method of Islamic law under both Sunnī and Shīʿī legal theory, there are some theoretical and practical differences between them. In Chapter 11, ‘The Concept of Ījmāʿ in Islamic Law: A Comparative Study’, Rahimīn Abd Rahim provides a comparative analysis of the concept of ījmāʿ in both Sunnī and Shīʿī legal theory, identifying the areas and causes of the disagreement between them on the subject. He starts by noting that ‘the primary reason why there existed disagreement between the Sunnī and Shīʿī sects on legal matters, was their different approach to and understanding of the principle of ījtihād, and ... ījmāʿ. In the debate between both the sides on the problems of usūl al-fiqh, they usually used justifications based on the ījmāʿ’ (p. 271). The essay then analyses the definition, nature, function, value, basis and authority of ījmāʿ, as well as the areas of agreement and differences between the Sunnī and Shīʿī perspectives on the subject.

On the other hand, qiyās as a method of Islamic law consists of the juristic extension of the application of an original provision from the Qurʾan or the sunnah to cover, by analogy, a new case that has a similar effective cause or ʿillah as the original case provided for in the Qurʾan or the sunnah. This is usually illustrated by reference to the prohibition of narcotic drugs under Islamic law by analogy to the specific prohibition of wine (khamr) contained in Q5:90 on the grounds that narcotic drugs have a similar effect on the intellect as wine. The concept of qiyās is quite technical and requires some expertise in logic, which makes its analysis sometimes difficult. Also, while qiyās is mostly presented in the context of analogical deductions, the early jurists did recognize its possible application in other circumstances not strictly linked to analogy. This has given rise to debates about the different genres of qiyās among the early jurists, including al-Shāfiʿī. As previously noted, qiyās is only recognized as a method of Islamic law under Sunnī legal theory, and is substituted by the concept of aql under Shīʿī legal theory.

Wael Hallaq’s ‘Non-analogical Arguments in Sunni Juridical Qiyās’ (Chapter 12) discusses the typologies of qiyās as a method of Islamic law. He notes that the jurists are generally agreed that ‘[o]nly points of law and fact that were not covered by the sources were to be the object of reasoning through what is known as qiyās [and that] ... the operation of qiyās was therefore predetermined to a significant extent by the volume of textual statements which were deemed to have been imbued with dalālāt al-nass [clear textual authority]’ (p. 286). Hallaq, however, observes that apart from such clear cases of analogy there were other arguments concerning the application of qiyās in respect of ‘cases which fell in the gray area between the explicit specification of revelation where reasoning was said to be superfluous, and the total absence of such revelation where analogy was deemed indispensable’ (p. 288). He then critically engages with the various perspectives of different classical jurists, including al-Shāfiʿī, on the nature and scope of such ‘non-analogical’ types of qiyās in Islamic legal theory, providing comprehensive analyses of the different jurisprudential views with relevant references and illustrations from both the Qurʾan and the sunnah.

The effective cause or ratio legis (ʿillah) is an important element that must be objectively established for a valid application of qiyās as a method of Islamic law. In Chapter 13, ‘İlla
and Qiyās in Early Islamic Legal Theory’. Nabil Shehaby thus analyses the important element of ‘illah in relation to the operation of qiyās. He begins by explaining the usefulness of usūl al-fiqh and its different connotations in relation to analogy as a method of Islamic law and then illustrates the process of Islamic law by which ‘[i]deally, when confronted with a legal problem, the first thing a jurist does is to try to find out if the legal sources can be of help. If not, then he seeks a judicial judgment reached by consensus [ijmā’] on the same problem or case. If that is not available, he can, in the opinion of the majority, resort to analogy [qiyās]’ (pp. 307–308). Shehaby traces the development of ‘illah and qiyās in Islamic legal theory, referring to different Islamic jurisprudential works.

Principles of Islamic Law

The practical application of both the sources and the methods of Islamic law are guided by established principles (qawā’id) under Islamic legal theory. The principles serve to ensure consistency between theory and practice as well as a logical application of the legal provisions. Some of the principles relate to the interpretation of the sources and some to the application of the methods. This helps to ensure consistency in the relationship between the sources and the methods, leading to a logical application of the law. Some examples of the principles of Islamic law are darūrah (principle of necessity), which enables proportionate deviation from the letter of the law in cases of necessity; maslahah (principle of welfare or public interest), which allows for the consideration of human welfare in the application of the law; istihsān (principle of juristic preference), which enables judges to do what is fair and equitable based on the facts before them; istishāb (presumption of continuity), through which the status quo ante is presumed to subsist until the contrary is proved; urf (custom), which validates the recognition of prevailing custom within the context of the sources and methods of Islamic law; and takhayyur (principle of eclectic choice), which allows movement between the opinions of the different schools of Islamic jurisprudence to avoid hardship, where necessary. There are many more of these principles, most of which have been formulated into maxims to formalize their scope and application in Islamic law. Differences, however, exist in respect of the degree to which some of the principles are applicable under the different schools of Islamic jurisprudence.

Among the different principles of Islamic law, maslahah is often considered as the most viable for bringing the humane ideals of Islamic law closer to realization for all time (see, for example, Kamali, 1988). In Chapter 14, ‘The Maslaha (Public Interest) and ‘Ilba (Cause) in Islamic Law’, Majid Khadduri briefly discusses the concepts of maslahah and ‘illah as important principles of Islamic law. He notes that ‘[i]n an effort to meet pressing needs and changing circumstances, the Muslim jurists have used their utmost ingenuity to provide concepts and legal methodology by which the fundamental principles and rules of law have undergone a continuous process of change and development’ (pp. 329–30). He further observes that ‘[t]wo important concepts used in the past by classical Muslim jurists may be singled out as perhaps the most relevant for contemporary discussion on legal reform in Islamic lands: the concepts of maslaha and ‘illa’ (p. 330). With regard to maslahah, Khadduri notes that ‘[m]aslaha, meaning “general good” or “public interest,” was used in the broad
sense of the term by the classical jurists, but in time its technical meaning assumed greater
importance’ (p. 330). And in relation to its possible broad usage, he notes that ‘[t]he jurist
Najm al-Din al-Tawfī seems to have gone as far as to argue that the principle of maslaha
is overriding even if it contradicts a primary source; al-Tawfī found this rule grounded on
the premise that the primary sources themselves were provided to protect public interests’
(p. 330). The essay analyses the approaches of relevant Islamic jurists and scholars such as
Mālik, al-Juwaynī, al-Ghazālī, al-Shāṭibī and Rashīd Ridā, who it describes as, perhaps, ‘the
most effective modern protagonist of the use of maslaha as a source for legal and political
reform’ (p. 331). Khadduri also discusses ‘illah and hikma as relevant principles of Islamic
law that can ‘be used as a basis for judgement in secular matters [and] for the maintenance of
the flexibility of the law’ (p. 331), citing some debatable examples.

Felicitas Opwis’ ‘Maslaha in Contemporary Islamic Legal Theory’ (Chapter 15) provides
a more detailed historical and evolutionary analysis of the concept of maslaha. She notes
that the importance of maslaha in contemporary Islamic discourse derives from the fact
that ‘since at least the 5th/11th century Islamic jurists think of maslaha as the embodiment
of the purpose of the law (maqṣūd al-sharʿ, maqāṣid al-shariʿa) [and that] ... the concept
of maslaha can serve as a vehicle for legal change’ (p. 336). She argues that the principle of
maslaha ‘presents jurists with a framework to tackle the problem, inherent in a legal system
that is based on a finite text, of bringing to bear the limited material foundations of the law
(i.e. Qur’an and hadith) on everyday life in an ever-changing environment’ but ‘[h]ow much
legal change may be achieved through applying considerations of maslaha depends primarily
on the purpose maslaha serves within a jurist’s overall conception of the law’ (p. 336). She
then ‘analyze[s] how the legal concept of maslaha was understood by some of the prominent
figures of Islamic jurisprudence in the modern period’ (p. 336) concluding that ‘a particular
jurist’s interpretation of masāḥala is not random, but ... influenced by the nexus of education;
personal position, and historical environment that affects the way in which a jurist employs
the principle of maslaha to shape the legal sphere’ (p. 376).

In Chapter 16, ‘Legal Logic and Equity in Islamic Law’, John Makdisi critically examines
the concept of istihsān as a principle of Islamic law. Makdisi starts by noting that the traditional
pejorative perception of Islamic law in Western legal circles as qadi justice is

truly mistaken, for in classical Islamic law, the discretion of the judge is stringently controlled
by highly developed and detailed doctrines ... The corpus of Islamic law has been developed by
Islamic jurists who have employed various techniques of legal reasoning from the two primary
sources of the law, the Koran and the sunna, and from a confirmatory source, consensus. The
techniques of legal reasoning have included primarily qiyas (reasoning by analogy), and secondarily
istiṣḥāb (presumption of continuity), istislah (consideration of public interest), and particularly in
the Hanafi school, istihsān. (pp. 379–80)

He proceeds to comprehensively analyse the concept of istihsān as a principle of Islamic law
and critically engages with the different academic views on the subject in comparison with the
common law concept of equity. Makdisi concludes, inter alia, that while the
provisions of the Koran and the *sunna* need no further justification in Islamic law than that they are divinely revealed ... The rules of law which are derived from these sources through reasoning by analogy and modified through *istihsan*, use a process which is quite rational [and that] ... [c]ontrary to the opinions of certain American scholars, the method of legal reasoning in Islam is not arbitrary, discretionary or unsystematic. (p. 406)

In a later essay entitled ‘A Reality Check on *Istihsan* as a Method of Islamic Legal Reasoning’ (2002), Makdisi further examined the important question of whether the jurisprudential perception of *istihsân* by Islamic legal theorists was the same as its practical application by the Islamic jurists in the solution of actual legal cases before them.

Another important general principle of Islamic law is the concept of *maqāsīd al-sharī‘ah*, which is addressed by Mohammad Kamali in Chapter 17, ‘*Maqāsīd al-Sharī‘ah*: The Objectives of Islamic Law’. Kamali begins by observing the evidently important role of the concept of *maqāsīd al-sharī‘ah* and yet its somewhat neglected role in the application of the *sharī‘ah* generally. He notes that the *sharī‘ah* is generally ‘predicated on the benefit of the individual and that of the community, and its laws are designed so as to protect these benefits and facilitate improvement and perfection of the conditions of human life on earth’ (p. 407), and that the concept of *maqāsīd al-sharī‘ah* is utterly important in realizing this. The essay discusses the nature and characterization of *maqāsīd al-sharī‘ah*, identifying its origins in the Qur’an and also addresses its classifications and the order of priority that is integrated into its structure. It also examines the historical developments and the contributions of some of the leading scholars and jurists, especially al-Shâtibî, to the theory of the *maqāsīd* and looks into the different approaches that the scholars have adopted towards its identification and use over time. Kamali highlights the relevance of the *maqāsīd* to *ijtihād* and discusses the ways in which the *maqāsīd* can enhance the scope of *ijtihād* in the application of Islamic law in contemporary times. He concludes that

[a]t a time when some of the important doctrines of *Usūl al-Fiqh* such as general consensus (*ijmā‘*), analogical reasoning (*qiyyās*) and even *ijtihād* seem to be burdened with difficult conditions, conditions that might stand in a measure of disharmony with the prevailing socio-political climate of the present-day Muslim countries, the *maqāsīd* have become the focus of attention as it tends to provide a ready and convenient access to the *Sharī‘ah*. (pp. 420–21)

The applicability of the two eclectic concepts of *takhayyur* and *taflīq* as legitimate principles of Islamic law has attracted differing views from jurists. In Chapter 18, ‘Cut and Paste in Legal Rules: Designing Islamic Norms with *Taflīq*’, Birgit Krawietz examines both concepts but with emphasis on the concept of *taflīq* as a principle of Islamic law. She notes that while the principle of *taflīq*, which means ‘the fusing of different legal opinions, is mostly discussed in the context of the application of the Sharia in the modern state laws of the Islamic world ... [t]here are, however, writings dealing with the topic that go well beyond the necessities of modern state law implementations as well as the confines of mere positive legal norms’ (pp. 423, 425). The essay analyses the perspectives of different classical scholars and jurisprudential schools on the concept and application of *taflīq* as a principle of Islamic law. As is necessary, Krawietz also makes reference to *takhayyur*, noting the perception of many
Muslim authors of its role as ‘a preliminary leading to ṭafṣiq’, which began to ‘take shape in the writings of Imam Qarafi’ in the thirteenth century (p. 432). She also refers to the concept of ṭataḥṣu’ al-ruḵas (that is, mere shopping around for easy solutions) as the basis for which most jurists oppose the applicability of ṭafṣiq. The essay provides an in-depth analysis of the history of the concept and its development and engages with the different juristic arguments regarding its application. Krawietz concludes that ‘[a]uthors from all [Islamic] law schools have influenced and shaped the discussion on ṭafṣiq at various times’ (p. 458) and that although

a latecomer to the genre of ṭṣūl al-fiqh, the topic of ṭafṣiq has to be seen in its systemic context there. It is related to topics like ṭaqrībd in general, the preferability (a ṭamīm̱y̱) of a certain multi, the crossing of law school boundaries, the idea of an attachment to certain rules by enactment, the search for easier solutions, the question how long a fatwa lasts, further legal stratagems and the blocking of ‘evil devices’. (p. 459)

Chapter 19, ‘Muslim Custom and Case-Law’, by Noel Coulson, engages with the concept of ṭuraf as a principle of Islamic law. Coulson notes that the shari‘ah ‘admits [s] ṭuraf (literally “what is known” about a thing, and so – loosely – “custom”) as a legal principle of subsidiary and supplementary value’ (p. 463). He then illustrates its operation within the framework of the sources and methods of Islamic law by relevant juristic examples and past case law from different Muslim countries, and reports that ‘in many areas the practice of the courts represents a close, and at times almost inextricable, combination of Shari‘a and customary principles’ (p. 467). He concludes that

any appreciation of the part played by custom and case-law in Islam must rest upon recognition of the gulf that exists between Shari‘a doctrine on the one hand and actual Muslim legal practice on the other. Within Islam this situation has produced two diametrically opposite attitudes. There are, at the one extreme, those who maintain that the Shari‘a … represents the sole and eternally valid criterion of conduct in Islam, and who reject as wholly illegitimate such practices as are not in strict conformity with its precepts; while there are, at the other extreme, those … for whom the doctrine of the mediaeval jurists is not stamped with any final or exclusive authority, and for whom principles and developments outside the bounds set by this body of doctrine are perfectly valid and acceptable. (p. 471)

These analyses of the different specific principles are followed by Kamali’s Qawā‘id al-Fiqh: The Legal Maxims of Islamic Law’ (Chapter 20), which provides a general analysis of the legal maxims of Islamic law. Kamali notes that legal maxims are an ‘evidently important chapter of the juristic literature of Islam, that is particularly useful in depicting a general picture of the nature, goals and objectives of the Shari‘ah’ (p. 473). The essay provides a historical background of Islamic legal maxims followed by a discussion of developments and relevant rules of application of the established maxims. Kamali notes that Islamic legal maxims were developed gradually in parallel with the development of fiqḥ itself and were basically a reiteration of principles found either in the Qur‘an or in the sunnah. He provides examples of the different legal maxims with an analysis of the different views of the Muslim jurists on their respective application.
Juristic Reasoning (Ijtihād)

*Ijtihād* has been defined as ‘the putting forth of every effort in order to determine with a degree of probability a question of the *Shariʿa*’ (Qadri, 1986, p. 251). In essence, it is the heart of Islamic legal theory and constitutes the most important instrument for the development of Islamic law. Through *ijtihād*, qualified *mujtahidūn* (singular: *mujtahid*) exert sincere efforts to extract the law from the sources of Islamic law, use the methods – that is, *ijmāʿ* and *qiyyās* – to fill any legal lacunae in the textual sources, and use principles such as *maslahah*, *darūrah*, *istihsān* and so forth to resolve any juristic challenges. A qualified *mujtahid* is expected to be a pious person well grounded in the knowledge of the Qur’an and the *sunnah* and all other relevant sciences related to *ijtihād*. There are different levels of *ijtihād* and *mujtahidūn* based on the level of qualifications and knowledge (Qadri, 1986, pp. 255–58). As *ijtihād* is based on a degree of probability, Islamic legal theory also acknowledges the principle of *ikhtilāf* (differences of juristic opinion) on particular issues, subject to clear *dalīl* (evidence) in support of respective views. This is reflected in the different views of the different schools of Islamic jurisprudence on particular matters. The opposite of *ijtihād* is *taqlīd*, which means legal conformism, whereby a non-*mujtahid* (layperson) follows the opinion of a qualified *mujtahid* on a particular matter.

The notion of the so-called ‘closing of the gate of *ijtihād*’ is said to have emerged around the thirteenth century. It consequently hampered the practice of *ijtihād* substantially and limited Islamic law to the practice of *taqlīd* by following the jurisprudential rulings of the classical jurists on different issues as recorded in the *fiqh* books of any one of the established schools of Islamic jurisprudence. The so-called ‘closing of the gate of *ijtihād*’ has, however, been challenged by many contemporary scholars, by reference to different classical sources and practices on the subject to establish that the practice of *ijtihād* never ceased at any time in Islamic legal history. While *taqlīd* remains a necessary methodology of Islamic law for enabling laypersons to follow the precedents of classical jurists and views of qualified *mujtahidūn*, Muslim jurists are of the view that a qualified *mujtahid* or judge must exercise his own *ijtihād* in accordance with the *shariʿah*, in every case before him, subject to a clear elaboration of the relevant methodologies of the law utilized in reaching his decision so that the validity of his judgment can be properly evaluated within the relevant rules of Islamic law.

In Chapter 21, ‘Interpretation in Islamic Law: The Theory of *Ijtihād*’, Bernard Weiss provides a comprehensive analysis of the concept of *ijtihād* as an important instrument of interpretation and for extracting Islamic law from the established sources. He observes that ‘[t]he distinction between law and its sources is carefully maintained in Islamic jurisprudence [and that] … [t]he process of extracting or deriving (*istiḥbāṭ*, *istiḥmār*) legal rules from the sources of the Law is termed, with reference to its character as a human activity, *ijtihād* … [which] literally means, “endeavor” or “self-exertion”’ (pp. 483–84). He further notes that in legal usage *ijtihād* ‘refers to the endeavor of a jurist to formulate a rule of law on the basis of evidence (*dalīl*) found in the sources’ (p. 484). He contrasts *ijtihād* to *taqlīd* (imitation) as a ‘term which refers to the acceptance of a rule, not on the basis of evidence drawn directly from the sources, but on the authority of other jurists’, highlighting that *ijtihād* ‘roughly corresponds to what in Western jurisprudence is called “interpretation”’ (p. 484). The essay provides a comprehensive analysis of the development of the concept of *ijtihād*, the jurists’ role and the
use of ijtihād over time. It also analyses the scope of ra‘y (rationality) as well as ijmā‘ and qiyās and principles such as istihsān, istislāh and maqāsid as instruments of ijtihād in relation to the main sources. It discusses the views of some classical jurists and addresses the concept of the so-called closing of the gate of ijtihād. Weiss also analyses the Shi‘ī perception of ijtihād, identifying areas of difference between the Sunnī and Shi‘ī perspectives. In answering the question of whether the theory of ijtihād still plays a meaningful role in legal development in contemporary Muslim societies, he concludes that ijtihād ‘is the key to the future of Islamic law, for it is by virtue of the theory that Islamic law is Islamic’ (p. 496).

In Chapter 22, ‘The Closing of the Door of Ijtihad and the Application of the Law’, Frank Vogel engages with the question of the so-called closing of the gate of ijtihād, asking the question of ‘how natural, and how seemingly necessary, the adoption of a theory like the “closing of the door” is to the operation of Islamic legal system’ (p. 498). In addressing the question of the closing of the gate of ijtihād, Vogel suggests the use of all the Islamic jurisprudential tools at our disposal ‘including the theory of qadā’ [adjudication], ijhā’ [authoritative opinion] and siyāsah’ (p. 498). He relates this to the role of qadā’ in the larger Islamic legal system, noting that ijtihād is an indispensable aspect of qada’ and analysing the different tenets of ijtihād to qadā’, one of which is that ‘no qāḍī has priority over any other in matters of truth. Once a case has been decided by ijtihād, it cannot be reversed by another authority’ (p. 499). He then argues that ‘[i]f this conception of qadā’ … were given full scope, Islamic legal systems would face great practical difficulty. In fact, such complaints are recorded very early in the ‘Abbāsid era’ (p. 499). Vogel thus proposes that the ‘restrictions on ijtihād were adopted when the ulama, knowing that their theory of law caused practical problems in actual legal systems, made the concessions necessary to ensure that their fiqh would survive and could compete successfully against contending principles in the legal system, chiefly siyāsah’ and that the claim ‘was one piece in a complex mechanism of ulama doctrines and institutions designed to protect and advance, in competition mainly with the ruler, their vision of law and legitimacy’ (p. 499). He then refers to the views of other jurists such as al-Māwardī to substantiate this proposition. Another very relevant essay that interrogates the so-called closing of the gate of ijtihād is Hallaq’s ‘Was the Gate of Ijtihād Closed?’ (1984) (see also Peters, 1980).

In relation to the modern use of ijtihād, Rachel Codd’s ‘A Critical Analysis of the Role of Ijtihad in Legal Reforms in the Muslim World’ (Chapter 23) explores the concept of ijtihād as a means for achieving a viable methodology for legal reforms in the contemporary Muslim world. Codd starts by identifying the need for reform of traditional Islamic law and asks the necessary question of how such reforms can be achieved within an acceptable Islamic framework. She notes that the concept of ijtihād is particularly appealing in that regard but that there are sometimes problems with its application, and she raises the controversial question of whether ijtihād is ‘only applicable in the absence of definite and clear injunctions in the Quran’ or whether ijtihād is ‘also allowed where there are such injunctions’ (p. 505). Codd argues that as ‘the link between the texts and a principle of the Shari‘a is established through reasoning … it is hard to see even in the presence of clear and definite injunctions that the use of Ijtihad would not be used to establish answers to problems’ and notes that ‘[c]lassical evidence suggests that Ijtihad has actually been used in the presence of clear injunctions in the Quran’ (p. 505). She then critically engages with the various classical and contemporary
perspectives on and approaches to the use of *ijtiḥād* for the advancement of Islamic law in the past and present, comparing both the *Sunna* and *Shi‘a* perspectives.

It is often suggested that because of its recognition of *ʿaql* (intellect) as a subsidiary source of law, *Shi‘a* legal theory has been more accommodating of *ijtiḥād* as an important means of Islamic law. In relation to the *Shi‘a* application of *ijtiḥād*, in Chapter 24, ‘*Ijtiḥād in Contemporary Shi‘ism: Transition from Individual-oriented to Society-oriented’ Hamid Mavani analyses the concept and evolution of *ijtiḥād* from a *Shi‘a* perspective. While he appreciates that the ‘adoption of the Mu‘tazili school of “rationalist” theology and the institution of *ijtiḥād* enabled *Shi‘i* legal theory to exhibit vibrancy and make it adaptable to changing contingencies and circumstances’ (p. 523), he notes, however, that *Shi‘a* jurisprudence nevertheless failed to exploit the different relevant Islamic jurisprudential principles and juristic devices but rather ‘anchored itself in the text of the Qur’an and the hadith literature and provided only a limited role for the contextualization and extraction of universal values and principles from the primary sources’ (p. 524). Mavani argues that this was ‘partly because for most of their history, the *Shi‘a* were a minority and, as such, did not face the challenge of providing pragmatic and practical guidance to the lay people. At the same time, access to the infallible Imam (at least until the middle of the tenth century) removed the urgency of developing a legal theory with an ethical underpinning because he (the infallible Imam) was viewed as the repository of authoritative information. Thus there was limited scope for *ijtiḥād* in early *Shi‘a* legal theory (p. 524). Mavani argues that the establishment of a *Shi‘a* state in Iran in 1979, ‘forced them to tackle social, political, economic, educational, and cultural issues, [and] demanded a change in orientation – away from the individual and toward society as the unit of analysis vis-à-vis *ijtiḥād*’ (p. 523). The essay examines ‘the writings of Ayatullaha Muhammad Baqir al-Sadr, Muhammad Mahdi Shamsuddin, Sayyid Muhammad Husayn Fadlullah, and Ruhullah Musavi al-Khomeini and studies this phenomenon of change from individual-oriented *ijtiḥad* to society-oriented *ijtiḥād* in *Shi‘a* legal theory’ (p. 523). Mavani concludes, *inter alia*, that the individual-oriented and narrow approach toward *ijtiḥād* [under classical *Shi‘a* legal theory] limited the scope of scholarly reflection on defining the objectives or purposes of the laws legislated by the Divine. Contemporary challenges … have [now] encouraged *Shi‘i* jurists to move their orientation away from the individual as the unit of analysis and toward society by incorporating and extending the devices and tools at their disposal in Islamic legal theory and by reestablishing a close link between law and ethics to resolve contemporary issues. (p. 543)

Conclusion

The role of Islamic legal theory in the development of Islamic law over the centuries cannot be overemphasized. From the time of al-Shafi‘i, when its rules were considered to have been systematically synthesized into a coherent system, it has evolved into an indispensable discipline of Islamic law through which contemporary Islamic scholars and jurists have sought to advance Islamic law forward to meet the various legal challenges of their time. There is no doubt that critical modern English language scholarship in different aspects of the discipline, as reflected in most of the essays contained in this volume, has contributed in no small way
to generating a vibrant engagement with the traditional perspectives of classical Islamic legal theory. The academic debate that has emerged has resulted in a more broad-minded approach to the different issues, which has greatly enriched the discipline in recent times. While the essays featured in this volume address some of the main issues, it certainly cannot be claimed that they exhaust all the necessary issues of Islamic legal theory. A supplementary further reading list therefore follows this introduction.

In conclusion it is important to note that the techniques of Islamic legal theory (usūl) as analysed by the essays in this volume cannot, however, apply autonomously or in a vacuum. Rather, they can apply only in relation to the substantive aspect of the law, otherwise called the furi` (branches of the law), which is the subject matter of the second volume in this series.

References


