Introduction

Islamic Substantive Law in Context

This second volume in the Ashgate Islamic Law series contains scholarly essays on selected substantive issues in Islamic law. Islamic substantive law, otherwise called the branches of the law (furūʿ al-fiqh), in contrast to Islamic legal theory, otherwise called the roots or foundations of the law (ustūl al-fiqh),\(^1\) covers the textual provisions and jurisprudential rulings relating to specific transactions in Islamic law such as issues on Islamic family law, Islamic law of evidence, Islamic law of finance, Islamic law of contract, Islamic criminal law and so forth. It is to Islamic substantive law that the rules of Islamic legal theory, covered in the first volume in the series, are applied. The relationship between Islamic legal theory and Islamic substantive law is metaphorically described by al-Ghazālī as a process of ‘cultivation’ (istikhmār), whereby the qualified jurist (muṭahid), as the ‘cultivator’, uses relevant rules of legal theory to harvest the substantive law on specific issues in the form of ‘fruits’ (thamarāt) from the sources (1996, p. 7). Thus, while Islamic legal theory deals with the general principles of Islamic jurisprudence, Islamic substantive law deals with the specific rulings on particular matters in Islamic jurisprudence. As Qadri has noted, this aspect of Islamic law covers ‘the various branches of law in private, public, social, territorial, and varied areas of human life [which] … are enforced in relation to individual or social conduct for civil or criminal administration for purposes of compensation, punishment, [and] settlement of disputes between human beings or for organs of State, government, etc.’ (1986, pp. 238–9).

Development and Scope of Islamic Substantive Law

Muslim jurists trace the foundations of Islamic substantive law to the fact that during the lifetime of the Prophet his Companions used to ask him questions about the relevant Islamic rulings on specific substantive issues. The Prophet would then give a ruling by reference to relevant existing Qur’anic revelation, through receipt of new Qur’anic revelation in response to the question or by a Prophetic statement from himself. This is reflected in the Qur’an by phrases such as ‘they ask you about …; say …’ (yas‘alūnāk ‘an ...; qul ...)(see, for example, Q2:219) or ‘they seek your legal opinion about …; say …’ (yastaftūnāk ...; qul ...)(see, for example, Q4:176). The Qur’anic verses or Prophetic statements subsequently became textual sources for the substantive law on those specific matters, which was then followed by the Prophet’s Companions and jurists after him. As Shah Wālī Allāh has illustrated:

The Prophet was asked by people to give legal opinions about things as they came up, so he gave opinions concerning them, and cases were brought before him to adjudicate, so he judged them. He saw people doing something good, so he praised it; or a bad thing, so he forbade it. Whenever he issued a legal opinion on something, passed a judgement, or forbade an action, this occurred in public situations. Similar (was the procedure) of [the] two Shaykhs (Abū Bakr and ‘Umar), who when they

\(^1\) Ustūl al-fiqh (Islamic legal theory) is covered in Volume I of this series.
didn’t have any authoritative knowledge (‘ilm) about an issue would ask the people for a hadith of the Messenger. Abū Bakr said, ‘I didn’t hear the Messenger say anything about her,’ i.e., the grandmother, and therefore he asked the people. After he led the noon prayer he asked, ‘Did any of you ever hear the Prophet of God say anything about the grandmother?’ Al-Mughīra ibn Shu’ba (669/70) said, ‘I have.’ Abū Bakr said, ‘What did he say?’ He replied, ‘The Prophet of God accorded her one-sixth [as a share of the inheritance].’ Abū Bakr then asked, ‘Does anyone else besides you know of this?’ Then Muhammad ibn Salama said, ‘He has spoken truly.’ So Abū Bakr accorded the grandmother one-sixth as a share. … Once the Companions had dispersed among different regions and each one had become the exemplar for some region, new legal problems proliferated and questions began to arise so that they were asked to give legal opinions about these. Each one answered on the basis of his recollection of the texts or resorted to legal inference. If he didn’t find in what he knew about or had been about to deduce something that could serve to respond then he would perform ijtiḥād based on his own opinion and he would ascertain the rationale for legislation on which the Messenger of God had based the ruling in his pronouncements. Thus he would search for the rationale underlying a ruling wherever he could find this rationale and he would spare no effort in order to remain consistent with the Prophet’s intent. At this point disagreement of various types arose among them. (Hermansen, 2010, pp. 6–8)

From its formative period as illustrated above, Islamic substantive law further developed through juristic decisions and opinions in relation to new substantive matters and questions that arose from time to time. The traditional process of determining a ruling on any specific issue was that the qualified jurist (mujtahid) would first search whether there was a specific Qur’anic provision on the issue, then, if necessary, search in the ahādīth for recorded sunnah on the issue, followed, if necessary, by a search for any evidence of ijma‘ on the issue. In the absence of any specific evidence from those three, recourse would then be to qiyyāṣ under Sunnī jurisprudence or to ‘aql under Shī‘i jurisprudence. It is arguable that this involved the exercise of juristic reasoning (ijtiḥād) directly or indirectly throughout the process. The development of Islamic substantive law was therefore both doctrinal and technical in nature, based on the rules of Islamic legal theory. Both judges (qādīs) and jurisconsults (muftīs), as qualified jurists, contributed to the process through their decisions and opinions respectively. It is therefore apparent, as is depicted in Muslim scholarship, that the development of Islamic substantive law has been influenced by both practical realities and the theoretical constructs of the jurists.

However, Western critical scholarship has long proposed that Islamic substantive law developed not on the basis of practical realities but mainly on speculative constructs formulated by the jurists at different times in the development of Islamic law. Hallaq has challenged this view in ‘From Fatwās to Furū‘: Growth and Change in Islamic Substantive Law’, where he states that ‘there is massive evidence in [the] sources to indicate that fatwās played a considerable role in the growth and gradual change of Islamic substantive law’ and noted ‘the fact that substantive law embodied in the furū‘ works was, by and large, nothing less than an active organ functioning within a vibrant social environment’. This, he further asserts, questions ‘the widely accepted thesis that Islamic law began only towards the end of the first century of Islam and that Muhammad and the generation that followed him did not view themselves as promulgators of Islamic legal norms’ (Hallaq, 1994, pp. 30–31).

Regarding its scope, Islamic substantive law traditionally covers a wide range of private and public transactions. According to Muslim jurists the scope of Islamic substantive law starts with relevant definitive (qat‘ī) Qur’anic and hadith provisions that serve as textual sources
for juristic rulings on few specific aspects of Islamic law. However, the scope is not closed or restricted to those definitive textual provisions but expands as questions on new substantive issues are raised from time to time and jurisprudentially ruled upon by qualified jurists. Thus, traditionally, this aspect of Islamic law substantially falls within the realm of jurisprudence (fiqh) based on evidence drawn by qualified jurists from the sources with their respective rulings compiled in the classical manuals of the different schools of Islamic jurisprudence.

Based on the recognition of the principle of differences of juristic opinion (ikhtilāf) in Islamic legal theory, the different schools of Islamic jurisprudence often have differences of opinion in their rulings on different aspects of Islamic substantive law. The contents of most classical manuals of Islamic jurisprudence usually first list the substantive matters of acts of worship (ibādāt) followed by matters relating to worldly transactions (mu‘āmalāt) to which the appellation of Islamic substantive law would more specifically apply in a strict legal sense. For example, while Volume 1 of Ibn Rushd’s classical work on comparative Islamic jurisprudence Bidāyah al-Mujtahid wa Nihāyah al-Muqtasid (see, for example, Nyazee, 2000) covers matters relating to the different acts of worship, the second volume contains chapters on matters of Islamic substantive law relating to worldly transactions such as marriage, divorce, sales, exchange, advance, hire, crop-sharing, partnership, pre-emption, security, interdiction, insolvency, negotiation, surety, debt transfer, agency, bailment, loan, usurpation, restitution, gifts, bequests, inheritance, manumission, crimes and punishments, judicial decisions and so on, and, as a manual on comparative jurisprudence, often indicates the areas of jurisprudential differences among the different schools on the different elements of the substantive matters and states the author’s preferred opinion at the end. For example, its section on the hukm (ruling) on the nature of marriage provides as follows:

A group of jurists maintained that the hukm of marriage conveys recommendation. These are the majority (jumhūr). The Zāhirites said that it is obligatory. The later Mālikites held that for some it is obligatory, for others recommended, and for the rest it is permitted. This depends on the extent to which an individual fears falling into evil. The reason for their disagreement lies in whether the form (sīgha) of the command in the verse: ‘[M]arry of women who seem good to you’ [Q4:3], and in the tradition, ‘[M]arry, for through you I wish to outnumber the nations’, and in other traditions like it – implies obligation, recommendation, or permissibility. Those who say it is obligatory for some, recommended for others, and permitted for the rest, have recourse to maslahah (secured interest), which is a kind of analogy called mursal. It is a principle for which there is no determined source of reliance; it has been rejected by a number of jurists. The preferred opinion in Mālik’s school is based on it. (see Nyazee, 2000, vol. 2, p. 1)

The differences of juristic opinion on the rulings regarding issues in Islamic substantive law give rise to the question of which juristic opinion prevails on any particular issue. Traditionally, there are five main schools of Islamic jurisprudence, namely the Hanafi, Mālikī, Shāfī‘ī, Hanbali and Shi‘i Imāmi schools of jurisprudence, with established juristic principles and processes of extracting rulings from the sharī‘ah sources. The opinions of jurists within the different jurisprudential schools on particular issues, based on clear proofs, are legitimate and valid and also perceived as a source of benevolence to the Muslim community. This is often expressed in the maxim ‘rahmah al-ummah fi ikhtilāf al-a‘immah’ meaning ‘the Muslim community’s beneficence is in the jurists’ differences of opinion’. A comparative Islamic jurisprudence treatise with that title was written by the fifteenth-century jurist al-Dimashqī
(1995), in which he lists the jurisprudential differences and consensuses of the classical Islamic jurists on different questions of Islamic law. The jurists’ differences of opinion in the interpretation of legal sources on particular matters therefore offer a range but equally legal scope of opinions from which individuals may choose an appropriate opinion on particular personal and private matters. On public law matters, the respective ruling authority can also choose the appropriate and most beneficial juristic opinions, taking into consideration the principle of maslahah and circumstances of place and time. This is based on the classical legal maxim ‘hukm al-hākim yarfa’ al-khilāf’, meaning: ‘the ruling authority’s decision settles the differences of opinion [on particular public matters]’ (see, for example, al-Qarāfī, n.d., vol. 2, p. 103). That maxim, complemented by the Islamic legal principle of takhayyur (eclectic choice), enables the ruling authority, ideally and in pursuance of the ultimate objective of the sharī‘ah (maqāsid al-sharī‘ah), to prefer the most beneficial juristic opinions that promote human welfare (maslahah) and avoid human detriment (mafsadah) from the range of legitimate juristic opinions available on a particular matter of Islamic substantive law (see, for example, Coulson 1969, pp. 20–39; Hallaq, 1997, p. 210).

In response to modern developments, contemporary Islamic jurisprudential works, such as Al-Zuhaylī’s multivolume compilation on comparative Islamic jurisprudence, al-Fiqh al-Islāmī wa Adillatuh (1985), contain, in addition to the traditional substantive law matters usually covered in the classical Islamic jurisprudential manuals, chapters on different contemporary questions and perspectives on issues such as the Islamic rulings on systems of governance and the separation of powers into legislative powers, executive powers and judicial powers. The classical jurisprudential manuals of the different schools of Islamic jurisprudence as well as relevant contemporary works are often consulted as legal references on these matters by Islamic jurists and sharī‘ah court judges in many Muslim-majority countries today. Also, there are many contemporary English language works that cover other matters of Islamic substantive law of contemporary significance (see, for example, Abd al-‘Atf, 1977; Al-Zuhaylī, 1997; Coulson, 1971; Gazi, 2004; Jackson-Moore, 2009; Kamali, 2001; Mahdi, 2008; Mansari, 2006; Rahman, 1978, 1980; Vogel and Hayes, 2006).

In this second volume of the Ashgate Islamic Law series, the essays are grouped into six main areas of Islamic substantive law, namely ‘Islamic Family Law’; ‘Islamic Law of Succession’; ‘Islamic Law of Financial Transactions’; ‘Islamic Criminal Law’; ‘Islamic Judicial Procedure’; and ‘Islamic International Law (Sīyār)’, providing a structured understanding of some of the main substantive topics under Islamic law. These areas of substantive law have been selected due to their relevance and application in different parts of the Muslim world today. There are relevant Qur’anic provisions and ahādīth that serve as the fundamental sources from which Islamic jurists derive the jurisprudential rulings on substantive matters under Islamic law. However, differences of opinion of the jurists on particular matters often result from their different interpretations of relevant Qur’anic provisions and ahādīth. We will now briefly summarize the issues covered in the six sections of this volume, starting with Islamic family law.

**Islamic Family Law**

Islamic family law is one of the core substantive areas of Islamic law. Despite the abandonment of the application of different aspects of Islamic law in most Muslim-majority countries today,
Islamic family law remains applicable in all parts of the Muslim world where Islamic law still applies as part of state law in one form or another. For example, Abu-Odeh has observed that ‘[d]uring the second half of the nineteenth century, Egypt made a historic decision to dispose of the rules of Islamic law in most areas and fields of the law. However, the Islamic rules on the family were preserved’ (2004, p. 1045). Even in Muslim-majority secular countries such as Turkey and Muslim-minority secular Western countries where Islamic law is not formally part of state law, the rules of Islamic family are still followed privately by Muslim communities in regulating family law matters such as the formation and dissolution of marriages. Also, expert opinion has for long been sought from Islamic law experts in respect of cases involving questions of Islamic family law before family divisions of civil courts in the West (see, for example, Pearl, 1997). Thus, the continued practical relevance of Islamic family law in the judicial systems of countries in the Muslim world as well as in the West cannot be denied. The ten essays in this section examine the Islamic jurisprudential perspectives on different elements of Islamic family law.

In Chapter 1, ‘Marriage in Islamic Law: The Modernist Viewpoints’, Majid Khadduri provides a brief analysis of marriage under Islamic law, comparing the practices in the pre-Islamic period with classical Islamic law rules and some modern developments that occurred in some Muslim jurisdictions in the 1970s. He observes that ‘[u]nder the pre-Islamic law of status … women had virtually no rights. The Shari‘a accorded women a number of rights and thus changed marriage from an institution characterised by unquestioned male superiority to one in which the woman was somewhat of an interested partner’ (p. 3). The shari‘ah ‘changed the nature of marriage from “status” to “contract” [in which] [a]n offer of marriage by the man, an acceptance by the woman, and the performance of such conditions as the payment of dowry are all essential elements of the marriage contract’ (p. 3). Khadduri notes some of the few differences under Sunnī and Shi‘i law and observes that ‘[m]arriage law remained essentially unchanged throughout the Islamic world until the beginning of the twentieth century, although its application varied from country to country and even from province to province’ (p. 4). He then discusses the reforms in marriage laws in the Muslim world starting with those during the Ottoman Empire in 1917 as well as the early reforms in Egypt, Tunisia, Iraq and Morocco. He concludes, inter alia, that Muslim countries ‘may be divided into three categories with regard to marriage law’ (p. 7) and briefly analyses each of these three categories.

The question of validity, which is the most important element of the formation of marriages under Islamic law, is addressed by J.N.D. Anderson in ‘Invalid and Void Marriages in Hanafi Law’ (Chapter 2). Anderson begins with the observation that ‘the classification and effect of various types of invalid marriage contracts’ constitute one of the most intricate problems in Islamic family law (p. 9). The essay focuses specifically on the Hanafi school of Islamic jurisprudence but cites the views of other relevant schools where necessary. Anderson notes that some ‘Hanafi jurists … make a clear distinction between marriage contracts which are irregular (fāṣīd) and those which are void (bāṭil), while others use the two words interchangeably’ and that ‘those who make the distinction differ considerably as to which types of invalid marriage contract fall within each category, as to the juristic concepts on which their decision is based, and as to the legal effects involved’ (p. 9). He provides detailed background on Abū Hanīfah’s approach to the question, noting that in Abū Hanīfah’s view ‘there was a clear and logical distinction between bāṭil and fāṣīd contracts of marriage. In the former the contract was vitiated in essence and there was no legal effect: in the latter
the contract was good in itself, and would have been valid in different circumstances, but was illegal in this particular instance by reason of some divine prohibition’ (p. 11). He also compares the positions of the medieval and modern Hanafis on the question of validity of marriages under Islamic law, citing relevant classical jurisprudential views to buttress the analysis.

The concept of equality (kafā‘ah) between the marrying parties is another contentious topic under Islamic law of marriage and it is often linked to the social stratification of the parties. Farhat Ziadeh’s ‘Equality (Kafā‘ah) in the Muslim Law of Marriage: Problem of Sources’ (Chapter 3) examines the requirement of kafā‘ah and how far social stratification is reflected in that doctrine under Islamic law. He analyses the origins of the concept of kafā‘ah and notes that ‘[a]n examination of the sources dealing with kafā‘ah indicates the paucity of reference to such a doctrine in pre-Islamic Arabia’ (p. 11) and thus it is ‘with a great deal of suspicion that one must view references to kafā‘ah as applying before Islam’ (p. 12). He also analyses the concept under Islam, arguing that ‘kafā‘ah can be supported as well as negated by quoting from the mass of contradictory traditions. But there can be no doubt that there is a preponderance of evidence to show that it is contrary to the spirit of Islam’, citing relevant provisions of the Qur’an and the sunnah to substantiate that view (p. 24). The essay also examines the effect of kafā‘ah, its constituents, the different jurisprudential views on the concept and instances of kafā‘ah with reference to its application in some Muslim countries. Ziadeh concludes that generally, ‘it would seem that the doctrine of kafā‘ah, has ceased to be of major importance in determining or reflecting social stratification in Muslim society … a field once regulated by legal rules – because of the all-inclusive character of the law at the time – has gradually come to be governed by social rules and considerations’ (p. 33).

The offer of the dower (mahr) by the bridegroom to the bride is generally considered to be one of the important conditions of a valid marriage in Islamic law. The Qur’an specifically provides for this in Q4:4. In Chapter 4, ‘Mahr: Legal Obligation or Rightful Demand?’ Mona Siddiqui analyses the concept of mahr with particular reference to the chapter on dower (Bāb al-Mahr) in Fatāwā `Ālamgīrī, which is an important seventeenth-century jurisprudential treatise on Islamic law. Siddiqui observes that

Muslim jurists have shown a stringent adherence to the principle that mahr is not a voluntary gift but rather a financial obligation imposed by Islamic law on the husband towards his wife. Furthermore, it is an obligation that does not cease if it is not settled prior to the marriage contract. Added to this is the notion that, in demanding the payment of her mahr, a Muslim wife is exercising the right accorded to her by Muslim law and thus, if she does not receive the stipulated amount, she may refuse herself to her husband. (p. 36)

She notes that ‘[t]hroughout the section on mahr [in Fatāwā `Ālamgīrī] the principal tension is that of the juristic attempt to balance the argument between obligation and demand’ (p. 37), a question that the essay explores in detail. It also examines other questions such as the prompt and deferred mahr as well as other miscellaneous issues relating to the mahr during marriage and divorce, referring to relevant jurisprudential texts and views on the different issues examined.

Other important issues in Islamic law of marriage are marriage guardianship, female minor’s marriage and the related question of ijbār (compulsion), all of which are addressed by Lucy Carroll in ‘Marriage-Guardianship and Minor’s Marriage at Islamic Law’ (Chapter 5), within
the practical context of a 1985 Nigerian case in which those issues were in contention. The essay notes that ‘on the question of the capacity of a girl … to consent to her own marriage the classical formulations of Mālikī and Shāfī‘ī law differ from those of the Shi‘as and the Hanafīs – a fact which underscores the absence of a definitive Qur‘anic mandate’ (p. 49). Carroll observes that ‘within the Mālikī tradition … it is considered “most desirable” for the daughter who has attained puberty to be consulted regarding selection of the man’ to marry, and argues that ‘[w]hat was regarded “as most desirable” in the early centuries of Islam can only be even more desirable – literally imperative – in the present day’ (p. 49). Apart from the Mālikī tradition, Carroll also examines the Shāfī‘ī tradition on the subject in India and Malaysia, citing relevant cases to substantiate the respective positions on each of the issues. She highlights the fact that ‘[t]he Muslim father’s role in selecting a spouse for his daughter and his right to compel her in marriage as a minor, and even as a major, in classical Mālikī and Shāfī‘ī law, is predicated on the assumption that the father will act in the best interests of the girl’ (p. 57). She argues, however, that this assumption ‘cannot always be relied upon and provides, unfortunately, very limited protection to the girl most in need of it’, citing the view that ‘[i]n a majority of cases the issue of forced marriage surfaces to satisfy the materialistic interests of parents’ (p. 57) (see also Fadel, 1998). The essay also discusses the law of marriage age in South Asia, reflecting the position of the law in Pakistan, Bangladesh and India at that time, noting that ‘[i]n all three countries of the subcontinent, the Muslim father’s right of irrevocably disposing of his minor daughter in marriage has been abrogated by the Dissolutions of Muslim Marriages Act 1939’ (p. 58). Although the essay was written in 1987, it nevertheless reflects the practical challenges concerning these issues, which still need to be addressed by many Muslim countries today. While some Muslim-majority countries such as Algeria, Bangladesh, Iraq, Jordan, Malaysia, Morocco, Nigeria, Oman and Tunisia2 have now fixed the minimum legal age of marriage for females at not lower than 18 years, with slight variations on when a girl may be allowed to marry below that age, there are still many Muslim-majority countries that need to address these challenges pragmatically within the flexible application of Islamic law. Relevant Islamic legal principles such as maslalah, istihsān and maqāsid al-sharī‘ah, as expounded under Islamic legal theory in Volume I of this series, can be used to achieve this.

Polygamy, another topical issue under Islamic law of marriage, is addressed in Doreen Hinchcliffe’s ‘Polygamy in Traditional and Contemporary Islamic Law’ (Chapter 6). The essay begins with the observation that polygamy ‘has always been considered a fundamental right of a Muslim husband sanctioned by the Qur‘ān itself’ (p. 63). Hinchcliffe notes that while pre-Islamic law permitted unlimited polygamy, ‘the Qur‘ān at the advent of Islam reformed the existing law by restricting the number of wives a man might have concurrently to four’ (p. 63). She further observes that ‘while the Qur‘ān authorises a man to marry up to four women it does so only on condition that he can deal equitably with them all [but that] … this restriction was construed [by most jurists] as a matter for the man’s own conscience, not as establishing a condition precedent for a polygamous marriage’ (p. 63). The essay notes that based on the fact that ‘the Qur‘ān … acknowledges that it is impossible for a man to treat several wives equally in all respects, however much he wishes to do so … it has been argued

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by some radical thinkers that this verse in effect forbids polygamy ... and so only monogamy was in fact permissible in Islam’ (pp. 63–64). However, Hinchcliffe refers to the prevalent opinion that ‘the Qur’an must not be interpreted in such a way as to contradict itself, and that the second verse referred only to the fact that a man could not control the degree of affection in which he held his various wives’ (p. 64). Against that background she then discusses the different questions relating to polygamy in traditional Islamic law citing the various views of the different schools of jurisprudence in that regard. In relation to modern practice, she notes that ‘[i]n some countries a husband is required to obtain the permission of the court before taking a second or subsequent wife’ and that ‘[i]n most countries ... a wife may now stipulate in her marriage contract that her husband shall not take a second wife’ (p. 67). She also points out that ‘it is Tunisia alone which ... has taken the radical step of abolishing polygamy’ (p. 67). The essay then examines the modern law on polygamy starting with Muhammad Abduh’s proposal for restrictions on the practice of polygamy and the subsequent legislation by Syria in 1953 as the first Muslim country ‘to place a restriction on the husband’s right of polygamy’ (p. 67). It discusses the laws with respect to different Muslim countries and communities as at 1970 when the essay was written, concluding that from ‘this survey of the contemporary law of polygamy, it is obvious that although the incidence of polygamous marriage is decreasing it still presents a serious problem for reformers who, while not wishing to abandon the sacred law entirely, wish to make it more consonant with the twentieth century’ (p. 77). Although the essay was written in 1970 and there have been reforms in some of the countries it examined, the conclusion is still very much valid today.

The rules on the dissolution of marriage constitute another important aspect of Islamic family law. In Chapter 7, ‘Women and Divorce: The Position of the Shari‘ah’, Abdul-Fatah Makinde ‘Kola notes that ‘Islam makes adequate provision for divorce, knowing full-well that it is a phenomenon likely to occur in human life’ (p. 79). He refers to different criticisms of the concept and process of divorce under Islamic law and ‘attempts to look at the provisions of the Shari‘ah on divorce with a view to putting the record straight [by examining] areas where women are given their due rights under the Shari‘ah when it comes to the matter of divorce’ under Islamic law (p. 80). The essay briefly discusses issues such as the concept of divorce, the pre-Islamic system of divorce and Islamic reforms, types of divorce under Islamic law, the rights of women to divorce and the related issue of custody of children after divorce. It concludes that ‘although the primary right to divorce is given to the man by the Shari‘ah, that is not to say that it fails to provide rights to women in divorce matters’ (p. 88).

Nehaluddin Ahmad’s ‘A Critical Appraisal of “Triple Divorce” in Islamic Law’ (Chapter 8) examines the topical question of the so-called immediate triple divorce under Islamic law. The author identifies the issue of immediate triple divorce as highly sensitive among Muslims and notes that despite clear Qur’anic injunctions to the contrary and despite it being classified as talāq al-bid‘ah (an innovative form of divorce) by Islamic jurists, ‘[t]he practice of immediate triple divorce is widespread among Sunni Muslims and has legal validity’ (p. 91). Ahmad notes that disputes about immediate triple divorce have ‘been highlighted by reports of some Muslims instantly divorcing their wives by mail, over the telephone, and even through mobile phone text messages’ (p. 91). The essay thus analyses the different theories of divorce under Islamic law and critically examines the legal validity and effectiveness of the practice of immediate triple divorce in the light of the sources and methods of Islamic law as well as the jurisprudential views of the different schools of Islamic jurisprudence. It also
traces the historical background of the practice of this form of divorce and how the practice can be abused. Ahmad concludes that ‘the obnoxious practice of triple divorce has muddled the whole Quranic scheme of divorce … there is a strong case for abolition of these practices of triple divorce which is highly unjust and violates the fundamental principle of Islam, which is justice’ (p. 98).

Owing apparently to the abuse of the right of unilateral divorce (talāq) granted to men under the shari‘ah, the concept of tafwīd al-talāq through which the husband’s right of unilateral divorce could be transferred to the wife by agreement, was devised by Muslim jurists to protect women. This concept is examined by Fareeha Khan in Chapter 9, ‘Tafwīd al-Talāq: Transferring the Right to Divorce to the Wife’. Khan examines this concept within the context of a fatwā (legal opinion) issued by ‘the renowned [Indian] Ḥanafī jurist Mawlana Ashraf ‘Ali Thānvi’ in 1933 (p. 101). She notes that the fatwā was ‘an important treatise which would later hold significant implications for Muslim women’s right to divorce in India and abroad’ and that it was issued ‘in order to provide “a more direct route of salvation” for women who become so “desperate and distraught” that they are forced to leave Islam in order to escape their marital situations’ (p. 101). She thereby ‘advises women to have the right to divorce written into their contracts either at the time of the nikāḥ, or else have it agreed to contractually before or after the nikāḥ’ (p. 102). The essay traces the historical presence of tafwīd al-talāq, noting that the practice ‘was not unknown to legal scholars in the pre-modern period. References for the transference of the right to divorce to someone other than the husband … are included in the major texts of the legal schools … and … mentioned explicitly in these texts’ (p. 102). The relevant classical texts containing such provisions are then discussed. Khan notes, however, that despite ‘the historical presence of this theoretical possibility, it seems that in some cultural contexts it was a rare occurrence for women to actually be given this right’ (p. 103). She then presents a detailed analysis of the 1933 Indian fatwā on the subject.

The concept of qiwāmah, which is often interpreted as the husband’s authority over the wife, plays a significant role in the interpretation and application of Islamic family law generally. Lynn Welchman’s ‘A Husband’s Authority: Emerging Formulations in Muslim Family Law’ (Chapter 10) examines the concept of qiwāmah particularly in the context of its ‘contemporary equation in statutory formulations of Muslim family law that sets the husband’s duty of support, or maintenance, of his wife, as the exchange for the wife’s obedience to her husband’ (p. 121). Welchman examines ‘the paradigm of the husband’s authority (qiwama) over his wife in jurisprudence and pre-modern practice, moving from there to the maintenance–obedience equation in Arab state family law codifications’ and compares ‘the way in which Morocco and the United Arab Emirates deal with this issue in their recent family law codifications’ (p. 121). The essay first analyses the scholarly understandings of Islamic family law and against that background examines relevant issues such as the question of male authority, maintenance and obedience in marriage under classical Islamic law and in the codifications of modern Arab states. It specifically compares ‘the way in which the new laws of Morocco … and the UAE … deal with the gender contract of maintenance–obedience’ (p. 133) and concludes that the ‘different articulations of the husband’s authority in Morocco and the UAE demonstrate the way in which articulations in law of the concept of qiwama – and the paradigm of the husband’s legal authority – are moving in the region’ (p. 137).
The scope of Islamic family law as a substantive aspect of Islamic law is very broad and covers many different aspects of family life, not all of which could be included in the essays reproduced in this volume. Thus reference material on some of the other relevant issues in Islamic family law is provided in the further reading list that follows this introduction.

**Islamic Law of Succession**

Islamic law of succession regulates the devolution of property within the Muslim family after death. It therefore constitutes a specialized aspect of general Islamic family law (see Abd al ‘Ati, 1977, pp. 250–73; Coulson, 1971; Doi, 2008, pp. 409–535). While the Qur’an and the *sunnah* provide some detailed rules on the subject, there are differences among Islamic jurists in the application of the rules, especially where no specific provision can be found in the Qur’an, such as the case of the grandfather vis-à-vis collaterals (see, for example, Omer, 1989). The general rules are traditionally perceived as drawing on the pre-Islamic Arab rules of inheritance, particularly in relation to the doctrine of ‘*asabah* (male agnatic succession), which constitutes one of the major areas of difference between the *Sunni* and *Shi‘i* rules of Islamic law of succession. It has been noted, however, that while some authors ‘have spent a great amount of time and energy in highlighting these differences … [i]t must be stressed that the Islamic laws of inheritance have [nevertheless] withstood the test of time’ (Hussain, 2005, p. 13). The four essays in this section examine some of the contentious issues on this substantive aspect of Islamic law, particularly the concept of ‘*asabah*.

Habibur Rahman’s ‘The Role of Pre-Islamic Customs in the Islamic Law of Succession’ (Chapter 11) provides a brief analysis of the influence of pre-Islamic custom on Islamic law of succession. Rahman notes that although ‘the Qur‘ān is embodiment of divine revelations … it cannot be said that it brought forth a new regime in its entirety on the law of succession’ (p. 147). The essay thus provides an analysis of ‘the pre-Islamic customs which are directly or indirectly effective for succession in the Muslim family’ (p. 147). Rahman argues that in order to understand the application of the Qur‘ānic provisions, it is ‘necessary to take into account the pre-Islamic customs for succession among the surviving heirs’ (p. 148). He then provides examples of specific cases to illustrate the different areas of influence of pre-Islamic customs on the Islamic law of succession, and concludes that although the Qur‘ān brought some reforms into the law of succession, it ‘cannot be said to have completely abrogated the pre-Islamic customs’ (p. 163).

Chapter 12, ‘The Islamic Inheritance System: A Socio-Historical Approach’, by David Powers, provides a critical historical analysis of the Islamic law of inheritance. Powers critically engages with traditional perceptions of the historical evolution of Islamic law of inheritance and attempts ‘to provide an alternative model for the socio-historical development of Islamic inheritance law’ (p. 167). He re-examines the traditional view that the doctrine of ‘*asabah* under Islamic law of inheritance was ‘a carry-over from the tribal customary law of pre-Islamic Arabia, and that the order of priorities according to which the ‘*asaba* inherit in Islamic law is identical to the order of priorities that prevailed prior to the revelation of the Qur‘ān’, arguing that the ‘uncritical reliance upon Islamic sources has resulted in an oversimplified view of the legal situation in the Hijaz on the eve of Islam’ (p. 168). Powers analyses the Qur‘ānic provisions on inheritance in the context of what he calls a ‘proto-Islamic law of inheritance’, which he considers as ‘a hitherto unrecognized stage in the formation of the
Islamic law of inheritance’ (p. 170). He then discusses the essential features of this so-called ‘proto-Islamic law of inheritance’, which, he argues, \textit{inter alia}, gives testators the freedom to bequeath the bulk of their estate to testamentary heirs of their choice, suggesting that most of the Qur’anic provisions were originally meant to apply only in cases of intestacy. Powers argues, however, that the ‘proto-Islamic law of inheritance was shortlived, giving way almost immediately to the [classical] Islamic law of inheritance [owing to] … a series of historical factors that emerged during the course of the first century A.H.’ (p. 172). The essay analyses the theory and practice of the Islamic law of inheritance generally as well as the concept of \textit{hibah} (gift \textit{inter vivos}) and its different variations as devised means for circumventing the laws of inheritance. It cites different classical examples and jurisprudential authorities to support the arguments advanced.

In Chapter 13, ‘The Qur’anic Law of Inheritance’, Richard Kimber also presents an analysis of the Qur’anic provisions on Islamic inheritance. He begins with the observation that ‘[t]he Sunnī law of inheritance relies on a particular interpretation of the Qur’anic inheritance verses. Even though Shi‘ī inheritance law is strikingly different from Sunnī law, the Sunnī interpretation of the Qur’anic texts has rarely been questioned’ (p. 183). He then notes that ‘[t]he defining systematic feature of Sunnī inheritance law is the residiary entitlement of the ‘\textit{aṣaba} or male agnatic blood relatives of the deceased, and this entitlement is derived not from the Qur’an but from Sunna. The Qur’anic rules are interpreted and applied in such a way that they mitigate but do not challenge the principle of male agnatic succession’ with the mitigation being ‘in favour of female agnates, male and female non-agnates, and spouses, all of whom would otherwise be excluded’ (p. 183). He argues that

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\text{[f]rom an early date this structure of Sunnī inheritance law was both explained and sanctioned by what Sunnī scholars believed was its history. Unmitigated male agnatic succession was said to have been Jāhili practice, which the Qur’anic rules had then mitigated in accordance with a more enlightened attitude towards women, in particular. This is now known as the ‘superimposition theory’, and is still widely accepted. It validates not only the Sunnī version of the law, but also the interpretation of the Qur’anic rules on which that version relies. This Sunnī view is remarkably undisturbed by the existence of Shi‘ī law. (p. 184)}
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The essay proposes a new interpretation of the relevant texts and examines the consequence of such re-interpretation. It engages with the different relevant Qur’anic verses on inheritance and classical exegeses such as al-Tabari’s interpretation of the verses. Kimber also disagrees with some of the views advanced by Powers in Chapter 12.

N.J. Coulson’s ‘Representational Succession in Contemporary Islamic Law’ (Chapter 14) further examines the ‘\textit{aṣaba} rule in the law of succession under contemporary Islamic law. It starts by observing that contemporary change in family social structures ‘has inevitably produced an impetus for reform in many spheres of the traditional family law and not least in the laws of inheritance, which, for Sunnī Islam … were firmly anchored upon the rights of the agnatic tribal group’ (p. 219). Coulson notes that the doctrine of ‘\textit{aṣaba} is a ‘fundamental rule of the traditional Sunnī law of inheritance, hallowed by the consensus of centuries, that the relative nearer in degree to the praepositus excludes the more remote’ (p. 219). He argues that while ‘[w]ithin the tribal agnatic family this rule did not occasion any real injustice … in the context of the present day nuclear family the rule is no longer so readily supportable’ (pp. 219–20). The essay then examines the different ways that some Muslim countries have tried
to deal with the apparent problems arising from the application of classical Islamic succession rules in the context of modern family structures. Coulson observes, for example, that ‘[t]he social problem of making suitable provision in succession law for the orphaned grandchildren of the praepositus was solved in two very different ways by Egypt in 1946 and Pakistan in 1961; and a comparative assessment of these respective legal remedies highlights the problems of principle and practice that are involved in the law reform movement in present day Islam’ (p. 220). The essay analyses and compares the two laws and approaches adopted in Egypt and Pakistan as an illustration of the practical difficulties of applying the classical rules of Islamic law of succession in contemporary times. Coulson concludes that

[p]erhaps the moral, both for the Egyptian and the Pakistani reformers, is that the question of the rights of the orphaned grandchildren ought not to be treated … as an isolated issue. The problem ought ideally to be solved in the context of a broader and systematic review of the laws of succession as a whole, which would decide, inter alia, what balance there ought to be between discretionary and compulsory transmission of property at death … and whether any priority … is to be given to a relative, male or female, who is nearer in degree to the deceased. (p. 226)

The Islamic law of succession is a very technical and complex aspect of Islamic substantive law. Its importance to Muslims is usually depicted by reference to a hadith in which the Prophet Muhammad is reported to have referred to the knowledge of Islamic law of inheritance as ‘half of [all] knowledge’ and recommended its learning and teaching by Muslims (reported by Ibn Majah). Materials covering other relevant issues and the technical distributive aspects of the subject are listed in the further reading section that follows this introduction.

Islamic Law of Financial Transactions

The development and growth of the concept of Islamic banking and finance in recent times has increased the relevance of and interest in Islamic law of financial transactions globally. This aspect of Islamic law is based on the general principles of contract and commerce under the shari‘ah and the fundamental rules are based on the legality of trade and the prohibition of ribā (usury) and gharar (excessive speculation). Q2:275 states that ‘God has permitted trade and has forbidden ribā’. Other relevant elements include the principles of partnership and agency, which are both currently employed as necessary tools in the formulation of different agreements in modern Islamic banking and finance. The five essays in this section examine different issues within this substantive aspect of Islamic law.

In Chapter 15, ‘Negotiating Contracts in Islamic and Middle Eastern Law’, Mahdi Zahraa observes that ‘although the law of contracts in the Middle East [and other parts of the Muslim world] is seen as a phenomenon of secular law, the effects of the rules and principles of Islamic law on this branch of law is indisputable’ and that the essay will highlight ‘some issues relating to the negotiation process which usually precedes the birth of contracts showing the effect of Islamic Law, custom and traditions on the Law of Contract and hence on the formation of contracts’ (p. 229). Zahraa notes the definition of contract by Islamic jurists as ‘the legally sound combination between an offer and acceptance in such a manner that its effect leaves its mark on its subject matter’, highlighting the word ‘combination’, which indicates ‘not only the presence of concordance or agreement of offer and acceptance but also the establishment
of a legally sound tie or connection between parties’ (p. 229). The essay then analyses the prerequisites of contract under Islamic law, noting that

[contra]ry to what some Orientalists have claimed, Islamic Law recognises the concept of juristic personality based on the Islamic practice and treatment of certain Islamic institutions [thus] … entities such as commercial companies, schools, hospitals, orphanages and mosques can have such a presumed personality and can enter into a contractual relationship provided that such a relationship is carried out by their representatives. (pp. 230–31)

Zahraa discusses relevant issues such as legal capacity, the fundamental elements of the contract, freedom of contract in Islamic law, conditions in a contract and so forth, and cites the different Islamic jurisprudential views on the issues to substantiate his analysis.

Hussein Hassan’s ‘Contracts in Islamic Law: The Principles of Commutative Justice and Liberality’ (Chapter 16) further analyses the concept of contracts in Islamic law. It begins by noting that while the term ‘āqd (contract) is often used in the classical manuals of Islamic law in respect of two-party transactions consisting of offer and acceptance, it is, however, ‘also used for transactions (guarantees, gifts, bequests) concluded by an offer only … for acts merely juristic in nature (divorce, release, manumission of debts)’ and also ‘covers obligation in every field: one’s religious obligations to God, the interpersonal obligations of marriage, the political obligations expressed in treaties, and the commercial obligations of the involved parties in a range of particular contracts’ (p. 243). Hassan notes that the ‘jurists did not attempt a formal definition of the term [‘āqd], nor an explicit general theory of contract’ [but rather] … develop[ed] a law of contracts, each with its own distinctive rules, categorizing them into classes of nominate (more accurately, particularized) agreements (al-‘āqud al-mu‘ayyana), then supplemented by mechanisms … for giving effect to innominate agreements’ (pp. 243–44). He discusses the different classes of nominate agreements and mechanisms, engaging with the different academic views on the subject. He proposes that ‘the two principles of justice that directed and stabilized commercial and other transactions in the Islamic world’ are the principles of commutative justice and liberality, both of which are also ‘widely recognized in Western legal reasoning and scholarship’ (p. 248). He presents a comprehensive comparative analysis of the two principles under both Western and Islamic legal reasoning in relation to the different elements of contracts in Islamic law.

With the prohibition of ribā under Islamic law, ‘profit and loss sharing’ is the mainstay of any business venture and financial transaction structured on the principles of Islamic law. In Chapter 17, ‘The Concept of Mushararakah and its Application as an Islamic Method of Financing’, Muhammad Usmani examines a very important method of Islamic financial transaction known as mushārakah (partnership), which has become popular in contemporary times through its adapted use in the so-called modern Islamic banking system. Usmani starts with the observation that ‘in the context of business and trade [mushārakah] means a joint enterprise in which all the partners share the profit and loss of the joint venture’ and that due to the prohibition of interest in Islamic law, it is ‘an ideal alternative for interest-based financing with far reaching effects on both production and distribution [and] … can play a vital role in an economy based on Islamic norms’ (p. 285). The essay highlights the flexibility of this method of financial transaction under Islamic law by noting that ‘Islam has not prescribed a specific form or procedure for musharakah [but] … has set some broad principles which can accommodate numerous forms and procedures’ and that a ‘new form or procedure in
mushārakah cannot be rejected merely because it has no precedent in the past. In fact, every new form can be acceptable to the Shariah in so far as it does not violate any basic principle laid down by the Holy Quran, the Sunnah, or the consensus of the Muslim jurists’ (p. 286). Usmani proceeds to provide a comprehensive analysis of the concept of mushārakah together with its sister concept of mudārakah and their application as legitimate methods of financial transactions under Islamic law. He discusses all the relevant elements of both concepts with exhaustive illustrations and reference to Islamic legal and jurisprudential evidence to substantiate his analysis.

Siddieq Noorzoy’s essay, ‘Islamic Laws on Riba (Interest) and their Economic Implications’ (Chapter 18) examines the controversies about the application of the prohibition of ribā in Islamic law ‘as they affect contemporary economic transactions in a Muslim society’ (p. 303). He discusses the nature of the controversy concerning ribā, tracing the ‘room for different interpretations of the Quranic injunctions against riba’ to the time of Caliph Umar ‘in the first century of the Islamic period’ (p. 304). Noorzoy also reviews the different kinds of ribā and their implication, the reasons for prohibiting ribā, and the comparative doctrines on ribā. He then provides a theoretical analysis of the different perspectives and the effects of the prohibition of ribā on economic transactions of Muslims and Muslim states in the contemporary world.

Finally, in Chapter 19, ‘The Islamic Law of Real Security’, Nicholas Foster examines the Islamic law mechanism of real security. He notes that ‘the Shari’a exhibits a range of security mechanisms [that are] … reasonably simple compared to those of present-day jurisdictions of civil and common law origin, because it was developed at a time of much greater simplicity in commercial transactions’ (p. 320). He observes that ‘the increase in the number of Islamic banking transactions, and the greater degree of Islamicisation in the positive law of the Arab states, necessitates a closer acquaintance with Shari’a mechanisms generally’ (p. 320). He identifies and analyses relevant Qur’anic and hadith provisions on Islamic law of real security, and also discusses different concepts and mechanisms of Islamic law relating to real security, such as rahn, hiyal and habs, and engages with jurisprudential views on the issues, with relevant explanatory illustrations. Foster concludes that ‘[t]he study of the Islamic law system of real security is rewarding from the point of view of legal history and sociology of law, as well as being valuable in the field of the application of classical Islamic law to modern conditions’, noting that ‘[t]he greatest challenge will no doubt be … the age-old … question of riba and the relationship of the prohibition to the demands of the internationalised, Western-influenced environment in which the Islamic world finds itself obliged to operate’ (p. 340).

Apart from the issues addressed in the essays discussed above, relevant material relating to other aspects of Islamic law of financial transactions can be found in the further reading section that follows this introduction.

Islamic Criminal Law

The application of Islamic criminal law is apparently the most controversial aspect of Islamic substantive law today. The need for a proper understanding of its theory and practice is reflected in the fact that a few modern Muslim-majority states still apply it as part of state law today, while its re-introduction in some others continues to be a subject of heated debate from time to time. The three essays in this section examine the nature and different aspects of
Islamic criminal law, the different jurisprudential views on the subject and the controversies about its application in modern times.

First, in Chapter 20, ‘Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law’, Matthew Lippman examines the evolution and substance of Islamic criminal law and procedure, and reviews some of the human rights issues raised by the return of the application of Islamic criminal law in Muslim-majority states today. He begins with an analysis of the evolution of Islamic criminal law from pre-Islamic Arabia, through the different periods of Islamic rule up to the period of the introduction of Western law in the Ottoman Empire and its impact on the application of Islamic law. He notes that ‘[t]he terminology and practices of pre-Islamic Arabia form the foundation of Koranic criminal law, procedure, and punishment. Islam, however … replaced blood revenge with uniform criminal offenses, punishments, and procedures which stressed individual rather than collective responsibility’ (p. 348). The essay provides a comprehensive analysis of Islamic criminal law and procedure, discussing the sources of the law and the different offences under Islamic criminal law as well as the different principles of Islamic criminal procedure and the rights of accused persons within the system, the role and responsibilities of the qāḍī and the rules of evidence in criminal proceedings under Islamic law. In his analysis of the hudūd offences, however, Lippman appears to wrongly conflate the offence of hirābah (brigandage) with the offence of sariqah (theft) and substitutes the punishment for theft provided in Q5:38 with the punishment for brigandage provided in Q5:33 (p. 357). It is important to emphasize that theft (sariqah) and brigandage (hirābah) are two different offences under classical Islamic criminal law, with different prescribed punishments in the Qur‘ān. They cannot simply be combined as ‘thievery’, as appears to be the case in this essay. Lippman also examines the human rights implications of the application of Islamic criminal law under the shari‘ah. He concludes that ‘[t]he Islamic world is experiencing a revivalist trend … [and] incorporation of Shari‘a crimes and procedure has become the touchstone of a regime’s Islamic character. Yet aspects of Shari‘a arguably are contrary to the international consensus on human rights’ (p. 379).

Fazlur Rahman, in Chapter 21, ‘The Concept of Hadd in Islamic Law’, examines the definition of ‘hadd’ as a concept of Islamic criminal law. He begins by noting that the concept of ‘hadd’ as ‘limit’ has been repeatedly expressed in the Qur‘ān in a moral sense when the Qur‘ān speaks of hudūd Allāh or “limits (prescribed by) God” which “you may not transgress” but that the usage of ‘the term in Islamic law and legal ḥadīth … signif[i]es] a punishment of an unchangeable quantum primarily laid down in the Qur‘ān’ (p. 381). To assess that development, Rahman undertakes a closer study of the term by examining in detail the different verses of the Qur‘ān in which the term is used and their contexts, referring also to relevant ahādīth provisions, classical jurisprudential works and the views of some contemporary jurists as part of the analysis.

Chapter 22, ‘Effective Legal Representation in “Shari‘ah” Courts as a Means of Addressing Human Rights Concerns in the Islamic Criminal Justice System in Muslim States’, by Mashhood Baderin, provides a comprehensive analysis of the Islamic criminal justice system and its human rights implications, arguing that providing effective legal representation in shari‘ah courts for accused persons charged with criminal offences under Islamic law would serve as a means of addressing the human rights concerns. Baderin begins by noting that although ‘[t]he Islamic criminal justice system forms part of the heritage of Islamic law … [it] is often criticised today as being behind the times for the 21st century and that its prescribed
punishments are inconsistent with international human rights norms’ (p. 398). He observes that there ‘are three main views regarding the application of the Islamic criminal justice system in contemporary Muslim societies’, namely the view ‘of those who see the system as archaic and barbaric and that it must therefore be discarded’; the view ‘of those who see it as part of the law of God which must continue to be obeyed and applied by Muslim States’; and the view ‘of those who argue that, even though it is part of the law of God, the ideal Islamic society in which the system is meant to be implemented does not exist anywhere in the world today, thus there should be a moratorium against its application until such an ideal society is first achieved’ (pp. 398–99). The essay analyses the criminal justice system under Islamic law, the classification of criminal offences under Islamic law, definitions and ingredients of the hudūd offences, evidential requirements for criminal offences under Islamic law and the position of legal representation under Islamic law, and provides brief case studies of selected Muslim-majority countries. Based on the analyses, Baderin concludes, inter alia, that the ‘proposition for effective legal representation advanced in this article … can go a long way in addressing the substantive and procedural human rights concerns regarding the application of the Islamic criminal justice system in those applicable States currently’ (p. 428).

Islamic Judicial Procedure

Although judicial procedure is normally classified as adjectival law, there are substantive jurisprudential rules and principles regulating it under Islamic law. Judges are enjoined by relevant provisions of the Qur’ān and the sunnah to always discharge justice fairly but the details of the procedure are not provided in these sources. The early Muslim jurists thus laid down evidential and judicial procedures in Islamic law to facilitate the realization of substantive justice as generally prescribed by the shari‘ah. The traditional substantive rules and principles of Islamic judicial procedure are, therefore, not sacrosanct but have evolved over time in response to the need for the realization of substantive justice. The five essays in this section examine some of the different elements of Islamic judicial procedure as laid down by the classical jurists and how they have subsequently evolved.

J.N.D. Anderson, in Chapter 23, ‘Muslim Procedure and Evidence’, analyses the traditional rules of judicial procedure as articulated by the classical jurists in their classical jurisprudential manuals. He discusses the procedure for initiating a claim by the claimant and the procedure of response by the defendant after the claimant has fulfilled the necessary conditions of bringing a valid claim. He also discusses the process of identifying who is the mudda‘ī (claimant) and the mudda‘ā alayhi (defendant) among the parties before the court, noting that ‘[t]he first duty of the Qadi therefore is to decide which of the parties is the mudda‘ī and which the mudda‘ā alayhi’ (p. 436). Anderson then examines the procedure by which the parties present their evidence and testimony before the court and how the qādi assesses the evidence depending on the nature of the case. He also discusses the role and requirements of a valid witness, noting that ‘[t]he fiqh books … lay down rules as to which testimony is to be preferred in special cases’ (p. 445). The concepts of tahkīm (arbitration) and sulh (settlement) are also discussed, with Anderson noting arguably that ‘[a]lthough most Muslim countries have in fact

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3 Cf. Chapter 26 by David S. Powers.
introduced some such system with the passage of time’ (p. 446). He presents the relevant jurisprudential views of the classical jurists on the issues and procedures discussed, and in conclusion provides a list of personnel that are traditionally found in the ḍādī’s court.

The importance of the role of evidence in judicial procedure cannot be overemphasized. In Chapter 24, ‘Evidence: From Memory to Archive’, Brinkley Messick presents an analysis of the doctrine of evidence in Islamic law, based on a close reading of a chapter in an authoritative fifteenth century Shī‘ī Zaydī school jurisprudential treatise and the nineteenth- and twentieth-century commentaries thereon. He endeavours to uncover ‘how the jurists pose the issues surrounding legal evidence and … their related analytic tools and … assumptions’ (p. 451). He starts by noting that ‘[a] key feature of the shari‘a evidence scheme depends on a prior determination by the judge … of the litigation roles of claimant and defendant and, as a consequence, the initial distribution of the burden of proof’ (p. 451) and that ‘once these roles are set, the associated rule is, in the wording of the well-known hadith … “upon the claimant is the evidence (bayyina),” that is, the claimant party in litigation assumes the burden of proof’ (p. 452). However, ‘aside from this formal principle, which has the claimant alone as the presenter of evidence, most actual cases involved evidence presentations by both sides in the litigation … in the typical court record, after the entry of the “claim,” followed then by the record of the negative response, the “denial” (inkār) by the defendant, the litigation is formally engaged’ (p. 452). The essay analyses the concept and procedure of shahādah (witnessing) and bayyinah (evidence) and discusses other relevant issues such as the interpretation of evidence by the judge, witness integrity, written evidence and the judge’s record.

Karen Bauer’s ‘Debates on Women’s Status as Judges and Witnesses in Post-Formative Islamic Law’ (Chapter 25) examines the topical question of the role of women as judges and witnesses in Islamic law. It starts with the observation that ‘[t]he question of whether any consistent logic guided doctrine on women as judges and witnesses in post-formative Islamic law has been particularly vexing for contemporary scholars’, but then notes that ‘[a]lthough women are disadvantaged in almost every aspect of rules on testimony and judging, their disadvantage is not consistent; two women do not always equal one man; in some cases they can testify without men; and some schools allow them to act as judges’ (p. 489). Bauer ‘contextualizes the jurists’ discourse on women as judges and witnesses by examining it diachronically, highlighting prominent arguments as they develop through time’ (p. 489). She examines how jurists justify their doctrines on women as judges and their discussions of women’s testimony, noting that the jurists’ opinions on the different questions are usually determined by the views of their different schools of jurisprudence. She then analyses the different jurisprudential views and classical studies on the issues addressed, and concludes that while

[i]t seems from the apparent lack of women judges in Shari‘a courts that men had a distinct advantage in their exercise of authority in court … the discourse in the legal and historical accounts shows that women could not be barred entirely from this realm: all jurists allowed that women could testify. After all, to deny women’s testimony would, in the words of Ibn al-Qayyim, “entail the loss of many rights”. (p. 508)

The view is often expressed by some scholars that there is no recognition of an appellate structure within the Islamic judicial system. Thus, in Chapter 26, ‘On Judicial Review in Islamic Law’, David Powers examines whether such an appellate judicial system exists within
Islamic law. He starts by noting that the prevailing view ‘among Islamicists for over a half-century has asserted that there are no appellate structures in Islamic law, that the decision of a judge is final and irrevocable, and that a judgement may not be reversed under any circumstances’ (p. 511). Powers challenges that notion and ‘on the basis of a reexamination of Islamic legal theory and an analysis of 14th-century Islamic court practice’ argues that ‘a judicial decision was reversible by the issuing judge himself … that hierarchical organization was a regular feature of Muslim polities; that the court of the chief judge of the capital city served as a court of review for the decisions of local judges; and that Islamic law also developed a unique, nonhierarchical system of successor review’ (p. 511). He illustrates his arguments with three judicial review cases from fourteenth-century Morocco and concludes that ‘in fact Islamic law allowed for a process which was functionally equivalent to appeal but which took a different institutional configuration’ in the form of what he describes as ‘Islamic successor review’ (p. 534).

Finally, Sayed Haneef’s ‘The Structure and Procedure of the Shari‘ah Courts: Historical Dynamics and Some Contemporary Practices’ (Chapter 27) outlines the process of administering justice in shari‘ah courts under Islamic law from both a classical and a contemporary perspective. Haneef notes that Islamic law provides for adjudication to ensure the equitable fulfilment of people’s mutual rights and justice and thus ‘the Prophet, through judicial practice and decrees, guided the ummah as to the process and principles of administering justice in the Islamic setting’ (p. 539). He also notes that the Islamic authorities after the Prophet subsequently ‘reapplied, adapted and expanded the basic principles of adjudications as laid down by the Prophet, and improved upon the structure of judicial machinery to suit the requirements of time and space’ (p. 539). He then discusses the place of justice in Islam, the qualification of a qâdî, the code of ethics of a qâdî, judicial organization and its mode of procedures in Islamic history and so forth. He notes that the jurisdiction of shari‘ah courts was curtailed and Islamic judicial procedure discarded in Muslim-majority countries during the period of European colonialism, but that after independence many Muslim-majority countries reinstated shari‘ah courts and judicial procedures, identifying, however, that the approaches adopted in that regard have not been uniform. He presents a case study of Saudi Arabia and Malaysia as examples of the different approaches adopted by different Muslim-majority countries and concludes that ‘Islamic law contains sufficient guiding principles necessary for creating a well structured system of judiciary with efficient process of trial and hearing [and that]… the existing legal framework for administering justice in Islam is robust as well as adaptable – is capable of assimilating all the means and modes that will be necessary for the cause of justice in changing environments’ (p. 566).

Muslim jurists concede that the processes of administration of justice in Islamic law are not and have never been static or inflexible; rather they leave room for necessary refinement as the needs of substantive justice demand from time to time and from place to place. The details of the necessary procedure for the realization of justice are left to the jurists and the relevant authorities of state to decide in accordance with the best interests of society.4 The

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historical development of Islamic judicial procedure is therefore usually mapped from the early rudimentary practices of the Prophet’s time through the practices of the Rightly Guided Caliphs, rising to its peak during the Abbasid Caliphate when the judiciary and other relevant institutions for an effective system of administration of justice were formally established and some level of separation between the Caliphate and the judiciary was recognized, and relatively detailed rules of evidence and procedure instituted in the courts. Al-Alwānī has illustrated the evolution as follows:

During the Prophet’s reign Madinah was small, and the community’s legal problems were few and uncomplicated … The institution of legal judgment during the times of the four rightly guided caliphs remained simple and uncomplicated. Judges had no court scribe or written record of their decisions, for these were carried out immediately and under the individual judge’s direct supervision. No detailed procedures were worked out for the judicial process, the registration of claims, the delineation of jurisdictions, or for any other matters that would arise later, for the lives of the people were not yet complicated enough to require such refinements. Even the *Shari‘a* specified no details, but left them to be determined by *ijtihād*. In other words, the juridical system was allowed to develop in a way that would be the best suited for the peoples’ circumstances and customs. Under the four rightly guided caliphs, the judiciary was limited to resolving civil disputes. Other types of disputes, such as *qīṣās* (where capital punishment may be prescribed), *ḥudūd* (where punishment, including capital punishment, is prescribed by the Qur’an), or *tażīr* (where punishment, including capital punishment, is left to the discretion of the judge or the ruler) were decided by the ruler or his appointed governor. Not a great deal of change in this institution took place under the Umayyids, particularly under the early rulers, so that procedures remained uncomplicated. The major development was confined mostly to recording decisions in order to avert evasion and forgetfulness. In fact, such an incident occurred during the reign of Mu‘awiya ibn Sufyān, when Salīm ibn Mu‘īzz, the judge of Egypt, decided a case of inheritance. When the heirs reopened the dispute and returned to the judge, he recorded his decision in writing. This period also saw agreement upon the qualifications for a judge, the specification of a place in which the judicial procedure was to be carried out, and the development of the system by which injustices in public administration would be addressed. With the coming of the ‘Abbasids, however, the judiciary made significant progress. Its sophistication grew in both form and procedure, and its vistas increased with the variety of cases heard. During this period the court register was introduced, the judge’s jurisdiction was increased, and the state established the position of Chief Judge (*qādi al-qudāh*), which today is comparable to the office of the Chief Justice. One negative development, however, was the increasingly infirm nature of *ijtihād*, which limited the judges to following the previous rulings of the four established schools of thought: *taqlīd*. Thus in Iraq and the Eastern territories, judges ruled according to the rulings of Abū Hanīfah; in Syria and Spain according to Mālik; and in Egypt according to Imam Shāfi‘ī. After the Mongol destruction of Baghdad and the subsequent end of the ‘Abbasid Empire in 1258 CE/606 AH, several smaller states emerged and developed their own legal institutions. While these legal institutions differed hardly at all in their foundations and the principles upon which they were established, they did differ significantly in matters of organisation, procedures, criteria for the appointment and removal of judges, and in the schools of legal thought followed. Ibn al-Ḥasan al-Nabāhī portrayed the judiciary of eighth-century (hijrī) Spain as follows: “The authorities who deal with legal rulings are first the judges, then the central police, the local police, the appellate authority, the local administrator, and then the market controller”. (1995, pp. 4–7)

The non-sacrosanct nature of judicial procedural rules under the *sharī‘ah* is reflected, for example, in Saudi Arabia’s enactment of a new Law of Procedure before *Sharī‘ah* Courts in 2000 containing 266 articles and a new Law of Criminal Procedure in 2001 containing 225
articles. Most of the provisions in both laws would not necessarily be found in traditional fiqh manuals but are based on modern procedural norms that ensure an effective administration of justice in modern times. There have been similar endeavours by other Muslim-majority countries showing that there is broad flexibility within the shari‘ah in formulating rules of procedure for a better administration of justice under Islamic law as this falls mostly within the realms of fiqh rather than the substantive provisions of the Qur’an and the sunnah, per se.

**Islamic International Law (Siyar)**

Within general Islamic law there is a separate traditional concept of an Islamic law of nations or Islamic international law known as ‘al-Siyar’. Similar to other aspects of Islamic law, its rules are derived from the Qur’an, the sunnah and relevant practices of the earliest Muslim Caliphs. Al-Shaybānī is acknowledged as the ‘father of Islamic International law’ and as the most prolific jurist of his time who wrote extensively on the subject in a systematized way (see Baderin, 2012; Khadduri, 2001). The classical siyar rules covered the rules of conduct in war and peacetime that the Muslim realm (Dār al-Islām) must follow in its relationship with the non-Muslim realm (Dār al-Harb), but also many of the issues of modern international law, such as treaty rules, territorial jurisdiction, nature, kinds and conduct of war, peaceful relations, diplomatic relations and neutrality rules. The possible role of the classical siyar principles in enhancing modern international law and relations has become very topical and a subject of increasing academic research in recent times. The three essays in this section examine some of the elements of this substantive aspect of Islamic law from different perspectives.

In Chapter 28, ‘The Siyar – An Islamic Law of Nations?’, Anke Bouzenita examines the Islamic concept of siyar and questions whether it can be rightly conceived as a system of Islamic international law or Islamic law of nations in relation to modern international law. The author critically discusses the concept and development of al-siyar, noting that ‘[t]he most frequently cited legal definition of the term siyar goes back to the Hanafite scholar Shams al-Dīn al-Sarakhsi (died ca. 490 AH)’ (p. 576). She discusses the different usages of the term and other relevant terminologies in classical Islamic literature and identifies that ‘[t]he technical usage of the term siyar as part of Islamic law that governed the relations between Muslims and non-Muslims seems to have taken clear outlines in the first quarter of the second century AH’ (p. 579). She also analyses the sources of siyar, noting that as ‘part of Islamic law, the siyar are deduced like all other legal norms (ahkām shar‘iyyah) from the primary sources of law … or secondary legal principles’ (p. 580) and she discusses the different classical Islamic jurists that contributed to the development of this aspect of Islamic law. The essay also elaborates on relevant classical Islamic jurisprudential writings as well as Western scholarship on the subject. After a detailed comparative analyses, Bouzenita concludes that ‘[t]he siyar of Islamic law and the modern law of nations resulted from specific historic and cultural developments respectively. They have specific sources, concepts, objectives and an own terminology diverging in essential points from each other’, arguing, debatably, that ‘[b]oth systems can only be described as incompatible’ (p. 600).

The protection of diplomats is an important part of international law and relations that is well recognized in both theory and practice under Islamic international law. This subject is addressed by M. Cherif Bassiouni in Chapter 29, ‘Protection of Diplomats under Islamic Law’, which examines the Islamic law provisions on the protection of diplomats in
the context of the 1980 occupation of the American Embassy in Tehran. Bassiouni notes that the sources of Islamic law and consistent Islamic state practice ‘clearly establish the privileges and immunities of diplomats in Islamic law and practice’ (p. 603). He cites relevant Qur’anic verses and Prophetic ahadith to substantiate this and also notes that ‘[t]he Treaty of Hudaibiya and its negotiating history demonstrate the sanctity of emissaries, that a violation of an ambassador’s immunity is casus belli, and that no ambassador may be detained or harmed’ (p. 605). He also cites other classical examples and argues that ‘[t]hat practice has been continued by Muslim states in their contemporary international relations and certainly without exception since their acceptance of the two Vienna Conventions of 1961 and 1963 on diplomatic and consular relations’ (p. 607). The essay provides comprehensive analysis of the protection of diplomats under Islamic law with particular emphasis on the Shi‘i doctrine of diplomatic immunity, which is the jurisprudential school followed in Iran. It also examines the different issues that the occupation of the US Embassy in Iran raised at the time. It concludes unequivocally that the seizure and detention of the diplomats was a ‘violation of Islamic law, Islamic international law, and conventional international law’ (p. 625).

Finally, in Chapter 30, ‘Suicide Attacks and Islamic Law’, Muhammad Munir examines the question of suicide attacks under Islamic international law. He notes that the phenomenon of suicide attacks constitutes one of the ‘most disturbing developments in the history of warfare under Islamic law and international humanitarian law’ (p. 629). The essay examines the legality of the use of suicide bombings by Muslims ‘from the perspective of Islamic jus in bello (rules governing the conduct of war)’ (p. 629). Munir provides a brief history of the first organized suicide attack in Islam and identifies the many questions that suicide attacks raise and which need to be answered from an Islamic perspective. He then examines and engages with the different views of Muslim scholars on whether or not suicide attacks are legitimate under Islamic law. He analyses the different views in the context of Islamic jus in bello, citing relevant Islamic sources and practices to substantiate the analyses. He opposes the views of those who endorse suicide attacks and concludes that ‘[w]hen a suicide bomber targets civilians, he might be committing at least five crimes according to Islamic law … A suicide mission is therefore contrary to the norms of Islamic jus in bello and has no place in Islamic legal thought’ (p. 647).

The classical treatises on Islamic international law also cover many other relevant issues such as treaty rules, territorial jurisdiction, treatment of prisoners of war, law of the sea and neutrality rules that are not covered in the essays selected for inclusion here. Materials covering some of these issues are, however, listed in the further reading section that follows this introduction.

Conclusions

Islamic substantive law reflects the positive law of Islam as it is through this that Islamic law regulates specific aspects of worldly transactions in accordance with the shari‘ah. For different historical and social reasons, all modern Muslim-majority countries only apply selective aspects of Islamic substantive law today. Nevertheless, its importance in the general study of Islamic law cannot be ignored by Islamic legal scholars and jurists globally, as volumes of books continue to be published worldwide on different subjects of Islamic substantive law. Writing in 1964, Schacht observed that the strongest hold of Islamic substantive law was in
the areas of family law, the law of inheritance and waqf (trusts), and its weakest hold, `and in some respects even non-existent’, was in the areas of 'penal law, taxation, constitutional law, and the law of war’ while ‘the law of contracts and obligations [stood] in the middle’ (1964, p. 76). The scope by which this has been retained or changed will be examined in the third volume of this series, which contains materials relating to Islamic Law in Practice.

As previously noted, Islamic substantive law covers very wide areas of human endeavour. It is therefore impossible to include essays covering all the necessary areas of the subject in this volume. Some of the many other areas that could not be specifically covered include Islamic law of tort, Islamic property law, Islamic law of trust, Islamic commercial law and Islamic law of taxation. A list of suggested further reading on the subject is provided after this introduction.

References
