

Introduction

The Application of Islamic Law in Context

This third volume in the Ashgate Islamic Law series contains scholarly essays relating to the practical application of Islamic law as a functional system of law in its historical and contemporary contexts. The implementation of Islamic law can be explored from two perspectives – theoretical and empirical. The theoretical perspective engages with three main questions: (i) who has the authority for the implementation of Islamic law, (ii) what are the necessary mechanisms for its implementation and (iii) are these two factors of implementation (authority and mechanism) rigid or evolutionary. The empirical perspective analyses the application of Islamic law in fact. The two perspectives are, however, interrelated because the theoretical questions cannot be adequately addressed without an empirical examination of the historical and contemporary application of Islamic law. This introduction and the selected essays in this volume are aimed at exploring both perspectives.

The Historical and Contemporary Application of Islamic Law

Historically, the practical application of Islamic law can be traced back to the nascent Islamic polity in Medina after the Prophet Muhammad migrated there from Mecca around 622 CE. In recounting the historical development of Islamic law, most classical and contemporary scholars have noted that the Prophet started implementing Islamic law in its rudimentary form when he assumed the political leadership of Medina. On his arrival in Medina the Prophet had enacted the so-called ‘Constitution of Medina’, which provided, *inter alia*, that he would be the final arbiter in all disputes that arose among the people. The relevant section of the document provided that ‘Wherever there is anything about which you differ, it is to be referred to God and to Muhammad for a decision’ (see, for example, Hamidullah, 1975, p. 20; Watt, 1968, p. 132). Watt has observed that

[t]he phrase about the referring of disputes ‘to God and to Muhammad’ may mean that decisions were to be based on the word of God in the Qur’an where applicable; or it may merely mean that Muhammad would be given divine help in his decisions. In either case the religious aura surrounding Muhammad enhanced his suitability to perform the function of an arbiter. (1968, p. 21)

In Medina, the context of Qur’anic revelations was extended beyond just theological injunctions to include specific substantive rules on different aspects of social and worldly transactions (*mu’āmalāt*) and also verses enjoining Muslims to judge with the revelations sent to them (see, for example, Q2:213; 3:23; 4:58; 5:44-45; 5:47; 7:87; 10:109). The foundations for the practical implementation of those injunctions were then set by Qur’anic injunctions that specifically enjoined the Prophet to judge by what God has revealed unto him (see, for example, Q4:105; Q5:49), and equally alerted the Muslims that ‘they can have no real faith until they make you [Muhammad] judge in all disputes between them, and find in their souls no resistance against your decisions, but accept them with the fullest conviction’ (Q4:65).

Coulson has thus observed that, more than the role of mere arbiter, the Prophet was, in Medina, ‘elevated to the position of judge supreme, with the function of interpreting and explaining the general provisions of the divine revelation’ (1964, p. 22). Thus, during his lifetime, the Prophet was invested with the authority for the implementation of Islamic law in its rudimentary form and he did so through the mechanisms of legal opinions (*fatāwā*)¹ and adjudication (*ḥukm qadā’ī*). Shāh Walī Allāh has noted in that regard that during his lifetime ‘[t]he 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 ... Whenever he issued a legal opinion on something [or] passed a judgement ... this occurred in public situations’ (Hermansen, 2010, p. 6). The perception that the basic application of Islamic law had been established during the Prophet’s lifetime in Medina is well argued by Ansari as follows:

during the last decade of his life, the period which he spent in Madina, the Prophet was no longer merely the spiritual religious guide of his followers or merely the religious head of his community. He also became the head of the body-politic embracing his followers and the tribes allied to him. The need to apply Islamic norms, to settle disputes and dispense justice according to, or in the light of revealed norms, seems to have introduced a change of far-reaching effect; justice thereafter became a public concern. The importance of the arbitrator of the pre-Islamic type who was chosen freely by the disputing parties was gradually reduced. His place gradually came to be occupied by a state functionary – the *qādī* ... The Qur’anic stress on *al-ḥukm bi-mā anzal Allah* (to judge according to what Allah has revealed) (Q5:44ff) implies that the norms propounded by the Qur’an must be applied in practice, a factor which obviously facilitated the development of the Islamic judicial institution. Moreover, the fact that a publicly administered system had already come into being seems to be implied by the following verse (2:188): ‘...And eat up not your property among yourselves in vanity, nor seek by it to gain the hearing of the *ḥukkām* that you may knowingly devour a portion of the property of others wrongfully.’ It seems obvious that, had there not been any functionary appointed by the state – as distinct from arbitrators of the pre-Islamic type – to administer justice at the time of the revelation of this verse, this admonition would have little meaning. This verse, in our view, suggests the existence of a changed institutional framework in which the pre-Islamic system of justice had been modified in several ways. First, in the new situation a disputing party, even if in the wrong, could force the other party to refer the matter to the *ḥukkām*. Secondly, the verdict of the *ḥukkām* was binding on both parties so that on the basis of that verdict it would be possible to ‘devour a portion of the property of others’, even wrongly. (1992, p. 148)

Obviously, the Prophet exercised both ‘executive’ and ‘judicial’ authority during his lifetime, but did delegate judicial authority to some of his companions such as Mu’ādh ibn Jabal, ‘Alī ibn Abī Tālib and Abū Mūsā al-Ash‘arī, whom he appointed as judges to some of the provinces of the expanding Islamic polity during his lifetime (Abramski-Bligh, 1992, pp. 54ff.; Azad, 1987, p. 45). After his death the succeeding Orthodox Caliphs, as respective leaders of the Islamic polity after him, stepped into his shoes and the implementational authority of Islamic law continued to be vested in them. With further expansion of the Islamic polity, the early Caliphs also appointed judges (*qādīs*) to different provinces with delegated authority to implement Islamic law. For example, Caliph Umar is noted as the first Caliph to have

¹ See, for example, Q4:127, ‘They ask your legal opinion (*yastaftūnak*) about women’; and Q4:176, ‘They ask your legal opinion (*yastaftūnak*) about [the inheritance of] a person who has neither parents or offspring [*kalālah*]’.

separated judicial functions from the executive function (Azad, 1987, p. 48). He is recorded to have appointed Abū Mūsā al-Ash‘arī as a judge to Basrā, and Islamic jurists such as Ibn al-Qayyim al-Jawziyyah in his *I‘lām al-Mūqqi‘īn* and Ibn Farhūn in his *Tabsīrāt al-Hukkām* have discussed his famous epistle sent to Abū Mūsā al-Ash‘arī containing instructions on Islamic judicial procedure (Guraya, 1972; Serjeant, 1984).

However, opposing views have been expressed by Western scholars such as Tyan and Schacht. Schacht has argued that ‘the first caliphs did not appoint *qādīs* and in general did not lay the foundations of what later became the Islamic system of administration of justice’ noting that this ‘is shown by the contradictions and inherent improbabilities of the stories which assert the contrary ... the alleged instructions for judges given by ‘Umar, too, are a product of the third Islamic century’ (1955, pp. 34–35; see also Tyan, 1960, pp. 67ff., 83ff.).² Such opposing views have been strongly contested (see, for example, Ansari, 1992, pp. 151ff.; Guraya, 1972). Considering these differing opinions, it is, in my view, much more plausible, particularly in view of the relevant Qur’anic verses cited earlier above, to support the position that there was some formal rudimentary application of Islamic law from the Prophet’s time, which the early Orthodox Caliphs built upon as the Islamic polity expanded in size and population.

After the Orthodox Caliphs, the implementation of Islamic law developed further under the Umayyad and Abāssid dynasties (see Coulson, 1964, pp. 120ff.). Schacht has observed in that regard that, as part of their administrative arrangements ‘[t]he Umayyads, or rather their governors, also took the important step of appointing Islamic judges or *kādīs*’ and that ‘[t]he earliest Islamic *kādīs*; officials of the Umayyad administration, by their decisions laid the basic foundations of what was to become Islamic law’ (1982, pp. 24–25), thus, proposing that the formal and practical implementation of Islamic law commenced during the Umayyad period rather than from the Prophet’s time. Schacht, however, concurs that

[t]he early ‘Abbāsīd’s continued and reinforced the Islamicizing trend which had become more and more noticeable under the later Umayyads ... they recognized the religious law, as it was being taught by the pious specialists, as the only legitimate norm in Islam, and they set out to translate their ideal theory into practice ... They regularly attracted specialists in religious law to their court and made a point of consulting them on problems that might come within their competence. (1982, p. 49)

He also identified a treatise on ‘public finance, taxation, criminal justice, and connected subjects’ (Schacht, 1982, p. 49), written by the eighth-century Islamic jurist Abū Yūsuf at the request of the Abbāsīd caliph Harūn al-Rashīd,³ as one of the early manuals of Islamic law used for the implementation of Islamic law by a Muslim ruler.

From the Umayyad and Abbāsīd periods, the application of Islamic law evolved in different ways in terms of implementational authority and mechanisms through to the Ottoman period

² Schacht argues that ‘[d]uring the greater part of the first century, Islamic law, in the technical meaning of the term, did not as yet exist. As had been the case in the time of the Prophet, law as such fell outside the sphere of religion, and as far as there were no religious or moral objections to specific transactions or modes of behaviour, the technical aspects of law were a matter of indifference to the Muslims’ (1982, pp. 19ff.).

³ For an English translation of the treatise, see Ali (1979).

and up to modern and contemporary times.⁴ Coulson (1964) gives an excellent general overview of the application of Islamic law during these periods. He noted in respect of the Umayyad that ‘the Islamic state under the Umayyads was not based upon any firm separation of the executive and the judicial functions ... Supreme power in both respects vested in the Caliph, and through the delegation of his authority a great variety of subordinate officials possessed judicial competence within the territorial or functional limits of their administrative duties’ (Coulson, 1964, p. 120). He discussed the specific roles of *qādīs* during the period, noting that ‘the *qādīs* came to have a general judicial competence which cut through the subsidiary administrative divisions of the state, and by the end of the Umayyad period they had become the central organ for the administration of [Islamic] law’ (Coulson, 1964, p. 121). In respect of the implementation of Islamic law under the Abbāsids, Coulson observed, *inter alia*, that ‘[w]ith the accession to power of the ‘Abbāsīd dynasty and its declared policy of implementing the system of [Islamic] religious law currently being worked out by the scholar-jurists, the status of the judiciary was greatly enhanced ... Henceforth the *qādīs* became inseparably linked with Sharī‘a law which it was their bounden duty to apply’ (1964, p. 121). However, with time the need for ‘[e]ffective organisation of the affairs of state ... necessitated the recognition of jurisdictions other than that of the *qādī*’ (Coulson, 1964, p. 127). Thus, apart from *muftīs* and *qādīs*, different other mechanisms of implementation such as the *mazālim* (complaints) tribunal, *wālī al-jarā‘im* (crime officer), *sāhib al-radd* (review officer), *muhtasib* (moral and market inspectors) and the *shurtah* (police) were created. The transformations were legitimized through the doctrine of *siyāsa shar‘iyyah*, which gave the executive wide discretionary powers in its application of the law. Coulson therefore argued that

[t]he doctrine of *siyāsa shar‘iyya*, based on a realistic assessment of the nature of Sharī‘a law and the historical process by which it had been absorbed into the structure of the state, admitted the necessity for, and the validity of, extra-Sharī‘a jurisdictions, which cannot therefore be regarded, in themselves, as deviations from any ideal standard [and that] Islamic government has never meant, in theory or in practice, the exclusive jurisdiction of Sharī‘a tribunals. (1964, p. 134)

Some of the new implementational mechanisms were perceived as secular creations of the ruling authority, leading Coulson to submit that,

Islamic legal practice, therefore, was based on a dual system of courts, and although all functions in the Islamic state were theoretically religious in nature, the distinction between *Mazālim* and Sharī‘a jurisdictions came very close to the notion of a division between the secular and religious courts [so] whereas the *qādī* was regarded as the representative of God’s law, the *Sāhib al-Mazālim* was regarded as the representative of the ruler’s law. (1964, p. 129)

Over an intervening long period of time, Islamic law successfully adapted itself to internal adjustments as was necessary for the practical implementation of the law up to the nineteenth century when there developed ‘an increasingly intimate contact between Islamic and Western civilisations, and legal development was henceforth conditioned, almost exclusively, by the novel influences to which Islam thus became subject’ (Coulson, 1964, p. 149). This eventually culminated in the *Tanzīmāt* reforms by the Ottoman authorities between 1839 and

⁴ See, for example, Coulson (1964, pp. 121–81) for an excellent analysis of this evolution.

1876, resulting in the abolishment of the traditional Islamic criminal punishments and the compilation of the *Mejelle* as codified Islamic civil law between 1869 and 1876. Coulson has observed that '[a]s a result of these initial steps taken during the Ottoman period [as well as the effects of colonialism in different Muslim-majority countries later] laws of European origin today form a vital and integral part of the legal systems of most Middle Eastern [and other Muslim-majority] countries' (1964, p. 152). From then up to contemporary times the development and application of Islamic law has varied in different parts of the Muslim world (Coulson, 1964, pp. 149–81 passim). There have been different reforms in the application of Islamic law in different parts of the Muslim world today that have been perceived by some contemporary scholars as consolidating the 'secularization' of Islamic law that had begun earlier indirectly under the Abbāsīd authorities.

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. Writing in 1959 Anderson identified in his *Islamic Law in the Modern World* that the 'legal systems of the Muslim world may be broadly divided into three groups: (1) those that still regard the Shari'a as the fundamental law and still apply it more or less in its entirety; (2) those that have abandoned the Shari'a and have substituted a wholly secular law; and (3) those that have reached some compromise between these two positions' (1959, pp. 82–83). He cited, at that time, countries such as Saudi Arabia, Northern Nigeria, Yemen and Afghanistan as examples of the first group, Turkey as an example of the second group and countries such as Egypt, Lebanon, Jordan, Tunisia and Morocco as examples of the third group (Anderson, 1959, pp. 83–90). The situation remains more or less the same today. Many Muslim-majority states today have constitutional provisions on the application of Islamic law (see, for example, Janin and Kahlmeyer, 2007; Stahnke and Blitt, 2004–2005). It must be noted, however, that the application of Islamic law is not limited to Muslim-majority countries only. Secular Muslim-minority countries such as Kenya, the Gambia, the Philippines and Thailand also provide for the establishment of *qādi* courts for the application of aspects of Islamic law among their Muslim minorities (see, for example, Hashim, 2005).

Due to the long evolution of Islamic law and the reforms affecting its scope of application in different parts of the Muslim world, contemporary scholars are divided on whether or not what subsists as Islamic law in practice in the different parts of the Muslim world today can really be perceived as Islamic law in its true application.

Against that background, the essays in this volume engage critically with different theoretical and empirical aspects of the application of Islamic law. The essays are grouped under six sections, namely 'Theoretical perspectives on the practical application of Islamic Law'; 'Empirical analyses of the practical application of Islamic law'; 'Islamic family and personal status laws in practice'; 'Islamic criminal law in practice'; 'Islamic law of financial transactions in practice'; and 'Islamic judicial and court practice'. Each group will now be discussed in turn.

Theoretical Perspectives on the Practical Application of Islamic Law

Whether or not Islamic law can or should be considered as part of state law has, theoretically, been perceived differently by different academic scholars. The three essays in this section

present a representation of the different theoretical perspectives on the practical application of Islamic law in modern Muslim-majority states.

Islamic law is primarily perceived by most scholars as ‘jurists’ law’ because it initially developed through the efforts of individual pious religious scholars and jurists, free from the political influence and pressure of the state (see, for example, Alam, 2006–2007). The state has, however, come to play a very significant role in its evolution over time. Chapter 1, by Rudolph Peters, ‘From Jurists’ Law to Statute Law or What Happens When the Shari’a is Codified’, examines the evolution of Islamic law from jurists’ law to statute law and its codification by states in the Muslim world. Peters begins by observing that ‘[s]ince the middle of the nineteenth century, the position of the shari’a in most Middle Eastern legal systems has changed drastically’ (p. 3). He then explores that change and examines ‘how the relationship between the state and the shari’a developed, focusing on the Ottoman Empire (including Egypt) and its successor states’ (p. 3). He engages with the question of ‘who controls the production of shari’a norms, or, in other words, who has the authority to formulate the rules of the shari’a’ (p. 3). To address that question, Peters analyses ‘the position of the shari’a in the pre-modern period focusing on its religious character and its relationship with the state’ and then moves on ‘to the second half of the nineteenth century and ... the notion of codification and the changing role of the state’ (p. 3). He subsequently analyses the present day role of the shari’a in the Muslim world, arguing that ‘[i]n the course of the twentieth century, most legal systems in the Middle East were westernized, by the adoption of Western substantive and adjective laws and Western notions of law’ (p. 12). He acknowledged that in most national legal systems the *sharī’ah* still has a role to play, but his role varies; and Peters classifies four types of legal system according to the position of the shari’a in them: ‘completely secularized systems’; ‘legal systems that are dominated by the shari’a’; legal systems ‘in which western law prevails, except in the field of personal status’, where Islamic law applies in codified or uncodified form; and finally ‘legal systems that have been re-Islamized’ (p. 12). He then provides examples and illustrations of each of the four types of application of Islamic law identified. He notes that it ‘is striking that the shari’a, nowadays, is not applied by using the classical books of *fiqh*, but via legislation’ and that the shari’a, ‘interpreted in different ways, has become part of a great number of national legal systems’ (p. 13). Peters concludes that

[a]s a result of the process of codification that has continued for nearly a century and a half, there are hardly any countries left where the shari’a is applied without codification ... This means that nearly everywhere the state has assumed the power to determine what the shari’a norms are, at least in those fields that are enforced as parts of the national legal systems ... This [has] led some, mainly Western, non-Muslim scholars to question whether this legislation can still be regarded as shari’a and as Islamic. Raising this question is ... not very relevant and betrays a certain polemical point of view. By arguing that codified shari’a is not shari’a and not Islamic anymore, they want to demonstrate that the re-Islamization of the law that was introduced in some countries, was not a real re-introduction of the shari’a’ (pp. 13–14)

Peters submits that the ‘only correct answer would be that if Muslims hold that it is Islamic and a legitimate ... interpretation of the shari’a, which most Muslims do, there are no good arguments to view it differently’ (p. 14).

Abdullahi An-Na’im’s ‘The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law’ (Chapter 2) apparently opposes the application of Islamic law

as state law. It advances the view that ‘Islamic law is not now and cannot be the state law of any state, whether Muslims are the majority or minority of the population’, noting, however, that this view ‘does not dispute the religious authority of Islamic law for Muslims, which exists only outside the framework of the state’ (p. 17). An-Na‘im argues that ‘the nature of Islamic Law as a religious normative system, on the one hand, and of the state and state law as secular political institutions, on the other, require clear differentiation between the two in theory and separation in practice [but] ... the methodological and normative similarities between Islamic Law and state law, and the fact that they both seek to regulate human behavior, raise possibilities of dynamic interaction and cross-fertilisation between the two’ through what he calls ‘civic reason’ (p. 18). He notes further that ‘Islamic Law cannot be enforced as state law and remain Islamic Law in the sense that Muslims believe it to be religiously binding’ arguing that because ‘the enforcement of Islamic Law through state institutions negates its religious nature, the outcome will always be secular, not religious’ (p. 18). He emphasizes that ‘all state law is secular, regardless of claims of an “Islamic state” that enforces Islamic Law in countries like Iran and Saudi Arabia’ (p. 18). An-Na‘im, however, perceives that ‘[t]he massive codification projects of the Egyptian jurist Abdul Razeg Al-Sanhouri (1895–1971) for several Arab countries illustrate the potential possibilities of ... a synthesis of traditional Islamic Law jurisprudence and modern state law, whereby Islamic Law principles are “incorporated” into modern legal codes as secular state law, rather than Islamic Law as such’ (p. 20). He calls on proponents of Islamic law to ‘abandon claims that Islamic Law principles can or should be enacted into state law as a matter of religious obligation’, suggesting that they should, instead, ‘advance Islamic Law as a jurisprudential tradition and cultivate their own ability to persuade other citizens of the utility and expediency of enacting specific principles of Islamic Law as secular state law’ (p. 20). He then presents an analysis of the nature and development of Islamic law, outlines the state and law in global perspectives, calls ‘for taking Islamic law seriously by including it in comparative legal education as a forward-looking jurisprudential tradition, not merely as the subject of historical curiosity’ (p. 21) and concludes with an argument for engaged citizenship through civic reason between Islamic law and state law: ‘for Islamic Law and state law to be complementary normative systems, instead of being in mutually destructive conflict, each system must operate on its own terms and within its field of competency and authority’ (p. 44). An-Na‘im proposes three ways of achieving this in the conclusion.

Finally, in Chapter 3, ‘Shari‘a and State in the Modern Muslim Middle East’, Nathan J. Brown examines the evolution of the application of Islamic law as part of state law in the countries of the modern Muslim Middle East. The essay begins with the observation that ‘Islamic shari‘a is central to Islam in the minds of most Muslims and non-Muslim scholars’ (p. 47) and that its centrality has increased in many ways in recent decades. Brown notes, however, that ‘despite – or perhaps because of – this centrality, the precise, even the general, role [and meaning] of the shari‘a in Islamic societies is the subject of contentious debate among Muslims’ (p. 47). He then analyses the important shifts in the meaning and application of Islamic shari‘a in the Muslim world, arguing that ‘these shifts are closely connected to the nature and viability of legal and educational institutions associated with the Islamic shari‘a in the past. As the Islamic shari‘a has become disconnected from these institutions, its meaning has changed in some fundamental ways’ (p. 47). Brown argues further that ‘widespread attempts to re-create older relationships (particularly involving the relationship between the

Islamic shari‘a and the state) in fact involve a deepening rather than a counteracting of the transformation in the Islamic shari‘a’ (p. 47). The essay then traces and analyses the puzzle of the abandonment of the Islamic shari‘a, the meaning of Islamic shari‘a, renegotiating the relationship between shari‘a and state, and recovering and re-inventing the Islamic shari‘a. Brown concludes that

[w]hat happened, especially over the past century is not that the shari‘a was abandoned but that it was redefined. In its old form, as a set of practices and institutions, it was maintained but rendered progressively less relevant to social life. In its current form, as a set of rules, it is sometimes not implemented, but it forces itself onto the political agenda throughout the region. (p. 61)

Empirical Analyses of the Practical Application of Islamic Law

Despite the different theoretical perspectives, there is empirical evidence that Islamic law continues to apply today in different forms in different states across the Muslim world (see, for example, Otto, 2010). The four essays in this section explore, empirically, the practical application of Islamic law within state law in different parts of the Muslim world.

As the cradle of Islam and Islamic law, Saudi Arabia claims the continued full application of Islamic law as state law with Article 1 of its Basic Law of Governance⁵ providing that its constitution is the Qur’an and the *sunnah*, and Article 7 providing that the government derives its authority from the Qur’an and the *sunnah* ‘which are the ultimate sources of reference for this [Basic] Law and the other laws of the State’. Relevant traditional mechanisms and institutions for the implementation of Islamic law are maintained but with some in a reformed mode. With regard to the judicial application of Islamic law, Article 48 of the Basic Law provides that ‘The Courts shall apply rules of the Islamic Sharia in cases that are brought before them, according to the Holy Qur’an and the Sunna, and according to laws which are decreed by the ruler in agreement with the Holy Qur’an and the Sunna.’ Article 46 also provides that ‘The decisions of judges shall not be subject to any authority than the authority of the Islamic Sharia.’ Saudi Arabia therefore serves as an apparent example of Muslim-majority countries falling within Anderson’s first categorization of countries ‘that still consider the Shari‘a as the fundamental law [of the state] and still apply it more or less in its entirety’ (1959, p. 83).

Chapter 4, ‘Shari‘a in the Politics of Saudi Arabia’, by Frank Vogel, examines the role of the shari‘a in Saudi Arabia. It begins with the observation that ‘Shari‘a holds a unique position in Saudi Arabia. It is the constitution of the state, the sole formal source of political legitimacy, and the law of the land or common law’ (p. 67). Vogel also notes that ‘[i]t is avowed as the solitary source of binding norms for the civil and private spheres, shaping and justifying social, communal, and family mores as well as individual morality’ (p. 67). He asserts that ‘[i]n Saudi Arabia, shari‘a must be understood in a different way than elsewhere’ and then proceeds to examine ‘how shari‘a serves as the binding law of the modern legal system in Saudi Arabia, how shari‘a is uniquely understood and structured in the Saudi consciousness, and how various political and social actors influence shari‘a politics in the country’ (p. 67).

⁵ The translated version of the Saudi Arabian Basic Law used herein is available on the website of the Royal Embassy of Saudi Arabia, Washington, DC, at http://www.saudiembassy.net/about/country-information/laws/The_Basic_Law_Of_Governance.aspx (last accessed 11/7/13).

The essay discusses the role of the *sharī'a* in the law and legal system and politics of Saudi Arabia, analysing the structures and the different actors in the system. It notes that 'Saudi Arabia stands apart from other Muslim majority countries, in that it consciously preserves the Sunni constitutional system that prevailed in most of the Muslim world for the last 1000 years [in the form of] ... *siyasa shar'iyya* ("governance in accordance with shari'a")' and that '[t]his system survives in modern Saudi Arabia, as explicitly acknowledged in its 1992 Basis Law of Government' (pp. 67–68). Vogel notes, however, that '[o]ne senses among Saudis both individually and as a society, a new boldness to tap shari'a's vast reserves of meaning and authority without waiting for or depending on the state or even establishment scholars', and argues that 'such exercises in religious beliefs are also exercises in law – not just law as religious rite, as moral or ethical law, or as civic obligation or communal mores, but as binding, enforceable rules' (p. 69). He also discusses the different attempts at and resistances towards legal reform in the country, noting that '[p]ressure to codify the laws – as has been done in every other Muslim-majority country, even those particularly devoted to shari'a – has been increasing for decades' (p. 71). Vogel concludes that '[h]owever regressive and traditionalist Saudi Arabia appears from outside, viewed internally the country seems to be on a path of rapid change and evolution' (pp. 75–76) and he identifies two main evolutionary perspectives ('bottom-up' and 'top-down') in respect of the application of the *sharī'a* in the country.

Gregory Kozlowski's essay, 'Islamic Law and Contemporary South Asia' (Chapter 5), gives a brief historical overview of the application of Islamic law in Bangladesh, India and Pakistan. It begins with the observation that discussions about Islamic law in these three South Asian countries seem too often to 'discourage a mid-range historical analysis' because they 'either harken back to the lifetime of the Holy Prophet or hurl themselves into the recent past by concentrating on politically contentious cases heard within the last two decades', an approach which, Kozlowski argues, leads to 'more complicated appreciations of the situation in contemporary South Asia' (p. 77). He then asserts that where the development of Islamic law is 'looked at from the perspective of Braudel's middle temporality' it 'disaggregates into a series of values and institutions that have significantly reshaped over the past 150 years' (p. 77). This observation, made by the author in 1997, still holds true today for the development of Islamic law not only in South Asia, but in every part of the Muslim world where Islamic law still applies today. Kozlowski notes that '[i]n contemporary South Asia, Islamic law has developed several distinct, but highly interactive, trajectories' with the 'conjunction forces' including 'states: both colonial and post-colonial, local as well as international communities, religious revitalization movements, but also popular practices or beliefs that are seemingly impervious to reform' and he consequently argues that until one or another of these conjunction forces 'clearly controls the institutions of government, plurality and antagonism will continue to mark the interactions of what are several different Islamic laws' (pp. 77–78). The essay then goes on to discuss the 'type of Islamic law supported directly by national governments' (p. 78) with historical reference to judicial decisions of imperial judges on matters of Islamic inheritance, marriage, divorce and personal status in Bangladesh, India and Pakistan from colonial times, highlighting how the law and courts were influenced by the colonial experience of these countries, which thus resulted in 'one sort of Islamic law' whereby the enforcement of Islamic criminal punishments were dropped and Islamic law 'applicable to Muslims became restricted to the realm of "personal law" through judicial decisions' (p. 79). Kozlowski also discusses the political influences on implementation of the law with particular reference to Zia

ul-Haq's Islamization project in Pakistan, which began in 1978; Islamic law in the context of identity in the local communities and the historical role of the *muftīs* and their *fatāwā* in the development of Islamic law in the different countries; and, finally, the issue of Islamic law reform and the worldwide Muslim community, citing Mawdudi's Islamic constitutionalism project in Pakistan as an example of 'yet another perspective on Islamic law' (p. 87). Writing in 1997, Kozłowski endeavoured to give a historical empirical analysis of different facets that may exist in the implementation of Islamic law in Muslim-majority states and concluded then, *inter alia*, that '[i]n current terms, several Islamic laws represent a blurring of two imagined modalities: that of the religious community and that of the nationstate' but 'Muslim law's history in contemporary South Asia may be one of those junctions where obvious boundaries disappear at the same time that real differences persist' (pp. 89–90). The author's conclusions remain largely credible within the context of developments in the region since the essay was first published 17 years ago.

Kozłowski's historical analysis is followed by Mark Cammack and Michael Feener's 'The Islamic Legal System in Indonesia' (Chapter 6), which discourses both 'the historical evolution and current structure of Indonesia's Islamic legal structure' and the application of Islamic law in that country (p. 91). Although Indonesia is the most populous Muslim-majority state in the world today, it is designated as a secular state with a limited application of Islamic law to mostly matters of personal status. It thus falls among the countries of the Muslim world that, in Anderson's categorization, 'have reached some compromise between [the] two positions' of fully applying and totally abandoning Islamic law (1959, p. 83). The essay traces the historical background of the Southeast Asian nation, noting that '[t]he current system of Islamic courts in Indonesia is traceable to a late nineteenth century Dutch decree establishing a system of Islamic tribunals on the islands of Java and Madura' which was 'expanded to south Kalimantan in the 1930s' (p. 91), and also 'resulted in the creation of the first Islamic appeals courts in the region' (p. 93). Approval was finally granted by the government in 1957 'authorizing the formation of Islamic courts everywhere in the outer islands where they did not already exist [with] territorial jurisdiction co-extensive with the civil courts' (p. 95). There were, however, major changes to Indonesia's Islamic legal system under Suharto's New Order regime between 1965 and 1998. The essay analyses the different changes that affected the application of Islamic law in Indonesia from that period onwards, and gives a comprehensive overview of the contemporary Indonesian Islamic legal system. It discusses the structure of the Indonesian Islamic judiciary and the jurisdiction and powers of the Islamic courts. It identifies that under the Dutch-chartered Islamic tribunals, jurisdiction was only limited to matters of marriage and divorce and expanded after independence to include other matrimonial causes and inheritance matters. The jurisdiction of the Islamic courts was further expanded with the passage of the Religious Judicature Act in 1989, which 'for the first time, established a uniform jurisdiction for all Islamic tribunals nationwide' and 'granted Islamic courts jurisdiction in three broad areas: 1) marriage; 2) inheritance, including wills (*wasiat* or *wasiyyah*) and gifts (*hibah* or *hiba*); and 3) religious endowments (*wakaf* or *waqf*)' (p. 106). Later amendments to the 1989 Act are also discussed. The authors also discourse the Islamic legal institutions in the special autonomous region of Aceh, which was from 1999 'granted the authority to formally implement Islamic law in the province' and in essence 'made it possible to develop more vigorous Shari'a regulations by allowing the Aceh provincial legislature ... to move forward with working out the details of new legislation (*qanun*), including those

defining the new institutions by which Islamic law would be implemented' (p. 116). They conclude, however, that despite the 'special autonomous' status of Aceh in respect of the application of Islamic law,

[i]n terms of their actual day-to-day operation, Aceh's Mahkamah Syariah appear to be little different from Islamic courts in other Indonesian provinces. The vast majority of the cases before the courts continue to be related to divorce, followed in number by inheritance – and these cases are generally decided according to rules and norms commonly found in the decisions of religious courts elsewhere in Indonesia. (p. 120)

Alfitri's 'Expanding a Formal Role for Islamic Law in the Indonesian Legal System: The Case of *Mu'amalat*' (Chapter 7) also examines the role of Islamic law in the Indonesian legal system and argues for its expansion. It starts by making reference to the debates over 'efforts to expand the role of Islamic law in the national legal system of Indonesia' (p. 121). It notes that being a secular State, 'the *Shariah as a whole* is not enforced by the state, but ... has a significant meaning for Muslims in Indonesia [and that] ... some elements of Islamic jurisprudence in personal law have been absorbed into positive law in Indonesia through the decisions of the religious courts, which have existed since the Dutch colonialism' (p. 122). Alfitri refers to the state's compilation of Islamic Law No.1/1991, noting that it 'essentially functions as the legal code for all Muslims who must resort to the religious courts for the adjudication of disputes involving marriage, divorce, inheritance and *waqf*'. The essay then proposes the need to expand 'the formal role of Islamic law in the area of *mu'amalat*, that is, in contract and property disputes, especially in the Indonesian banking context ... for the effective functioning of the religious courts (*Pengadilan Agama*) in Indonesia', advancing arguments on why this is necessary (p. 122). Alfitri asserts that '[s]uch an expansion should be guided by both *Shariah* and *fiqh*, and particularly by the principle of *maslahat*, or public good, which is among the highest norms in Islamic jurisprudence' (p. 123). He discusses each of these concepts in relation to the proposed expansion of the role of the religious courts in the area of *mu'amalat* and also provides some in-depth analyses on the proposal for the formal role of *mu'amalat* in Indonesian banking and the need for the development of standard contracts for shari'a banking, concluding that the 'development and availability of standard, enforceable contracts between *Shariah* banks and their customers is important to realize the highest value of *mu'amalat*, namely *maslahat*, here the ability of *Shariah* banking to contribute significantly to the development of Indonesia's economy'. He asserts that 'expanding the formal role of Islamic law in Indonesian law, by transforming the law of contracts in *mu'amalat* into standard contracts, is critical' (p. 138).

Nigeria is one of the countries in sub-Saharan Africa where Islamic law applies as part of its pluralist legal system. It can also be described as falling within Anderson's categorization of countries 'that have reached some compromise between the two positions' of fully applying or totally abandoning Islamic law (1959, p. 83), even though the application of Islamic criminal law was re-introduced in the northern states of the country from 2000 (see, for example, Baderin, 2008; Ostien, 2007).

In Chapter 8, 'Islamic Law as Customary Law: The Changing Perspective in Nigeria', A.A. Oba discusses the trajectory of the application of Islamic law in Nigeria. The expression of legal pluralism in Nigeria is reflected in the fact that English common law, Islamic law and customary law apply concurrently. The essay engages with the earlier controversial

classification of Islamic law as ‘customary law’ by the former colonial authorities in Nigeria, arguing that it was ‘an arbitrary statutory classification that has no real basis in fact or law’ (p. 144). It then proceeds to examine the ‘nature of Islamic law and its developments in Nigeria in the pre-colonial and colonial eras [and] looks at the basis and effects of this classification, the reactions thereto, the present status of Islamic law in Nigeria, and the future of Islamic law in Nigeria’ (p. 144). Oba traces the history of Islamic law in Nigeria, noting that Islamic law was firmly established in the northern part of the country before the arrival of the colonial masters and that ‘[f]rom the time of their conquest of northern and southern Nigeria, it was clear that the British were determined to replace Islamic law completely with their common law’ but ‘because of the different circumstances in the north and south, they adopted different strategies’ (p. 150). Oba argues that for the northern part of the country where Islamic law predominantly prevailed, ‘the approach of the British to Islamic law can be classified into three phases, namely the accommodation phase, the domination and control phase and the living under the shadow phase’ (p. 151), and he analyses each of the three phases. The essay discusses the arguments on the classification of Islamic law as customary law and provides an analysis of the differences between Islamic law and customary law citing relevant case law as well as academic, judicial and political reactions to substantiate the arguments advanced. It also examines the status of Islamic law in Nigeria today, noting that the application of Islamic personal law was constitutionally recognized under the 1979 Constitution of the Federal Republic of Nigeria which also ‘made provisions for its administration by creating Sharia Courts of Appeal’ (p. 171). Oba discusses the statutory recognition of Islamic law in different states of the federation, referring also to the adoption of the full application of Islamic law by Zamfara State, which has now been extended to 11 other states in the northern parts of the country. He concludes that Islamic law applies in Nigeria as ‘a fully fledged, self-sustaining, and highly sophisticated system of law’ and is ‘no longer part of customary law in Nigeria’ as previously classified by the colonial authorities (p. 175).

Turkey is a Muslim-majority country often classified as located at the crossroads of Europe and Asia. It has abandoned the formal application of Islamic law and officially adopted secularism. It therefore serves as an obvious example of countries of the Muslim world that, in Anderson’s classification, ‘have abandoned the Shari’a and have substituted a wholly secular law’ as state law (1959, p. 83). Despite Turkey’s formal adoption of secularism, however, Islamic law apparently influences the lives of the majority Muslim populace in various ways. Ihsan Yilmaz’s ‘Secular Law and the Emergence of Unofficial Turkish Islamic Law’ (Chapter 9) ‘examines the ways in which local and unofficial Islamic legal practices have been retained alongside secular law despite the official position’ (p. 177). The essay begins with the assertion that ‘[l]ocal and unofficial Turkish Muslim laws have resisted the unification and assimilation purposes of the modern nation-state ... People have not abandoned their local and religious laws and customs, whether legal modernity recognizes them or not ... Today, secular official and Muslim unofficial laws co-exist in the Turkish socio-legal sphere’ (p. 177). Yilmaz argues that ‘Turkish Muslims have not totally abandoned their Muslim laws in favor of the transplanted “secular” Western law ... Muslim Turks have actively assimilated to the secular law but *on their own terms*. By combining the rules of two different normative orderings, they have pragmatically been successful to meet the demands of both the secular law and religious law’ (p. 178). The essay then analyses legal modernity and instrumentalist use of law by modern nation-states, Turkish legal modernity and secularization of Turkish

law, the socio-legal challenge to legal modernity and the construction of the Turkish Muslim law, and the future of postmodern Turkish legality and Turkish ‘democracy’. Yilmaz identifies the aspects of life such as marriage and divorce in which Islamic law continues to be followed unofficially by Turkish Muslims, noting that ‘[a]lthough the Turkish state tried to abolish Muslim law by transplanting new secular and uniform laws, the result has been that Turkish Muslims have not abandoned their local Muslim family laws’, not even in urban areas (p. 191). Although the essay has only dealt with family law issues, Yilmaz notes that ‘it is also starkly observable in the Turkish society that in other fields such as business, finance, banking, insurance and in all sorts of spheres of life, Muslim law is referred to and obeyed by many people despite the non-recognition of the state’ (p. 192). He concludes, however, that ‘[t]here is little support for the so-called “Islamic penal laws” as practiced in Saudi Arabia’, but rather, the Muslim Turks retain ‘their Muslim law in secular and modern contexts in a post-modern way without violating the democratic order’ (p. 194).

Islamic Family and Personal Status Laws in Practice

The practical application of Islamic law as part of state law in the Muslim world today is mostly reflected in the area of Islamic family and personal status laws. All Muslim-majority countries today have codified some aspects of Islamic family and personal status law into state legislation. As Mahmood has noted ‘[s]tatutes relating to Islamic personal law, with varying scope and contents, are now in force also in a number of Muslim-minority regions including India ... and several other states in Africa and Asia’ (1995, p. 2). The different codifications of Islamic family law have all accommodated some necessary reforms to different aspects of traditional Islamic family law provisions. The four essays in this section give an overview of the current application of Islamic family law in Morocco, Malaysia, Tunisia, Egypt and the Philippines respectively.

In Chapter 10, ‘Family Law & Reform in Morocco – The *Mudawana*: Modernist Islam and Women’s Rights in the Code of Personal Status’, Laura Weingartner examines the evolution of Islamic family law in Morocco. She starts by noting that

[f]amily law exists in many forms throughout the world, from the civil code traditions of continental Europe, the common law of England and the United States, to Islamic law throughout the Middle East and beyond. The various systems differ in scope of jurisdiction, mode of application and traditional bases but, for the most part, deal with issues of marriage, divorce, child custody and inheritance, as is the case in Morocco, where the family code, or Code of Personal Status, is called the *Mudawana*. (p. 199)

She then presents ‘a brief history of Morocco, highlighting the centrality of Islam as a motivating political force *and* as a fundamental principle underlying the legal system’ and also analyses ‘some major aspects of traditional Islamic, or *Shari’a* law, followed by detailed analyses of both the pre-reform *Mudawana*, and the changes to the Code as promulgated in January 2004’ (pp. 199–200). The essay also examines the significance of the reforms, the question of why Islamic law prevails in the area of family law and personal status in Morocco, and the challenges posed by the conservative Islamic religious scholars against the reform. It notes that the ‘newly reformed *Mudawana* is an example of such [good] public policy goals

rendered in conjunction with the precepts of traditional Islamic law' (p. 204) and goes on to identify the different areas in which the *Mudawana* has modified traditional Islamic family law in Morocco. Weingartner concludes that while

[I]aw and religion have been largely separated in the western world – compartmentalized to preserve either the freedom of all from the tyranny of the few, or vice versa, depending on one's outlook and position in society ... In Morocco, where the dual goals of modern, progressive democratic development, and adherence to Islamic ideals as a source of law coexist, the reformed *Mudawana* may well be received as the best, although imperfect, example available today of modernist Islam benefiting women, their husbands and children, indeed society as a whole. (pp. 224–25)

Zaleha Kamaruddin and Raihanah Abdullah, in Chapter 11, 'Protecting Muslim Women against Abuse of Polygamy in Malaysia: Legal Perspective', examine the development and evolution in family law provisions in Malaysia with particular reference to the question of polygamy. They note that '[p]olygamy remains a controversial issue not only in Malaysia but also in many Muslim countries around the world' (p. 227) and that '[a]lthough there exist two different views in analysing polygamy, many Muslim countries have made improvements in their Islamic Family Law legislations from as early as 1917' (p. 229). The authors then go on to 'discuss the concept of polygamy and its implementation whilst focusing on the effectiveness of certain provisions relating to polygamy as provided under Islamic Family Law in Malaysia [concentrating] ... on the relevant provisions in the Islamic Family Law enactments of the different states in Malaysia' (p. 230). They also suggest 'how perversions in the practice of polygamy should be handled from the legal perspective in order to ensure that stability and strength of the family institution is kept intact and women are protected' (p. 230). The essay provides a detailed analysis of the polygamy laws in Malaysia noting that 'Malaysia has decided not to prohibit polygamy despite what has been practiced by many other Muslim countries such as in Egypt, Jordan, Pakistan and also Indonesia. But such practices are governed by specific laws ... in Malaysia aimed at controlling the practice so as to avoid abuse' (pp. 231–32). The essay also identifies the different problems in that regard and concludes that '[a]lthough polygamous marriages are allowed, as is divorce, both practices are not encouraged. On the contrary, polygamy and divorce may only be resorted to as a form of solution to problems faced by the society' (pp. 248–49). The authors cite the view that 'Islam did not initiate polygamy, neither does it advocate or even encourage it' arguing that 'what has happened in Malaysia is that many of those who practice polygamy have disregarded the guidance in the Holy Qur'an and Hadith even though these provisions have been incorporated in the Islamic Family Law enactments' (p. 249). They then propose some suggestions on how the problems could be addressed.

In Chapter 12, 'Islamic Law and Gender Equality, Could There be a Common Ground? A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt', Amira Mashhour examines the evolution of family law in Tunisia and Egypt with particular focus on the issues of divorce and polygamy in relation to Islamic law. The essay addresses the general question of

whether or not there could be a common ground between applying Islamic Sharia law and gender equality through an examination of the textual Sharia rulings regarding polygamy and divorce, a comparison of this theoretical framework with the applied laws in Egypt and Tunisia, and, finally,

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an attempt to show the relationship between the divine texts, jurisprudence, and the role of *Ijtihad* in responding to social change. (p. 254)

Mashhour notes that '[a]ny discussion relating to women in Muslim societies has to take Islamic law (*Sharia*) into consideration to show that either Islam does or does not give women certain rights' (p. 255). She then goes on to argue that

the deterioration of women's rights in many Islamic countries has nothing to do with their Islamic nature and that most of the gender inequalities are not based on Islam but are mainly the result of traditional, patriarchal, male-dominated societies' practices that aim to dominate women and to find any pretext to suppress them. These societies seek justifications by applying conservative and literal interpretations of various Quranic texts or by abstracting certain passages out of their contexts. (p. 255)

She asserts that the

Sharia is not static but rather evolving. It posits an evolutionary quality based on *Ijtihad* ... to interpret the texts in their socioeconomic and historical contexts and to compare their relevance to the contemporary context as a means of responding to the needs of the society and coping with social changes. By applying *Ijtihad* generally or feminist *Ijtihad* in particular, based on justice, which is the core value of Islam, one can fulfill gender equality to its fullest. (p. 256)

The essay gives a comprehensive analysis of the *shari'a* and its sources, development of Islamic jurisprudence, polygamy and divorce in the *shari'a*, and other relevant matters in relation to the personal status codes of both Egypt and Tunisia. Mashhour concludes, *inter alia*, that

because there is a direct relation between the text, either divine or jurisprudence, and the society, Islamic law, through *Ijtihad*, based on the principles of justice and public welfare, has to cope with and respond to the changing social needs ... The dynamism of Islamic teachings, the spirit of Islam towards women's rights, the principles of justice and public welfare, and the essentiality of feminist *Ijtihad* leave no room for doubt that a common ground can be found between Islamic law and gender equality. (pp. 286–87)

Finally, Chapter 13, 'The Legal Impediments to the Application of Islamic Family Law in the Philippines', by Anshari Ali, discusses the application of Islamic family law in the Philippines, identifying the different legal impediments in that regard. As the Philippines is a secular Muslim-minority state, Islamic family law applies as part of its secular laws not in 'consideration of the religious beliefs of the Filipino Muslims, but rather of their cultural traditions ... The religious characteristics of Islamic family law are not implemented in the country' per se (p. 289). Ali notes that the 'issues of the application of Islamic family law arose after the codification of the Muslim Personal law through Presidential Decree 1083 on 4 February 1977' (p. 289) and that Philippines is the only country in Asia with a 90 per cent Christian population and less than 10 per cent Muslim minority, who are, nevertheless, 'granted the legal right to adhere to the basic principles of *Shari'ah* dealing with personal and family relations, subject, however, to the legal apparatus set up by the government [which] ... includes the secular principle of the state according to which its affairs are divorced from any religion or religious belief' (p. 290). The essay indicates that 'the adoption of secular principles

in the Philippines Constitution is an important element within the framework of which the limitations on the application of Islamic family law in the country can be understood' (p. 290), noting that 'any provision of the Islamic family law that runs contrary to the Constitution is not enforceable in the country' (p. 294). Ali then examines the concept of secularism in relation to Islam, freedom of religion in the Philippines and the constitutional limitations in that regard. He also presents a comprehensive analysis of the Presidential Decree 1083 and other relevant laws in relation to classical Islamic family law and the current application of Islamic family law and the jurisdiction and procedure of *shari'a* courts within the secular dispensation in the Philippines. He concludes that

[t]he secular principle of the Philippines Constitution has played an important role in the application of Islamic family law in the Philippines and has caused the deviation of the Muslim law from the basic principles of the [traditional] *Shari'ah*. The basic characteristic of Islamic family law being attached to a religious belief is excluded from the enforcement of Islamic family law in the Philippines. (p. 305)

He highlights the fact that the Philippines Supreme Court

shall have the constitutional power to review on appeal the decisions of the *Shari'ah* District Court [and that] ... there is no guarantee that the decision of the Supreme Court in a case appealed from the *Shari'ah* court will not deviate from the basic teachings of the *Shari'ah* ... even if such a decision runs counter to the basic teachings of the *Shari'ah*, it will become part of the Islamic legal system in the Philippines. (p. 306)

Islamic Criminal Law in Practice

The application of Islamic criminal law remains the most controversial aspect of the modern application of Islamic law. Only a few Muslim-majority states such as Saudi Arabia, Pakistan, Iran and twelve states in Northern Nigeria apply Islamic criminal law as part of state law today. Nigeria is the country that has most recently re-introduced Islamic criminal law, in its northern states, commencing with Zamfara State in 2000. The four essays in this section cover the application of Islamic criminal law in Nigeria, Malaysia and Pakistan.

In Chapter 14, 'Judicial Practice in Islamic Criminal Law in Nigeria – A Tentative Overview', Gunnar Weimann examines the re-introduction and application 'through the framework of a secular federal constitution', of Islamic criminal law in Nigeria in 2000–2001 when 'twelve Northern states adopted legislation on the *hadd* offences and the Islamic law on homicide and bodily harm' (p. 315). The essay presents an overview of 'roughly 125 criminal cases tried before Nigerian *Shari'a* courts between 2000 and 2004' (p. 315). It notes that the legislation which re-introduced the application of Islamic criminal law in Nigeria

was preceded, accompanied and followed by a controversy in which all parties exhibited equal passion and anger. While supporters of the 're-introduction of *Shari'a*' point to their constitutional right to practice their religion, opponents regard some punishments prescribed by the new codes, in particular stoning to death and amputation, as inhuman and degrading, and therefore unconstitutional. (p. 316)

The essay provides a historical overview of the re-introduction of the laws, noting that

[m]any Northern Nigerian Muslims regard the ‘re-introduction’ of the criminal offences and their respective punishments as defined by traditional Islamic jurisprudence (*fiqh*), as a long-awaited step of decolonization. Islamic law was applied in both criminal and personal matters in Northern Nigeria until the advent of British colonial rule, which was established in the aftermath of Lord Lugard’s military victory over the Hausa-Fulani-dominated Sokoto Caliphate in 1902/03. (p. 318)

Weimann observes that ‘[f]or many Muslims the slogan of “re-introducing Sharī‘a” had become linked to the hope of building a just, equitable and democratic society’ (p. 320). He notes, however, that this codification of Islamic criminal law ‘has changed the way in which justice is administered. Instead of relying on their knowledge of the classical works of Maliki *fiqh*, the advice of the “*ulamā*” or Muslim scholars, and other instruments of Islamic law, judges in Sharī‘a courts are now required to base their judgments on the letter of the codes’ (p. 322). He then proceeds to identify the different problems emanating from the exercise. Weimann also provides a comprehensive analysis of the relevant codified laws and the regional distribution of the prosecuted cases under the codes in the twelve northern states, concluding with an analysis of ‘the political and socio-political consequences of the introduction of Islamic Criminal Law in Northern Nigeria’ (p. 357).

Chapter 15, ‘Punishment in Islamic Law: A Critique of the Hudud Bill of Kelantan, Malaysia’, by Mohammad Kamali, examines the adoption of the application of Islamic criminal (*hudūd*) law by the State Legislature of one of the states in Malaysia in 1993 and analyses the criticism that followed its adoption within the general context of the philosophy of punishment under Islamic law. The essay begins with the observation that ‘[t]he Qur’anic outlook on punishment may be characterized by its dual emphasis on retribution and reformation’ but that ‘the conventional *fiqhi* approach to the formulation of the underlying policy toward the *hudud* has failed to be adequately reflective of the Qur’anic guidance on this subject’ (p. 363). The author submits thereby that ‘the Hudud Bill of Kelantan has also failed to be reflective either of the balanced outlook of the Qur’an or of the social conditions and realities of contemporary Malaysian society’ (p. 363). The essay gives an overview of the Hudud Bill, providing a summary of its provisions and the offences it covers. It also discusses the problems of the Bill such as its areas of conflict with the Federal Constitution of Malaysia, the status of non-Muslims under the Bill, issues over rape and proof of *zinā*, circumstantial evidence and issues over apostasy, among others, noting that the Bill exhibits a ‘literalist approach to the understanding of *hudud* [with] ... no attempt to exercise *ijtihad* over new issues, such that would fulfill the ideals of justice and encourage the development of a judicious social policy’ (p. 366). Kamali analyses the concept of *hadd* within the context of the Qur’an and *fiqh* generally, highlighting the Qur’an’s emphasis on repentance and the juristic views on that. He examines Islam as a total system noting that ‘[t]he implementation of *hadd* is generally seen as a necessary component of the Islamic resurgence movement and it is, as such, by no means confined to Kelantan or to Malaysia’ (p. 388) and he engages with the views of different prominent Islamic scholars on the subject. Kamali concludes that the Kelantan Hudud Bill ‘is a product of undiluted imitation (*taqlid*) failing to acknowledge the contemporary realities of Malaysian society, and make necessary adjustments to some of the *fiqhi* formulations of pre-modern times’ (p. 393). He poses the question ‘whether the attempt on the part of the State Government of Kelantan, even if it succeeds, is not likely to make the

Shari'a an object of fear at a time when our efforts should be in the direction of emphasising the more compassionate and humanitarian teachings of Islam that are universally appealing' (p. 393). He then concludes that

[a]s a principle of public policy, the hallmark of *siyasaḥ shar'iyah* must always be its pursuit and realisation of the overriding values and objectives (*al-maqasid*) of the *Shari'a*. It should be the manifest purpose of such a policy, in the area particularly of criminal law including the *hudud*, to facilitate necessary adjustment in the law so as to bring the conventional formulations of penal law in line with the Qur'anic vision of the basic objectives and philosophy of punishment. (p. 394).

Another state in Malaysia, Terengganu, also adopted the Syariah Criminal Offences (Hudud and Qisas) Bill in July 2002. The scope of implementation of both the Kelantan and Terengganu Islamic criminal law bills has remained controversial in view of the apparent ambiguity on the question of legislation in the area of criminal law and procedure between the Federal and State Legislatures under the Federal Constitution of Malaysia.

In Chapter 16, 'Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-sensitive Perspective', Asifa Quraishi critically examines the Zina Ordinance of 1979 enacted as part of the Islamization of laws in Pakistan in the 1970s. She critiques the law 'from an Islamic point of view' noting that '[u]nlike much of what is popularly presented as traditional Islamic law', the essay 'will reveal the inherent gender-egalitarian nature of Islam, which is too often ignored by its academics, courts, and legislatures' and that 'cultural patriarchy has ... colored the application of certain Islamic laws in places like Pakistan, resulting in the very injustice which the Quran so forcefully condemns' (p. 396). Quraishi begins by providing a critical overview of the adoption of the Zina Ordinance. She notes that when the law was enacted 'proponents argued that it codified the Islamic law of illegal sexual relations' (p. 398) but she challenges the accuracy of that claim. She asserts that the application of the Zina Ordinance in Pakistan placed 'a new twist and a renewed urgency on the question of its validity [in that] ... when a *zina-bil-jabr* (rape) case fails for lack of four witnesses, the Pakistani legal system has more than once concluded that the intercourse was therefore consensual, and consequently has charged rape victims with *zina*', citing some cases to illustrate that problem (p. 398). She argues that there is evidence that the police had 'deliberately failed to file charges against men accused of rape, often using the threat of converting the rape charge into a *zina* prosecution against the female complainant to discourage women from reporting' (p. 399). The essay then evaluates the Zina Ordinance against the concept of *zina* in the Qur'an, identifying areas of disparity. It discusses the drafting problems in the ordinance, critiquing particularly the problems with the provisions on rape, and analyses the concept of rape under Islamic jurisprudence. The author concludes that the result of the Zina Ordinance 'has been injustice to the women of Pakistan, and a disservice to Islamic law' (p. 427) and argues that based on classical Islamic law provisions, it was 'more than feasible for modern Muslim legislators to take the tools offered in Islamic jurisprudence ... to form a comprehensive gender-egalitarian law of rape, one which does not counteract the positive honoring of women which is inherent in the Quranic verses on *zina*' (p. 428). She thus calls for 'official legislative changes ... to give life to the Quranic verses honoring women' (p. 428).

Niaz Shah's essay 'The 2006 Women Protection Act of Pakistan: An Analysis' (Chapter 17) examines the legislative changes that have since been undertaken in Pakistan in relation to the

Hudud laws as proposed in the conclusion of Quraishi's essay above. It notes that 'the 1979 *Hudood* laws of Pakistan, especially the Zina Ordinance were discriminatory and led to the violations of rights of men and women, but women were the hardest hit victims (however) ... new legislation in 2006 has remedied the situation and the state of human rights violations on the basis of Zina Ordinance has changed' (p. 429). The essay gives a brief background to the five Hudud laws of 1979, noting that '[o]ut of all these ordinances, the Zina Ordinance was the subject – and rightly so – of severe criticism' (p. 429) and that the Protection of Women (Criminal Law Amendment) Act of 2006 (PWA) 'was passed with the objective "to provide relief and protection to women against misuse and abuse of law"' (p. 430). Shah notes that '[t]he PWA has made significant changes in the Zina Ordinance and minor changes in the Qazf Ordinance' (p. 430). First, he briefly discusses the original Zina Ordinance of 1979 and two previous amendments aimed at preventing the abusive use of the Ordinance, before providing a short but comprehensive analysis of the PWA, noting that the PWA has now 'removed most of the sections that were subjected to criticism' (p. 433). He discourses the question of rape before and after the PWA, noting, *inter alia*, that the police 'can no longer register cases of fornication or zina. The power has shifted to the court. Men and women cannot be put behind bars by the police on mere allegation of zina or fornication' (p. 435). He also examines the punishment of *qazf* under the new law, noting that the PWA has now 'given new powers to the court to punish cases of qazf (false allegation of zina) ... [thus] anyone making a complaint of zina has to think twice because the requirement of the current law is either bring sufficient evidence or face the punishment of qazf' (pp. 435–36). The author also discusses the question of marital rape and *li'ān* under the new PWA. He concludes that 'the PWA has had real impact on the rights of men but most importantly on women as they were the hardest hit victims of the Zina Ordinance' and that the new law 'has been proved to be a solid step towards preventing women's rights violations on the basis of false cases under the Zina Ordinance' (p. 438).

Islamic Law of Financial Transactions in Practice

The application of Islamic law of financial transactions has greatly increased with the introduction of modern Islamic banking and its consequent growth in different parts of the world. Different cases involving substantive questions of Islamic law of finance have been brought for adjudication before the courts in Muslim-majority countries as well as in secular Muslim-minority states in recent times.

Chapter 18, 'An Analysis of the Courts' Decisions on Islamic Finance Disputes', by Zulkifli Hasan and Mehmet Asutay, provides a detailed analysis of the different cases and court decisions on disputes that have arisen in the application of Islamic law of finance in different parts of the world. The global growth in the concept and application of Islamic law of finance has necessarily given rise to many disputes in the industry. The essay begins by providing a short background on the significant growth in Islamic law of finance globally, noting that one of the obvious problems within this growth pertains to 'the question of having a proper legal regime and framework' and that 'a number of Islamic finance cases have been brought before the courts for adjudication in different jurisdictions' in recent years (p. 442). The authors observe that most Islamic financial institutions today operate within 'mixed legal systems where the Sharī'ah (Islamic law) co-exists with common law and civil law legal

systems' requiring that 'every transaction, product, document and operation must comply with the Shari'ah principles as well as relevant laws, rules and regulations' (p. 441). They observe that 'where Islamic law is the ultimate legal authority, such as in Iran and Saudi Arabia, any issue in Islamic banking cases may not pose a big problem' but 'in the countries of mixed legal systems as in the case of Malaysia or in a non-Islamic legal environment such as in the UK' the issue can create significant problems (p. 441). Furthermore, the problem becomes more complicated where 'Islamic finance disputes involve parties from different jurisdictions in cross-border transactions' (p. 441). The essay analyses selected relevant court decisions on Islamic finance disputes in four different jurisdictions, namely Malaysia, the United Kingdom, India and the United States. It 'critically examines and reviews the different positions and distinctive approaches of courts in resolving Islamic finance disputes' (p. 443). After a comprehensive analysis of the cases in each of the jurisdictions, the authors conclude that 'a jurisdiction with a flexible and comprehensive regulatory framework with proper legal infrastructure to support the implementation of Islamic finance provides a better environment for the development and sustainability of the industry' (p. 468). They assert that '[c]onsidering the continuous legal uncertainties, the polemics of governing laws, the distinct interpretational approach and the different positions on the status of Islamic law as a recognised law of the land as argued and debated in the courts, it is important to have a proper, sound and clear legal environment to support the implementation of Islamic finance' (p. 469). They finally propose that '[i]n order to mitigate any sort of legal risk as well as Shari'ah non-compliance risks which are most likely to be disputed in courts, the ideal legal framework for Islamic finance must be characterised at least by four important features', which they go on to explain in detail (p. 469).

Islamic Judicial and Court Practice

Islamic court systems operate in different Muslim-majority countries as part of their application of Islamic law. Some secular Muslim-minority countries also make provisions for the establishment of Islamic *qāḍī* courts to adjudicate on issues of Islamic personal laws in respect of their minority Muslim populace.⁶ The four essays in this section analyse different issues relating to Islamic judicial practices in Malaysia and Thailand, Syria, Nigeria and Lebanon respectively.

In Chapter 19, 'Shari'ah Court Judges and Judicial Creativity (*Ijtihad*) in Malaysia and Thailand: A Comparative Study', Ramizah Muhammad provides a comparative analysis of 'the role played by Shari'ah Court judges towards the development of Islamic law and its application in Malaysia and Thailand' (p. 475). The essay discusses issues such as the nature and jurisdiction of shari'a courts in both countries, highlighting the differences 'in the administration of Shari'ah Courts, power of the judges, conflict of laws and political interests that made both countries "special" in their own ways' (p. 475). It notes that the application of Islamic law is limited to four southern provinces in Thailand and that 'a Thai Muslim is not subjected to Islamic law if he resides in other than those four provinces' while in Malaysia 'Islamic law is a state matter. All Muslims are subjected to Islamic law as prescribed in the

⁶ See, for example, S. 137 of the Constitution of the Republic of Gambia 1997 (as amended); and S. 169(b) and S. 170 of the Constitution of Kenya 2010.

Federal Constitution' (p. 475). Muhammad also compares and contrasts the qualification of shari'a court judges in both countries. She then examines the issue of judicial creativity, highlighting the need for Islamic court judges to resort to *ijtihad* when necessary under Islamic law. She provides analyses of cases tried by the shari'a courts in both Malaysia and Thailand and concludes that while in Malaysia 'Shari'ah Court judges were given an opportunity to utilize their judgment and creativity in deciding the cases' the situation in Thailand is much more circumscribed (p. 485).

Chapter 20, 'Why Aren't Women Shari'a Court Judges: The Case of Syria', by Monique Cardinal, examines the topical question of appointing women as shari'a court judges under Islamic law, and seeks to answer the question of 'Why haven't women been appointed to the shari'a courts in Syria?' (p. 490). Cardinal observes that while almost 200 women representing 14 per cent of the judiciary in Syria 'work at all levels of the ordinary courts, both civil and criminal ... they do not hold office in the personal status courts, special courts that apply codified religious law' including Islamic law (p. 489). She notes that 'Muslim personal status courts [are] referred to as shari'a courts (*al-mahākīm al-shar'iyya*) in the Judicial Authority Law' of 1961 in Syria (p. 490). In addressing the question, Cardinal notes that there is in fact 'no explicit legislation that prohibits the appointment of women to the shari'a courts in Syria' and that she was not aware of any 'official document or report which explains the reasons for the non-appointment of women to these courts or other personal status courts ... This unwritten rule is obvious to all and is part of the judicial tradition of each faith community' (p. 491). The main source of analysis for the essay is 'a series of interviews with judges and public prosecutors at Syria's largest court houses in Damascus and Aleppo' (pp. 491–92) conducted between May 2004 and July 2007. Cardinal presents both the majority and the minority views of the interviewees on the question and also examines the different classical and modern Islamic juristic opinions on the question of appointing women as shari'a court judges. She discusses 'how religious texts and classical Islamic legal doctrine are used today to undermine women's judicial power and oppose their appointment to the ordinary courts' (p. 489). By comparison she also discusses the amendment of the Greek Orthodox Personal Status Law of Syria in 2004 to allow women to be appointed as judges in the personal status courts of the Greek Orthodox Church in Syria. She notes, however, that '[f]emale judges and public prosecutors in Syria do not experience their exclusion from the shari'a courts as a form of discrimination' and that since the majority of classical Islamic jurists forbid women from holding judicial office, 'female judges and public prosecutors do not challenge their non-appointment to these courts [because] [d]efiance of religious law is interpreted as an act of non-belief' (p. 507). The conclusion of the essay discusses the possible means of changing this situation, making references to other jurisdictions such as Palestine where two women judges were appointed to the shari'a courts of Ramallah and al-Khalil in the West Bank in January 2009. The appointments were supported by the Chief Islamic Justice (*qāḍī al-quḍāt*) who argued that their appointment did not violate Islamic law, citing 'historical fact and Islamic legal opinions to substantiate his view' (p. 514). The essay concludes with the observation that

We can assume that the Palestinian example of female judges appointed to the shari'a courts is an overt recognition of the competence of women working in the legal profession ... a tacit espousal of the principle of equal opportunity for equal merit, a principle applied today in the judicial selection process in most jurisdictions. (p. 516)

In Chapter 21, 'Kadis (Judges) of the Sharia Court of Appeal: The Problems of Identity, Relevance, and Marginalisation within the Nigerian Legal System', A.A. Oba examines the position of the Kadi of the Sharia Court of Appeal in the Nigerian judicial system, arguing that it 'reflects well the inferior position of Islamic law in relation to the common law in the Nigerian legal system' (p. 519). Oba notes that the 'general attitude of many legal practitioners to the Sharia Court of Appeal and the Customary Court of Appeal is that these courts will eventually disappear and their jurisdiction will merge into that of the High Court. Kadis are considered as aberrations within the judicial system' (p. 519). He asserts, however, that 'the Zamfara State initiative [in 2000] revived Islamic law and the status of Kadis' (p. 519) in the Nigerian legal system. He then analyses 'the position of Kadis before and after the Zamfara State initiative, and suggests what remains to be done to give Kadis a befitting place within the Nigerian legal system' (p. 519). He begins with a brief introduction of the history of Islamic law in Nigeria before providing a detailed analysis of the position of Kadis in Nigeria between 1960 and 1999 before the Zamfara State shari'a initiative of 2000, noting that the 'Sharia Court of Appeal was established for the defunct Northern region of Nigeria on the eve of independence in 1960' to replace the defunct Moslem Court of Appeal which was 'an inferior court with jurisdiction limited to Islamic personal law' (p. 520). In this section Oba examines the many issues of concern such as the status of the Sharia Court of Appeal, its jurisdiction in contrast with the High Court and the qualification for appointment as a judge of the Sharia Court of Appeal, arguing that both the '1979 and 1999 Constitutions placed Kadis in an inferior position' (p. 524). He also examines the participation of legal practitioners in the administration of Islamic law in Nigeria, the mode of addressing judges of the Sharia Court of Appeal, the Anglicization of Islamic law and the 'identity crisis of Kadis' among others. He then analyses the impact of the Zamfara State shari'a initiative on the position of Kadis in Nigeria, noting that the Sharia Penal Code promulgated under the new initiative replaced the old Area Courts in the state with Sharia Courts and granted the Sharia Court of Appeal 'exclusive appellate jurisdiction in all Islamic civil law matters decided by the Sharia Courts and in all criminal appeals arising from the Sharia Penal Code in cases where the appellant is a Muslim. By this masterstroke, many of the problems highlighted earlier ... disappeared' (p. 535). Oba observes, however, that '[i]n spite of the Zamfara State initiative, the prospect of advancement of Kadis within the country's judicial hierarchy remains the same. Kadis who are not legal practitioners still cannot advance beyond the Sharia Court of Appeal' (p. 536). He concludes that '[a]lthough the High Court, the Sharia Court of Appeal and the Customary Court of Appeal are courts of co-ordinate jurisdiction [in Nigeria], the law has in many ways placed the High Court above the other two courts' (p. 536). He then suggests ways by which this position could be corrected.

Finally, in 'The Judge as Tragic Hero: Judicial Ethics in Lebanon's Shari'a Courts' (Chapter 22) Morgan Clarke examines the role of ethics in judicial practice under Islamic law. He presents an ethnographic analysis 'of judicial practice in Lebanon's shari'a courts and find[s] a tension between the identity of the judges presiding as Islamic religious specialists and their identity as legal professionals' (p. 543). Clarke notes that while '[j]ust applying the rules of the law is incompatible with true religious vocation, which demands personal engagement with the morally needy ... to ignore legal strictures is to be dismissed as a mere sermonizer' (p. 543). He observes that this situation is 'illustrative of a deeper tension between the use of rules and the disciplining of virtuous selves and argue[s] for a new anthropology of rules

to set alongside the new anthropology of ethics' (p. 543). The essay considers the practices of Islamic religious specialists (*shaykhs*) working within the state as Islamic judges in Lebanon, drawing 'on extensive ethnographic fieldwork (2003–04, 2007–08), primarily in Beirut in such explicitly Islamic contexts as mosques, the offices of religious authorities, Sufi circles, and ... Lebanon's state-sponsored shari'a (family law) courts, both Sunni and Ja'fari (i.e., [Twelver] Shi'i)' (p. 544). It begins with a historical, legal and ethnographic sketch of Lebanon's sharī'a courts and then goes on to contrast the approaches of a number of the judges in coping with what is a complex dilemma. Clarke notes that 'an Islamic judge can, in practice, ignore neither the demands of legal consistency and bureaucratic efficiency nor those of a truly religious vocation' noting that '[d]ifferent judges adopt different approaches in this regard' (p. 544). He then describes and critically analyses the styles of different judges observed during his fieldwork in the courts in balancing between the legal and the ethical in their judicial practice. He concludes that 'a consideration of the particular dilemmas facing Islamic judges in Lebanon raises a common (indeed, notorious) problem, one intrinsic to judicial ethics, at least, in "legalistic" settings' and argues that 'there is an inherent tension between following the dictates of the law (where they are phrased as rules) and following the impulsion to justice that those rules are intended to secure' (p. 553). He asserts that '[i]n this tension lies the peculiar, contested, perhaps, ultimately, even impossible nature of judicial ethics' in relation to Islamic judicial practice (p. 553).

Conclusions

The essays in this volume demonstrate that the practical implementation of Islamic law is still recognized and continues to apply in one way or another, not only in Muslim-majority countries, but also in some Muslim-minority countries that provide for the application of Islamic law on family and personal law matters for their Muslim populace. A list of suggested further reading on the application of Islamic law in different parts of the world is provided after this introduction.

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