1 INTRODUCTION

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WHEN MUSLIMS DISCUSS the ethical imperatives of their faith regarding contemporary moral issues such as abortion, stem-cell research, or the treatment of racial or religious minorities, they will at one point consider what Shari'a says about these questions. All normative discussions within Islam, as well as between Muslims and members of other faiths, center on the content of Shari'a, a concept that can be roughly translated as Islamic religious law. What many Muslims regard as being determined by Shari'a, however, includes much that modern Westerners would not recognize as law. Handbooks on Shari'a have been in circulation since the ninth century and are still widely used by Muslim scholars today. A traditional handbook of Shari'a starts with acts of worship (Arabic *ʿibādāt*), for example, the five daily prayers and the ritual purity required to perform prayers, the month of fasting, or the alms tax. Next the manuals move to issues concerning human relationships (*muʿāmalāt*), such as marriage, divorce, inheritance, commerce, taxation, and war. These the modern Westerner might easily recognize as legal issues. However, Shari'a goes beyond what in the West would be considered legal discourse, for it extends to matters concerning proprieties of clothing, conduct between spouses, filial piety, behavior at funerals, and other questions that Westerners would treat not as legal, but as moral issues or mere etiquette. At the same time, Shari'a also provides answers to the most vital moral questions of the contemporary world, such as the legitimacy of violence or torture, just war, suicide and self-sacrifice, or the means of combating injustice.[1]

Over the centuries of Muslim history a vast amount of literature has been generated discussing these normative questions. The first impression one gets

from looking at this library is that of continuity and congruency. Legal authorities from many different centuries of Muslim history are quoted to determine the response of Shari'a to today's moral questions. When asked about the notion of just war between nations and the rules for conducting warfare, for instance, contemporary Muslim scholars often refer to one of the earliest treatments of this matter, that of the jurist al-Shaybānī (d. 805).[2] On achieving a balance between combating injustice and not interfering in other people's affairs, the jurist and theologian al-Ghazālī (d. 1111) is still regarded as one of the most prolific experts.[3] Al-Ghazālī, who was also one of the foremost authorities on legal theory in Islam, understood Shari'a as human efforts to derive congruent rules and norms from divine sources. He stressed that although the sources of Shari'a are divine and go back to a revealed text, the establishment of Shari'a is a distinctly human enterprise that requires its own kind of scholarship. During the course of its development this understanding changed, and by the twentieth century the meaning of the term *Shari'a* had been subtly but fundamentally transformed. Contemporary Shari'a is in many ways different from what classical scholars such as al-Ghazālī had in mind. This collection of essays is devoted to a further understanding of what Shari'a means in the contemporary context.

SHARI'A IN THE CLASSICAL MUSLIM PERIOD

"Islamic religious law" is at best only an approximate translation of the term *Shari'a*. The origin of this word is Arabic, yet today it appears in all languages used by Muslims, including English.[4] It evolved as a technical term in the early period of Islam during the seventh and eighth centuries. Originally the Arabic word *sharīʿa* described the practical aspect of religion. This is how it is used in the Qur'an, for instance, where God is quoted as saying, "We have set you on a *sharīʿa* of command, so follow it" (Q 45.18). But the word *sharīʿa* does not play an important role in the Qur'an; this is, in fact, the only time it appears.[5] In the context of this Qur'anic chapter (*sūra*) the verse refers to the fact that Islam is a new religion that is distinct from, for instance, Judaism or Christianity. Its distinction comes with new kinds of worship and new ritual duties—the five daily prayers, for instance—and most interpreters translate *sharīʿa* in this verse as "rites," "the right way of practicing the religion," or simply as "the way." Muslim lexicographers give a wide range of explanations of how the Arabic word *sharīʿa*, which initially referred to the place around a well and whose original meaning may have also been connected to "path," "road," or "highway," came to refer to

the correct way of practicing a religion.[6] These shifts of meaning are not always clear. What is important is that within Muslim discourse the word *Shari'a* came to designate the rules and regulations that govern the lives of Muslims.

Once it became clear that Islam had its own ritual duties and rules for human actions, these regulations needed to be identified. The academic discipline whereby Muslim scholars describe and explore Shari'a is called *fiqh*, Islamic jurisprudence. Doing *fiqh* is a human activity and cannot be ascribed to God or to His prophets, although revelation and prophetic insights are, in fact, the sources from which the Muslim scholar who does *fiqh*—the *faqīh* or Muslim jurisprudent—takes his clues. The discipline of *fiqh* arose in the early days of Islam, during the eighth century or probably even earlier.[7] By the early ninth century Muslim scholars had developed two or three different methodologies for how the norms of Shari'a can be determined. Most of them place the Qur'an and the practice of the Prophet Muhammad at the center of Muslim jurisprudence and differ only regarding the balance between these two sources and the weight of third sources such as commonly practiced law or legal analogies. These slightly different approaches to the sources of jurisprudence are reflected in four different schools (sing. *madhhab*) of law, each of which has its own authorities and teaching tradition.[8]

The centrality of the Qur'an for Shari'a stems more from theological considerations than from the ability to generate substantive legal rulings from its text. Although a number of the most central judgments in Islamic law are derived from the Qur'an, the majority of rulings in Shari'a derive from the practice of the Prophet Muhammad. Information about his actions and legal decisions was collected from oral reports. These reports were gathered as *ḥadīth*. Since the ninth century they have been available in six large collections that Sunni Muslims regard as canonical.[9] Muslim jurisprudence in the classical period aimed at reducing all new legal problems to existing rulings in the Qur'an and the corpus of collected *ḥadīth*s. Because there are only a few legal rulings in the Qur'an, and because even the great number of cases in the *ḥadīth* corpus cannot exhaust all future legal problems, Muslim jurists understood that the most important technique in Muslim jurisprudence is to reduce new cases to ones that are mentioned in these two sources. This was done by legal analogy (*qiyās*). Thus the Qur'an, *ḥadīth*, analogy with the rulings contained in these two, and a fourth source, the consensus of legal scholars (*ijmāʿ*), which has always been of limited relevance, make up the four sources of classical Muslim jurisprudence (*uṣūl al-fiqh*) for Sunni Islam, which has based most of its rulings in

Shari'a on the example given by the Prophet Muhammad's actions. In Shiite Islam the actions and sayings of the early imams, especially the first imam, ʿAlī ibn Abī Ṭālib (d. 661), and the sixth, Jaʿfar al-Ṣādiq (d. 765), are an important additional source.

The complexities of legal theory soon made Muslim jurisprudence into a professional discipline with its own experts, handbooks, and encyclopedias. Practitioners went through a long and thorough education in professional schools, *madrasa*s or seminars, such as the influential al-Azhar college in Cairo. If one had asked two hundred years ago what Shari'a was, the answer would not have been difficult. It was the norms studied by students at places such as al-Azhar from teachers who had gone through a long and rigorous education in *fiqh*. These authorities stood in a scholarly tradition with earlier ones and wrote books in the established genres of legal literature. After graduation the students of Shari'a became legal experts and collaborated in the implementation of Shari'a in Islamic countries. Two hundred years ago Shari'a was the law of Muslim lands.

But *law* is not the right word to describe Shari'a before the nineteenth century. There were no documents, no paragraphs, and no commentaries that one could refer to as "the law." Rather, Shari'a was a practice and a process of deriving law and of adjudicating disputes. These processes were associated with specific institutions and techniques of education and adjudication. The form of derivation and instruction of Shari'a cannot be separated from its content. "Law" was established not by issuing legal codes or by the decisions of principal authorities such as high courts or central administrations, but rather by the rules of its legal discourse. In traditional Sunni religious writing, texts always refer to previous texts; by discussing the rulings and decisions of previous generations, these texts set a standard of what is accepted by the community. This led Sunni jurisprudence to become a legal discourse whose first source of normativity was the variety of the views discussed and accepted by its scholars.[10] Before the nineteenth century Shari'a was never understood as an abstract code, but rather as a series of commentaries on particular practices and of commentaries upon those commentaries.[11]

It has already been said that in classical Arabic the word *Shari'a* refers to the law that God has ordained through revelation.[12] Shari'a is understood as divine law and practiced in a realm that connects religion and law. Historically, law and religion have always been close companions, not only in Islam but also in the Western tradition. Plato (427–347 BCE), for instance, requires that all citizens of

a polis must accept three basic religious tenets, namely, that there are gods, that they care for humans, and that they cannot be easily bribed by sacrifices given on their altars.[13] People are to believe that the gods implement the laws and that they punish humans for transgressions. Most legal traditions of antiquity include the belief that the gods gave humans their laws. This is the case in the Mosaic law of Judaism that developed in the books of Exodus and Leviticus, believed to be composed around the seventh century BCE. The notion of a divine law that has its source in prophecy, that is, in the verbal pronunciation of divine norms, imperatives, and promises of rewards, as well as punishments, became fundamental for all three monotheistic religions of the Mediterranean basin, Judaism, Christianity, and Islam. Even when the societies shaped by these religions consider themselves thoroughly secularized, their practice of law often cannot hide the religious provenance of many of its procedures. Courthouses are designed to produce respect and awe and often resemble ancient temples. Judges and lawyers dress in robes, just as ancient priests did. People's behavior at court follows certain procedures that resemble a ceremony. They stand when an individual in a special robe—the judge—enters the room where the law is practiced and rise when this individual leaves the room. Lawyers begin their address with certain formulas, such as "May it please the court," and end it with a "pray" for relief. A higher authority than their own words must back everything they say in court. Indeed, they do best if they do not use their own words but quote from higher authorities.[14]

These similarities suggest that the practice of law and the practice of religion are not as far apart as they seem at first. There is a structural similarity between the two because both look at superior authorities.[15] Working with authority in both cases means that they work with authoritative texts. The meaning of these texts and the authority they convey are not within them but are established through the reading of these texts and their interpretation. A constitution, for instance, conveys authority not only from the words it contains but also through the context that is known to its reader, namely, that a political community adopted the text as a foundational document for the norms that govern political actions.

Islam's understanding of divine law arose from the same tradition as Judaism and Christianity. Muslim jurists accepted the validity of the Mosaic law, as well as the law practiced by Christians. The Muslim point of view on earlier laws that are based on revelation assumes that they are, like Islam, genuinely inspired by divine decree. They have, however, been abrogated by the clear message of the

Qur'an and the law that comes with it. Islamic revelation is considered a more fruitful and a more precise source of divine law than any earlier revelation. However, although there are many similarities in these three traditions, there is an important difference. Compared with the Old and the New Testaments, the character of the Muslim revelation is a much more literal address to its reader. In the Qur'an God speaks to Muhammad in the second person ("you") and through him to the whole of humanity. Often Muhammad is bypassed, and the "you" in the text is an address to humanity as a whole. The only parallel in the two earlier books of revelation would be the Ten Commandments of Exodus 20.2–17 and those passages in the four Gospels of the New Testament in which Jesus, who is regarded as part of the Holy Trinity, is quoted literally. These words can be understood as God's direct address to mankind. Other parts of the Old and the New Testaments are often considered equal in holiness and authority. Their textual manifestation, however, is that of a text written by humans to humans, even if the authors are considered prophets or evangelists and the words directly inspired by God. The narration in the Qur'an is a more straightforward imperative from God to humanity. The readers find themselves directly addressed—a powerful feature of the text that might be responsible for much of the success of Islam as a world religion.

The most important branch of Muslim jurisprudence, that of Sunni Islam, emerged in the ninth century CE from a dispute about the nature of Muslim revelation. Rationalist theologians of the now-defunct Muʿtazilite school of theology had suggested that the Qur'an is a document that God had created like any other of His creations. When this view was adopted by the caliph al-Ma'mūn (reg. 813–33), it prompted a vigorous reaction from a more conservative group of Muslim scholars. These scholars were the nucleus of what is today called Sunni Islam. They argued that the Qur'an represents God's speech, and as such, it is one of God's eternal attributes. Therefore, unlike any other of God's creations, the Qur'an cannot be created, but must be coeternal with God. The close connection between the text of the Qur'an and of God as its author almost led to an identification of the two. The dogma of the existence of the Qur'an from eternity was an undisputed cornerstone of Sunnism from the ninth century to the beginning of the twentieth. Even if this dogma plays almost no role within contemporary Muslim debates on the Qur'an, it has deeply shaped the Muslim understanding of its revelation. This is true not only for Sunni Muslims—who make up 80 percent of the contemporary Muslim community—but in a similar way also for Shiites and other smaller branches of Islam. For Muslims, the

Qur'an is the door between the manifest world of our experience and the transcendence of God. It is the bridge between the Creator and His creation. Some interpreters have coined the word *inliberation* for this process.[16] In Christianity the divine word (the *logos* of John 1.1) became flesh in Jesus Christ as its incarnation, but in Islam the divine word became a book.

This difference may lead one to the conclusion that Islam developed a unique understanding toward divine law and its sources that is different from that of Judaism or Christianity. The contemporary significance of Shari'a, one may argue, can only be explained out of the history of its central role within Islamic scholarship of the past. Shari'a is the *Wesenskern*, the essential core of Islam, the quintessence of the true Islamic spirit, and the decisive expression of Islamic thought.[17] This essentialist view leaves little room for Shari'a to change or to be understood differently by different generations of Muslims. In contrast, this book wants to explore how the contemporary understanding of Muslims is different from that of previous generations. An essentialist view, for instance, downplays the strength of the intellectual convulsion that has been caused by the confrontation with European thought and culture since the early nineteenth century. Modern Muslim theology, which is the ultimate home of jurisprudence of the divine law, is in many ways different from its predecessors during classical Islam and the Muslim Middle Ages. We have already said that the dogma of the uncreatedness of the Qur'an plays almost no role in contemporary debates. Having been taught and discussed for many centuries, it flew out of the textbooks of Muslim theology, so to speak, when Muhammad ʿAbduh (1849–1905), the most influential Muslim theologian of the period around 1900, published a book in which he said that the Qur'anic text and its recitation are created. This and his casual remark that he could not comprehend the historical dispute on the eternity of the Qur'an prompted harsh criticism from his peers at al-Azhar.[18] Later, when his student Muḥammad Rashīd Riḍā (1865–1935) reedited ʿAbduh's work on this subject, he omitted the controversial passage and added a long footnote that responds to the complaints.[19]

Rashīd Riḍā's reaction illustrates the ambiguity of modern Muslim thinkers toward the classical heritage of Muslim theology and jurisprudence. On the one hand, they wanted to avoid the impression of introducing innovations that prior generations of Muslim authorities considered heresy. On the other hand, they understood that some teachings had simply become obsolete. They recognized and often preached the necessity for widespread *ijtihād*, intellectual efforts that lead to new kinds of teachings. A widespread strategy in dealing with

the dilemma between tradition and innovation was the silent omission of outdated teachings even if they had been of key significance in the past. Cornerstones of classical Sunni dogma, such as God's determination of all events in His creation, the "acquisition" (*kasb*) of human actions, or the incapacity of humans to develop sound moral judgments independent from revelation, are hardly mentioned in contemporary Muslim discourse.

SHARI'A IN THE ERA OF MODERNIZATION AND WESTERNIZATION

The nature of Shari'a, its practice, and its understanding changed most drastically during the nineteenth and twentieth centuries. The crushing defeat of the Egyptian-Ottoman army by Napoleon's expeditionary force and the short-lived French occupation of Egypt (1798–1802) led in the subsequent decades to several circles of modernization in Egypt and the Ottoman Empire. Other Muslim nations followed suit. Although the reform programs and the results were not the same and did not happen at the same time, each was guided by the perception that traditional Islamic law, the Shari'a practiced in the seminaries and implemented as the law of the land, was an obstacle to progress and antithetical to modernization.[20] The reforms affected the educational as well as the legal system and led to a decline of the traditional *faqīh*'s significance, status, and self-confidence. The government opened secular schools inspired by the European polytechnics, first for the military and bureaucracy elites and later for all higher education. In the Ottoman Empire the government took control over the schools away from Muslim scholars and opened its own secondary schools during the Tanzimat era (1839–79). The new elites of the increasingly modernizing Muslim countries were educated outside the curriculum of Shari'a studies. They challenged the belief that an education in Shari'a was sufficient—or even helpful—to administer the Muslim countries and their judicial system.

Most important, the state expanded its new ideas of jurisdiction into areas previously reserved for Shari'a. It introduced legal codes that were influenced—sometimes copied wholesale—from European prototypes. During the Tanzimat era the Ottoman Empire formed legislative councils that were beyond the control of Shari'a-trained jurists. They drew up the Penal Code (1840 and 1859), the Commercial Code (1850), and the Imperial Land Code (1858), all influenced by French law. With the new codes came a system of secular courts that replaced Shari'a courts and restricted their activities to the laws of personal statutes such as marriage and some transactions such as inheritance. This created an

institutional differentiation between "religious" and "worldly" (secular) law. Finally, even the practice of Shari'a law became the subject of government regulation. In 1877 the Ottoman government issued the Mejelle, intended as a civil code based on Shari'a. It codified large areas of Islamic law, mainly concerning transactions (*muʿāmalāt*), in order to apply it in secular courts and make it binding on all subjects, regardless of religion.[21]

Most Muslim governments followed the example of the Ottoman Empire and marginalized the Shari'a that was studied in the seminaries and applied in courts at the beginning of the nineteenth century. Those countries that came under direct European control, such as Algeria in 1830, India in 1858, Tunisia in 1881, or Egypt in 1882, often adopted the legal system of the colonial power. In hindsight, it is astonishing that this process met with little resistance from traditionalist legal scholars.[22] This may be explained by the fact that changes, which were ordered from above, were slow to reach the populace. The reforms came step by step over a long period of time. Nowhere did they lead to an outright abandonment of Shari'a. Throughout the Middle East the decision was made to maintain two separate legal systems, one based on Shari'a and the other on Western codes and procedures.[23] In Egypt Shari'a courts were reorganized during the 1880s in a hierarchical system of tribunals. This system has been adopted in most other Islamic countries, including Saudi Arabia.[24] Traditionalist Muslim scholars—the *ʿulamāʾ* who had been educated at colleges such as al-Azhar—continued to play an important role in society, particularly in education. At the turn of the twentieth century the majority of Egyptian Muslims were still receiving their education from religious schools.[25] Traditional Shari'a still mattered a great deal for them. Although it had lost much of its significance in the courts, it still dominated expectations of moral conduct and virtuous behavior. Stripped from the practice of actual law, Shari'a jurists still dominated the moral discourse of Muslim countries. They continued to be asked for their guidance, and they issued their views in the form of *fatwā*s, nonbinding legal opinions that carried a moral weight equivalent to the authority of their authors. In principle, at least, traditional Shari'a always made a distinction between law and morality. Unlike European jurisprudence, however, where the law is taught in its own faculty and where morality is a branch of philosophy and the humanities, the practice of Shari'a includes all branches of normative human behavior.

A new era of the meaning of Shari'a began during the 1930s to the 1950s and coincided with the full implementation of the legal reforms started in the nineteenth century. During this time Egypt gradually abolished Shari'a courts—and

with them the system of parallel legislation—by amalgamating them with the civil courts.[26] This provoked opposition from the Muslim Brotherhood, a religious, philanthropic, and political movement founded in 1928 by Ḥasan al-Bannā (1906–49). By now Egyptian publishing houses had started to issue literature on classical Islamic jurisprudence. The textbooks of traditionalist education became accessible to all, and Shari'a could be studied as a discrete subject, like all others.[27] No particular training was necessary to participate in debates regarding the content and proper role of Shari'a. Subsequently the word *Shari'a* assumed a new set of meanings.

In the 1920s reformers such as Muḥammad Rashīd Riḍā and ʿAbd al-Razzāq al-Sanhūrī (1895–1971) argued that French law was culturally inappropriate for Egypt and that the legitimacy of laws should be judged against Shari'a.[28] In the late 1940s and early 1950s leaders of the Muslim Brotherhood such as ʿAbd al-Qādir ʿAwda (d. 1955), a civil-court judge educated in French law, turned this argument in a radical direction. ʿAwda claimed that a Muslim's first commitment has to be toward the implementation of Shari'a. Muslims were obligated, he said, not only to ignore but even to combat those laws that contradict Shari'a.[29] The publication of Sayyid Quṭb's (1906–66) programmatic pamphlet *Milestones* in 1964 moved the call for the application of Shari'a to the center of the new Islamist movement.[30] Sayyid Quṭb is typical of this new kind of contemporary Shari'a theorist. He was self-taught and had no formal training in the Islamic sciences. The formative period of his religious thinking fell into a time when the works of the conservative Muslim theologian Ibn Taymiyya (d. 1328) were rediscovered and reintroduced into Muslim discourse. During the 1920s Muḥammad Rashīd Riḍā chose a number of short programmatic texts by Ibn Taymiyya to be serialized in his widely read journal *al-Manār*.[31] Ibn Taymiyya had lived at a time of religious confrontation between Islam and other religions, when the Crusaders' occupation of Muslim lands had just ended and the effects of the Mongol invasion were very present. His sharp distinction between Islam and non-Islam seemed to provide applicable answers for Egyptians of the 1920s and 1930s. Although nominally independent since 1923, Egypt still hosted British troops and depended greatly on decisions made in London or by the British high commissioner in Cairo. Ibn Taymiyya, who in the thirteenth century had preached the virtues of Islamic identity and *jihād* against infidel rule and domination, appeared like a neglected voice that inspired the newly formed Islamist movement with his uncompromising stand against any kind of non-Shari'a rule.

In the law-finding processes of traditional Muslim jurisprudence, Ibn Taymiyya was one of the many voices in the concert of Shari'a. Sayyid Quṭb and others in his generation, however, were looking for a set of identifiable rules that make up *the* Shari'a. This quest is most evident in Quṭb's influential commentary on the Qur'an.[32] Once those monolithic rules had been identified, any law that did not conform to them was branded a violation of Islam. For Islamists such as Sayyid Quṭb, divine law was understood as a law of absolute validity—the one single law that God has given to His creation and that all lower law has to conform to. Sayyid Quṭb's understanding of Shari'a is significantly different from that of classical Islam. His usage of *Shari'a* must be studied with other parameters in mind than those that have been developed for the study of classical Muslim jurisprudence. The Muslim Brotherhood's view of Shari'a never included the four classical schools of law as its manifestations.[33] But no inquiry into contemporary Shari'a can do without the results of the study of classical Islam and its jurisprudence. The example of the intellectual connection between Sayyid Quṭb and Ibn Taymiyya shows that the dynamic of contemporary Muslim thinking is such that it always connects itself to a context in classical Islam.

Normative practices, as well as the legal education according to traditional processes of Shari'a, are still alive in many Muslim countries. Modernized versions of a traditional *madrasa* education in the legal theory of Shari'a (*uṣūl al-fiqh*) can still be found in such places as al-Azhar in Cairo or the Qarawiyyīn mosque and university in Fès, Morocco. Many of the modern universities in the Middle East offer courses of study that focus solely on Islamic law. Their graduates often have no chance of being integrated into the modern Western-oriented legal apparatus. The educational goal of these courses of study is, in fact, not very different from that of the classical *madrasa* education. All these places use modern textbooks that aim at enabling the student to read, understand, and do active research on the classical body of literature on Shari'a, most important, the works on its methodology (*uṣūl al-fiqh*).[34] Yet the perspective on Shari'a that these new textbooks take is often a distinctly modern one in the sense that Shari'a is approached from the perspective of a codified law. Today's students of Shari'a often encounter it in the form of articles embedded in Western-inspired codes. Modern professors sometimes clothe the Islamic legal tradition in Western garb in order to convince law professionals at the Western-inspired law schools that Shari'a is as modern and universal as the Western tradition is perceived to be. The diverse tradition offered in the classical literature

on Shari'a and its theory has effectively become conflated with what in the Islamic context is called *qānūn*, the law practices in contemporary Muslim states, which are mostly imported from the West.[35]

Where the tradition of the classical approach to find legal judgments among the diverse opinions of a specific school of law survived, it often merged with the modernist understanding of Shari'a as the one and only eternal divine law, which can be expressed in simple articles. This is also true for Shiite Islam, where the tradition of premodern Shari'a scholarship managed to survive more substantially than in Sunni Islam. The Shiite community continuously upheld a system of institutionalized learning in the *madrasa*s and *ḥawza*s of Najaf in Iraq or Qom and Mashhad in Iran. When their graduates were excluded from the modern legal system, the schools were nonetheless able to generate their own financial resources from among the Shiite community. Before 1979 they had never come under the control of the expanding modern nation-state. Unlike key Sunni institutions such as al-Azhar, the Shiite *madrasa*s and *ḥawza*s did not become subject to several waves of modernization of their curricula and an effective bureaucratization of their teaching activities. The Shiite schools, on the other hand, lost much of their social base to state bureaucrats, populist dictators, liberal modernists, and Muslim activists, none of them trained in Islamic law. What was left of the elaborate *madrasa*-based system of Shiite jurisprudence in the 1960s was of little legal consequence for Iranian and Iraqi society.

From the dwindling normative relevance of the study of Shari'a—both Shiite and Sunni—emerged during the second part of the twentieth century a Shari'a that often had little to do with the law that was taught at the *madrasa*s of old and practiced at the premodern Shari'a courts. This new type of Shari'a was advocated by Islamic activists who were unified by their opposition to the secularizing state and its law. During the twentieth century intellectuals such as Ḥasan al-Bannā, Sayyid Quṭb, and Abū l-Aʿlā Mawdūdī (1904–79), who were self-trained in their competence of Islamic law, led the call for the implementation of a Shari'a that in this form had never existed in premodern times.

SHARI'A IN THE CONTEMPORARY CONTEXT

Shari'a today means different things to different Muslims. This volume brings together contributions that look closely at the various meanings of Shari'a for Muslims today. Some of them connect more closely to the classical period of Islam, when Shari'a was the law of the land, others to the modernist period, when Islamist thinkers revived the concept of Shari'a and made attempts to establish

a unified vision of what Shari'a entails. Each of these contributions focuses on a small facet of what Shari'a can mean to contemporary Muslims.

The process of canonization of law during the nineteenth and twentieth centuries has shaped the understanding of Shari'a probably more than anything else. Many Muslims today understand Shari'a as a canonized code of law that can be easily compared with the European codes, which were introduced during this period. In the 1940s ʿAbd al-Qādir ʿAwda wrote a detailed comparison of the criminal justice legislation of Shari'a and the French legal tradition that was and still is practiced in Egypt. The book is still an influential best-seller.[36] It promotes the idea that the content of Shari'a is methodologically on an equal footing with European law, and the two can thus be easily compared with one another. ʿAwda stood at the beginning of the movement that rediscovered Shari'a as a source for contemporary Muslim law. Because he was a judge active in the Egyptian judicial system, his legal thinking was deeply rooted in European-style codes of law. His generation of Muslim thinkers—and this includes such influential authors as Sayyid Quṭb, as well as Mawdūdī—shaped the contemporary understanding of Shari'a as a law where the individual sayings of the Prophet Muhammad collected in the books of *ḥadīth*, as well as the individual verses of the Qur'an, are viewed almost as if they were paragraphs in a Muslim civil code.

This understanding has profound consequences. In the premodern period, when Shari'a law was practiced by Muslim jurists, these verses and sayings of the Prophet were contextualized in the process of law. Legal literature of a secondary nature, namely, procedural law and its commentaries, played an important role in this process. Almost every legally important *ḥadīth* was surrounded by interpretations that suggested or demanded how the law that derived from it was to be practiced. In the case of apostasy from Islam, for instance, Muslim jurists developed a certain legal institution that almost entirely circumvented the harsh ruling that can be found in the *ḥadīth* corpus. There Muhammad is quoted as having said, "Whoever changes his religion, kill him!"[37] In the early period of Muslim law, jurists agreed that before this imperative is to be applied, an accused apostate must be given a chance to repent and return to Islam. This "invitation to repent" (*istiṭāba*) soon became a legal loophole that prevented the application of the harsh law of apostasy in all but the most manifest cases, namely, when someone was intentionally provoking the Muslim community and its judges. When Islamist activists managed to apply the law of apostasy in the 1980s in the Sudan and in the 1990s in Egypt, they disregarded all premodern injunctions and did not adress any

invitation to repent (*istiṭāba*) to their victims. They rather pointed to the prophetical *ḥadīth* and demanded that its literal contents be put into practice.[38]

Similar observations can be made in applications of the law of adultery. Again, there is a seemingly clear injunction in the Qur'an that demands the harsh punishment of one hundred lashes for those involved in extramarital sexual relations (Q 24.2). In the premodern period, however, the procedural law set huge obstacles before a public flogging could take place—some of them prompted by ambiguities in the text of the Qur'an (cf. Q 4.15–16). In recent cases in Nigeria, for instance, the Muslim jurists neglected the textual ambiguities, as well as the traditional procedural law of Shari'a, and focused entirely on the injunction in verse 24.2, as if it were a paragraph in a code of law. Hence codification has often limited the flexibility of premodern Shari'a law. In the premodern period individual circumstances were highly important and often influenced the ruling more than abstract legal reasoning. In a codified law, a defined case simply needs to be matched with an established ruling, and this often leaves little room for flexibility.

In contemporary Shari'a one also comes across what is effectively a pick-and-choose mentality with regard to the rulings that were practiced in the premodern period. Authors such as ʿAwda, Sayyid Quṭb, and Mawdūdī meant to take the norms they identified as being Shari'a not from the classical and premodern periods of Islam—that is, the period between 700 and 1800—but rather from the earliest period, before 661. They believed that after 661, when the era of the "four rightly guided caliphs" ended, corruption set in and created a distance from the original spirit of Shari'a that increased with time. Hence these twentieth-century thinkers focused even more on the Qur'an and the *ḥadīth* corpus than classical Shari'a does, and they neglected the procedural law that was developed in the centuries after 661. This is a thoroughly "modern" understanding of the earliest Muslim sources.

Pick-and-choose also applies to the contents of the law. Both the earliest sources of Shari'a and its practice in premodern Muslim societies set few limitations on the possession of slaves, for instance. Yet no contemporary advocate of Shari'a would argue that today's Muslims should apply these rules and become slaveholders.[39] In cases where the direct comparison between Shari'a and the tradition of Western law is too much in favor of the latter, proponents of Shari'a often abandon it. In fact, when contemporary Muslims call for a revival of Shari'a, they can mean a range of different options. For some, revival may include only the adaptation of selected rulings that go back to the Prophet Muhammad.

For others, it means the establishment of an allegedly pure Shari'a legislation in which the whole Western tradition of law is replaced with a code of law that is based on one of the many types of premodern Shari'a scholarship. However, as the example of slavery shows, every contemporary call for Shari'a, even the purest, is in practice a call for a mixed judicial system in which premodern Shari'a legislation is to some degree enriched or replaced by the Western legal tradition in addition to the replacement of the discursive nature of premodern Shari'a scholarship by an understanding of Shari'a as a code of law.

Language is another aspect where the contemporary call for premodern Shari'a legislation reveals its distinctly modern character. The earliest sources of Islam, including the Qur'an and the *ḥadīth* corpus, are in Arabic, the same language that is used by many interpreters today. The meaning of certain words in that language, however, changed over the centuries. Shahrough Akhavi discusses in Chapter 8 a contemporary debate among Iranian intellectuals about what the Arabic word *ḥukūma* really means. This debate is just one of many reflections of the Islamist concept of God's sovereignty of earth—God's *ḥākimiyya*—as it first appears in the works of Mawdūdī and Sayyid Quṭb in the mid-twentieth century. This idea has become a key element of most Islamist political practice today. The Qur'an contains numerous verses where it is said that God is the one who judges human affairs. He is the only one whose judgment humans should heed. Hence they should adopt these judgments as their own. Qur'an 5.44–45 says, "Those who do not judge by what God has revealed, they are the unbelievers . . . and the wrongdoers."

The Qur'an expresses this judgment with the Arabic verb *ḥakama,* which may simply be translated as "to judge, to pass judgment." For Sayyid Quṭb and Mawdūdī, who read these verses with a contemporary understanding of the Arabic vocabulary, the verb *ḥakama* means not only "to judge" but also "to rule." It is, in fact, among the many small changes in the Arabic language over the past centuries that the verb *ḥakama* also assumed the meaning "to rule." The active participle "he who passes judgment" or "a judge," *ḥākim* in classical Arabic, may in modern standard Arabic also mean "he who rules" or "a ruler." Yet this meaning is not known to have applied to the Arabic of the Qur'an, and none of the classical commentators of the Qur'an reads it that way. For them, the verses that use *ḥakama* refer to God's judgment about human deeds, and not to God's rule on earth.[40] Verses such as the quoted Q 5.44–45, however, are, for Sayyid Quṭb, Mawdūdī, and many Islamist thinkers who have been inspired by them, key revelatory witnesses that God claims to exert a political rule

(*ḥukm*) over humans. If humans heed only His rule, then they must apply His rules—Shari'a—in their communities. The Qur'an says in Q 5.44–45, they argue, that those who do not rule by what God has revealed are unbelievers and wrongdoers. This Qur'anic verse means, according to Sayyid Quṭb, that the governments of contemporary Muslim states that do not apply Shari'a legislation are unbelieving (*kāfir*), and their rulers are not real Muslims. For Islamists who do not historically contextualize the language of the Qur'an, the call for Shari'a legislation has always been the most important imperative of the divine revelation. Sayyid Quṭb's and Mawdūdī's concept of *ḥākimiyya*, God's political rule in this world, reflects a distinctly modern understanding of the Qur'an's language.[41]

There is no question that Shari'a plays a more important role in the minds of Muslims today than during the early part of the twentieth century, the nineteenth century, and probably also the period before.[42] The contributions in this volume address the implications and ambiguities of Shari'a in the contemporary context. They analyze the current applications of Shari'a and the potentials and obstacles for its development into a modern legal system. These studies challenge the view that during the centuries of Muslim history, Shari'a has been an unchanged entity, and that contemporary Shari'a is the mere extension of its classical notion into our times, but they also point out the connections between classical Muslim scholarship and the positions on contemporary Shari'a.

Several contributions deal with the Islamist call for the implementation of Shari'a. In the second chapter Gudrun Krämer examines the place of values in contemporary Muslim debates. Classical Islamic scholars identified a set of five essential goods in society that Shari'a serves to uphold and to advance. Krämer asks which are the moral values most emphasized in the writings of contemporary Islamist authors from Egypt and from other Muslim countries such as Nigeria. Her inquiry leads to an investigation into the role and the understanding of justice in these debates. Islamist authors claim that justice is the key moral value of Shari'a, and that its implementation leads to a more just society than the ones that follow the Western legal tradition. Krämer asks critically whether the understanding of justice in these works relates to equality among all legal subjects or rather to a situation of *suum cuique*, where the legal subjects receive a certain share of rights according to their role or function in society and according to their gender.

In Chapter 3 Frank Griffel also looks into the writings of Islamist authors and explores the relationship between natural law and Shari'a in the thought

of their most influential writers in the twentieth century. Their position that Shari'a is identical to natural law is today widely used to legitimize the application of Shari'a in Muslim countries. These authors develop their position from Qur'anic verses that mention a divinely created universal human nature (*fiṭra*) to which the revelation of the Qur'an responds. This concept of Shari'a as a divine law that corresponds to human nature is sometimes regarded as a strong point of Islamist ideology. Griffel argues that the claim of Shari'a to be part of or identical to natural law remains exactly that—a declaration that is not verified. There is only a very vague idea of natural law in Islamist literature and no real inquiry into its contents. In Islamist literature natural law is defined as being identical to Shari'a, and that makes the process of verifying the claim circular. This circular approach has diminished the intellectual appeal of Islamist theology, particularly among the academic elite of contemporary Muslim societies, whose impression of natural law may differ from what they know about Shari'a.

In Chapter 4 Felicitas Opwis gives an overview of the development of what has become the most important legal concept for the contemporary practice of Shari'a: *maṣlaḥa*. The Arabic word *maṣlaḥa* means the well-being, welfare, and social wealth of a person or a community. It is not one of the traditional four sources of Shari'a. At some time during the eleventh century, however, Muslim jurists made the case that it should be considered as an extension of those sources. Opwis looks at Islamic legal theory both in the classical and in the contemporary period and analyzes how *maṣlaḥa* gained an increasingly prominent position. For contemporary jurisprudents, *maṣlaḥa* has become the most important vehicle for legal change.

This innovative use of *maṣlaḥa* in contemporary Shari'a is illustrated in the fifth and the sixth chapters. In Chapter 5 David L. Johnston contributes a case study of the Moroccan thinker and politician Muḥammad ʿAllāl al-Fāsī (1910–74). In addition to being one of the most important figures in the Moroccan independence movement, ʿAllāl al-Fāsī was also an influential writer on the methods of Shari'a. Johnston explains the innovative elements in his legal thinking. The concept of *maṣlaḥa* plays a key role. Similarly, ʿAllāl al-Fāsī connects his thinking to the idea of a divinely created human nature (*fiṭra*) and to Sayyid Quṭb's concept of Shari'a as natural law. The result is a most interesting concept in which Islam is viewed as a religion that can easily connect to all humans.

Noah Feldman presents in Chapter 6 a vivid portrait of Yūsuf al-Qaraḍāwī, one of the most influential Sunni jurisprudents today. Al-Qaraḍāwī grew up in

Egypt but chose exile in Qatar, where the popular satellite channel al-Jazeera is based. His frequent appearances on the most widely watched Arabic television channel made him one of the most recognized Muslim scholars today. Feldman takes a close look at al-Qaraḍāwī's discussion of the compatibility between Shari'a and democracy. Al-Qaraḍāwī develops the somewhat surprising argument that in today's world Shari'a demands democratic rule in Muslim countries. The key legal category that makes al-Qaraḍāwī come to this conclusion is again *maṣlaḥa*, the common benefit of the Muslim community.

Three chapters in this collection are devoted to Iran and developments in Shiite religious law and leadership. In Shiite Islam the contemporary discourse about Shari'a is shaped by Rūḥallāh Khomeini's (1902–89) demand that the legislative and the judicative branches of a Muslim Shiite state should be overseen by a council of experts in Shari'a legislation, headed by a very distinguished Muslim jurisprudent. Khomeini's concept of the "guardianship of the jurist" (*wilāyat-i faqīh* in Persian, *wilāyat al-faqīh* in Arabic) puts enormous political power into the hands of Muslim jurisprudents, who thus far had not seen themselves as part of the executive branch of the state.

In Chapter 7 Abbas Amanat examines the emergence of the doctrine of "guardianship of the jurist" out of the organization of Shiite scholarship. After having successfully parried the challenges of *akhbārī* criticism during the eighteenth century, the Shiite *'ulamā'* of the remaining *uṣūlī* branch developed a hierarchy in which a single scholar, called the *marjaʿ-i taqlīd* (the source of emulation), became accepted as the highest authority in Shiite jurisprudence. The principle of *taqlīd*, in which lower-ranking jurists "emulate" the decision of higher-ranking ones, became a hallmark of Shiite scholarship. This structure had a significant influence on the development of the doctrine of the "guardianship of the jurist" and facilitated its implementation after the Islamic revolution of 1979. Amanat looks into the dynamics between the *wilāyat-i faqīh* and the acceptance of a single *marjaʿ-i taqlīd* in the past and surveys the arguments of contemporary Iranian defenders and critics of the principle.

In the eighth chapter Shahrough Akhavi evaluates how notions of social contract affect the contemporary understanding of Shari'a in Shiite Iran. Akhavi takes a broad view of social contract theories in Islam and concludes that they never had much impact before the twentieth century. Once they were introduced into contemporary debates about Shari'a, they questioned the special role of the clergy and led to disputes about the *wilāyat-i faqīh*. They also questioned the claim that the divine law of Shari'a is identical to natural law. Akhavi analyzes

these tensions by looking into the publications of some contemporary proponents of social contract theory in Iran and the reactions they prompt.

In Chapter 9 Saïd Amir Arjomand also takes a closer look at the relationship between Shiite jurisprudence and the state. In his perspective he focuses on the state's side. He examines the tradition of constitutionalism in Iran and asks to what extent Shari'a plays a role in this tradition. Constitutionalism began in Iran during the early twentieth century, when Muslim jurists took an active part in its first parliamentarian movement. Arjomand examines whether this early involvement of Muslim scholars facilitated the development of such ideas as the "guardianship of the jurist" and the realities it creates.

Anna Würth has looked into the practical application of what can be called a codified version of Shari'a in today's Yemen. She studied the practice of Shari'a law at a family court in Yemen's capital Sanaa. In Chapter 10 she describes the contemporary practice of Shari'a in a Muslim country. Würth challenges the Western view that codification has negatively affected the highly flexible and often-accommodating nature of premodern family law rulings. Her study shows that judges have a significant amount of flexibility that they often use in order to create some neutralizing social justice to the often-unequal realities in a highly patriarchal society.

In his Afterword Roy P. Mottahedeh sums up the debates and provides a context for the study of contemporary Shari'a. He reminds us that the study of contemporary Islamic law must not define its subject in a way that would exclude normative practices and ideas that describe themselves as "Islamic" by their practitioners but are not regarded as distinctly Islamic by other Muslims. Mottahedeh also observes that today considerations about the rulings of Shari'a are increasingly driven by the spirit of the law—even if this concern is not always plainly expressed. This should be viewed as an encouraging sign and offers a way for contemporary Shari'a to move—as Mottahedeh puts it—toward a "strong positive expression of citizenship."