Prologue

[Give the good news to] [t]hose who listen [to different views and perspectives (qawl)], and follow the best [of those views] … [that] those are the ones whom God has guided, and those are the ones who are indeed people of wisdom (ulul al-bab).  

Islamic law is the world’s third major legal system, after the common and civil law systems. Although the Quran and Sunna are the original sources of Islamic law, the Islamic legal system has evolved many other sources, methodologies and perspectives. Like any other legal system, the Islamic legal system has developed over many centuries in various Muslim societies, incorporating local cultures and customs as well as some limited state decrees and particularly the work of Muslim jurists. In the words of Joseph Schacht, ‘Islamic law represents an extreme case of “jurists’ law”; it was created and developed by private specialists; legal science, and not the state, plays the part of a legislator, and scholarly handbooks have the force of law’. Islamic law is therefore neither common nor civil law, but is juristic law.

Traditionally, Islamic law consists of both revelation and reason. After the death of the Prophet Mohammad (633 AD), the revelation of Islamic law by God to humanity ceased. Humanity now relies on reason to understand Islamic law. According to Allama Muhammad Iqbal (d. 1937), humanity needed the guidance of Prophets when it was primarily controlled by passion and instinct. However, from the time of the Prophet Mohammad, people achieved the ability to reason, and this is why the Prophet Mohammad is the final (khatam) Prophet. Iqbal concludes that the nature of revelation (wahy) is reason. This means that human beings, since the time of the last Prophet, must involve reason and human experiences in developing the legal system of Islam. However, do we still need to follow reasoning suggested by Muslim scholars a hundred or even a thousand years ago to solve our contemporary problems? This book examines Islamic law by offering a contemporary perspective that is rational, ethical and comparative. For this reason, we have given our book the title Modern Perspectives on Islamic Law.

The rational approach of this book is an effort toward a renewal of classical traditional Islamic thought on the basis of rational thinking.
There are no theological reasons why Islam should be in contradiction to human rights, democracy, the rule of law, civil society and pluralism. The book is an attempt, within an Islamic legal context, to demonstrate that Islam, as a religious, cultural, political, ethical and economic worldview, could deal with the rapidly modernizing and ever-changing world that we live in today. This does not mean that it neglects revelation and reason in the classical sense, but rather it uses classic Islamic legal discourse as a vehicle to respond to some modern issues. The authors do not neglect classical Islam's richly textual basis, as such a collection of knowledge provides valuable tools to respond to questions and problems in the contemporary Islamic world. At the same time, the authors do not treat these classical works as the only source of authority, but as important for the legal reasoning (*ijtihad*) of each scholar devoted to reaching solutions to challenges in their respective contexts.

The ethical approach of this book means that rationality alone is not enough as ethics is one of the core elements of Islamic teachings. Islamic teachings are not confined to acts of worship and prayer and to a set of moral counsels. As Islam has dealt with people’s relations with God, it has also given the broad lines of human beings’ relations with each other. It has, in various forms, dealt with individual rights and obligations too. The authors take the view that there is an intersection of Islamic law and ethics as reflected in our discussions of economics, family law, criminal law and contemporary debates. The authors also use a comparative approach: evaluating the practice of Islamic law in different times, regions, schools and places, and also connecting Islamic law to other legal systems (common law and civil law). All of these approaches bring together the modern perspectives indicated by the title.

The approach taken by this book encourages *ijtihad* (independent legal reasoning) in order to revisit many concepts and issues in Islamic legal tradition. *IJtihad* in modern times may require collaboration between religious leaders and scholars from related disciplines. It is a collective effort leading to various opinions and options. For instance, when scholars discuss a controversial subject such as human cloning, rather than simply stating whether such a practice is forbidden (*haram*) or permitted (*halal*), they should consider other observations and views, particularly professional views, such as those of scientists, medical practitioners and lawyers. This will result in more comprehensive advice being given on a particular subject.

It has often been understood that certain traditional civil and social laws of Islam are drawn from the simple life of the pre-Islamic Arabs, and are mostly based on their customs and usages. At the time of the Prophet, the Islamic legal system consisted of two main types of laws:
those which pre-dated Islam and were approved by Islam (akham ta’idi); and those developed by Islam (akham ta’sisi). As the Islamic legal system has developed over the centuries, many more interpretations and distinctions have developed in response to the changing needs of society. The body of rules that we consider ‘Islamic law’ today may be based on the original two sources of law, but the majority of rules that apply were developed over 15 centuries of juristic interpretation, scholarly work and occasional pronouncements by authorities. Therefore, some Islamic law rules and principles are based on facts and circumstances that existed many centuries ago. In this sense, contemporary Muslim scholars must find a way to determine which Islamic legal principles should be maintained, and which ones should be adjusted in response to social changes. Islamic principles support the flexibility and adjustability of principles to the requirements of time.

In the classical or traditional sense, a study of Islamic law requires an examination of both principles of the study of Islamic jurisprudence (usul al-fiqh) and the study of Islam to infer legal and religious principles (fiqh), which is the subject of an extensive literature in English and other languages. A historical approach is useful to understand the text of Islamic law, but this book focuses more on the context of Islamic law today: modern times. The authors take the view that the adaptation of Islamic law according to time and circumstance is necessitated by changes in society, and the influx of various cultures and material conditions. As will be shown, this new ijtihad can lead to reform of Islamic law, as has occurred in some Muslim countries and through some juristic works. Such reforms also allow Muslims living as minorities to better accommodate Islam within a non-Muslim majority setting.

The book starts with an analysis of the nature of Islamic law, its concepts, meaning and sources, as well as its development in different stages of Islamic history. The first chapter discusses some of the most important and fundamental contemporary issues of Islam and Islamic law, such as the relationship between religion and law; the divine aspects of law; the sacredness of certain legal principles; and the traditional and modern sources of Islamic law. Any attempt to interpret, analyse and reform Islamic legal systems to accommodate modern societies must start with a comprehensive understanding of these fundamental and basic concepts. This is followed by accounts of how Islamic law is being practised today. Key modern institutions are discussed, such as the parliament, judiciary, dar al-ifta, political parties and other important organizations. While some elements of Islamic law are practised at
individual level, others require the involvement of institutions or communities. Consideration of Islamic institutions is a good example of ‘Islamic law in action’ rather than ‘Islamic law in books’.

It continues by analysing some key concepts in our modern times: nation-state, citizenship, ummah, dhimmah (recognition of the status of certain non-Muslims in Islamic states) and the rule of law. Fifteen centuries ago, when Islamic law was introduced in Medina, the concept of state and the rule of law had not been developed. Today, Muslims live in both Muslim and non-Muslim countries. As a citizen, a Muslim should follow the law of the land, but as a Muslim, they must follow Islamic teaching, particularly its requirements and restrictions: the parameters of halal and haram. This is one of the most challenging issues facing modern Muslims. It is concluded that the overwhelming majority of Muslims living in non-Muslim countries (including in the West) take Islam and its legal system in broad terms of belief in God, the humanitarian message of Islam and the practice of rituals and Islamic personal law within the boundaries of the existing legal system where they live, rather than as an exclusive ideology. It is also acknowledged that mainstream Muslims in Western countries are rightly concerned with the acknowledgement of their identities, the practice of their faith and the preservation of their traditions, family life and values.

For Muslims everywhere, Islamic law is living law. The practical importance of Islamic law to everyday life relates to the role of fatwa in contemporary Muslim societies, a topic too important to ignore. Muslims at grass root levels require guidance from Muslim scholars on an array of relevant Islamic issues ranging from ritual, social interaction and technological advances to problems associated with business, schools, the workplace or the government. The book investigates how in recent times more and more fatwas are issued collectively rather than emanating from an individual scholar. Collective fatwas are a modern phenomenon that did not exist at the time of the Prophet and his companions, nor was there the plurality of fatwas that are issued today by Islamic organizations, state and non-state muftis via both digital and non-digital media. The on-line environment that gives ready access to fatwas is a reflection of the modern global world.

As will be shown in the book, changes in social life also affect relationships at personal levels. The family is considered a very important unit within all Muslim communities. Modernization of Islamic family law has taken place since the nineteenth century, but this has not been uniform. Owing to increased level of education and prosperity, Muslim women seek new roles and the recognition of rights they believe are inherent in Islam. While adherence to the principles and edicts of Islamic
family law remains strong and central to Muslim identity at an individual and community level, colonization and other factors resulted in the codification Islamic family law in many Muslim nations. In the era of nation-states, governments have given Sharia courts greater oversight of family matters, with court registration and judicial approval required for a growing range of matters. Acknowledgement, too, of international norms has meant that principles of equality and nondiscrimination inform family law reforms in many Muslim countries. It makes family law a perfect vehicle to appreciate the contemporary role of *ijtihad* across the Muslim world and in the West, where it continues to inform the lives of Muslims in secular lands.

While the Sharia courts are the most visible mechanism for dealing with family law matters and other disputes, Islamic law has always sanctioned and supported other modes of alternative dispute resolution. Amicable settlement through mediation and arbitration continues to have relevance for Muslims today, not only in Muslim nations but also in non-Muslim countries, where there has been considerable recent debate on whether Muslims should be allowed to establish Sharia tribunals to resolve conflicting issues between Islamic family law, especially in matters of divorce and inheritance, independently from Western law.

The next chapter focuses on relationship between Islamic law and economics. The idea of non-interest banking and other related financial products and institutions is introduced, along with discussion of how Islamic law could potentially provide options and possibilities that are relevant to the debate on the current global financial crisis in United States and Europe. This is followed by a chapter that reviews the historical background of theories of property and inheritance in Islamic law, and considers the basic principles of Islamic trust (*waqf*) law under Islamic law. The book investigates the institutions of property, inheritance and *waqf* as economic instruments in the history of the Middle East, and examines the relationship between these institutions and the rule of law in Middle Eastern and Muslim countries’ legal systems. Unlike family law and inheritance law, Islamic property law is in its early stage of development. *Waqf*, unlike trust in common law, has at its heart a charitable purpose, has acted as a social security mechanism, and has significant potential to be further developed in Islamic economic law.

On Islamic criminal law, the book re-examines the classic rules of *hudud*, *diyāh*, *qisas* and *ta’zir*, outlining certain prescribed classic punishments such as cutting off the hands of thieves or stoning adulterers to death. The book offers a fresh and new interpretation of Islamic criminal in line with the idea of modern perspectives described earlier. Given well-publicized events in 2012 in Mali, where two women were...
stoned for adultery, the chapter demonstrates ways in which it is possible to reform Islamic criminal law.

Lastly, the book revisits certain contemporary issues of debate in Islamic law. The authors have selectively chosen debates occurring not only in Western countries but also in many parts of the Muslim world. There are five issues: first, the banning of the burqa in some Western (and also Muslim) countries; second, building places for worship including discussion of cases such as the ‘Ground Zero’ mosque in New York and the minaret issue in Switzerland, and an overview of the recent events in Indonesia, Egypt and Australia; third, the debate on Sharia’s compatibility with democracy, outlining three different approaches – traditionalist, secularist and what is described as ‘the middle’ way; fourth, halal food, including the issue of whether Islamic law can accept stunning before slaughtering or not with a Jewish comparison on the same issue; and fifth, the issue of apostasy in Malaysia, Egypt and the West. These debates are vehicles to demonstrate that contemporary issues are complex and plural, requiring understanding of Islam in line with principles of modern life, justice, human rights, democracy and the dignity of all humankind.

Throughout the book, the reader will find different terminologies or categories to describe the thought and ideas of individual scholars and groups of Muslims who align with a particular view on an issue or with an approach. The attempts to define, classify and identify differences amongst Muslims have been reflected in many scholarly works. Scholars in the contemporary era have used the terms ‘modern’ and ‘traditional’, ‘conservative’ and ‘moderate’ or ‘fundamentalist’ and ‘liberal’, or ‘neo-modernism Islam’, the last as a synthesis of modern and traditional scholarship. To this we could add the political dimensions imported into the concepts of ‘Islamist’, ‘modernist’ and ‘secularist’. To some extent, the lines between these terms are often blurred and should be seen as such. One scholar may agree with a liberal approach in a case (for instance, to allow a woman to become the president of a Muslim nation), but he or she may strongly disagree with another liberal stance (for instance, that polygyny should be prohibited totally). In other words, two individuals might have some shared common visions, but when it comes to the details of each element of Islamic law, may take different positions. Categorizations tend to narrow the complexities and the dynamic of thought within any one group, making them not fully representative. Having said all this, although any categorization is far from perfect and can be contested, we have made an attempt in the book to define and justify the use of terms.
Muslims recognize that Islam and Islamic law contain a plurality of definitions, meanings and classifications. Different terms are used in Arabic, English and other languages to explain Islam, Sharia and Islamic law. In this book, terms have been defined in ways that reflect different Islamic religious and legal traditions: classical, contemporary, Middle Eastern, Southeast Asian and Western. In the West, and in English literature, references are made to terms such as ‘traditionalist’, ‘fundamentalist’, ‘Islamist’ or ‘extremist’ Muslims, and ‘modernists’. Traditionalist Muslims can be considered those who live according to the strict teachings of traditional Islam. Fundamentalist Muslims can be understood as those calling for radical political change based on Islamic teachings. It is vital to note that extremist or Islamist movements are a subset of fundamentalist Islam, but not all fundamentalist Muslims are extremists. The term ‘modernist’ captures the political ideology of those who wish to reform Islam and place it at the centre of a ‘modern’ political entity. The approach taken in this book is to consider the majority of the world’s more than 1 billion Muslims as ‘mainstream Muslims’. They may well share aspirations of democracy and the rule of law and most certainly wish their children to live in a better world than the one they inhabit. However, they are not influenced by political or religious ideology to the extent of some other contemporary Muslim groups. The approaches of mainstream Muslims to Islam and the Islamic legal system are rich, pluralistic and evolving. They involve various cultural, philosophical, mystical and legal traditions.

Above all, this book is part of *ijtihad*: it is the interpretation of the authors. The Prophet said that ‘[w]hen a jurist or a judge exercises *ijtihad* and reaches a correct conclusion, they receive a double reward; but if the conclusion is incorrect, they will still receive a single reward’. Drawing on the Prophet’s words, we are encouraged to offer this book for the appreciation of all who read it.

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