
Introduction: Islamic law in action

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This book examines the role of Islamic law, not just as it exists in the Holy texts (*Qur'an* and *Hadith*), but as it is actually applied in society, through legislation, *fatwa*, court cases, *khutbah* (sermon), media, or scholarly debate. By considering its larger social, political, economic and cultural contexts, all the contributors in the book evaluate when and how actors and institutions turn to Islamic law to find the answers to problems faced by Islamic society.

Modern problems are complex and require explanation from different perspectives before one may find the right answers. Most of the time, what we perceive as the 'right' answers should be understood in a local, temporal and debatable context. This indicates that the 'right' answers in Saudi Arabian, Bangladeshi or Australian societies might not be considered to be the 'right' solutions in other Muslim societies. However, the main approach of this edited collection is not to discuss development and progress in Muslim countries and non-Muslim countries where Muslim live. In other words, it is not a country report. The approach taken in the book is based on issues; rather than countries. At the same time, some case studies are needed to illustrate the application and interaction of Islamic law in societies.

The idea of the way Islamic law responds to problems in society is nothing new. It seems 'new' because there has been propaganda by the Islamist movement of 'back to the *Qur'an* and *Hadith*' coined by Muhammad bin Abdul Wahab (1703–1792). Wahab, within the context of the Muslim response to the increasing influence of Europe and to the subjugation of the Arab world by the non-Arab Ottoman Turks, was convinced that Muslims had departed from pure Islam and needed to return to its original beliefs and practices. His interpretation of Islam is also referred to as Salafist –the first 300 years of the practice and the interpretation of the *Qur'an* and the *Hadith* which Wahab considered as the pure and correct form of Islam.¹

¹ John Esposito, *Islam and Politics* (Syracuse, NY: Syracuse University Press, 1998) 33–4.

How could Muslims face the challenges of the twenty-first century by returning to the practice and interpretation of the *Qur'an* and the *Hadith* appropriate to the sixth–ninth centuries? According to Wahabism, the answers to all problems have been provided by the *Salaf al-Shalihin* (early Muslim scholars). Muslims had to go back to their own traditions in the past, and to reject what Wahab regarded as *Bid'ah* (innovation) and *Shirk* (idolatry). The way in which Wahab read and interpreted the *Qur'an* and the *Hadith* has influenced many Muslims, who call him a reformer and a modernist, whereas those who are against him label him a puritanist and Wahabist.

Amongst the Islamist movements influenced by Wahab's reading of the Holy texts, there has been a view that Islamic teaching is immutable, because the authoritarian, divine and absolute concept of revelation in Islam does not allow any change in Islamic teachings and institutions. The *Qur'an* and the *Hadith* are considered immutable, regardless of history, time, culture and location. Muslims may change, but Islam will not. This means that the rulings pronounced by *Shari'ah* are held to be static, final, eternal, absolute and unalterable. In other words, Islam's idealistic nature, religious nature, rigidity and casuistic nature lead to the immutability of Islamic teaching.² For Textualists, it is the *Qur'an* that should guide Muslims, rather than any so-called modern 'needs'. They consider the meaning of the *Qur'an* to be fixed and universal in its application.³

However, the view above is only one side of the coin. Islamic teaching is, in fact, the product of a very slow and gradual process of interpretation of the *Qur'an*, and the collection, verification and interpretation of the *Hadith*, during the first three centuries of Islam (the seventh to the ninth centuries AD). This process took place amongst scholars and jurist who developed their own methodology for the classification of sources, derivation of specific rules from general principles, and so forth.⁴ The *Qur'an* and the *Hadith* must involve human interpretation. The *Qur'an* and the *Hadith* cannot be understood nor have any influence on human behaviour except through the efforts of (fallible) human beings. Therefore, even though Islam is based on the revelations of God, it cannot possibly be drawn up except through human understanding, which means

² See the discussion in Muhammad Khalid Masud, *Shatibi's Philosophy of Islamic Law* (Pakistan: Islamic Research Institute, 1995) 17.

³ Abdullah Saeed, *Interpreting the Qur'an: Towards a Contemporary Approach* (New York: Routledge, 2006) 3.

⁴ Robert Gleave, *Islam and Literalism: Literal Meaning and Interpretation in Islamic Legal Theory* (Edinburgh: Edinburgh University Press, 2012).

both the inevitability of differences of opinion and the possibilities of error, whether amongst scholars or the community in general.

Whilst the *Qur'an* contains a variety of elements, such as stories, moral injunctions and general (as well as specific) legal principles, it should be noted that the *Qur'an* prescribes only those details which are essential. It thus leaves considerable room for development, and safeguards against restrictive rigidity. The contextualists argue for a high degree of freedom for the modern Muslim scholar in determining what is mutable (changeable) and immutable (unchangeable) in the area of socio-ethico-legal content.⁵ The clash of the literalist and the contextualist is a huge source of debate between Islamic scholars and jurists, and is arguably the main reason that there are multiple schools of thought within Islam.

The diversity of Islamic Law has been further deepened with the development of Muslim nation-states during the era of empires, because each nation established its own Islamic legal system according to its needs and understandings.⁶ As a result, a wide range of different constitutional systems emerged, some of them separating 'mosque and state', others implementing a theocratic system.⁷ This constitutional diversity set different starting points for the further application and interpretation of Islamic law, establishing different practices in different Muslim countries.

Islamic jurists and ordinary Muslims hold diverse opinions about how Shari'ah applies to certain aspects of a Muslim individual's life in the modern world. Some aspects, including marriage, divorce and the custody of children, are mainly regulated by what can be precisely labelled as Islamic law. In an Islamic state, other aspects are subject to provisions which are not Islamic law, although they also may not necessarily contradict Islamic law. While principles of Islamic law govern family law, inheritance, trusts, contract and, in some Islamic states, criminal law, it can be seen that modern regulations govern matters such as corporations, broadcasting law, health law, food production, travel, immigration and the environment. Things will be different in non-Islamic state, where Muslims live as the minority and have to obey the law of the land, and

⁵ Saeed, above n3, 3.

⁶ L. Ali Khan and Hisham M. Ramadan, *Contemporary Ijtihad: Limits and Controversies* (Edinburgh: Edinburgh University Press, 2011) 7.

⁷ *Ibid.*, 7–8.

where Shari'ah is practised only at the private level. Today the opinions and practices in the Muslim world vary widely.⁸

This edited collection is an effort to demonstrate how differently Islamic law in different areas has been practised, in different contexts and circumstances. There are 18 chapters, divided into six themes, covering around 22 countries, presented in this volume. The 20 contributors are a mix of established and emerging scholars, and also practitioners, consultants and government officials. The book has been designed for scholars and postgraduate researchers in the field, but at the same time, the general reader will also find the edited collection a lively debate and an inspiration to shape future research.

FAMILY LAW AND COURTS

The themes discussed in these chapters provide an understanding of how Islamic family law has been applied both in, as well as outside, the court systems, in both Muslim and non-Muslim countries. It starts with Ann Black's chapter examining how Islamic family law can be applied in Singapore and Australia where, in both nations, there is a significant and recognisable Muslim minority: 3 per cent in Australia and 15 per cent in Singapore. She points out that Singapore and Australia were colonised by Britain two centuries ago, thereby becoming inheritors of the common law legal system, with its attendant institutions, methodology and principles. Yet despite this common legal heritage and a government-endorsed policy of multiculturalism, only Singapore has adopted and endorsed a form of formal legal pluralism. In Australia, a different approach was taken, known as 'one law for all'. There are neither separate courts nor Islamic personal status laws enacted or applied to Muslim Australians, nor for any other religious or ethnic group.

Arif Jamal explores Alternative Dispute Resolution (ADR) in Singapore and compares it with the system in the United Kingdom (UK). This examination shows that Islamic law is applied more formally in Singapore than in the UK. However, the implications in the ADR context are interesting. Drawing upon literature about religious-based ADR, he argues that the informal system in the UK may be more facilitative of Islamic ADR than the more formal system of Singapore.

Kieran Eadie reviews the issues of *kafala*, of providing support for orphans, but this becomes controversial, as it involves the issues of child

⁸ Jamila Hussain, *Islam, Its Law and Society*, 3rd ed. (Leichhardt: The Federation Press, 2011), 48.

adoption for migration purposes to Western countries. He discusses the practice and focuses on the difficulties with meeting all the requirements provided by Shari'ah, immigration law and international law. It requires a careful approach to ensure the government's policy is based on the best interest of child. The topic of the best interests of the child is also discussed in Ali Mesrati's chapter. He critically evaluates how the Libyan court has made decisions on guardianship, and whether those decisions are in line with the requirements of the Convention on the Rights of the Child (CROC). He provides analysis from both Shari'ah and international human rights perspectives.

PROPERTY AND BUSINESS

In Iran, land ownership and interests in land are regulated by the Iranian Civil Code, which has adopted modern principles of European land law blended with principles of Shari'ah. However, the law of *waqf* (trust law) is almost entirely based on Islamic law. Hossein Esmaeili argues in his chapter that both Islamic law and Iranian law have recognised and protected private ownership of land and other property interests. His chapter finds a compatibility between Iranian and Islamic laws.

The incompatibility issues arise in Afroza Begum's examination of Islamic banking practices in Bangladesh. Shari'ah prohibits interest-based transactions and discourages monopolistic, deceptive and restrictive trade practices. Bangladesh embraced Islamic banking via the establishment of the Islamic Bank (IB) in 1983 and became the first nation in Southeast Asia to introduce it. Afroza Begum's work investigates Shari'ah compliance in devising 'modes of financing', and she argues that the way in which IB functions in Bangladesh is fundamentally flawed and needs to be reviewed to achieve the pertinent goals of Shari'ah.

S. M. Solaiman highlights an important point that, although Shari'ah is not part of the domestic or positive law of Bangladesh governing employment relationships, a vast majority of its people respect and voluntarily adhere to the rights and obligations enunciated in Islam. His chapter examines the safety rights of workers and the corresponding obligation of their employers under the principles of Islamic law. He draws the conclusion that employers evidently fail to comply with their religious obligations to protect workers. This is in addition to their failures under municipal law.

The chapters on this theme give us an insight into the compatibility or incompatibility of Islamic law and domestic law. Western influence has

dominated the areas of trade and finance in the Muslim world. Traditional Islamic contracts and financial instruments have been replaced by Western financial instruments and institutions, through either colonialism or capitalism. On the other hands, many Muslim countries are trying to 'Islamize' their property, trade and commercial laws. This could be one of the most challenging issues faced by Muslim societies.

CRIMINAL LAW AND JUSTICE

The discourse of criminal law in modern Islamic states goes beyond traditional *hudud* (ranging from public lashing to publicly stoning to death, amputation of hands and crucifixion). This because what we consider to be a 'crime' is no longer restricted to personal issue, but can also involve corporations. Corporate criminal liability is one of the significant tools governments can use to prevent corporate crimes. Mohammed Alsubaie specifically examines the situation in the Kingdom of Saudi Arabia and takes the position that not only should the Saudi law be amended to reflect new developments in the area of corporate crimes, but also that Saudi Arabia must create independent and specialised commercial courts, with qualified and trained judges and prosecutors, to hear only commercial cases. He suggests that the database of corporate cases and statistics should be published, as this would help judges, investors, companies, lawyers and researchers.

The next chapter under this theme is written by three scholars (Hanifah Haydar Ali Tajuddin, Nasimah Hussin and Majdah Zawawi) and focuses on Shari'ah, criminal law and restorative justice in Malaysia. The authors highlight some of the issues with the current practices, in particular that they have yet to include laws permitting offenders to take responsibility and restore losses which they have caused personally to victims, other than by paying some small amount of compensation.

Moving to a different but still controversial issue, Faisal Kutty reviews the laws of apostasy and blasphemy in the Muslim world, by looking particularly at Pakistani and Malaysian cases. He strongly argues that the death penalty in the laws of apostasy and blasphemy is untenable in the modern period. He demonstrates in his chapter that these laws conflict with a variety of foundational teachings of Islam, and with the current ethos of human rights, in particular the freedom to choose one's religion and the freedom to express oneself.

ETHICS, HEALTH AND SCIENCES

Nurussyariah Hammado explores areas of Islamic law affecting the reproductive and health issues of Muslim women, such as adoption, medically assisted reproduction, abortion, child marriage and female genital mutilation. She compares the situation in two different countries: one with strongly religious sentiments (Saudi Arabia), and another one where more liberalist views prevail (Tunisia). Having compared those issues in Saudi Arabia and Tunisia, she observes that Islam is not the source of all discriminatory treatment of women, but rather that it stems from the traditional cultural and social norms of a particular society. However, as religion informs and shapes cultures, such practices are the indirect consequences of a particular Islamic interpretation.

My own chapter provides an example of how Muslim scholars are responding to the issue of modernity. I evaluate new developments such as collective *ijtihad* in the Muslim world as a group effort to find answers. This is different to the early formation of Islamic schools of thought (*maddhab*) when individual scholars interpreted the Holy Books. I provide examples of Indonesian collective *fatwa* on health issues such as organ transplant, vasectomy and IUDs (Intra-Uterine Devices). It can safely be stated that the institution of collective *ijtihad* is a viable tool through which a society can adjust itself to internal and external social, political and economic change.

Richard Mohr in his chapter goes beyond the issues of modernity. He questions whether halal certificates, along with science and ethics, could together provide legal guides for consumers. He outlines that religious requirements may be regulated by a religious council; food safety is monitored by government and industry bodies; while consumer and animal rights organisations may be involved in demands for particular standards and the reliability of various claims for food. Using a case study in Sydney (Australia), he argues that there is continuous negotiation between government, industry, religious or ethical bodies and consumer advocates over labelling and other regulations.

ARTS AND EDUCATION

Mia Corbett admits in her chapter that the relationship between law and art in Islam varies greatly between temporal, geographical and political boundaries. She points out that the lack of figurative representation in Islamic art is often also subjected to the Western understanding of art, as a cultural movement toward the most accurate representation of the

human figure, which is considered to parallel the development of civilisation. As a result, there is a perception that Islamic law and civilisation is primitive and backward for its perceived aversion to the development of the figurative style. She argues that the reality is that Muslims are constantly changing and evolving their understanding and relationship with religious law, like any other culture.

The next chapter, written by Neneng Lahpan, is on the lawfulness of music in contemporary Indonesian discourse. There has long been a debate among Muslim scholars on this issue, but she goes further by looking at the Indonesian local context in West Java, where ethnicity and politics play their parts. What we consider to be 'Islamic' music does not need to be in the Arabic language nor to employ Arabic songs and instruments.

Maan Khutani conducts research on the rights of Saudi women to pursue education at university level. This is one of the hot topics in the Islamic world. His chapter reveals the structural gaps in institutions concerned with women's education in Saudi Arabia. He believes that there is a necessity to review all philosophical and social basics and domestic laws relating to women's education in the Kingdom. He further argues that its objectives need to be reviewed; and its suitability examined in regard to the modern changes which have altered a woman's vision of herself and also society's vision of her. This, in turn, requires radical change in educational and vocational services in Saudi Arabia, opening them up to women, in order to increase their opportunities and to create future strategies for investment of female ability and power in economic and educational activities.

COMMUNITY AND PUBLIC SPHERES

Richard Burgess evaluates the practices of Islam in Bosnia and Hercegovina. He believes that it is both compatible and sustainable within a Christian and laic Europe. As a result, he reveals that there are national communities where (among other things) the social participation of women is expected and inter-faith dialogue is endorsed. While domestically serious tensions regarding national identity remain, he takes the view that the Bosnian model rests as an example as to how the faith may be practised throughout Europe.

Finally, Muhamad Ali examines sermons (*khutbah*) and edicts (*fatwas*), and the extent to which colonial contexts shaped their characteristics and development in colonial Indonesia, particularly in South Sulawesi, and in Malaysia, particularly Kelantan. His chapter analyses how various *ulama*

(clergy) constructed sermons and edicts, what sources and languages they used, and what problems and issues they faced. In such an analysis, the flexibility of religious knowledge and the contending interpretations of the religious texts reveal some of the tensions, as well as the compromises, that characterise the production of such knowledge. He argues that the sermons and the edicts are textual and contextual, persistent and changing, according to the *ulama*'s interpretations and socio-cultural and political circumstances.

CONCLUDING REMARKS

All 18 chapters in this volume demonstrate that Islamic law is changeable according to the requirements of different places and times, and therefore suits the values shared by Muslim societies. This is in contrast with the common assumption that Shari'ah law is a medieval and unchangeable legal code which reflects the seventh-century, Arabian desert-living practices of Muhammad (peace be upon him).

Islamic teaching today may be based on the original two primary sources (the *Qur'an* and *Hadith*) but the majority of rules which apply were developed over 15 centuries of juristic interpretation, scholarly work and occasional pronouncements by authorities. Therefore, some rules and principles are based on facts and circumstances in existence many centuries ago. In this sense, contemporary Muslim scholars must find a way to determine which principles should be maintained, and which ones should be adjusted, in response to social changes. This volume has revealed how Islamic law has engaged with contemporary issues beyond what has been prescribed in the *Qur'an* and *Hadith*. It involves a dynamic interpretation and also responses to the challenges faced by Muslim societies. In other words, what we offer in this volume is Islamic law in action.

