Chapter 6

Fiqh and Legislation in the Middle East and Africa*

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Introduction

Much has been written about the transformations experienced by Islamic law in the contemporary period. This chapter uses a selection of outstanding references to produce a personal synthesis that moves away from the religious/secular divide focus and provides some updates that confirm or nuance previously outlined tendencies. The ideas presented in this chapter are borrowed from the sources listed in the references section and selected from the perspective of a student of the relationship between law and society in the premodern Islamic West. A number of continuities are

*In what follows, Sharia and fiqh are sometimes used interchangeably to refer to Islamic divine law. Other times, a distinction is made between, (1) Sharia—in the sense of divine law contained within the Quran and Prophetic tradition; (2) fiqh—meaning human intellectual activity to derive legal principles and practical rules from these sources as well as the corpus of jurisprudence resulting from this activity; and (3) qanun—legislation enacted by modern nation-states. My understanding of classical fiqh includes court decisions; my use of the expression Islamic law, without quotation marks, encompasses fiqh and governmental law (qanun; siyasa shar’iyya) as distinct from modern state legislation.
emphasized that challenge the view of Islamic law in the contemporary period as the result of a drastic break with the past. The transformations experienced by Islamic law are treated mainly as the result of a dynamic and, for the most, endogenous process determined by modern states’ enhanced capacity to control their citizens by means of technological advance, to levels unknown to premodern Islamic polities.

Distortions and misconceptions

Sharia is subject to essentialist misconceptions about its alleged unchangeable and general, binding nature. Islamists in first instance often hold isolated and decontextualized legal opinions and rules mentioned in authoritative texts to represent the entire Islamic legal system or the entire Islamic civilization and culture. Western scholarship sometimes ignores historical and political contexts and presents an image of Sharia in which religious teachings and traditions are confused with the legal and political agendas of country elites or else, the extent to which religion shapes institutions is underestimated. In turn, essentialist perspectives going against actual social practice and historical experience feed Islamophobia in the West (Kalanges 2014, 285; Masud 2019, 81–88). In addition, media reports do not always distinguish Islamic court rulings from primitive mob justice and the abuse of authority by local policemen or other officials, in flagrant violation of Sharia’s basic procedural and evidence rules (Otto 2010, 648).

Recent studies provide historical examples of what contemporary Western lawyers would call “legality,” “due process,” and “justice” and of a conciliatory legal methodology that led to a moderate tradition capable of accommodating the needs of each time and age (Feldman 2008; Otto 2010, 650–51; Peters and Bearman 2014, 9; Serrano-Ruano 2017). Sharia is not opposed or alien to modernity, as long as the meaning of modernity is not restricted to the influential European modes of social life or organization. Understood as the capacity to reinterpret historical origins, modernity can adopt different forms and is present in all societies (An-Na’im 2014, 307–9, 318; Masud 2013, 177–208; Masud, Salvatore, and van Bruinessen 2009).

General chronological overview

The transformations experienced by Islamic law from 1800 onwards did not represent a radical departure from a religious toward a secular legal
system (Otto 2010, 617). The significance of the process relies primarily on the new centrality achieved by the state in defining the contents of the law and its scope. Thus far, this role had been played by the religious scholars.\(^1\) The ruler was entitled to make new laws, but his legislative powers were derived from the principle of *siyasa* (Sharia-compliant governance). The religious scholars retained the capacity to determine whether and to which extent the *siyasa* implemented by the ruler deserved to be labeled as Sharia-compliant (*siyasa shar'iyya*) (Masud 2013, 248–79; Otto 2010, 625).

It would be misleading to understand the far-reaching and unprecedented reforms that affected Islamic law in the nineteenth and twentieth only as the result of external influences and to ignore the complexity of the process of exchange and dialectics in which European and local stakeholders got involved in this period, combining orientalist and reformist views of the Sharia with political aspirations (Buskens 2014, 218). Changes imposed by new social, economic, and administrative internal demands were already implemented by the Ottoman authorities in Anatolia and the semi-autonomous province of Egypt. Legal reforms implemented in the Middle East often radiated eastward and southward, whereas reforms originating elsewhere had few repercussions in the Middle East (Fahmy 2018; Mayer 2019, 26).

Reforms targeted both legal methodology and substantive law. In the Ottoman Empire, Egypt, and Persia, local elites deliberately introduced European legal concepts. In Asia and Africa, local rulers, chiefs, and religious personnel were incorporated in colonial structures led by Europeans and moved to a secondary position (Otto 2010, 623–4).

During the colonial period, new legislation completely distinct from Sharia was systematically enacted. Also, some singular forms of mixing took place, like “Anglo-Muhammadan” law or “Le droit musulman algérien.” Meanwhile, modernist religious scholars like al-Afghani and Muhammad Abduh proclaimed the reopening of the gate of *ijtihad* and paved the way for the further codification and modernization of Islamic legal doctrine on marriage (Masud 2009; Otto 2010, 624).

Today, most Muslim states have replaced the classical Sharia structures and practices with new legal institutions and rules. Given the weight of Sharia’s intellectual heritage and most citizens’ sensitivities, national legislation has preserved important elements of *fiqh*. Although the

\(^1\) Henceforward also referred to as ulama or *fiqh* experts (*fuqaha*).
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resulting laws are often referred to as Sharia, they do not look like classical fiqh, and their import no longer depends on the authority of the religious scholars (Berger 2014, 231; Otto 2010, 617). The modern period is also marked by the dissolution of the classical legal schools, though legal interpretive communities have remained in place (Messick 2005).

In the 1970s, an antiwesternization wave moved a number of states to enact laws that selectively revived elements of traditional Islamic law. Other Muslim governments thought it prudent to amend their constitutions to introduce Sharia as a source of legislation. Also, legislative and judicial authority was reclaimed by lay Muslims. Sharia, which had evolved from a corpus of norms ruling private relations to legal codes enacted by the government, has now become an argument to enforce morality in the public domain, opening up a Pandora’s box of at times mutually contradictory interpretations (Berger 2014, 223, 226, 231; Mayer 2019, 26–7). This process—treated in the fifth section, on re-Islamization, below—is referred to as “legal re-Islamization.”

The legislatures of modern Muslim nation-states have either adopted Sharia in family and, especially after re-Islamization, criminal law, or adapted their constitutional and finance law to Sharia, or declared their readiness to comply with Sharia. The latter method is applied by most Muslim-majority countries to their civil, state, criminal, international, financial, and commercial laws, which were already subject to modern and international legal standards and concepts. Both constitutional and finance law are underdeveloped in Sharia. As happened with qanun, which went from designating governmental law or codified fiqh to meaning national legislation, certain concepts like shura (consultation) or ijma’ (consensus) have been given a new sense in combination with modern notions of “republic” and “democracy” (Berger 2014, 228–9; Fahmy 2018, 226–70; Masud 2019, 97).

The dissociation between law and religion in the legal systems of Muslim-majority countries has emphasized the association between Sharia and identity, be it individual, collective, or national (Cammack 2005). National identities in postcolonial societies have been also built by locating “an authentic past” in women’s bodies and women’s position in the family opposed to the norms associated with colonialism (Emon 2012, 67).

Sharia remains an authoritative legal, ethical, and theological worldview strongly determined by the state and sociocultural norms. Conversely, legislators tend to base laws on norms that enjoy widespread social
acceptance. Those who feel that contemporary Muslim societies are losing Sharia, and with it their identity, appear to disregard the fact that law is the product of the society that is subject to its rules. The relationship between Sharia, state, and society is complex; it is the product of a constant negotiation that varies according to context, rather than the subject of a fixed formula of either total separation or complete fusion (An-Na’im 2014, 315; Masud 2019, 97–8; Peters and Bearman 2014, 9; Vikør 2006, 227).

Codification and Secularization of Islamic Law
Under the Late Ottomans

By the late nineteenth century, the idea that the state is the sole legislator and that legislation should take the form of enacted codes was adopted throughout much of the Muslim world. This idea, inspired by the European civil law tradition, meant that only the state determines what law is, that state-enacted law is the highest form of law, and that law can be changed through legislation.\(^2\) The validity of the legal rules passed depends on the constitutional rules of the state and no longer on their Quranic or Prophetic roots or the criteria of the religious scholars. Secularization of the legal system in this way did not mean the disappearance of Sharia but rather that Sharia became part of a legal system of territorial reach, whose jurisdiction was decided by the state according to partial codifications of its rules or the accustomed *fiqh* manuals. The transition toward a secular legal system was facilitated by the prevalence of the abovementioned *siyasa shar’iyya* principle, which gives rulers more leeway to determine punishments and admits less complicated procedural and evidentiary rules (Peters and Bearman 2014, 8; Vikør 2006, 207–9, 346, 347).

\(^2\)The civil law tradition emerged in Continental Europe and heavily influenced modern legal reforms in North African countries, Mali, and Mauritania. The civil law tradition is characterized by written legal codes and a unique set of judicial procedures. By contrast, the common law tradition, which heavily influenced legal reforms in Sudan and Gambia, developed in England from the local corpus of judgments, doctrines implicit in those decisions, and customary practices. Judicial precedents are sources for authoritative law alongside written legislation, and the judicial procedures differ significantly from those of civil law systems. Some countries, like Somalia, mixed common and civil law traditions with Islamic and customary ones (Rabb 2018, 38).
The Ottomans did not stand out from their predecessors because of the promulgation of governmental laws running parallel to those found in fiqh manuals, but rather because of their systematic compilation of these rules in special collections called qanun. Here we have the forerunners of the modern legal codes, but with a fundamental difference. The governmental laws enacted by the Ottoman sultans from the fifteenth century onward aimed at supplementing rather than replacing Sharia where the latter was silent or imprecise, like in land, fiscal, and criminal regulations. However, those qanun collections did not yet imply the state’s monopoly on lawmaking, and their regulations were not superior to other types of law (Peters and Bearman 2014, 8).

Codification proper began with the legal reforms undertaken by the Ottoman sultans between 1839 and 1876. This is known as the tanzimat (reorganization) period. The old legal, educational, and military institutions were deemed insufficient to meet the changing internal and external demands of the empire (Rabb 2018, 38). Among the former, recent scholarship has underlined the need to bolster the Islamic legitimacy of the regime in face of domestic challenges to its authority (Emon 2012, 65; Fahmy 2018, 35–8; Mayer 2019, 27).

Codified Sharia excluded moral injunctions (e.g., opinions expressing disapproval of a certain practice) or rulings about Islamic rituals. Codification also involved a piecemeal selection of the variant and at times mutually contradictory opinions transmitted by fiqh manuals. For the sake of clarity, fairness, and homogeneity, codification ended with the plurality of legal opinions (ikhtilaf), which may foster arbitrariness, yes, but also allowed judges to accommodate customs and a flexible judicial practice. Codification also involved the risk of crystallizing rigid rules (Buskens 2014, 212; Emon 2012, 67; Peters and Bearman 2014, 8; Rabb 2018, 40). Moreover, the interpretation and application of Sharia was taken from the hands of the religious scholars, and the approach to Sharia as religious legal scholarship shifted to that of modern law (Berger 2012, 225).

Both governmental and fiqhi laws were revised and codified. The most significant result of this reform was the Mecelle (Majalla in Arabic), a codification of relevant Hanafi fiqh rules concerning trade and contracts promulgated between 1869 and 1877. It was organized following the French Civil Code of 1804 and included rules concerning property, torts, and procedure to guide judges in the still running Sharia courts. Rules were selected “that best furthered social welfare,” regardless of their
Qadis and muftis became civil service officials organized according to a hierarchy headed by the Shaykh al-Islam, or official mufti of the empire (Vikør 2006, 212–3). Other institutions emerged, like the Council of Judicial Ordinances in 1839. Mixed civil and criminal courts staffed by both European and Ottoman judges were created in 1847, as was a Council of State after the model of the French Conseil d’État in 1868. Their operation resulted in a new curriculum for the training of judges, following European lines, and in the establishment of secular courts. Competence in the Islamic religious sciences lost relevance for the actual operation of the courts, and the jurisdiction of religious courts was restricted to family matters or eliminated. The religious scholars were replaced by new legal professionals in the newly established legal institutions. This led to tensions, as individuals who combined competence in both Western law and fiqh were very exceptional (Mayer 2019, 26–7). The Mecelle restricted the discretion of judges, already undermined by their lack of fiqh training; over time, it proved unworkable (Rabb 2018, 45–6).

In 1917, a Law of Family Rights was enacted. It combined rules from the four Sunni schools but also from minority and ancient schools of law with the aim to accommodate new social needs, but it was short-lived. In 1924, with the end of the Ottoman Empire and the birth of the Turkish state, the government abolished Sharia courts. Two years later, the Mecelle was replaced with the Swiss Civil Code. In 1928, Islam ceased to be the state religion in Turkey, and in 1937, the Turkish Republic was declared to be a secular state (Mayer 2019, 28; Rabb 2018, 45–6).

In other regions under Ottoman rule, such as Egypt, the jurisdiction of the Sharia courts was also curtailed as a result of the tanzimat reforms and of legal codification. In the first decades of the nineteenth century, new civil tribunals were introduced alongside the Sharia courts. The new tribunals applied both classical Islamic law and laws promulgated by the Egyptian government. In 1874, mixed courts with jurisdiction over civil and commercial cases between Egyptians and foreigners, between foreigners of different nationalities, or where a foreign interest was involved were established utilizing a civil code inspired by the French Civil Code. Following the British occupation in 1882, national courts were established for Egyptians based on a code similarly drawn from the French model,
which also included Islamic commercial rules borrowed from the Mecelle. Personal-status matters remained under the jurisdiction of Sharia courts, but these were reorganized and new regulations regarding judges’ qualifications were introduced. A new school for their training was set up in 1907. Various so-called milli courts survived to address non-Muslims’ personal-status disputes outside state regulation. In 1956, the jurisdiction of Sharia and milli courts was transferred to the national courts by Nasser, though the applicable law remained dictated by the parties’ religious affiliations. Many Arab countries used Egypt’s experience as a guide to their own legal reforms (Mayer 2019, 31; Rabb 2018, 39).

The legal reforms undertaken under the Ottomans and, subsequently, under colonial rule were accompanied by internal proposals to accommodate Islamic traditions to the challenges of the new times. Muhammad Abduh (1849–1905) is a significant example of this trend. Educated at al-Azhar, he engaged with the Egyptian nationalist cause and became Grand Mufti of Egypt in 1899. His reformist ideas and his commentary on the Quran, Tafsir al-manar (The beacon exegesis) were disseminated by his disciple Muhammad Rashid Rida (1865–1935). Like Ibn Taymiyya—and al-Shatibi—Abduh held that fiqh areas other than rituals could be adjusted to changing circumstances in accordance with the criterion of social well-being (maslaha). This approach led him to criticize polygamy. Abduh’s influence on reformist thought was far-reaching, but his actual impact on Egyptian law was limited (Masud 1995; Mayer 2019, 30–1).

**The Colonial Period**

Codification took place both in areas still under Ottoman rule and others that, by the end of the nineteenth century, passed into the hands of European colonial powers. With the latter’s arrival in the Middle East and Africa, Sharia became almost exclusively restricted to family, inheritance, and the administration of pious endowments, and was codified (Vikør 2006, 250–1).

The impact of colonialism on the legal systems of the Middle East and Africa was more pronounced in property and commercial law and less so in penal matters that, since well before, had been under the jurisdiction of siyasa courts (Vikør 2006, 228; 278–9). Within the domain of family law, the fiqhi rules to enter the codes were selected in a great variety of ways. In Algeria, for example, the colonial administrator integrated the Sharia courts into a national court system dominated by French
judges, controlling all judicial decisions in the colony. A hybrid system known as “Le droit musulman algérien” emerged, combining *fiqh* with French law according to French legal categories and concepts (Berger 2014, 224; Mayer 2019, 30). In Ethiopia, however, the Sharia courts established at the beginning of the twentieth century for the local Muslim population received even wider recognition during the Italian occupation (Kebede 2019).

The reduction of Sharia’s jurisdiction during the colonial period is a fact but also a topos involving the relationship between power, law, the formation of political nationalist identities in Europe, and the legitimization of colonial enterprises on the grounds of efficient administration. European scholars and colonial administrators viewed Sharia as rigid, static, ambiguous, and unfit to operate in a modern state alongside other legal traditions. Looking through the lens of their own legal traditions, they equated Sharia with “Islamic law” and custom with customary law. “Islamic law” was conceived as a set of unequivocal binding rules to be imposed by the state. In addition, some colonial rulers privileged either *fiqh* or custom, like the British in Northern Nigeria, who in their bid to favor Sharia over custom imposed a legal system that had never existed before. The French, on the contrary, considered that the Berbers in Morocco should live according to their customary law. The conceptualization of Sharia as “Islamic law” translated into legislation—with all the above-described consequences—new institutional and archival practices, teaching programs, and printed handbooks and studies that represented European interests but also those of Muslim reformists and protonationalists (Buskens 2014, 211–3, 218; Emon 2012, 67, note 54; Masud 2013, 98–107; Masud 2019, 85–6).

The unrest generated by the colonial experience provided the breeding ground for the emergence of two influential faith-based movements: the Muslim Brotherhood, founded in Egypt in 1928 by Hasan al-Banna (d. 1949), and Jamaat-e-Islami of Pakistan, established in 1941 by Abu l-A’la Mawdudi (d. 1979) (Mayer 2019, 35–6).

**Modernist Legislative Reform in the Postcolonial Nation-States of the Middle East and Africa**

The codes that began to be promulgated in Egypt from the middle of the nineteenth century onward had no lasting effect until Abd al-Razzaq al-Sanhuri’s code of civil law, combining elements of French and Islamic
law, was adopted in 1949. Al-Sanhuri (1895–1971) combined expertise in both Western and Islamic law and thought that applying the principles of modern comparative law was the best means of breathing new life into the Islamic legal heritage. Relying on his code, Egypt made the above-mentioned transition from the mixed to the national courts system. The code was adopted as a model by Syria already in 1949, by Iraq in 1951, was imported verbatim by Jordan in 1976, replacing the Ottoman Mecelle, and by some Arab countries in the Gulf (Mayer 2019, 31; Rabb 2018, 39–40, 45–6).

By the mid-twentieth century, the codification, reform, and nationalization process undergone by Sharia law in the preceding decades was accelerated with the predominance of hybrid legal systems in which family issues and inheritance remained governed by Sharia. The constitutions enacted after those countries achieved independence provided that Islam was the state religion and commonly required that the head of state should be Muslim. However, Lebanon, whose 1946 Constitution was reconfirmed in the 1989 Taif Accord, designated a Maronite Catholic as the head of state, whereas the 1973 Syrian Constitution did not establish Islam as the religion of the state. A differentiation can be made between constitutions that mention Sharia either as one among other sources of legislation or as “a” source of legislation, or as “the only” source of legislation. Further, there is a distinction between legislation that should “draw” on Sharia and legislation that should “comply” with Sharia. The constitutions of Lebanon, Gambia, and Senegal do not mention Islamic law, but some courts in these countries apply Islamic law in personal-status cases. In Ethiopia, Ghana, Israel, Kenya, and Tanzania, Sharia is applied to Muslims by specific courts or by the national secular courts in personal-status matters (Berger 2014, 226; Lau 2014, 236; Mayer 2019, 28; Otto 2010, 631, 635; Peters and Bearman 2014, 8; Rabb 2018, 45–6). “Islamic law” is the only religious source of law expressly mentioned by the Ethiopian Constitution, whose Article 34 permits the adjudication of personal and family law disputes according to religious or customary laws (Kebede 2019).

Modernization, development, nation-building, and socioeconomic progress became major goals for almost all newly independent states. The adoption of a modern, unified national legal system with a division of power and the reform of personal-status legal matters were considered essential prerequisites for social transformation. All citizens of the new nation-state became subjects to a single legal system run by a new legal profession. A blend of Arab nationalism, socialism—with its emphasis on
equality, also between men and women—and authoritarianism shaped the new regimes of the Middle East, especially under the leadership of Egypt’s president Nasser (Berger 2014, 223–4; Mayer 2019, 31; Otto 2010, 622–3).

The codified versions of Islamic family law enacted by most governments deviated considerably from classical *fiqh*. In addition, some legislators attached equal value to all legal schools, including the Shi’i ones, and considered themselves free to choose from among their different rules those that best fit their aims (Otto 2010, 632; see subsection “Consequences” of the fifth section on re-Islamization below). To minimize objections from conservatives, reforms were often made via procedural expedients or by decree, imposing requirements such as the registration of marriages, a minimum age for marriage—thereby deterring child and forced marriages—or compliance with certain bureaucratic formalities and conditions to discourage polygamy and the husband’s use of discretionary divorce (Berger 2014, 224–5; Mayer 2019, 31–2). In Egypt, a reforming personal-status law promulgated by decree by President Anwar Sadat in 1979 eliminated a husband’s right to compel his disobedient wife to return to the marital home, required that the husband register a divorce and inform the wife he was divorcing her, and provided that a husband’s taking of a second wife constituted grounds for divorce by the first wife. Also, the law enhanced the wife’s rights in matters of maintenance, child custody, and post-divorce division of property (Mayer 2019, 32). Yet in Sudan, Mali, and Nigeria, the man can still cast off his wife on his own authority, with no or hardly any restriction (Otto 2010, 631).

In Algeria, a High Islamic Court was created in 1976 whose competence extended to the promotion of *ijtihad* as long as the result of its application did not overlap with or contradict a secular regulation (Mayer 2019, 30). Morocco’s family law (the *Mudawwana*) drew from a selection of rules from the four Sunni schools of law, with an emphasis on Malikism—which is dominant in the area—plus the Imami Shi’i legal school. Until the promulgation of the new *Mudawwana* in 2004 (see “Consequences” section in the section on re-Islamization below), the 1956 Tunisian family code was considered the most “revolutionary” reform attempt ever carried out in a Muslim-majority country. Polygamy was abolished and men and women were given equal rights in divorce. Furthermore, adoption was legalized in 1958 (Berger 2014, 226; Mayer 2019, 32).

Codified *fiqh* on inheritance has been less subject to reform than marriage regulations. In practice, people have always managed to find
ways to leave to their daughters shares equal to those corresponding to their sons, but formally, women receive one-half of the share corresponding to a man in an equal position (Otto 2010, 632). In Iraq, a law adopting German inheritance law promulgated in 1959 was canceled in 1963. An earlier reform plan was then brought back, combining relevant Sunni and Shi‘i fiqh (Mayer 2019, 32).

The authority of the religious scholars was further relegated to the fields of worship and morality, or to legitimating reforms of Sharia, where the ultimate power of selection and interpretation was exclusively assigned to the national legislatures. The monopoly on determining the applicable Sharia rule was transferred to the judiciary, whose work relies on codified sets of rules. Issuing judgments on the basis of modern legal codes required professional skills, imparted at newly established faculties of law where the study of Sharia was limited to an introduction of its basic principles and to family law. Tribal and community leaders, who had been in charge of customary law for so long, were also marginalized (Berger 2014, 225; Otto 2010, 623; Peters and Bearman 2014, 8).

Conversely, from the 1960s onward, the implications of the sacred sources for areas not covered by fiqh thus far, or where earlier doctrines were deemed inadequate, were developed. A new literature was produced by Muslims from different educational backgrounds and outlooks, like the Iraqi Shi‘i scholar Muhammad Baqir al-Sadr (d.1980). Their writings are more oriented toward ideology than toward jurisprudence, and focus on public-law issues such as government, penal law, and macroeconomic principles. Their theories did not fit into the traditional categories, thus contributing to making the barriers formerly separating the schools of law and Islam’s major divisions more permeable. Some, like the Sudanese Hassan al-Turabi (d. 2016), supported the idea of states constituted according to Islamic criteria. Theoretical debates went on about the degree to which Islam was compatible with the post–World War II system of international law and the degree to which an Islamic system was susceptible to incorporating democratic principles (Masud 2013, 143–76; Mayer 2019, 35–6).

Legal Re-Islamization or Traditionalist Legislative Reform

Motivations

The independent Muslim countries faced huge challenges. Many states succeeded in stabilizing society and in using their oil revenues to develop
a agriculture, industry, education, and public health, but much went wrong too. Attempts at bringing family and property law closer to rule-of-law standards caused considerable resistance, whereas the implementation of these laws proved disappointing for many people. Individual rights were systematically subordinated to the general goods of “stability” and “development.” Policies were made in the name of the people without giving them a political voice. Moreover, most countries were unable to maintain effective courts to control illegal practices and provide remedies. Bureaucracies blocked and frustrated private business initiatives. The cases of politicians, civil servants, and army officers who used their public positions for their own private interests undermined their reputation. Ethnic conflicts, separatist movements, military coups, and other conflicts threatened the stability of many young states. In addition, people’s attachment to tradition was underestimated. By the mid-1960s, the centralist, authoritarian, mostly socialist ideology of the times started to crack. People’s dissatisfaction with their governments gave religious scholars and tribal chiefs new opportunities to regain lost powers. The ulama reacted by calling for religious and cultural authenticity, but at the same time, other domestic and transnational actors began to promote democratization, privatization, human rights, anti-corruption measures, and rule-of-law policies (Otto 2010, 621, 623, 626).

The ideology of Islamization—whose emergence was sketched at the end of the previous section—intensified and resulted in an open call for the rejection of Western laws because of the West’s political, military, and economic dominance and its “moral decadence.” Law has always played a central role in Islam, and contemporary political Islam is no exception in that regard. Islamist standpoints are based on the belief that economic development, justice, and prosperity will follow automatically from the establishment of an Islamic legal order and social system. The resulting movements summon Muslims to replace governments in power with genuinely Islamic governance systems that, apart from law, should extend to education, politics, economics, and finance. The necessary inspiration should be drawn from the important contributions to learning and civilization made by their forerunners (Lau 2014, 243; Masud 2013, 125–33; Mayer 2019, 34; Otto 2010, 621; Saeed 2014, 248–9).

Today’s most famous puritan movements claim to be Sunni and are, in some cases, sponsored by Saudi Arabia. They call for a better society and government and present themselves as true and pious Muslims. Only a few are individual models of selflessness. Groups like the Muslim
Brotherhood provide social services where the government is absent, an activity that understandably earns them a large number of followers. In doing so, they become catalysts of popular discontent. Some puritans are militant and are ready to die as martyrs. Their international impact has been tremendous, with the political successes we are going to see next, but also triggered a variety of negative reactions that have undermined their credibility (Otto 2010, 621, 645–7).

**Facts**

From the 1970s onward, a number of initiatives were launched to re-instate Islamic law. Punishments considered typical of classical Sharia, *zakat* taxation, and bans on interest on loans were integrated into legal systems that remained strongly shaped by their Western models; innovations were not introduced by referring the judiciary to the classical *fiqh* books but by referring them to codifications of the relevant rules promulgated at the state’s initiative. Legal re-Islamization also affected constitutional and family law. However, the legitimacy of Islamization has been measured by the degree to which Islamic penal law has been reinstated and enforced, particularly the *hudud* punishments (i.e., amputation of the limbs, stoning to death, flogging, and the death penalty), retaliation in kind (*qisas*) and blood money for intentional and unintentional corporal damage and killing respectively. Islamic criminal law has thus become the hallmark of political Islamization, with an emphasis on sexual offenses, the consumption of alcohol, the free mixing of unrelated members of the opposite sex, apostasy, and blasphemy. Modern reconstructions of Islamic criminal law and the way its punishments are implemented today have often overlooked important substantive and procedural requirements developed by premodern jurists to verify that they are applicable and, if so, avoid their implementation as much as possible. However, lack of historical precedent does not make this trend less relevant to the shaping of contemporary understandings of the nature and applicability of Islamic law, and does not render Islamist political forces less capable of exerting pressure on Muslim governments and oppressing people (Berger 2014, 226–7; Lau 2014, 236, 243; Mayer 2019, 34; Peters and Bearman 2014, 8–9; Saeed 2014, 249; Shabana 2017, 290–1).

Legal re-Islamization varied according to the specific contexts in which it took place. Islamic criminal law was reintroduced in a codified

Elsewhere, governments were forced to respond to the pressure exerted by Islamists by either introducing isolated Islamic laws or making constitutional amendments regarding Sharia’s relevance to national legislation. In Egypt in the 1970s and 1980s, proposals like making apostasy from Islam a capital crime were put forward, raising objections from the Coptic community and leading to confessional tensions. Most proposals came to nothing, but a law prohibiting alcohol was passed and came into force in 1976 (Mayer 2019, 35). A new clause was introduced in the Egyptian Constitution that declared Sharia as the principal source of legislation (Rabb 2018, 39–40). The abovementioned personal-status law of 1979 was nullified in 1985 by Egypt’s High Constitutional Court. However, to placate the feminists, several changes were subsequently reintroduced into the amended 1979 law, giving women more options for divorce (Mayer 2019, 32). In Algeria, the conservative reaction came in 1984 in the form of a new family law that, presented as a return to Maliki legal doctrine, brought back male guardianship of women, gave husbands the right to divorce at will while requiring the wife to establish grounds, and reasserted polygamy (Mayer 2019, 32).

The 2012 Provisional Constitution of Somalia provided that “[n]o law which is not compliant with the general principles of Shariah can be enacted.” Equally, the 2005 Constitution of Iraq provides that “[n]o law may be enacted that contradicts the established provisions of Islam” (Lau 2014, 236). In none of these cases, Sharia was reintroduced as a specific law—leaving the door open for multiple interpretations—nor were its contents defined. The same lack of definition applies to the reservations that many Muslim states have about international human rights treaties in the name of “Islam,” “Sharia,” or “Islamic law” (Berger 2014, 227–9).

In the 1990s, waves of democratic decentralization led to the empowerment of the 12 Muslim-majority states to the north of the Nigerian Federation. Between 2000 and 2001, their parliaments used the legislative powers accorded to them by the secular constitution to pass some Sharia-inspired criminal provisions, a dress code for women and men, and compulsory lessons in religion. Some prohibited the consumption of food and drinks during Ramadan, the consumption of alcohol, or “indecent
behavior,” in particular extramarital sex. Also, the jurisdiction of Sharia courts, thus far limited to family issues, was extended at the cost of general courts (Lau 2014, 239; Otto 2010, 628, 640–1; Peters 2003, 2004).

Consequences

Since the mid-1980s, a sense of moderation about some of the early legal reforms is discernible: countries are either moving to constitutionalism (Sudan), or continuing the liberalization of marriage laws (Egypt), or exercising restraint in the execution of cruel corporal punishments (Nigeria). Judicial executions of cruel corporal punishments such as stoning and amputation in the countries where such punishments are legally in force are reportedly very rare—with the exception of Iran and Saudi Arabia. The expansion of Sharia criminal law has lost much of its practical application. Muslim scholars have criticized these criminal laws for not adhering to the conditions set by fiqh, for being “repugnant to the teachings of the Qur’an and the Sunna,” or for incumbent judges’ lack of training to act according to those teachings. Occasionally, such criticisms have had legislative consequences. Politicians in the Muslim world seem to have lost interest in pursuing a policy of Islamization, due to its association with the violent attacks for which Islamists claimed responsibility (Berger 2014, 227; Masud 2019, 80; Otto 2010, 633, 649).

Islamists tend to consider local custom, music and dancing, Sufism, and the veneration of saints as un-Islamic, for which reason they are sometimes accused of “cultural genocide” (Otto 2010, 647). The puritans’ belief that Sharia was curtailed and that its incorporation into national law was a corrupt and failed process, contaminated by Western values. For them, the only viable alternative to this was the complete replacement of national law by “true Sharia” and the establishment of an Islamic state. This view is simplistic and essentialist (Otto 2010, 616–617). The legislators and Islamist activists who advocate for the Islamic state do not seem to be aware that their approach to Sharia is rooted in the above-described colonial concept of “Islamic law” (Buskens 2014, 218). Islamists’ reenactment of an imaginary historical conception of Sharia as law of the state is conceptually incoherent, historically unprecedented, and practically unworkable today; actually, most Muslim-majority countries are secular (An-Na‘ım 2014, 307). The idea that Islam requires the establishment of a so-called Islamic state is a myth, and
enforcement of Sharia norms as state law goes against the rationale of those very same norms (An-Na’im 2014, 307–9, 318; Emon 2012, 68).

Recent studies on Sudan have shown the adverse impact of cruel, inhuman, and degrading punishments, the application of which has adopted a political and class bias, particularly against women from marginalized groups (Köndgen 2017). Moreover, though the severe hudud punishments have largely remained symbolic, they have kept a repressive and social control function that may foster the abuse of power and use of violence outside the courts (Oette 2018, 290–1).

Re-Islamization in Nigeria has been accompanied by similar controversy. The introduction of corporal punishments like amputation and stoning to death has damaged the country’s reputation, internally and externally. The constitutionality of the new criminal rules and the extension of the jurisdiction of the Sharia courts have been also questioned (Lau 2014, 239–40, 244). Be that as it may, almost two decades since its inception, the introduction of Sharia has already become a nonissue in the country. The judiciary has not allowed any stoning so far. Hundreds of sentences ordering the amputation of hands have been issued, of which three were implemented. Since 2002, however, no more amputations have been carried out. Moreover, the federal government has decided to allow Islamization only as long as judgments do not violate the constitution. Despite this evidence of moderation, there are some signs of reverse trends, and there is no reason to expect that political pressure to incorporate Sharia in national law will disappear (Lau 2014, 239–40; Otto 2010, 620–1, 632–3, 641, 645; Peters 2005). The latter remark has been confirmed by Brunei’s recent reinstatement of stoning to death as a punishment for gay sex and adultery (“Brunei says controversial Sharia law aimed at ‘prevention’”).

The suggestion of supremacy produced by the presence of Sharia in the constitutions of Muslim-majority countries must be questioned since, as we have seen, many provisions in those very same constitutions testify to the supremacy of the constitution itself and to the rule-of-law standards laid down therein (Otto 2010, 629–30, notes 3 and 4). The legitimacy of the legislative, judicial, and executive structures adopted by Muslim-majority countries upon independence—with their parliaments, elections, legislation, codifications, constitutions, and courts—have rarely been questioned by the Islamists. They have been more interested in discussing contents. In fact, the call for Islamization of the national laws was issued within the framework of a westernized legislative and judicial system and,
with the exception of Sudan, most legal areas have not been pervaded by Sharia (Berger 2014, 224, 228; Otto 2010, 627).

The secular orientation of Mali’s legal system and constitution explains, at least in part, why the activities of the influential local Islamists did not translate into legal re-Islamization. Rooted in its French colonial heritage, Mali’s legal system allows only limited space to Sharia in family and inheritance law, with marriage subject to a secular code promulgated in 1962 and elaborated further in 1975. Another reason is the growing influence of the Western organizations that provided financial assistance to former president Moussa Traoré in the 1980s. However, in most rural and urban zones of contemporary Mali, physical punishment, practices reaffirming women’s inferior status, and even polygamy are widespread, but they are not identified as Islamic. Efforts to amend family law have been frustrated for many years due to the conflicting views of Islamists and moderates, and of Western and Islamic donors (Otto 2010, 641–3; Schultz 2010, 545–7).

Since they are in charge of interpreting and implementing constitutional law and codified Sharia, judges play a crucial role in determining the outcome of the re-Islamization process (Berger 2014, 228; Lau 2014, 239). Following the 2005 Comprehensive Peace Agreement, the pluralistic Sudanese Constitution of 1998 was reconfirmed and put under the safeguard of a Constitutional Court (Köndgen 2017, 38–65). In Egypt, the scope of the Sharia referent has been kept within narrow limits by the Supreme Constitutional Court, which is the only court allowed to decide whether Egyptian legislation is compatible with Sharia. Moreover, only legislation implemented after 1980 must conform to the principles of Sharia. The constitutional courts have demonstrated a remarkable knowledge of Islamic jurisprudence and independence in determining (ijtihad) what Sharia is to be codified, with the exception of areas considered immutable, like Islamic rituals. In the issue of apostasy, however, the Egyptian Court of Cassation has been heavily criticized for giving in to fundamentalist views (Berger and Sonneveld 2010, 65–74; Lau 2014, 237; Otto 2010, 628). Elsewhere, the constitution has assigned the task of ensuring conformity of existing laws with the injunctions of Islam to a special advisory council, which is also tasked with recommending the necessary reforms (Masud 2019, 92–4).

Islamist interpretations of the law have spread, especially among judges of lower courts. This fact has been attributed to the poor quality of the Islamic legal training they receive in the secular law faculties.
An example is the use that lower Nigerian courts make of Islamic criminal laws regarding pregnancy out of wedlock (Berger 2014, 228, 231–2; Masud 2013, 288–90; Peters 2003).

Codification and legal nationalism also meant the disappearance of the state’s enforcement of Islamic public morals through the muhtasib. Khaled Fahmy (2018) has convincingly argued that some recent studies advocating for the continued validity of the hisba institution to keep Islamic societies ethically virtuous ignore that muhtasibs used to be closely attached to rulers. They also ignore the high degree of violence that was inherent to the performance of their functions. Be that as it may, from the 1970s onward, the enforcement of Islamic morals was gradually taken over by social groups wishing to impose their understanding of Islamic piety to all. Apart from the already mentioned norms of decency, piety, and dress regulated by law in several countries, Islam-compliant behavior is further enforced by means of laws on blasphemy and violation of public order or state security. Activities such as publishing books, airing films allegedly critical of Islam, but also cases of homosexuality have been labeled as un-Islamic by groups who tend to identify the state with Islam and their actions as safeguarding the integrity of Islam (Berger 2014, 229–32).

Islamic public morals can also be enforced indirectly, as illustrated by apostasy from Islam in those countries where it is not legally forbidden. The identity card in most Muslim countries contains the religion of its holder; conversion from Islam is often not accepted by officials, contrary to conversion to Islam, which is readily recorded on the identity card. Moreover, most national Muslim family laws prohibit marriage between a Muslim woman and a non-Muslim man (Berger 2014, 230).

The emergence of “Muslim laypeople” has been central to realizing the demand to be Islam-compliant, which was brought about by the re-Islamation wave, and to enforce Islamic public morals. Relevant research identifies them with modern-day intellectuals, “alternative elites,” or new authorities with credentials inferior to those of fiqh experts, combining self-esteem gained through education with an acute awareness of their Muslim identity. They may have studied the religious sources, but independently from the ulama, whose authority they challenge; actually, the line between them all has become blurred (Berger 2014, 230). They are no longer content with only asking for fatwas, but have themselves started to turn into semi-educated or grassroots “prosumers” who use the new research possibilities offered by the internet to navigate Islamic legal
scholarship and come to their own conclusions (Krawietz 2014, 302; Yilmaz 2005, 198–200). The relationship between the religious scholars and the Islamists is ambivalent: many scholars feel criticized by the Islamists and see them as overzealous and lacking a sound knowledge of fiqh, but also as the forefront capable of bringing about an Islamic state in which the scholars would play a leading role (Otto 2010, 646).

There was a certain degree of consensus between the ulama and the state on determining what Sharia is or is not. Yet, the Muslim laypeople have become an important third voice, which they make heard through political activism or proselytism or by forming isolated communities where they live in accordance with their interpretation of Sharia. Some do resort to violence. Others have keenly used the national laws and the judiciary system to impose their moral code and worldview, especially since the 1990s, by filing court cases against other individuals for allegedly un-Islamic behavior or even apostasy (Berger 2014, 230–1).

Such accusations usually fall under the umbrella of criminal law—in which the state, rather than individual citizens, acts as accusing party—but even when they do not, some radical elements among lay Muslims have, in collaboration with judges of lower courts, taken it upon themselves to act against persons with a public profile whom they deem to be un-Islamic. The most infamous action of this kind was the court case filed against Egyptian university professor Nasr Hamid Abu Zayd (d.2010), but similar cases have occurred in other Muslim countries. Most were found to be lacking sufficient legal basis and dismissed by the court or overturned by higher courts. However, until that happens, mostly after a lengthy process, the accused remains in prison. The prospect of being brought before a court is sufficiently terrifying to force the accused to give in to the claims of the accusers, retracting certain statements, withdrawing a book or film, or merely reasserting the sincerity of his or her religious beliefs (Berger 2014, 228, 231–2; Peters 2003).

Legal re-Islamization has occurred without reference to a madhhab. Rather, there has been a preference to go directly to the Quran and the Sunna (Berger 2014, 228–9). The call for a new ijtihad by Muslim modernists at the end of the nineteenth century and the much more recent emergence of Muslim laypeople have deeply affected the structure of the established legal schools as institutionalized manifestations of the principle of consensus, to the point of dissolution (Cammack 2005; Masud 2013, 87–97; Ziadeh 2018, 19). The Hanafi School continues to be the most widespread. It is still the official school for issuing fatwas, for
personal-status matters, and for religious rituals of Sunni Muslims in the successor states of the Ottoman Empire, including Egypt, Syria, Lebanon, Iraq, Jordan, and Israel-Palestine, as well as in the Balkans. Its adherents are estimated to make up more than one-third of the world’s Muslims. Malikism is the official legal school in Morocco and continues to be predominant among the people of Algeria, Tunisia, and Libya. It has also spread to Upper Egypt and Sudan. Today, although the Hanafi School is officially enforced by the courts in matters of personal status, many Muslims in Egypt—particularly in the rural areas, Palestine, Jordan, Syria, Lebanon, and Iraq—follow the Shafi’i School in ritual matters. The Hanbali School has many adherents in Palestine, Syria, Iraq, and elsewhere (Ziadeh 2018, 14–8).

A key modern development, already hinted at above, consists in crossing the boundaries of the various schools in order to find juristic opinions in support of reform. *Takhayyur* (selecting the best) and *talfiq* (combining parts of the doctrines of different schools or jurists—including the Shia—into a new doctrine) have been applied several times in the past, as in the abovementioned Ottoman Family Law of 1917. The Egyptian Law of Testamentary Dispositions of 1946 allowed a bequest to an heir within the “bequeathable third” without the consent of the other heirs, contradicting the Sunni position on the matter (Ziadeh 2018, 19; see above, Section 4). The Ja’fari School (also known as the “fifth madhhab”) was accredited by Mahmud Shaltut, the rector of al-Azhar University in Cairo, along with the four Sunni schools, in 1959 (Sachedina 2018, 22.) Crossing madhhab boundaries became particularly instrumental to improving women’s family rights during the 1950s and 1960s; for instance, the Maliki School allowed women certain grounds for divorce without the consent of their husbands, the Hanafi School allowed a woman to marry without a guardian’s consent, and the Hanbali and Maliki Schools allowed for stipulations and conditions in the marriage contract (Ibrahim 2017; Masud 2019, 76–7; Otto 2010, 632; Ziadeh 2018, 19). *Talfiq* and *takhayyur* are also practiced by individual Muslims and by collective national and transnational *fiqh* organizations. They all engage in “inter-madhhab surfing” to bridge the gap between social and cultural change and self-perceptions of Muslim identity (Masud *et al.* 2019; Yilmaz 2005).

Two examples of emerging jurisprudential fields are *fiqh al-aqalliyyat*, or jurisprudence on Muslim minorities, and “Islamic bioethics.” *Fiqh al-aqalliyyat* is devoted to the concerns of Muslims living as religious
minorities in majority non-Muslim countries. The European Council for Fatwa and Research (ECFR), founded in London in 1997, is the most prominent organization engaged in the theory and practice of this matter, which is also subject to individual contributions by Muslim jurists. Many critics argue that the methodology of the ECFR is too eclectic and leads to unacceptable exceptions. Critics are also concerned that these exceptions become the norm in the majority-Muslim world (Caeiro 2011; Hassan 2019; Hendrickson 2018, 24–5; Masud 2013, 117–4).

The introduction of the modern natural sciences, medical education, and general healthcare into the Islamic world by the end of the eighteenth century led to normative assessments and reactions to them in the form of fatwas, studies, reports, conference discussions among experts (including physicians), and debates in mass media, in Arabic as well as in other languages relevant to Muslims. From the mid-twentieth century, knowledge on specific medico-jurisprudential questions began to circulate widely among the general public. Today, a number of states consult with the religious scholars about their biomedical policies and regulations. These are also present as ethical advisors in medical institutions and as representatives of their nations in international forums (Ghaly 2015; Krawietz 2014, 291, 301; Shabana 2019).

Most national and transnational Sunni fiqh organizations refuse to acknowledge the capacity of the advancements of medicine and biology to change Islamic jurisprudence, especially as far as the family is concerned. They oppose surrogate motherhood, third-party reproduction, and paternity establishment out of wedlock through genetic testing, while they are open toward some innovations such as organ transplantation (Krawietz 2014, 301–2; Shabana 2013, 2019). Feminist bioethics in the sense of liberation jurisprudence (Abou El Fadl 2001) is rare, especially in Muslim “core” countries. Nevertheless, contemporary Islamic bioethics provides many examples of creative readings of classical Islamic jurisprudence triggered by modernity and technological development, especially at the level of individual contributions (Krawietz 2014, 302; Serrano-Ruano 2018, 300–3).

If criminal law has been used as a marker of the authenticity of legal re-Islamization programs, civil law—particularly the laws of personal status—has provided a testing ground to observe the interplay between gender and family relations and the requirement to preserve the state and society’s “Islamic identity.” This is no surprise, given the relevance of civil law to people’s everyday lives and the widespread awareness of the
rights and obligations of marriage and divorce. All this helps explain the frequent recourse to courts in many Muslim countries to mediate family law disputes and is one reason that reform of Islamic family law codes is so central in the agenda of governments and civil society organizations (Rabb 2018, 40).

Actually, the emergence of “Islamic feminism” can in a certain way be viewed as an unexpected side effect of the re-Islamization wave. Muslim feminists fight for equal rights and the improvement of women’s legal status with Islamic reasoning and rules. Though still grossly misunderstood—especially in the West, where no distinction is made between arguing on the grounds of the Islamic tradition and the gender predeterminism of Islamist women’s movements—this strategy has been rather successful, in particular regarding women’s autonomous right to divorce and the legal position of unmarried mothers (Berger 2014, 227; Serrano-Ruano 2018). Islamic gender activism has been intertwined with “human rights” (huquq al-insan) claims. The latter concept has become a very important political argument to both legitimize and criticize the government (Masud 2013, 209–47; Otto 2010, 639–40, 649; Rabb 2018, 40).

In 2003, the Moroccan Mudawwana was amended at King Mohammed VI’s initiative. The reform was undertaken after massive protests against the existing family laws between 1992 and 2000, avowedly with the aim to reconcile universal human rights, justice, equality, and amicable social relations with the country’s Islamic traditions by means of ijtihad (Mayer 2019, 33; Rabb 2018, 41). The parties involved in the debate on family law articulated their positions almost entirely in Islamic terms (Buskens 2003; Otto 2010, 639–40). With the amendment, the family was placed under the joint responsibility of husband and wife. The minimum age for marriage was raised from fifteen to eighteen years (for both genders), women and men were given the right to contract their own marriages without the legal approval of a tutor, a man’s right to unilateral divorce was restricted, verbal repudiation by the husband was invalidated, “discord” (shiqaq) was established as a reason for divorce, and important limits were put to polygamy—for example, women were given the right to make the marriage contract contingent on husbands’ compromise not to take other wives. The amendments were praised by local women’s groups and international human rights NGOs as an example of “progressive” personal-status laws from within an Islamic framework (Berger 2014, 227; Mayer 2019, 33; Rabb 2018, 41).
The need to strike similar balances between different political and social forces has translated into amendments of the family law, or of issues impacting family relations, in Tunisia (1998 and 2003) and Algeria (2005). Already in 1981, a new provision gave divorced Tunisian wives the right to claim a payment or an allowance to maintain the same standards they enjoyed when married (Mayer 2019, 32). Law no. 75 of October 1998, known as “Patronymic Name Law,” gave unmarried mothers and other concerned persons the right to demand registration of a child under the biological father’s family name and to claim or establish paternity by acknowledgment, testimony, and genetic testing. All these legislative moves have earned the Maghreb a special reputation for advancing gender equality and respecting children’s rights (Serrano-Ruano 2018, 296–97).

Other bold steps from the Maghreb include the revocation of the law banning Tunisian Muslim women from marrying non-Muslims in September 2017 (“Tunisian women free to marry non-Muslims”). On November 2018, a law stipulating gender equality in inheritance was approved by the Tunisian cabinet (Sadek 2018). However, the law, “seems to have vanished into the limbo of parliamentary debate” (Belkaïd 2019).

In Egypt, a new marriage law promulgated in 2000 gave women the right to unilaterally divorce their husbands through khul’. *Khul’* is a well-known *fiqhi* procedure for women to obtain divorce from their husbands in exchange for their dower (*mahr*). This time, however, the prerequisite consent by the husband was removed. Given the strongly opposing forces that mark the relation between Sharia and national law in the country, the provision’s compliance with Sharia had to be stressed (Berger 2014, 227; Masud 2019, 94–5; Otto 2010, 640; Sonneveld 2012).

No aspect of modern life can escape the economy; thus, re-Islamization also had a visible impact on how Muslims, individually or corporately, view their earning, spending, borrowing, saving, and investing activities (Saeed 2014, 248–9). Since the 1960s, Sharia-based finance has evolved into a thriving business, present in Muslim and non-Muslim-majority countries on all continents. In both, Sharia-based and conventional financial systems coexist; Sharia-based finance attracts many customers, including non-Muslims (“Why non-Muslims are converting to sharia finance”). Though it is uncertain whether all so-called Islamic financial products would stand an authenticity test, many Muslims believe that by dealing with them, they are in compliance with the Quranic prohibition on *riba*, and that the future prospects of Islamic finance seem rather good (Saeed 2014, 258).
Islamist economists regard the zakat income tax that individual Muslims must pay in fulfillment of one of the five pillars of Islam as a very powerful instrument for bringing about a more egalitarian economic system. Zakat was easier to introduce than a public Islamic finance system. In 1983, Sudan made a move toward an interest-free banking system but, as elsewhere, enough loopholes were left so that banks and financial institutions remained functioning within the international financial markets (Berger 2014, 227–8).

**Sharia Today and Future Prospects**

In the modern world, lawmaking and the legitimate use of force are often considered to be the exclusive prerogatives of a centralized sovereign state that defines the operation of individual rights and public institutions within delineated geopolitical boundaries. Externally, the modern state operates within an international system in which all states are considered equal sovereigns and engage each other through trade negotiations, diplomatic relations, or international organizations. The state system in which Islamic law is immersed today extends to the arenas of government, civil, political, and economic society, bureaucracy, and judiciary. The legal systems of the contemporary Muslim-majority nation-states are primarily based on European models of civil law and governance, and incorporate Islamic law only partially (Emon 2012, 63, 67–8; Otto 2010, 644).

After the above-described adaptation to different forms of national law, Sharia is now subject to democratization and constitutionalization. This process strongly depends on domestic politics; it is also increasingly shaped by contemporary understandings of justice. As in most developing regions, political culture in the Middle East and Africa is still marked by authoritarianism, but new market forces have created an entrepreneurial middle class whose success has come to depend on that of the rule of law. Corrupt behavior is pervasive but openly discussed and tolerated less and less. The relevance of Sharia to Muslims’ social and private lives is one of the most debated issues in contemporary Islamic thought. However, Sharia’s relevance in contemporary Islamic societies should not be exaggerated. Other issues—like security and stability, economic growth, public finance, poverty reduction, education, public health, housing, decentralization, elections, and foreign relations—are considered far more pressing. Sharia comes into the spotlight occasionally with regard to
politically sensitive issues such as gender segregation, reform of family law, religiously motivated violence, and interreligious conflict (Otto 2010, 630–7, 644, 651; Saeed 2014, 249).

On the international level, the activity of transnational organizations like the Organization of the Islamic Conference has had a visible impact on discourses about Sharia and the rule of law, especially as far as respect of human rights and the promotion of gender equality are concerned. Since the 1990s, governments of Muslim countries—including those with re-Islamized legal systems—have become signatories to international treaties and have adopted human rights in national constitutional law (Mayer 2019, 36; Otto 2010, 634). At the grassroots level, Islamic laws affecting women are, as we have seen, increasingly evaluated in terms of their conformity with the modern norm of male-female equality (Mayer 2019, 36). However, certain human rights violations regarding gender, religion, and sexual orientation and cruel corporal punishments continue to be justified on the grounds of Islamic legal traditions or even Sharia-based legislation (Otto 2010, 618–9).

Sociocultural norms have traditionally informed the state’s definition of the public interest or are subordinate to local custom. Customary norms were, and continue to be, deeply rooted in kinship, power, and economy (Otto 2010, 647). Conversely, many Muslims identify with Sharia or with Islamic traditions, values, and practices that are alien to the prescriptions of fiqh, such as honor killings and female genital mutilation (Peters and Bearman 2014, 9; Vikør 2006, 227, 244–55). For this reason, women’s rights movements in Nigeria, Tanzania, and other countries view Sharia as the desired antidote against arbitrary tribal justice and repressive customs. Yet, it must be taken into account that the only available alternative in many places is not an effective and fair state justice system, but a semi-functional customary one. In the case of Libya and Somalia, the legal and justice systems have been destroyed by violent conflict. Meanwhile, tribal and community leaders are essential to peace and national political stability because of the power they still hold in many areas of the Muslim world. However problematic the kind of justice they impart, governments take care to keep these leaders satisfied and include them in the delicate balances they have to strike between opposed social groups when deciding on Sharia-related matters (Otto 2010, 618, 647–9).

In spite of the setback experienced by the ulama as a consequence of the nationalization and codification of the law in the Middle East and Africa, they retain important religious-legal functions and hence, much
capacity to exert social and political influence. As judges in family courts, many of them have earned a reputation of fairness and the ability to find reasonable solutions to problematic cases. As preachers, they lead the Friday prayer and are called to attend to the important “rites de passage” of birth, marriage, and death. As *muftis*, they provide legal advice and moral guidance to the people and do not hesitate to use new technologies, the mass media, and the internet to reach their audience. In addition, they oversee educational institutions, the management of *waqf* land, the pilgrimage to Mecca, and the collection of Islamic alms (*zakat*). Last but not least, their opinions have preserved the capacity to enhance the legitimacy of the state (Otto 2010, 646).

Future ways of incorporating Sharia—or rather, of reconstructing it in the framework of *ijtihad*—will depend on politicians, legislators, judges, *fiqh* experts, and bureaucrats in interaction with civil society. As elsewhere, Muslim governments aim for stability, prosperity, and social justice. These goals require a modicum of democracy, sound administration, an effective legal system, and the ability to convince opposing and complex ideological forces to reach compromises (Masud 2019, 95–7; Otto 2010, 643–7).

One of the most convincing proposals for defining the future role of Sharia has been put forward by Sudanese scholar Abdullahi An-Na‘im. He relies on the premise of a separation between Sharia and the state for, in his view, the integrity and validity of religious experience itself requires the religious neutrality of the state. Yet, the premise that Sharia should not be enforced by the state does not necessarily entail its suppression or the denial of its cultural and political role or its capacity to order Islamic societies (An-Na‘im 2014, 307–9, 318).

An-Na‘im emphasizes the efficiency of practice over theoretical analysis or legal stipulation to mediate the paradox of the separation between Islam and the state on the one hand and the connection between Islam and politics on the other. According to An-Na‘im, the main premises of mediation are as follows: First, the modern territorial state should neither seek to enforce Sharia as positive law or public policy nor claim to interpret its doctrine and general principles for Muslim citizens. Second, Sharia principles can be a source of public policy and legislation if they are submitted to the constitutional and human rights of all citizens equally and without discrimination (An-Na‘im 2014, 315).

Well-informed debates about Sharia’s role in contemporary societies and the relevant regulations and policies require the insights of many
disciplines and the consideration of the complex interplay of law, politics, and the demands of daily life. Yet, a solid knowledge base to make the theory compatible with actual practice is not enough to produce workable institutions. Winning over public opinion requires political sophistication. Arguments may come from a variety of perspectives, but it is clear that those made from within Islam will remain essential. This is an important reality to those seeking to promote democracy, development, and human rights in Muslim-majority states, which experts recommend not to disregard (Buskens 2010, 130–4; Emon 2012, 68; Kalanges 2014, 285; Otto 2010, 639–40, 650).

It might be argued that the prerogative of defining the contents of Muslims’ religion, and hence, those of Sharia, belongs to Muslims, and that Sharia might be defined as an understanding of Islamic law shared by Muslims of a given time and place. Yet, as Knut Vikør has observed, such common understandings are seldom reached, let alone become universal among adherents of a single religion. A rule’s consistency with Sharia may be decided by reference to the sources of authority rather than by a given form of religious expression or belief. *Fiqh* is part of Islamic legal history and as such, an objective point of reference in Muslims’ debates (Vikør 2006, 227, 244–55, 347). Authority on the grounds of competence is thus a key question in defining and accommodating Sharia to present-day living conditions. The challenge is not reduced to arguing that a given interpretation of the Quran is not convincing; discerning how the sacred sources were used to justify certain positions will probably be more helpful. Classical Islamic legal scholarship makes clear that the interpretation of the revealed sources was based on reason and logic, and considered valid and applicable not because of any inherent quality but in as much as it was accepted as just and beneficial by the community of authoritative interpreters (Cammack 2005; Emon 2012, 61; Masud 2019, 78–9, 95).

According to Muhammad Khalid Masud, there is an epistemological crisis in the modern interpretation of Sharia. The methods of formal logic and syllogistic reasoning typical of classical Islamic legal interpretation have been challenged by modern notions of justice, judiciary, rights, and equality, giving way to new methods like deontic logic (Masud 2013, 73–4). Abdullahi an-Na’im proposes to rely on “civic reason.” Based on this, Muslims and others should be able to propose policy and legislative initiatives emanating from their beliefs, provided they can support their proposals in a public, free, and open debate with reasons that are accessible and convincing to the generality of citizens, with all the basic
constitutional and human rights safeguards against the tyranny of the majority. Private voluntary compliance with Sharia should not affect the rights of others, since coercion is incompatible with the piety guiding religious practice that, in turn, must be voluntary and deliberate. Muslims would also definitely not be entitled to wield Sharia to justify the violation of state law. Modern states should guarantee that Muslims are able to exercise their right to religious/cultural self-determination within the framework of state law and its constitutional safeguards, like any other religious/cultural community (An-Na’im 2014, 315–8).

Religious scholars, leaders of civil religious movements, and judges have the task of making constructive use of the intellectual heritage of fiqh, acting as “cultural brokers” to facilitate the compatibility between Sharia, modernity, the rule of law, and human rights, and to raise awareness of existing Islamic law and rule-of-law-based rights among the common people (Otto 2010, 651–2; Von Carlowitz and Kirschweng 2012, 5–6; Yılmaz 2005). In doing so, the key point is to treat all such references as the product of human interpretations of the Quran and the Sunna and hence, as subject to accommodation and change, not as the binding word of God. This does not mean that Sharia is essentially incompatible with the principles of international law and the rule of law. The key question is, who has the authority to define Sharia and its scope? And since this is not a question of logic but one that depends on the power relations among the relevant actors and stakeholders, no human institution should be considered capable of “declaring or amending Islamic doctrine” on behalf of the bulk of the world’s Muslims (An-Na’im 2014, 317–8; Masud 2019, 78–9, 95; Vikør 2005, 256–7).

An-Na’im’s proposal to consider Sharia through “civic reason” and democratic process is meant to enable Muslims to press for legislation consistent with their religious beliefs, without asserting that belief as the rationale of state enforcement or their own religious conviction or cultural affiliation as a categorical justification. The secular legislative organs of the modern territorial state must have the exclusive monopoly on enacting state law, which is however shaped by Islamic norms and values, and secular judicial administrative organs must have the exclusive authority to interpret and apply it (An-Na’im 2014, 317–8).

As long as the state’s legal systems keep suffering from serious shortcomings, Islamists will have to be taken into account as a necessary social and political interlocutor and Sharia will fuel new legal, moral, and political aspirations (Otto 2010, 652). As Jean Michel Otto
remarks, the legal systems of most Muslim-majority countries are oppressive and restrictive in several aspects: Islamic fundamentalist ideas have been able to take root in the mind of judges and lawyers, and efforts to remove discriminatory provisions in national laws are met with resistance from conservative forces, even when based on a reinterpretation of the Quran and the Sunna (e.g., Masud 2019, 94–5). Since significant groups among Muslims do not seem to be satisfied with this situation, a new phase is foreseeable in the interaction between Sharia and the nation-state that corrects abuse and manipulation of the law, for example to get rid of political opponents, and reviews the training of legal professionals. Infringement of human rights in the name of Sharia is due to avoidable domestic governmental failures. This is demonstrated by the considerable progress made in the last decades by legislatures, bureaucracies, and courts in the Muslim world, despite political controversies and intellectual confusion. Legislators, administrators, and judges have displayed impressive balancing capacities, keenly combining norms of fiqhi and Western origin and making use of legal ambiguity. Judges in particular have shown that codified fiqh does not prevent them from finding creative solutions to acute social problems like the discrimination of unmarried mothers and their children. There is hope that domestic and international programs to strengthen judiciaries and the mechanisms of modern law will contribute to soften contradictions between Sharia and the rule of law (Berger 2014, 232; Masud 2013 4, 301–5; Otto 2010, 635, 647, 651; Serrano-Ruano 2018).

Haste in bringing about democratization, especially when imposed from outside, has proved detrimental in many cases. Longer periods should be considered for civic institutions, courts, political parties, and the economy to begin to function before organizing elections. Be that as it may, the quality of legal process and human rights protection could benefit much from international cooperation and from technical and financial assistance (Otto 2010, 649–50).

Investment in the rule of law and the protection of human rights is essential, in Muslim-majority countries but elsewhere too. The use of the rule of law in the international arena remains undertheorized. The fact that international law has religious and theological underpinnings needs to be recognized and discussed more systematically.³ Care must also be taken

³This point has been made recently by Muhammad Khalid Masud in connection with his research in progress on al-Shatibi’s contribution to the emergence of international law.
that the invocation of the rule of law in the international realm does not undermine the values that are supposed to be safeguarded by this ideal within each country. To complicate things even more, international institutions themselves are not totally bound by the rule of law. This is surprising, because the UN and its agencies, for example, vehemently advocate for the rule of law within individual countries. However, they maintain diplomatic immunity with various—unconvincing—arguments (Waldron 2016, 13–4). The legitimacy of Western nations and international organisms to impose respect for human rights and the rule of law in Muslim-majority countries is further undermined by the exceptions and double standards applied when geostrategic, energy, and economic interests are involved, such as the torture and mistreatment of prisoners in extraterritorial prisons in the name of security.

Nevertheless, convergence toward rule-of-law standards is incompatible with interpretations of Sharia that exert a powerful influence on Muslims’ social relations and political behavior, such as those supporting male authority over women (qiwama), legal superiority of Muslims over non-Muslims (dhimma), aggressive jihad (An-Na’im 2014, 316), discrimination of children on the basis of lineage, etc. The emancipation of women, the democratization of politics, and the increase in respect for human rights are inescapable developments that can be hindered but not halted (Otto 2010, 635).

References


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