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Introduction

This book, *Sharia Law in the Twenty-First Century*, offers a much-needed general introduction to the perspectives on studies of Sharia in the globalizing world. Globalism and Sharia have been challenging each other for more than two centuries. The book aims to highlight the significance that contemporary academia gives to the contextual diversity and multidisciplinary approaches in their analytical studies of Sharia laws. The co-editors began discussing the theme with the contributors to this volume in 2018. Hana Jalloul Muro organized an international seminar on "International law and Islamic law; Impact of two legal traditions in Spain" in cooperation with Casa Árabe, Complutense University of Madrid, and the European Mediterranean Institute on September 18, 2018 in Madrid. The participants in the seminar recalled how Spanish jurists from the Jewish, Christian, and Islamic legal traditions in Spain contributed to the mutual understanding of the legal challenges posed by the rising Mediterranean international trade and mercantile economy during the fourteenth to sixteenth centuries. These Spanish jurists laid the foundations of an international law beyond the laws of international relations. Among several scholars who participated in the above seminar, Ana Ballesteros Peiró, Mohammed Dahiri, Muhammad Khalid Masud, Hana Jalloul Muro, and Delfina Serrano are contributors to this volume as well.

The contributors to this volume are well-known academics who have broken new paths for understanding the dynamics of Islamic law and society in their relevant fields; most of them have certainly influenced the current academic discourse on Sharia (see "About the Contributors," p. vii). The book aims to make their thoughtful contribution accessible to a wider public. The book follows the Chicago Manual of Style in references and for diacritic

marks: (single opening quotation mark) for Arabic ‘ayn and (single closing quotation mark) for hamza. There is no hamza at the beginning of words. The book offers an essential glossary at the end of the volume with diacritic marks and in the titles of the books where the authors regarded them necessary.

The fourteen chapters in this book analyze these challenges from multi-disciplinary perspectives. Accordingly, the chapters are arranged in three sections: Theoretical Perspectives, Historical Perspectives, and Contextual Perspectives.

Theoretical Perspectives

Studies of Islamic legal theory mostly deal with such topics as authority, sources of law, hermeneutic techniques, principles of interpretation, and maxims in Islamic literature (Weiss 2002). The four chapters in this section analyze Islamic legal theory from the following perspectives: political (Chapter 1), moral (Chapter 2), philosophical (Chapter 3), and theological (Chapter 4). These chapters explore issues relating human rights, law and morality, sovereignty, and theoretical challenges to Sharia and globalism.

As an academician and activist for more than three decades in the field, Professor Abdullahi Ahmed An-Na‘im examines the Problems of understanding Sharia and international human rights in chapter one. He believes that genuinely mutual understanding is necessary for moving toward a globalized legal world, and that the human rights paradigm could have been a source for building such a mutually beneficial globalized world. In his critical study, “Contesting Sharia in Postcolonial and Geopolitical Contexts,” he is doubtful that such an understanding is possible. He explains the two reasons for this failure: First, the human rights paradigm is seldom aimed at mutual trust and understanding and is rarely used for social justice and protecting individual freedom. Hegemonic geopolitics in postcolonial international relations invokes this paradigm to justify or rationalize their power, expecting others to conform to their epistemology and rationality in respective legal, philosophical, and cultural traditions—proving a real obstacle in building mutual trust. Second, the negative perception of the human rights paradigm led to a narrow vision of social transformation: interrupting states and societies and depriving existing local systems of moral and political authority undermined the universal legal force of international norms and institutions.

According to An-Na‘im, Sharia is not a product of the sovereign state as in Western law. Historically, Islam, state, and society have been related

to each other by constant contextual negotiations. Human agency has been central to the development of Sharia; human intent and intellect on an individual level are basic components of the concept of legal obligation in Islamic law.

In Chapter 2, Professor Mohammad Hashim Kamali, author of several highly valued academic studies on ethical issues, focuses on what he labels a more worrying question: Is there a crisis of values? Globalization, modernity, positivism, and science have challenged traditional values, and moral norms are now challenged in legal debates. Noting how moral precepts influence and interact with legal principles, Kamali explores whether this is a question about separation between law and morality, or if it is a question of understanding how Sharia regulates the relations between moral and legal components. He observes that the moral rectitude of conduct often provides the basis of legality in other legal traditions. Distinguishing between the concepts of "moral precept," "religious belief," and "legal norm," Kamali explains how the three are interconnected in the social and legal processes of normativity. The globalized world in which we live underrates global ethics; the environmental crisis has yet to find consensus-based solutions. Sharia, however, has continuously taken morality and law into consideration through the *usul al-fiqh*. The current interest in the *maqasid*, the higher purposes of Sharia, illustrates the process of elevating a "moral" into a legal principle.

In Chapter 3, Professor Rula Jurdi Abisaab, a poet, novelist, and historian with a special interest in the relationship between religious and political authority, focuses on the redefinition of Sufism as religious normativity to maintain the boundaries in the relationship between the religious and the political in Safavid Iran in the sixteenth century. Some Sufi orders, through their social influence within the public, had become a threat to Safavid political authority. Abi Saab explores the debate on religious knowledge and authority by Mulla Sadra, one of the most luminous Islamic thinkers in sixteenth- and seventeenth-century Iran. Challenges to political authority could be effective in a religious society because of the religious and moral authority claimed by some Sufis invoking spiritual authority. The Safavids resolved to define the boundaries between religiosity and heterodoxy on the one hand, and between religious and political authority on the other. This differentiation, which Abi Saab calls "sociolegal standardization," was considered conducive to greater administrative control and centralization during the process of empire-building under

the Safavids. It did not mean elimination of Sufism but rather decreasing the public patronage and socioeconomic support for these Sufi orders. Consequently, specific Sufi groups were pushed outside public spaces of worship but allowed to continue their practices in private.

Mulla Sadra developed principles for distinguishing between legal and spiritual modes of religiosity, ethical values, and spiritual capabilities, and between hidden and apparent interpretations of Sharia texts. He considered it necessary to "cleanse" Sufism from such ideas and practices. Consequently, Abi Saab observes, by the late medieval period it was unlikely for a Sufi master to allow his disciples to enter the Sufi path before acquiring knowledge of the Quran and the *hadith* and expressing adherence to the Sharia. Sufi orders with no interest in socio-political mobilization, and strong ties with textual tradition and Sufi scholarship fared better in Safavid Iran. Whereas the messianic-heterodox groups were suppressed, the Sufi brotherhoods were absorbed in the Twelver Shia devotional space. Sufi scholars increased emphasis on outward conformity to the Sharia, especially in a public space. Religious homogenization and sociolegal standardization played a decisive role in building the premodern state such as the Safavid Empire and privatizing Sufi religious practices.

In Chapter 4, Julio César Muñiz Pérez, a jurist and legal analyst specializing in conceptual history, stresses the need for comparative legal studies of Islamic and Christian theology. Specifically studying the concepts of justice, sovereignty, and laws of *kafala*, adoption, marriage, inheritance, and taxes in Islamic and Western traditions, he demonstrates how these are historically and conceptually rooted in dogma and theology. Pérez notes, however, that the interconnection between theology and law is often unknown to Western-style legal systems, mostly underestimated and even denied. Presently, jurists are primarily interested in the most recent jurisprudence and the latest legislative mandates. However, most authors interested in the "theology of law" are linked to the category of "believers," who discuss legal reality and consider it "standard rules of faith and life." This approach involves the risk of appearing biased or indoctrinated. According to Pérez, this phenomenon, motivated by the general secularization of Western society and modern judicial dynamics, has taken several forms. Islamic schools have particularly complicated this connection further and introduced cultural constraints for research in comparative law.

Pérez raises the following question: Is this evolution specific to Islam, analogous to Christianity, or an interpretation imported from Christian theological categories and as such foreign to authentic Islamic tradition? He answers that "it all develops from the assessment of historical objectivism so that the theological categories may be approached from a global perspective, without any theological purposes. In methodological terms, I seek to position myself in a more balanced position between the objective and the subjective element of all understanding."

Recognizing the theological connection with legal institutions is quite useful. First, it is a critical legal-social research method from the perspective of both the history and philosophy of law. Second, it helps to avoid conflicts in seeking to solve controversies more effectively. Third, it allows identifying differences that express possible dysfunction points, especially when Western society seeks to impose legal conceptions totally foreign to other societies. It also helps to examine the appropriateness of the extrapolation of Western society's legal model to the Islamic world to the detriment of Islam's traditions and legal institutions. Incorporating a Western model of governance based on the division of powers and founded upon a dogmatic basis may cause the dysfunction of Islamic legal traditions rooted in different theological principles.

Historical Perspectives

The second section on historical perspectives includes four chapters studying state practices and the institutionalization of Sharia and *ijtihad* (Chapter 5), nationalized legislation (Chapter 6), history of the legal interpretation of torture (Chapter 7), and the institution of modern *fatwa* (Chapter 8). Shaykh Muhammad al-Khudri (d.1927), probably the first Islamic modernist historian, divided the history of Islamic law into five Periods: that of the Prophet, his companions, *ijtihad*, the growth of schools of law, and ending in *taqlid* with the absence of *ijtihad* from the fifth Islamic century onward (Khudri 1967, 4). Analytically, al-Khudri explained that the Quranic injunctions were to be understood within a historical context. The verses revealed in Mecca differ from those revealed in Medina, the former dealing with moral and ethical aspects of Sharia and the latter consisting of detailed legal injunctions. The Quranic legislation is founded on three basic principles of removal of hardship, minimum legal obligations, and gradual legislation (Khudri 1967, 14–8).

While most modern historians of Islamic law, including Joseph Schacht, focus on *fiqh* in the classical period, N. J. Coulson argues that even though Muslim legal literature appears to show no interest in historical enquiry, Islamic legal history does exist (Coulson 1964, 62–73). The history of Islamic law is usually descriptive and based on periodization, generally focusing on schools of law. It is occasionally analytical, and rarely explores the conceptual and institutional evolution of Islamic law. Coulson historicizes Sharia as an Islamic law system evolving in three stages: growth (seventh to ninth centuries), classical Islamic legal tradition (tenth to nineteenth centuries), and legal modernism (twentieth century). In the classical tradition, the dominant concept was that law was eternally valid and binding for both state and society. The problem for Western legal history, however, is that as a divine command, reform in Islamic law could not be justified on the basis of social necessity. Islamic legal modernism, therefore, argued that divine commands were general principles, not expressed in rigid or comprehensive terms (*Ibid.*).

Unlike other scholars who limit the history of Islamic law to early jurists, Knut S. Vikør, with several ground-breaking studies on the history of Islamic law, includes *siyasa* and *qanun*, in addition to *fiqh* in the history of Islamic law. Recognition of the role of caliphs and sultans in the making of Islamic law allows him to view Sharia as a legal tradition. In Chapter 5, Vikør traces the history of the concept of the legal authority of Sharia from early Islam to the modern period of states and globalism. Legal scholars in early Islam resisted the authority of caliphs to influence the formation of Islamic law because they insisted that law was to be based on God's revelation: The Quran and the Prophet were the divine sources of authority. The issue of legal authority arose mainly due to different, and sometimes conflicting, interpretations of the Quran and *hadith* texts. *Ijtihad* for interpretation and *ijma*' for validity existed, but they were not institutionalized. Legislative authority was, therefore, necessary for the formulation and application of law. This need was fulfilled by the evolution of schools, *madhhab*, which vested law-making authority in the founders of the schools, and *fiqh* literature, authorized by the consensus for validity of interpretation. The nature of legal authority in this system was autonomous, and the gates of *ijtihad* were open.

The conservative nature of law as a system, however, required institutional authority. This need led to the consolidation of schools by limiting *ijtihad* within the boundaries of school doctrines. Each school defined its own principles of interpretation, hierarchical codification of law texts,

and strict adherence to schools by judges and courts. There were occasional calls for opening the gates of *ijtihad*, but which ended instead in the reorganization of states patronizing one of the schools for courts and codification. This development also led to the agreed-upon dual system of Sharia and *qanun*. The legal authority of the state brought legal pluralism in courts to an end. Islamic legal rule of exemption of non-Muslims from Sharia was reformulated in this period as capitulations or pacts between the Muslim and foreign states to exempt foreign traders from local taxes and laws. It not only confirmed Sharia law as personal and religious but also extended the authority of one state over persons in another state on a religious basis.

Vikør finds continuity in this quest for legal authority in the later periods under caliphs and sultans, Ottoman and colonial empires, and modern nation-states to the present globalized world. He points to various methods and interpretive tools like *talfiq* and institutions like capitulation pacts to solve the problems of authority after the decrease of *madhhab*'s legal authority in nation-states during the modern period.

In Chapter 6, Delfina Serrano Ruano, a specialist in the history of Islamic law, overviews the transformations experienced by Islamic law in the contemporary period. Her chapter uses a selection of outstanding studies to emphasize a number of continuities that challenge the view of Islamic law in the contemporary period as the result of a drastic break with the past. Serrano Ruano provides some updates that confirm or nuance such a view and tries to move away from the religious/secular divide. She finds the history of Islamic law and the shift of Sharia from classical non-state to a modern national law system to be a more complex historical phenomenon than the simplified and stereotypical image projected by Orientalist and Islamist scholarship.

Replacement of the classical Sharia structures and practices with new legal institutions and rules, the dissolution of the classical legal schools, and diversity in the revival of certain elements of traditional Islamic law reflect the changes that have taken place while Sharia remains an authoritative legal, ethical, and theological worldview strongly determined by the state and sociocultural norms. This relationship between Sharia, state, and society 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. 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.

Legislators tend to base laws on norms that enjoy widespread social acceptance. 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. Legal re-Islamization, since the 1970s, affected constitutional and family law, but it varied in the *hudud* punishments according to the specific contexts in which it took place. Serrano Ruano points to the emergence of "Islamic feminism" as an unexpected side effect of the re-Islamization wave. Muslim feminists fight for equal rights and the improvement of women's legal status within the framework of gender activism that intertwines Sharia with "human rights" claims.

In Chapter 7, Kathleen A. Cavanaugh, a critical sociolegal scholar of international law, examines how the politics of law has played out within the fields of international and Islamic law, specifically with reference to the prohibition on torture. The notion of international law as pre-political, fixed, and stable has been challenged in the legal narrative of the "war on terror." The "war on terror" discourse has shifted the boundaries of the legally permissible use of torture, invoking exception for the state. The question was whether torturing terrorists by the state to seek further information is subject to state law or entirely outside of it. The definition of torture, in Article 1 of CAT, suggests several constitutive elements of torture. Consequently, despite international and regional prohibitions, the very meaning of torture and of other forms of ill-treatment and the rationale for their absolute prohibition remain contested and uncertain.

Cavanaugh finds that politics is also visible in the contestation between the "textualist" and "contextualist" readings in Islamic law; Islamic legal scholars with the textualist approach believe that the law is fixed and immutable, while the latter approach reads the text within a specific historical context. Islamic discourses on various international legal norms and prescriptions, therefore, interpret and apply norms and principles of Islamic law with differentiated readings. Varying readings and interpretations of Islamic law challenge the notion that its content, scope, and application are fixed and stable. Legal practices specific to an individual country draw on a variety of sources that can shift over time in ways that are not identical to Western experiences and may not be consistent across Muslim cases (Mayer 2007, xiii). The three main Islamic declarations of human rights approach rights-based discourse in a variety of

ways. With reference to the law on torture, she notes that "the gap in textual (and guidance) authority is most acute when we turn to Islamic criminal law and procedure."

Hana Jalloul Muro is a specialist in international relations and has particularly studied the Islamic legal institutions of interpretation, application, and adjudication. In Chapter 8, she studies the history of the institutionalization of legal authority in Islam in the absence of systems such as the modern state. In Islamic history, political and legal authorities were separated. It was a strong sense of religious community that held the people together. Legitimacy of political authority was entrusted by the people to the ruler with *bay'a* pacts of allegiance in exchange for responsibilities. This concept of pact—that continued despite structural changes in the formation of political systems—ensured the separation between legal and political authority.

Legal authority was secured by independence of legal education, autonomy of the jurists, and their authority of legal interpretation (*ijtihad*). Legal authority was exercised by the institution of *fatwa* which was collected in a somewhat codified form for the judges (*qadi*). *Muftis* also served as consultants to the courts. This system was reorganized under the Ottomans, who organized hierarchy in the *fatwa* by patronizing one school of law and by codifying Islamic laws. Christians living in the Ottoman Empire were governed by their own religious law under the authority of their religious courts. With Capitulation laws, the Ottomans allowed this authority to their co-religious European kings, thus accepting the international notion of personal religious laws in some areas. After the end of the Ottoman Empire in the twentieth century, most Muslim countries retained Islamic law personal status codes for Muslim communities. In countries like Lebanon, Egypt, Sudan, and Morocco, religious minorities may choose whichever faith codes they wish to apply to personal status codes.

Dr. Jalloul notes that the introduction of the modern state brought a new notion of national identity based on nation-states. It broadened and influenced not only political and social but also legal fields in local contexts. The religious confrontation between Shia and Sunni Islam led to ethnic tensions going back to pre-Islamic history. Thus, for example, many Shia in Iran include strong Persian elements within their religious identity, and many Maronite Christians in Lebanon identify themselves as Phoenician instead of Arabs.

Contextual Perspectives

This section reflects contextual diversity in geography, demography, legal frameworks, and religious affiliations, and, therefore, diverse problematization of legal issues. Six chapters in this section offer focused contextual studies of Sharia in the following selected countries: Morocco (Chapter 9), Germany, UK, France (Chapter 10), Iran (Chapter 11), India (Chapter 12), Pakistan (Chapter 13), and South Africa (Chapter 14). Contextually, the selected countries differ from each other in terms of modern legal frameworks: UK, India, and Pakistan follow the Common Law system and Morocco, Germany, and France follow the Civil Law system, whereas South Africa follows a hybrid Common and Civil law system. These countries also vary in Muslim population size: Morocco, Iran, and Pakistan are Muslim-majority countries, and Germany, France, UK, India, and South Africa have Muslim minorities. The populations in these countries also follow different schools of Islamic law: The Maliki school is dominant in Morocco, the Ja'fari Shia in Iran, the Hanafi in India and Pakistan, and the Shafi'i school is prominent in South Africa. The studies of Islamic law in this section are diversely focused; Chapters 9, 10, 12, and 14 study issues relating to personal laws, and Chapters 11 and 13 focus on constitutional issues.

In Chapter 9, Professor Mohammed Dahiri, with expertise in Arab and Islamic Studies, Comparative Literature and Translation, and focused studies in the fields of International Migration, Interculturality, Muslim Minorities, Interreligious Dialogue, and Conflict Resolution and Human Rights, offers an analytical overview of reforms in *Mudawwana*, the Moroccan Personal Status Code of 1957–1958 and why it took 47 years to review the Code. He studies how this Code inspired by the Maliki school of law came to be modified in 2004 and why public debates between the religious establishment and civil society groups continue.

According to Dahiri, the main problem of reform of gender inequality remains unsolved; changes are needed to create an independent judiciary, with judges and court clerks trained in the values of human rights and respect for gender equality. In his opinion, the Moroccan judicial system suffers from a structural problem; it is impregnated with a culture and mentality contrary to the innovative spirit of the *Mudawwana* and any possible future reforms.

In Chapter 10, Professor Mathias Rohe, a well-known German scholar of law and Islam in Europe and expert in civil law, international

private law, and comparative law, discusses the place of religious law in Western societies. He explains that Christianity served as the state religion for centuries in most parts of Europe. Religious minorities were sometimes tolerated, sometimes persecuted, or even expelled. The state–church system broadly lost its political, social, and finally legal grounding in the nineteenth and twentieth centuries. The situation altered significantly after waves of mass immigration to Western Europe, particularly since the 1960s, for various reasons. Presently, Muslims are the largest group of "minority religions" in Europe, but Islam is much more widely distrusted in European public opinion than any other religion. The treatment of Muslims is considered a litmus test for the application of freedom of religion and equal treatment in legal practice, and thus for the credibility of the rule of law system.

In modern Europe, relations between state and religion are organized in three different systems: (1) strictly laic systems, (2) secular systems with a positive attitude toward religion, and (3) weak versions of state–church relations. In Europe, religious issues are regulated by the European and national constitutional provisions, including Article 9 of the ECHR, granting freedom of religion and state neutrality toward religions. State legal systems also differentiate between religious and legal issues. Freedom of religion includes private worship as well as adequate protection of religious needs like building mosques, forming religious organizations, and social security. Due to differing interpretations about the distance between the state and religion, Western European countries vary in their application of these provisions. The debates and demands regarding visible Muslim religiosity also influence the confrontation with Muslim needs and creeds. Often, democracy and the rule of law are simplistically equated, but the two might conflict with each other.

Contrary to religious rules, the application of foreign legal rules does not fall under the freedom of religion. That would amount to total equality of different legal norms within one state. "Legal pluralism," in this sense, would fundamentally contradict the existing constitutional orders in Europe. A few Western European states have introduced Islamic legal provisions concerning family matters that can be applied in Muslim communities on a voluntary basis. Mechanisms of conflict resolution outside state courts (ADR) are operating in the field of economic disputes. ADR systems fail because representatives of religious organizations often lack information about the scope and limits of European law regarding ADR as well as sound knowledge of Islamic law.

In Chapter 11, Professor Fatemeh Sadeghi, an expert in the fields of gender studies and political thought, particularly Islamic political thought and Iranian politics, explores the limits of constitutionalism on a universal scale, focusing on Iran as a symptomatic case. Sadeghi argues that rather than considering the guardianship of the jurist a particularity of Shi'ism, it needs to be studied in the general historical context of the notion of absolute authority (sovereignty) that goes back to the premodern contexts of Roman legacy and Ash'arite Islamic theology and exists in modern political thought—from Jean Bodin to Carl Schmitt and the modern differentiation between sacred and profane. That is probably how in the Iranian Constitution, God as sovereign quickly transforms into Sovereign as god and is exemplified so in the doctrine of the guardianship of the jurist as well as in the absolute secular authority of the nation-state.

Sadeghi explores the concept of "sovereignty" in two contexts: general as well as specific to the Iranian Revolution of 1979. In the general context, sovereignty is the supreme authority with the ability to issue absolute and final decisions to be observed as law. The essence of sovereign power is "the [absolute] right to kill" (Foucault 2003, 240). The power of sovereignty comes from a potent mix of political and theological legacies (Martel 2012, 7). Building a constitution on the sacred and profane arches reveals the significant limits of the sacred/secular dichotomy for grasping how deeply violence is embedded in both orthodox Sharia and secular constitutional law. The sacred and the secular are not mutually exclusive, as is commonly believed. The ethical task is not to choose between secularism/atheism and religion; they are complementary. The chapter argues that a critical engagement with theology is required to question the simile of God as a sovereign ruler because it tends to justify political idolatry.

With reference to the specific context, Sadeghi observes that post-revolutionary developments led to the failure of the Iranian revolution. They were concerned more with the consolidation of power rather than with securing the rights of citizens. Ten years after the ratification of the 1979 Constitution, "an (un)constitutional assembly—whose members were no longer elected—modified the Constitution in 1989. As a result of this manipulation, people have lost many rights, while the absolute sovereignty of the *vali-e faqih* (the guardian jurist) became lawful," which possesses all authorities and forces equivalent to Schmitt's sovereign, who decides on the exception. The omission of "people" and their acceptance was a decisive change in the Constitution. Sovereignty was an amalgam

of three intertwined types of divine, popular, and national absolute authorities. This theocratic notion of sovereignty that depicts God as a masculine patriarchal sovereign is disagreeable to the Islamic theology in which "God is neither masculine nor sovereign; it is rather a vision that promises the capacity of human beings to constitute a more equal and freer community."

In Chapter 12, Professor Vrinda Narain, an expert in constitutional law and feminist legal theory, examines the Supreme Court of India's decision on *Shayara Bano and others v Union of India and others* (2017) AIR SC 4609, which declared instantaneous triple *talaq* unconstitutional. The triple *talaq*, *talaq-e-biddat*, is the unregulated, unilateral right to divorce held by Muslim men. A husband pronounces *talaq* (divorce) thrice, and at the third pronouncement, the divorce becomes final and irrevocable.

The legal validity of triple *talaq* in India is a controversial issue, implicating minority rights, religious freedom, and gender equality. The contradictions inherent in the simultaneous existence of discriminatory Muslim personal law and constitutional equality pose serious challenges for Muslim women's equality in India. This contradiction between public equality and private discrimination, and the privileging of religious freedom and minority rights over gender equality, has meant that Muslim women's equality has been largely marginalized in Indian constitutional interpretation and jurisprudence. In this chapter, Narain examines the interface between religious personal law and constitutional law.

The chapter begins by contextualizing the situation of Muslim women and describes the multiple axes of discrimination they face. It also sets out the legal framework governing Muslim women's rights in the family and the constitutional provisions regulating minority rights. It details the facts of the Shayara Bano case, identifying the issues considered by the Supreme Court. It then assesses the Supreme Court's analysis of key issues, including the constitutional status of personal law, women's equality rights under Muslim personal law, the validity of the triple *talaq*, and the issue of whether the religious freedom guarantee disallows reform of personal law. It concludes by discussing the consequences and future implications of the Shayara Bano case for Muslim women's rights.

In Chapter 13, Ana Ballesteros Peiró, an expert on Islamic sectarianism and sociology of religion and politics in South Asia, analyzes the debates in Pakistan about Sharia, constitution, and identity of state. Explaining the context of this debate, she refers to the late colonial period

when the British began the devolution of power to Indian nationals. Muslim elites were worried about their future political identity in India ruled by an overwhelmingly Hindu majority. The Independence Act 1947 provided a guideline for the Constitution of Pakistan that considered The Government of India Act (1935) the provisional constitution for independent Pakistan and India with dominion status.

Peiró finds that the question of national identity for state has been crucial to framing the constitution in Pakistan. The question about the definition of a Muslim further divided Pakistan. She explores sectarianism as the specific context in which the problems of identity, constitution, and legislation have been debated in the country. Identity is considered constantly threatened, not only because Sharia has been diversely interpreted by different sects but also because there is a constant debate on the definitions of Islamic state and nation. There has been confusion about other identity affiliations (linguistic, ethnic, provincial, religious) claimed by marginalized groups as being against the nationalist narrative.

In Chapter 14, Muhammad Khalid Masud, with research interest in Sharia debates, explores the debate on the specific issue of the recognition of Muslim marriages in South Africa. Public discourses on Islamic legal issues in the twenty-first century are usually labeled "Sharia debate" in academic studies on several Muslim countries and societies all over the world. Sharia became the most prominent subject for intense and even violent debates toward the end of the twentieth century. Debate as a formal discourse on a particular matter is one of the characteristic processes in the discursive traditions of Sharia. The rise of modern states was coeval with colonialism in most countries. While it introduced the modern concepts of a state's absolute authority and national law, it also shifted the focus of Sharia debates from the legal to political perspectives. Instead of adherence to specific schools, debates moved to Islamization of national laws in the twentieth century, and from pan-Islamism to Islamic globalization in the twenty-first century. Some academic studies notice this shift as a move from the interpretive to a discursive approach. Western Orientalist scholarship was fascinated by the textual growth of Islamic law, and considered these debates as a significant departure. Some scholars regarded them as gaps between the classical Islamic theory and practices; others viewed them as contestations between the modernist and Islamists.

Masud focuses on South Africa because while interpreting the universal values of freedom, equality, and justice, the differences in the four legal traditions of indigenous customary, Common, Civil, and Sharia laws

in the country have generated debates on some basic issues. Sharia debates on the issue of the "recognition of Muslim marriages" are deeply contextualized in these differences. While the public debate is widely diverse and the Constitutional court is dynamically open, judicial reasoning seems highly inflexible and politically rigid. This chapter explores how we can learn from these debates about law reforms in general and Sharia in particular.

Muslim marriages are not legally recognized even today, and this most complicated debate is facing an impasse in South Africa. Sharia debates on this issue provide an opportunity to look critically not only at Sharia as a legal system in a modern secular state context but also to examine how Sharia and the Common and Civil law systems interact with each other while facing religious diversity and multiculturalism in the modern nation-state context. This chapter explores the issue in three local contexts: colonial-historical, Muslim minorities with cultural diversity, and legal politics.

The South Africa Act (1909) brought different British colonies and republics, racially and legally divided, into a united self-governing dominion within the British Commonwealth. Power was transferred to the white minority, excluding others from political participation. The South Africa Act (1910) declared independence under the name of Union of South Africa. The British and the other European settlers both had developed legal systems based on the philosophy of legal positivism. The British followed the Common law tradition, while others practiced Civil law. Three reasons may be discerned from the debates on this issue: (1) Common law restraints about custom, (2) negative perception of diversity as a threat to the modern state and the ensuing politics of law, and (3) positivist debates on the restrictive normativity of the religious as customary law.

Muslims have been diverse small groups, divided into various ethnic communities based on the countries of origin from where they were brought as prisoners and laborers by colonial rulers. They were also diverse in their affiliations to Islamic law. Even as a small minority, Muslims were conspicuous in business and other professions. They have featured prominently in the country's representative institutions since 1994. Since 1965, Muslim marriages enjoyed some statutory recognition, though subject to South African Civil Marriage laws. The courts have been reluctant to consider this indirect and limited recognition as a valid and full formal recognition of Muslim marriages. The issue remained under discussion with the South African Law Reform Commission.

The politics of recognition was shaped by the ideas of power and supremacy that believed in sovereignty rather than equality based on diversity. Most Muslims had the Islamic ceremony of *nikah* and registered it as civil marriage afterward. Some *ulama* declared civil marriages un-Islamic and advised Muslims to have only *nikah* marriage and not to combine it with the civil procedure. Sharia debates on Muslim marriages in South Africa emerged in 1993 and focused on two points: the status of Muslim women and normativity of Sharia in South African Law. Customary marriages came to be recognized in 1998, but religious, particularly, Islamic marriage is not yet recognized. To understand this legal issue, one must explore the historical background of the impact of the ideas of racial segregation as a determining factor of legal capacity and development of Constitutional law defining citizenship. Fundamental rights and legal systems informed the framework for legislation and codification of personal laws in modern states.

Most chapters in this volume point to theological and legal essentialism, the debating process, and politics of law as apparent causes for the impasse in these debates. These chapters stress the role of the judiciary and judicial authority in South Africa, Britain, Canada, and Pakistan more than the reforms through Parliamentary legislation and *ijtihad*. Sharia debates are often associated with legal pluralism that challenges the process of unification of laws in a modern state. Legal pluralism in premodern societies was commonly practiced on account of local ethnic, political, and religious diversity and plurality.

Globalism

The general theme of the studies in this book is the challenges that globalism and Sharia pose to one another. A brief introductory note on the theories of globalism and globalization of Sharia would, therefore, be helpful in understanding this theme. Historically, the first use of the term "globalism" was observed in 1943 (Merriam-Webster, "globalism") in the context of war-stricken Europe looking toward an imagined peaceful new world order without war and conflict. Most studies on the theory and history of globalism call these trends the three "waves of globalization" to underline diversity (Keohane and Nye 1972; Huntington 1993; Robertson 2003; James 2006; Steger 2010). Joseph Nye, however, understood globalism as transnational interactive connections, but later noted a huge shift of emphasis from globalism to a globalized world (Nye 2002). Steger

(2005) described these waves as the rise of different ideologies of globalization. Some studies (Nordregio.org, 2008) periodized the three waves as follows: the first wave (1860–1914), the second wave (1944–1971), and the third wave (1989–).

During the first wave, the ideas and theories of the global world reflected the dreams and anxieties of "the West." The ideal—"Western global"—in these theories was generally a Euro-centered, powerful society, shaped by the Kantian philosophy of the "universal citizen" (MacLean 2013,1). The United States emerged as a global power in the imagery of some American globalists like Joseph Nye—naturally because the US emulated Europe's imperialistic might before the 1940s. However, this vision of globalism was lopsided because the ideas of universal citizenship, civil society, and multiculturalism could not survive long with the ideals of the unique Western modernity and hegemonic globalization sculpted as colonial empires.

The second wave promised globalization based on a global economy. Referring to the role of capital mobility, multinational corporations, and economic interdependence between nations, theorists of this wave were associated with progress through constitutionalism, nation-state, modernization, and the establishment of international and transnational institutions and corporations. According to Luke Martell (2007, 9, 173), the three waves identified in most of these studies may be named respectively as globalist, skeptical, and post-skeptical. Skeptics argue that economic globalism in the second wave marginalized national economies and justified reducing the legal restrictions by some nation-states on global trade. It created uneven economies and unstable political structures.

Martell argues that the third wave that came toward the end of the twentieth century constructed a more complex and qualified theory of globalization (Martell 2007, 9, 173). The establishment of institutions like World Bank International Centre for Settlement of Investment Disputes (1966), United Nations Commission on International Trade Law (1966), United Nations Claims Commission (1991), and International Criminal Court (1998) illustrates how globalism transformed from an idea to reality. Now, it relies on law and inevitable judicialization for its sustenance.

Celebrating globalism, Fukuyama called it the "end of history." He was referring to global democracy as he wrote, "What we may be witnessing is just not the end of Cold War, or passing of the particular post-war history, but the end of history as such that is the end point of mankind's ideological evolution and universalization of the Western liberal

democracy as the final form of the human government" (Fukuyama 1989, cited in Mazroui 1993, 512). He was, nevertheless, widely criticized, particularly on his "hegemonic" rather than universalist approach to the history of globalism. He defended himself in 1992 clarifying that his concept of history was misunderstood. He explained that history to him is the "single, coherent, and evolutionary process, considering the experiences of all people of all times." By "end," he meant the universal acceptance of the "Western liberal democracy" as the "final form of human government"; "final" and "universal" referred to the ideological universalization by all people (Fukuyama 1992). That is probably why he put a question mark at the end of the title of his article.

Referring to the Muslim world, Fukuyama explained that due to tribal and cultural political structures, Arabs and radicalized Muslims resisted global democracy. He explained that global democracy was free from such "fundamental internal contradictions." On the question of the concept of equality, he differentiated between absolute equality and broad equality to explain the problem of existing "incomplete implementation of liberty and equality." Fukuyama argued that equality and rule of law are religious and absolute values which are not pragmatically possible at the international level. Apparently, he was explaining "hegemony" with reference to absolute equality as universal normativity. He clarified that these were the radical Muslims who demand absolute equality, not the traditionalists. Global democracy is certainly an issue at the international level; Muslim minorities in Europe are invoking for themselves international human rights laws. American courts have been successful in dismissing the Muslim claims for exception by interpreting these claims in the framework of legitimacy claims as a state of exception (Fukuyama 1992).

While national laws in some Western countries posed their authority as coercive and hegemonic and claimed state exception at the international level, international human rights law evolved to be ethical and more comprehensive than national laws; it responded to concerns like the environment, international trade, human rights, refugees, disarmament, and cyberspace. Legislation on such matters was made at the international level because their enforcement was beyond the power of nation-states. Global law, nevertheless, had to depend on nation-states to rule the new "empire" of international law. Nation-states found issue with the perspective of universal normativity. Globalists defined the concept of law in international relations on the basis of right not might. Legal positivists suspected that this approach would revive moral, philosophical, and

ethical values. As the concept of sovereignty was the central legal principle in constitutional law, nation-states feared that globalization would deprive them of their constitutional sovereignty in international relations. Some Western thinkers like Agamben (2005) even claimed exception for the state from basic laws in case of emergency and wars as states of exception (Humphreys 2006 and Cavanaugh 2012 and this volume).

Some studies on the ideology of globalism noted that the relationship between the legal and the political came too close to separate politics from law (Bartninkas 2014). Some political theorists note "hegemonic contestations" in the present discussions on international law (Koskenniemi 2004, 2006). Others find that law cannot be read as "divine," "unmediated," or "pre-political" when the space between law and politics is blurred (Cavanaugh 2012, 17, Koskenniemi 2004). Powerful states succeed in globalizing their own economies and cultures, and then transform their national laws to function as international law. Over time, international law has been reduced to a technique of hegemonic contestation and political supremacy of the powerful against weaker nations (*Ibid*.).

It was certainly not the "end of history" for the non-western countries who continued to suffer from internal and international wars, weak governance, illusive democracy, and growing poverty. The ideas of globalism and experiences of globalization were not the same between the various parts of the globe. In the non-Western countries, the first wave of globalism and globalization came with colonization in Asia and Africa. While colonialism brought new technology, and modern ideas of political organization and self-rule, because the colonial administrators also used law to establish hegemony on pain of subjugation and cultural humility, mistrust continued between the colonized and the colonial rulers. Muslim views were divided on modernity and globalism.

Islamic modernists, like Muhammad Iqbal (d.1938) and Ali Mazroui (d.2014), interpreted Islamic history as an "end of history" because Muhammad is the last prophet and with him the religion reached perfection (Iqbal 1982, 126 and Mazroui 1993, 513). The diverse Muslim responses to modernity and globalism were shaped by claiming finality of Sharia. Muslims understood modernity and globalism in terms of ethical and universalist perspectives. They disputed the hegemonic claims of Western modernity and globalism. Fukuyama calls this particular response "radicalism," also known as "Islamism" and "political Islam." Radicalism was, in fact, a continuation of the idea of the revival of pan-Islamic caliphate in the early twentieth century (Özcan 1997, Qureshi 1999),

and extended to the ideology of the Islamic State and Islamization in the middle of the twentieth century (Adams 1983), emergence of Sharia and judicial councils for Muslim-minority communities in the Western countries (Al-Alwani 1994, 2004), and the proposal for globalizing the methodology of *fiqh al-aqalliyat* for application of Sharia to Muslims minorities today (Al-Alwani 1994, Ben Bayyah 2007). Islamic modernists disagreed with these responses and called for the reconstruction of religious thought (Iqbal 1930) and the transformation of Islamic law (Rahman 1982).

Globalization of Sharia

The term Sharia in this book is used inclusively for various expressions like Islamic law, *fiqh*, and *fatawa* and encompasses all the Sharia-related concepts, ideas, and institutions prevalent today. Established scholars of Islamic law assumed that Sharia, as a religious legal system, would not survive the challenges of globalization. Joseph Schacht was surprised when Islamic law was quietly superseded by codes of British inspiration in the nineteenth century and "no significant voice of dissent was raised" (Schacht 1966, 95). He concluded that "It showed that the idea of secular law had for the first time been accepted by the leaders of an important community of Muslims" (*Ibid*.). Wael Hallaq argues that the normative paradigm for Islamic law and state is moral, whereas for a modern state, it is the authority of state that coerces a person to obey the law. An "Islamic state" is, therefore, impossible to establish because "Islamic State" as a concept is a contradiction in terms of any standard definition of a modern state (Hallaq 2012, Introduction and 100). According to N. J. Coulson, Islamic law is a divinely ordained system preceding and not preceded by the Muslim state, controlling and not controlled by Muslim society (Coulson 1964, 2).

Coulson, however, disagreed with the assumption of rigidity. He observed that Western laws may have been imposed from above, but they are in "broad harmony with the temper of Muslim populations today" (Coulson 1964, 160). That is because Islamic political theory has always recognized the right of the ruler to supplement Sharia in the fields of public law and general civil law (*Ibid*., 161). In his opinion, keeping family law as a stronghold of Sharia, separate from other spheres, created a sharp dichotomy between the Islamic and Western laws and led to growing emphasis upon the religious and Islamic significance of Sharia (*Ibid.*). Western powers ensured that their residents are governed by their own

laws (*Ibid*., 150). Vikør (this volume) also finds these observations about colonial concerns particularly important as they help in exploring why the British and French colonial policies laid stress on the religious and customary nature of Islamic law.

There were three concerns that colonials had about Sharia in the early period. First, that the legitimacy of their rule depended on continuing application of Sharia. Second, that the natives and colonial administrators must be governed by their own laws. Third, that the natives were not accustomed to modern laws. The Charter of George II (1753) allowed the application of English laws in their colonies only as an "exception" [to Mughal Farman]. The two reports of the Charter use two words, "reservation" (Grady 1869, xxxiii) and "exemption" (Fyzee 1963, 412). The notion of exception or exemption was understood as non-application of European laws to the natives in some specific matters. The Mughal Farman of 1765 bound the Company to abide "agreeably to the rules of Mahomet and the laws of the empire" (Wilson 1930, 25). Accordingly, Muslim judges (Qadis), first in Bengal and later in other parts of India, continued to administer Sharia laws until 1862.

The "exemption" later came to imply application of the Islamic laws limited to civil matters, including inheritance, which continued as personal laws because they were religious and customary and were applicable only to Muslims. Warren Hastings, Governor-General of Bengal (1772–1785), found problems working with Muslim judges who refused to pass death sentences on dacoits unless they had murdered someone during the robbery (Fisch 1983, 35). The Qadis argued, "The Muhummadan law is founded on the most lenient principles, and on abhorrence of bloodshed" (*Ibid*.). Hastings ruled that even though his proposed punishments were not in accordance with the spirit of the British constitution, the people in Bengal needed harsher penalties because they were not as perfect as the British people were (*Ibid.*). He wanted to abolish Islamic legal distinctions between the cases of murder based on the instrument of murder, the right of pardon, and *qisas*, the right of the heirs to execute the criminal (*Ibid*., 34–5). Hastings assumed the title of Nawab (deputy) Governor-General Hastings to legitimize his authority as a deputy of the Mughal Emperor (Rankin 1946, 169). He justified his authority to amend the laws by invoking the Hanafi doctrine of Siyasa that authorized the ruler to make the exception to amend Sharia criminal laws in case of emergency. Hastings defined the objective of the 1772 Charter as "adhering as closely as we are able to their ancient uses and institutions." Metcalfs further described the

following two points as principles of Hastings' jurisprudence: (1) "fixed body of laws" to be established by "lawgivers" and (2) distinct separate codes on religious grounds, laws of the Quran with respect to "Mahomedans," and the laws of the Shastras for "Gentoos" (Metcalf 2002, 56–57).

According to Joseph Schacht, the French colonial administrators faced similar problems. Qadis continued to develop Maliki Law in their competence as judges (Schacht 1966, 97). The development of Islamic law under French legal influence in Algeria was in some respects parallel to its development in India, "but widely different in its results" (*Ibid*.). Oussama Arabi's critical essay on Marcel Morand's (d.1932) Code provides relevant insights. First, Code Morand, prepared on the request of French government in 1905, completed in 1914, and published in 1916, was never promulgated as law (Arabi 2000, 43). Second, the code was more modern than the traditional Islamic texts which were restricted to one *madhhab*; the code was a synthesis of all of them. Third, the French policy had introduced a distinction between indigenous and naturalized peoples; the former were subjects, ruled largely by their own laws and customs, the latter were citizens governed by French laws. The code preserved Islamic identity. Morand explained that keeping Islamic law was a natural choice for Algerians. The reason was that when they were accorded French nationality in 1865 and French citizenship required opting into French laws, Algerian Muslims opted to be governed by Islamic law. In Morand's words, "Code gives more political and judicial power to Muslim legal culture," "Which is further step in distancing of Algerians from French Culture." Arabi concludes, "That is to say, the *Code Morand* could rightfully be considered one of the earliest heralds of twentieth century legal reform in the Arab lands" (Arabi 2000, 50).

Comparing Code Morand with Anglo-Muhammadan law, one finds that the Morand was more open to Muslim *ijtihad* tradition, not only in terms of adopting more suitable rules and principles from other Islamic law schools but also providing opportunities to courts to exercise contextual *judicial ijtihad*. In this way, the courts also had the opportunity to consult Muslim modernist jurists rather than being restricted by the classical legal texts which were treated as precedents in developing Anglo-Muhammadan law. Islamists, who opposed the Muslim modernist *ijtihad*, also came to an impasse when they restricted themselves to classical text without historicizing them. Contesting political theories debating separation or interdependence between religion and politics since the classical period show that Sharia has also been the arena for claiming final political authority and supremacy of law.

Like other laws, Islamic law and jurisprudence also have deep roots in theology. Concepts of sovereignty, command, sanctions, authority, and validity of the rules were informed by debates during the ninth and tenth centuries on God's sovereignty in classical Islamic theology. Later, twentieth-century authors like Uztaz Mahmoud Mohammed Taha (d.1985), the proponents of the "second message of Islam," argued that verses revealed in Mecca affirm religious freedom, spirituality, or gender equality, among other things, and prevail over those revealed in Medina, which he considered "subsidiary verses." While the Mu'tazili school proposed that good and bad actions are knowable by the human intellect, the Ash'ari school of theology rebutted arguing that good and bad are known by revelation from God. Al-Ghazali (d.1111), an Ash'ari theologian, held that human acts on their own have no legal value prior to Sharia, the revealed law; human intellect cannot decide what is good and bad (Ghazali 1904, 1:55). The point of discussion was theological, but the conclusion was taken from legal reasoning: legal obligation does not exist before the legislative declaration. This is like a legal positivist argument that theology, ethics, and morality do not create a legal obligation. Ibn Khaldun (d.1406) observed two major approaches in Islamic jurisprudence: theological and the Hanafi (Ibn Khaldun 1989, 455). The Shafi'i jurists followed the Ash'ri theology more than other schools. Consequently, Sharia and *siyasa,* the two basic legal concepts were defined, respectively, as theological and political and separated or combined from these two perspectives. The theological approach was strict and politically pragmatic (Masud 2001, 2018).

To illustrate the theological–political nexus, one needs to look at the development doctrine of *dar al-Islam*, House of Islam, in the medieval and modern period. It became the key doctrine in Sharia debates on the obligation of *jihad*, international relations, migration, and application of Sharia in Islamic political theory (Masud 1990). It addressed significant issues of Islamic globalism like the revival of the caliphate, *jihad*, Islamic State, and the status of Muslim minorities. Historically, these issues were formulated in classical Islamic legal theory with reference to the diversity of opinions on these issues, which does not allow a precise typology. During the modern period, three major groups may be described as traditionalists, Islamic modernists, and Islamists. The first group, mostly *ulama*, were nevertheless divided on whether Sharia could be applied in a non-Muslim or secular legal system (*dar al-harb*). In principle, Muslims could not stay in such a country and must migrate to

an Islamic country. They demanded application of the whole of Sharia in postcolonial nation-states. They allowed temporary migration to non-Muslim countries, but Muslims must return to their countries if they were not free to practice Sharia laws. The second group, Islamic modernists, sought reforms in *fiqh* laws according to social and political needs in modern times. They dismissed the doctrine *dar al-Islam* and *dar al-harb*: The whole world was *dar al-'ahd* (House of Truce). They asked for reforms eliminating gender inequality, injustice, and religious discrimination. The third group, who viewed Islamic law as a comprehensive legal system, called for establishing an Islamic state to apply Sharia comprehensively. They insisted on Islamization of all the laws introduced in the colonial period. As for Muslim minorities, Islamists called for Muslim Judicial Councils in the Western legal systems to administer Sharia.

In the *fatawa* literature and legal texts, Muslim jurists debate the issues of *jihad*, migration, and application of Sharia. Three *fatwas* in the nineteenth century interpreted the traditional definition of *dar al-harb* in India: Shah Abd al-Aziz's (d.1824) *fatwa*, probably in 1803, Tariqa Muhammadiyah's declaration in 1857, and Karamat Ali's (d.1873) *fatwa* in 1870. Various members of the *jihad* groups, who took part in local revolts, like Farai'izi in Bengal in 1823, Mujahidin (in northern areas, present-day Pakistan in 1826–1831) led by Sayyid Ahmad Shahid, and some Wahhabi *jihad* groups (1837–1867), also wrote Fatawa in the name of Tariqa Muhammadiyya, calling for *jihad* in 1857 to restore *dar al-Islam* (Guenther 1998, 23).

Shah Abd al-Aziz gave three reasons: (1) The Imam lost sovereignty to Christians, (2) Taxes were collected by the Christians, and (3) Christian decided the lawsuits. Muslims had the freedom to carry on Friday prayers and slaughter cows (Guenther 1998). This *fatwa* is very academic and focused on the Islamic legal question of the status of Sharia law. Shah's approach is simply traditional Hanafi (Guenther 1998, 7). Shah Abd al-Aziz did not mention the obligations of Hijra and *jihad* in this *fatwa* (Masud 2008, 347–8).

Karamat Ali's (d.1873) *fatwa* in 1870 clearly declared India *dar al-harb*. He took a different position from others. Referring to Shah Abd al-Aziz's *fatwa* based on Hanfi rules, he argued that *dar al-Islam* required three conditions to be turned into *dar al-harb*: establishment of infidel rule, annexation to *dar al-harb* without a Muslim territory in between, nonexistence of true believers in the country. None of the three conditions

existed. *Dar al-harb* may be restored to *dar al-Islam* by establishment of Muslim rule (Guenther 1998, 19).

To keep this introduction short, we have chosen to limit our of contemporary fatawa to an overview by Shaykh Yusuf al-Qaradawi on the issue of *jihad* (2009). The reason for this choice is that the classical and medieval jurists speak on these issues from the perspective of the law school to which they belonged. In the modern period, as mentioned already, two new perspectives have emerged in addition to the traditional: Islamic modernists and Islamists. Qaradawi belonged to the Islamists, but presently he leads the Wasatiyya group of jurists, who take a moderate position between the traditionalists and Islamists. This position is more post-Islamist than post-modernist and therefore distances itself from Islamic modernists. We find these views very important with reference to the rise of global Islam and global Sharia. The following is a summary of Qaradawi's analysis of these discussions on *dar al-harb*, *jihad*, and Sharia in the globalized world.

Regarding *dar al-harb*, Qaradawi mentions that the classical jurists differed about the binary division of the house of Islam and house of war. To clarify this distinction, the jurists formulated the following question: Can the *dar al-Islam* turn into a *dar al-harb*? Qaradawi lists the following five major views among the jurists (Qaradawi 2009, 2: 874–92):

1. *Dar al-Islam* can never turn into a *dar al-harb*. This is the majority view among the Shafi'i jurists, including Ibn Hajar al-Haytami (d.1567), al-Khatib al-Shirbini (d.1570), and Shams al-Din al-Ramli (d.1671). The first two held that *dar al-Islam* continues even when non-Muslims begin to rule a territory.
2. *Dar al-Islam* turns into *Dar al-harb* when captured by non-Muslims. This was the majority view of the early Shafi'i jurists, including Imam al-Haramayn al-Juwayni (d.1085) and Abd al-Karim al-Rafi'i (d.1226).
3. *Dar al-Islam* turns into *Dar al-harb* with the promulgation of non-Islamic laws. Abu Yusuf (d.798) and Abu Abdulla Muhammad al-Shaybani (d.805) among the Hanfi jurists, the Hanbali school, and some jurists of the Zaydi school held that as *dar al-harb* turns into *dar al-Islam* with the promulgation of Islamic laws, *dar al-Islam* does not remain so and turns into *dar al-harb* when Islamic law is no longer applied. Khamis ibn Sa'id Shiqsi al-Rustaqi among the Ibadi jurists qualifies this conclusion with certain conditions and stipulations.

4. *Dar al-Islam* does not turn into *dar al-harb* if the population continues to be Muslim. This view is held by the Maliki and Ibadi schools and some later Shafi'i jurists. The Maliki and Ibadi Schools and some later Shafi'i jurists hold the view that as long as Muslims can perform their Muslim rites publicly, like the call to prayer, and Friday and Eid prayers, the territory continues to stay as *dar al-Islam*. Muhammad al Dasuqi (d.1815) clarified that even if non-Muslims capture it by force, *dar al-Islam* does not become *dar al-harb* as long as rites of Islam continue to be performed.
5. *Dar al-Islam* turns into *dar al-harb* only under three conditions.

    a. The laws of the disbelievers gain supremacy so that no law of Islam can be executed.
    b. Muslim and non-Muslim populations are no longer governed by the original pacts that they enjoyed before the non-Muslim occupation.
    c. The land in question is adjacent to the territory of *dar al-harb* such that there is no land of Islam between them.

    Abu Ja'far al-Tahawi (d.933) and Abu Bakr al-Jassas (d.981), among the early Hanafis, reported that Abu Hanifa (d.767), the imam of the Hanafi school, held this view. Ahmad b. Yahya al-Murtada (d.1437) among the Zaidi jurists and Muhammad b. Abdullah al-Timartashi (d.1598), 'Ala al-din al-Haskafi (d.1677), and Ibn 'Abidin (d.1836) among the later Hanafi jurists supported it. The Hanafi jurist Sarakhsi (d.1090) added *dar al-'ahd* or *dar al-Sulh*, house of truce and treaty, to the binary division. Among the modern Hanafis, Abu Zuhra (d.1974) supported Sarakhsi.

Looking at these five views, one finds them to be nuanced legal clarifications of the issue with references to the respective contemporary political contexts. Qaradawi supports the Shafi'is and disputes the Hanafi and modern views. He finds the Hanafi jurists divided; some hold that *dar al-Islam* may formally turn into *dar al-harb*, but others qualify that if Muslims are free to continue practicing Sharia it remains *dar al-Islam* (2009, 2:891). Wahba Zuhayli (d.2015) said that such divisions are not found in the Quran and Sunna; they were inspired by the needs of time and context. Al-Qaradawi (2009, 2:874) disagrees with him and argues that they are certainly derived from the Quran and Sunna. He disagrees

with the Islamic modernists who hold that "The world today, in the era of globalism, cannot be divided on religious basis" (*Ibid*. 893). He insists that *dar al-Islam* is continuing in the twenty-first century.

Regarding *"aggressive" Jihad, migration and Sharia for Muslim minorities*, Qaradawi disagrees with the terrorists who do not distinguish between *jihad*, and conventional wars. The Quran uses the term *harb* for conventional war and *qital* for fighting with sword; both are not *jihad*. Qaradawi clarifies that Muslim jurists do not regard the fight for the sole objective of domination as *jihad*. He finds that the terrorists claim a specific Quranic verse (9:5) and a specific *hadith* as the sword verse. Qaradawi argues that the context of the verse refers to a particular situation and refers only to the pagans in *Makkah*. It cannot be extended to all times, situations, and peoples. The cited *hadith* is technically too weak to be cited as authority (Qaradawi 2009, 1:336–44). This *hadith* is not acceptable also because it contradicts the Quran and Islamic history (Qaradawi 2009, 1:245–6). He argues that the ideas of aggressive *jihad* were developed by the leaders of Islamic political movements in the twentieth century (Qaradawi 2009, 1:31–3). According to Qaradawi, *jihad* is always defensive and is an obligation for all Muslim only when the enemy attacks a Muslim country. *Jihad* is not allowed with countries that have a pact or treaty with Muslims (Qaradawi 2009, 1:25–28).

Regarding migration, the questions changed in the nineteenth and twentieth centuries when Muslim began to migrate to European countries to study and work, and stayed for longer periods of time in non-Muslim countries. In a *fatwa*, even the term *dar al-harb* was translated as "enemy country." The Saudi *muftis* urged Muslims staying in the Western countries to return to their home countries because they were allowed only temporary stay in an "enemy" country (Baz and Uthaymeen 1998).

Qaradawi finds the following two views about migration from *dar al-Islam* to *dar al-harb*: (1) According to Shaykh Muhammad Ulaysh (d.1882) and Ahmad Abu'l Wafa, the Maliki School held that it is necessary to migrate from a Muslim country captured by the non-Muslim enemy (Qaradawi 2009, 882–3). Shaykh Nasir al-Din al-Albani (d.1999) issued a *fatwa* for Muslims in Palestine to migrate when Israelis occupied the territory (*Ibid*. 888). (2) Among the Shafi'is, al-Mawardi (d.1058), al-Rafi'i, Yahya Sharaf Nawawi (d.1277), Al-Haytami, and al-Ramli held that Muslims should not migrate from *dar al-Islam*. Al-Mawardi ruled that migration is necessary only when Muslims are not free to practice

Islam. If they have this freedom or if migration is not possible, then it is not obligatory. He preferred that people not migrate because if Muslims leave *dar al-Islam*, it turns into *dar al-harb*.

Qaradawi disagrees with Abu El-Wafa and clarifies that it is not the view of the Maliki school; the Maliki jurist Al-Dasuqi ruled that *dar al-Islam* does not turn into *dar al-harb* only by the enemy occupation. He refutes al-Albani because his *fatwa* supported what Israel wanted Muslims to do (*Ibid*. 888).

Muslim jurists held diverse views regarding Muslim minorities in Western countries staying long, taking residence, and seeking citizenship; some held it forbidden, some regarded it reprehensible, others allowed it unconditionally. Qaradawi disagreed with those who consider such stays forbidden even on the principle of prevented measures to avoid evil. He refers to the principles of universal objectives of Sharia, higher principles of Islamic jurisprudence, jurisprudence of reality, exception, dire necessity, and relaxation. Migration is allowed also for the purpose of education, financial needs, employment, medical treatment, trade, and asylum (*Ibid*. 931–8). Qaradawi mentions an earlier *fatawa* that opposed Muslims seeking citizenship in non-Muslim countries on account of lack of religious freedom in western countries or with reference to the principle of "loyalty (to disbelief) and disavowal (of Islam)." He discards such doubts. Instead, he stresses on the political, economic, educational, and cultural benefits to *dar al-Islam* that Muslims gain by staying and lobbying to strengthen Islam. He also clarified that Muslims have freedom, rather, facilities provided by the western countries, to ensure human rights. Muslims can claim exception from obligation such as participating in actions like war against Muslim countries (*Ibid*. 945–6).

With reference to the application of Sharia, he clarifies that Muslim democracies presently under Communism and Muslim countries governed by man-made laws all constitute *dar al-Islam*. The whole world today, constitutes *dar al-'ahd*, except Israel. *Dar al-Islam,* as a member of the organization, is bound by United Nations conventions, except those that are contrary to Sharia (*Ibid*. 895). He specifically mentions CEDAW because it contains sections that are in clear contradiction with the teachings of the Qur'an and Sunna, or they are known to be religiously essentials, for example, the difference between the shares of inheritance of a daughter and her brother or between the shares of a sister and her brother, or the prohibition of the marriage of a Muslim woman

with a non-Muslim man, and legality of divorce and polygamy (*Ibid*., 896).

Global Sharia, as an idea, rather than as a term, originated with the migration of Muslims and their settlement as religious communities in non-Muslim countries. Conservative Muslims had built mosques and *madrasas* in Europe, but they discouraged political activities. Muslims were forbidden to participate in elections because such participation would support the infidel political system. Construction of a new branch of Sharia, *fiqh al-aqalliyat*, Islamic law for minorities, began to transform Sharia toward the end of the twentieth century. Islamists like Taha Jabir Al-Alwani argued that freedom of religion, according to International Human Rights, guaranteed freedom of belief and practice. In his *fiqh al-aqalliyat*, he developed new jurisprudence that was globally applicable (Alwani 1994). The Muslim Brotherhood issued an official statement in 1994 supporting Muslim participation in British politics and elections (Hussain 2004, 383). Islamists established Sharia Councils, *dar al-Qada*, and arbitration institutions for Muslim minorities in Britain, Canada, and the United States for regularizing marriage, divorce, succession, and consultations according to Sharia. We may call it Global Sharia, which allows exceptions to traditional *fiqh* and extended application of Sharia to Western countries (Alwani 1994, Qaradawi, 2001, 2002–3; Shavit 2015). Bin Bayyah (2007) welcomed this development as it encouraged Muslim countries to extend application of Sharia to penal and public laws where it was not applied after independence. Islamism pushed aside Islamic modernism during globalist waves. It is important to acknowledge that the political and religious hermeneutic that Islamism carries out rests on a politicization of Islam in general, with its own discursive and communicative techniques that favor the interests of Islamist groups and leaders; based on the idea that the main purpose of the Islamic creed is the construction of a political entity. And, while in Islam politics is innate to religion, the reality of religious texts does not clarify this unique and final consequence of this political goal in Islam (Jalloul Muro 2015).

In the twenty-first century, a new trend of post-Islamism is emerging, even though it is still Islamist in its understanding of gender equality and rule of law. Instead of reforms, Islamic modernism is "reconstructing Islamic law" (Masud 2019) that expands the principles like exception, necessity, and facilitation of *fiqh al-aqalliyat***.** The new perspective of Islamic modernism is globalist as it invokes the philosophy of five basic

rights and the purpose of law of the *Maqasid al-Sharia*; both doctrines are gaining popularity among the post-Islamists as well.

References

Adams, Charles J. 1983. "Maududi and the Islamic State." In Esposito, John L. (ed.). *Voices of Resurgent Islam*. Oxford University Press.

Agamben, Giorgio. 2005. *State of Exception.* University of Chicago.

Alwani, Taha Jabir Al-. 1994. *Muqaddima fī Fiqh al-Aqalliyāt.* Washington.

Alwani, Taha Jabir Al-. 2004. "Toward a fiqh for minorities: Some reflections." In *Muslims' Place in the American Public Square: Hope, Fears, and Aspirations.* Edited by Zahid H. Bukhari, Sulayman S. Nyang, Mumtaz Ahmad, and John L. Esposito. Herndon: IIIT, (2004): 3–37

Arabi, Oussama. 2000. "Orienting the Gaze: Marcel Morand and the Codification of Droit Algerien." *Journal of Islamic Studies*, 43–72.

Bartninkas, Vilius. 2014. "The pre-political and the political in Aristotle's politics." *Problemos*, 85 (2014): 18–29.

Baz, Ibn and Uthaymeen. 1998. *Fatawa Regarding Muslims Living as Minorities*. London: Message of Islam.

Ben Bayyah, Abdullah B. Mahfuz. 2007. *Ṣinā'at al-Fatwā wa Fiqh al-Aqalliyāt*. Jeddah.

Cavanaugh, Kathleen. 2012. "Narrating Law." In Anver M. Emon, Mark S. Ellis and Bejamin Glahn (eds.), *Islamic Law and International Human Rights Law, Searching for Common Ground?* Oxford University Press, 17–51.

Coulson, Noel James. 1964. *A History of Islamic Law*. Cambridge University Press.

Fukuyama, Francis. 1989. "The end of history?" *The National Interest*, 16 (1989): 3–18.

Fukuyama, Francis. 2006. *The end of history and the last man*. Simon and Schuster.

Fyzee, Asaf A. A. 1963. "Muhammadan Law in India." *Comparative Studies in Society and History*, Vol. 5, No. 4 (Jul. 1963), pp. 401–415.

Grady, Standish Grove. 1869. *A Manual of the Mahommedan Law of inheritance and contract, comprising the doctrines of the Soonee and Sheea schools, and based upon the text of Sir W. H. Macnaghten's Principles and precedent together with the decisions of the Privy Council and high courts of the presidencies in India.* London: W. H. Allen. p. xxxiii.

Guenther, Alan M. 1998. Dar al-Harb and Dar al-Islam, The Controversy regarding the British Presence in India, 1870–72. Academia.

Ghazali, Abu Hamid Muhammad al-. 1904. *Al-Mustasfa min 'Ilm al-Usul*. Cairo: Amiriyya Bulaq.

Hallaq, Wael. 2012. *The Impossible State: Islam, Politics, and Modernity's Moral Predicament*. New York: Columbia University Press.

Humphreys, S., 2006. Legalizing lawlessness: On Giorgio Agamben's state of exception. *European Journal of International Law*, 17(3), pp. 677–87.

Huntington, Samuel P. 1993. *The Third Wave: Democratization in the Late Twentieth Century*. Vol. 4. University of Oklahoma Press.

Hussain, Dilawar. 2004. "Muslim Political Participation in Britain and the 'Europeanisation' of Fiqh." *Die Welt des Islams*, 44, no. 3: 376–401.

Ibn Khaldun. 1989. *Muqaddima*, Tehran: Istiqlal.

Keohane, R.O. and Nye, J.S. 1972. *Transnational Relations and World Politics*. Harvard University Press.

Khudri, Muhammad. 1967. Shaykh. *Tarikh al-Tashri' al-Islami*. Dar al-Fikr.

Koskenniemi, Martti. 2004. "International law and hegemony: A Reconfiguration." *Cambridge Review of International Affairs*, 17, no. 2: 197–218.

MacLean, Derryl N. 2013. *Cosmopolitanisms in Muslim Contexts*, Edinburgh: Edinburgh University Press, pp. 1–2.

Martell, Luke. 2007. "The third wave in globalization theory." *International Studies Review*, 9, no. 2: 173–96.

Masud, Muhammad Khalid. 1990. "Obligation to migrate: Formulation of the doctrine of Hijrah in Islamic Law." In Dale F. Eickelman and J. Piscatori, *Muslim Travelers: Pilgrimage, Migration and the Religious Imagination,* London: Routledge and University of California, Berkley.

Masud. 2008. *Atthārwīn Ṣadī 'Īsawīi men Barr-e ṣaghīr men Islami Fikr ke rahnumā.* Islamabad: Islamic Research Institute.

Masud. Muhammad, (ed.) 2009. *Islam and Modernity: Key Issues and Debates*. Edinburgh University Press.

Masud. 2018. *The Dimensions and Phases of Globalization: An Islamic Perspective*. Islamabad: Iqbal Institute for Research and Dialogue.

Masud. 2019. "Modernizing Islamic law in Pakistan: Reform or reconstruction?" *Journal of South Asian and Middle Eastern Studies*, 42, no. 2: 73–97.

Masud. 2001. "The doctrine of siyasa in Islamic law." *Recht van de Islam*, 18: 1–29.

Masud. 2018. "Religion and State are Twin Brothers: Classical Muslim Political Theory." Ali Salman, Muhammad Hashim Kamali, Mohamed Azam Mohamed Adel. *Democratic Transitions in the Muslim World*. Selangor: Pelanduk Publications (M) SDN BHD, pp. 3–23.

Mayer, Ann Elizabeth. 2012. *Islam, and Human Rights: Traditions and Politics*, Avalon Publishing, p. 211.

Mazrui, Ali. 1993. "Islam and the end of History." *American Journal of Islamic Social Sciences*, 10, no. 4: 512–535.

Merriam-Webster.com. *Dictionary*. s.v. "globalism," Accessed January 26, 2021, https://www.merriam-webster.com/dictionary/globalism.

Nordregio.org. 2008. Accessed September 1, 2021, https://archive.nordregio.se/en/Metameny/About-Nordregio/Journal-of-Nordregio/2008/Journal-of-Nordregio-no-1-2008/The-Three-Waves-of-Globalisation/index.html

Nye, J. 2002. "Globalism versus Globalization." *The Globalist*, 15.
Özcan, Azmi. 1997. *Pan-Islamism: Indian Muslims, the Ottomans and Britain (1877–1924)*, Brill Academic Publishers.
Qaradawi, Yusuf al-. 2001, 2002–3. *Fiqh al-aqalliyāt al-Muslima* Cairo: Dar al-Shuruq.
Qaradawi, Yusuf al. 2009. *Fiqh al-Jihad*. Cairo: Maktaba Wahba.
Qureshi, M. Naeem. 1999. *Pan-Islam in British Indian Politics: A Study of the Khilafat Movement, 1918–1924*, Brill Academic Publishers.
Rahman, Fazlur. 1982. *Islam and Modernity: Transformation of an Intellectual Tradition*, University of Chicago Press.
Rankin, George Claus. 1946. *Background to Indian Law*. Cambridge: The University Press, p. 169, citing *Parliament Papers*, 1831–1832, 12, p. 696.
Robertson, Robbie. 2003. *The Three Waves of Globalization: A History of a Developing Global Consciousness*. Zed Books.
Schacht, Joseph. 1996. *An Introduction to Islamic Law*. Oxford: Oxford University Press.
Shavit, Uriya. 2015. *Shari'a and Muslim Minorities, The Wasati and Salafi Approaches to fiqh al-aqalliyyāt al-Muslima*. Oxford University Press.
Steger, Manfred B. 2005. "Ideologies of globalization." *Journal of Political Ideologies*, 10, no. 1: 11–30, 25
Swatscheno, Janet, and Patricia Denci. 2009. "Napoleon Bonaparte's Proclamations, speeches and letters during his campaign in Egypt." pp. 9–16.
Weiss, Bernard G. (ed.) 2002. *Studies in Islamic Legal Theory*. Vol. 15. Brill.
Wilson, Sir Roland Knyvet. 1930. *Anglo-Muhammadan Law*: *A Digest Preceded by a Historical and Descriptive Introduction of the Special Rules Now Applicable to Muhammadans as Such by the Civil Courts of British India, with Full References to Modern and Ancient Authorities*. India: W. Thacker & Company.