Editor's Introduction to the Special Issue

Scholarly Debates: Moving Past Structural Death

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This special issue explores the interactions between Islamic law and other legal traditions during the modern period, particularly in the contexts of colonialism, imperialism, and centralized bureaucratic states from the eighteenth to early twentieth centuries. The three essays in the issue contribute to the ongoing scholarly debates that present contrasting views on the fate of *sharīʿa* during this period. Between the two sides of this debate, there is a space ripe for exploring the fitness and movement of Islamic law in the contested period between tradition and modernity.

One view presents *sharīʿa* as a victim of modernity, suggesting that Muslim scholars were powerless against the expanding influence of the positive law regimes associated with colonial powers. For example, Léon Buskens, Baudouin Dupret, and Leonard Wood argue that colonialism transformed Islamic law into a legal category constructed to serve a colonial enterprise.[1] Avi Rubin, in exploring the decline of *sharīʿa* in

1 Léon Buskens and Baudouin Dupret, *The Invention of Islamic Law: A History of Western Studies of Islamic Normativity and Their Spread in the Orient*, in After Orientalism: Critical Perspectives on Western Agency and Eastern Re-Appropriations (F. Pouillon et al., eds., 2015); Leonard Wood, Islamic Legal Revival: Reception of European Law and Transformations in Islamic Legal Thought in Egypt 1875–1952 (2016).

the Ottoman Empire, points to the Tanzimat reforms (1839–76) as an example of how legal positivism as a global phenomenon radically shifted Ottoman legal practice to the detriment of *sharīʿa* dominance.[2] Likewise, Raza Saeed asserts that the "normative orderings" of the colonial project in the Indian subcontinent drastically changed the underlying logic and rationality of *sharīʿa* to align with the interests of the colonial state.[3] Earlier, Wael Hallaq suggested that *sharīʿa* underwent "structural death" because modern political structures ended the longstanding "synthetic" tradition of scholarly legal discussion and education that had existed for centuries before.[4] In sum, the current opinion of a considerable number of scholars writing on Islamic legal history converges on the idea that institutional changes in political structures of the Islamic world—including European colonialism, imperialism, and the rise of a modern state—led to the corruption or even "death" of *sharīʿa* in the modern world.

By contrast, another set of historians have focused on Islamic law's responsiveness and transformation across different cultural and geographical contexts, even as they recognize the drastic impact of colonialism and the rise of modern nation-states. Iza Hussin, for example, argues that Islamic law is neither static nor fixed but that it has evolved in response to historical contingencies. Hussin's perspective sheds light on the dynamic nature of the local elite groups, who engaged in contestations, adaptations, and renegotiations in response to colonial pressures in Malaya, India, and Egypt.[5] Likewise, Muhammad Zubair Abbasi argues that Muslim scholars under British colonial

2 Avi Rubin, *The Positivization of Ottoman Law and the Question of Continuity*, in State Law and Legal Positivism: The Global Rise of a New Paradigm 154 (Badouin Dupret and Jean-Louis Halpérin, eds., 2022).

3 Raza Saeed, *Law and Coloniality of Empire: Colonial Encounter and Normative Orderings in the Indian Sub-Continent*, 19 Yearbook of Islamic and Middle Eastern Law 103 (2019).

4 Wael B. Hallaq, The Origins and Evolution of Islamic Law 122 (2005); Wael B. Hallaq, Shari'a: Theory, Practice, Transformation 15–18 (2009).

5 Iza R. Hussin. The Politics of Islamic Law: Local Elites, Colonial Authority and the Making of the Muslim State 9 (2016); Iza R. Hussin, *A Discussion of Wael Hallaq's Islam, Politics, and Modernity's Moral Predicament*, 12 Perspectives on Politics 461 (2014); Renisa Mawani and Iza Hussin, *The Travels of Law: Indian Ocean Itineraries*, 32 Law and History Review 733 (2014); Kelvin Ng,

rule in South Asia adapted the *waqf* (endowment) institution to modernity by building on the tradition of earlier reformers. He thereby demonstrates the use of complex legal reasoning as a form of resistance against colonial rule.[6] Similarly, Gianluca P. Parolin examines how a Muslim scholar of Islamic law, Rifāʿa al-Ṭaḥṭāwī (d. 1875), sought to align Islamic legal principles with the French Constitution of 1814. Through that examination, Parolin demonstrates how Muslim scholarly elites invested in new legal thinking.[7] Such works by Hussin, Abbasi, and Parolin highlight the agency of Muslim subjects and the adaptable nature of implementing *sharīʿa* principles under colonial rule.

In a similar vein, there are legal historians of the Ottoman Empire who write about the changing status of *sharīʿa* within the empire. Jun Akiba and Ruth Miller, for example, chart how Ottoman reformers staffed the Nizamiye (state-administrative) courts with *sharīʿa* court judges and other functionaries who had traditional Islamic law training.[8] Further, Ebru Aykut's research reveals that the conflicting views between *fiqh* and the Ottoman Penal Code about the definition of "premeditated murder" limited the Nizamiye courts' authority to impose death sentences in homicide cases.[9] These scholars of Ottoman Islamic legal history underscore the autonomy and persistence of

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Crosscurrents: Law, Economy, and Islam in the Indian Ocean, 11 South Asian History and Culture 323 (2020).

6 Muhammad Zubair Abbasi, *Co-Existence of Sharīʿa and the Modern State: A Historical Perspective from South Asia*, 19 Yearbook of Islamic and Middle Eastern Law 161 (2018).

7 Gianluca P. Parolin, *"Translating" the 1814 French Charter: Al-Ṭahṭāwī's New Semiotics of Law and Governance*, 19 Yearbook of Islamic and Middle Eastern Law 188 (2018); *Preface to Special Edition: Islamic Law and Empire*, 19 Yearbook of Islamic and Middle Eastern Law 1, 7 (2018).

8 Jun Akiba, *Sharīʿa Judges in the Ottoman Nizāmiye Courts, 1864–1908*, 51 Osmanli Araştirmalari 209 (2018); Jun Akiba, *From Kadı to Naib: Reorganization of the Ottoman Sharia Judiciary in the Tanzimat Period*, in Frontiers of Ottoman Studies 43 (C. Imber and K. Kiyotaki, eds., 2005); Ruth Austin Miller, Legislating Authority: Sin and Crime in the Ottoman Empire and Turkey (2005); Avi Rubin, *The Positivization of Ottoman Law and the Question of Continuity*, in State Law and Legal Positivism: The Global Rise of a New Paradigm 161 (Badouin Dupret and Jean-Louis Halpérin, eds., 2022).

9 Ebru Aykut, *Judicial Reforms, Sharia Law, and the Death Penalty in the Late Ottoman Empire*, 4 Journal of the Ottoman and Turkish Studies Association 7 (2017).

sharīʿa before the rise of Turkey as a modern nation-state. They recognize that Islamic law was never too distant from politics and has always undergone transformations led by those from within its institutions.

In this special issue, we build on the latter trend of examining rather than assuming the death or dominance of Islamic law with the onset of modernity, and expand the inquiry beyond the main Ottoman provinces and the far-flung hinterlands to include developments in the nineteenth-century Egypt, Austria-Hungary, and the Russian Empire. That is, we shift the focus away from narratives of the encroachment of the imperial, colonial, or nation-state authorities upon *sharīʿa* and its normative legal structure. We shift toward investigation of the autonomy of local actors in adaptation and transformation of *sharīʿa* in the face of a changing social and political order with the rise of the modern nation-state.

Contributing Articles: Islamic law in Egypt, Austria-Hungary, and the Russian Empire in the Nineteenth Century

A collection of essays in this special issue of the *Journal of Islamic Law* authored by Brian Wright, Ninja Bumann, and Rozaliya Garipova contributes to the scholarly debates on the fate of Islamic law with the rise of modernity by providing a critical analysis of Islamic legal history in Egypt, Austria-Hungary, and the Russian Empire of the nineteenth century. These emerging scholars shed light on the encounters between *sharīʿa* and imperial or modernizing states, offering fresh insights into the intricate dynamics of Islamic law's interaction with non-Islamic legal traditions. Building on the scholarship above, these essays describe the processes and players involved in negotiating, borrowing, and intertwining Islamic legal practices with those of other legal systems beyond the experience of European colonialism. In line with the overarching theme of Islamic law's dynamism and resilience during this period, all three papers assert the continuity of *sharīʿa* despite the changing sociopolitical contexts of their respective regions. By delving into the

institutionalization of *sharīʿa* within the modernizing state apparatus, the authors raise thought-provoking questions about the agency of Islamic law practitioners and judges, and the flexible implementation of Islamic legal principles: How did the process of forced conceptualization or categorization of Islamic law unfold? Were Muslim judges, jurists, and other Islamic law practitioners mere passive bystanders unable to halt the conceptual transformations of Islamic law? Did they compromise Islamic principles to generate a unified legal system?

To answer some of these questions, Brian Wright's article, "Debating *Sharīʿa* in Egypt's National Courts," delves into a discussion that emerged in the early phase of Egyptian judicial reforms of the 1880s concerning the role of *sharīʿa*. The article contends that during this reform period, marked by the establishment of native courts (*al-maḥākim al-ahliyya*), the emphasis among the reformers was not on *whether* to implement *sharīʿa* within those institutions but rather on *how* to approach its application. Drawing on contemporary periodicals, including *al-Ḥuqūq* and *al-Ādāb,* the author explores how *sharīʿa* served as a foundational legal framework for both proponents and critics of the reforms, challenging the notion of its marginalization during the nineteenth century. Contrary to some scholars' claims, the article reveals the importance of *sharīʿa* in shaping the native courts' legal system, a novel legal institution that applied the relevant commercial, contract, and penal codes. The article delves into the public legal debates that resulted from these innovations, particularly the inclusion of Christian judges in native courts and the acceptability of capital punishment in criminal cases. As a part of this story, the author argues that the promulgation of the legal codes did not diverge from the Islamic or *sharīʿa*-dominated past. He shows that the penal code, for example, represented the outcome of local debates rooted in interpretations of *sharīʿa*. Engaging with existing scholarship on nineteenth-century Egyptian Islamic law—including the works of Mina Khalil, Rudolph Peters, Leonard Wood, Khaled Fahmy, Samy Ayoub, and Talal Asad—Wright contributes to the ongoing debate by showing that *sharīʿa* remained a vital legal source for Egypt's changing legal system. By shedding light on these

dynamics, this article illuminates the complexities surrounding *sharīʿa*'s continued influence within the changing societal and legal environment of nineteenth-century Egypt.

In an article entitled "Forging a Habsburg Islamic Legal System: Legal Transformation and Local Agency in Bosnia and Herzegovina (1878–1918)," Ninja Bumann explores the integration of Islamic law into the Habsburg administration in Bosnia and Herzegovina during the late nineteenth and early twentieth centuries. Building on scholarship on the issue of Habsburg reforms in post-Ottoman lands and on compelling archival evidence, including Austrian and Bosnian sources, Bumann is able to show the impact of legal reforms implemented by the Austro-Hungarian government following its 1878 occupation of the region. In this "quasi-colonial" regime, the Habsburg bureaucratic authorities limited the scope of Islamic law to family matters. The Habsburgs also established a two-tier appellate system with a Supreme Sharīʿa Court in Sarajevo under state supervision. Here, Bumann builds upon existing scholarship on European and Russian interventions in *sharīʿa*—including works by such scholars as Paolo Sartori, Ido Shahar, and Lauren Benton—to explore the efforts of the Habsburg regime to modernize and exert control over the *sharīʿa* judiciary. The author argues that the incorporation of *sharīʿa* courts into the Habsburg legal framework led to a translation of legal episteme and fostered a synthesis of Ottoman Islamic judicial practices and Habsburg legal structures. The scholarly contribution of the paper lies in its exploration of the agency and autonomy of local *qāḍī*s and plaintiffs navigating Habsburg legal reforms. In the process, the paper also sheds light on the hybridization of legal cultures. Overall, the article makes an important scholarly contribution to the study of Islamic legal structures in Habsburg Bosnia and opens avenues to similar comparative studies of encounters between *sharīʿa* and other multi-confessional imperial formations.

In a third and final contribution to this special issue, Rozaliya Garipova examines the legal reasoning and interpretation of Islamic law surrounding women's divorce claims in early nineteenth-century Russia in her article entitled

"'Emancipating' Muslim Women in Early Nineteenth-Century Russia: Ākhūnd Fathullah bin Huseyn al-Uriwi, Ḥanafī Law, and Muslim Women's Rights." Specifically, Garipova analyzes select court cases to demonstrate how Huseyn ughli, a prominent jurist of the Volga-Ural region, developed a pattern of legal interpretation that supported the rights of abandoned women to seek divorce. Garipova's research confronts the prevailing stance in the Islamic legal history literature that Muslim jurists in the Volga-Ural region lost their authority under tsarist rule. To the contrary, the author highlights Huseyn ughli's autonomy in making legal decisions despite the challenging social context of this period, which was characterized by changing practices of Islamic law and conflicting understandings of Islamic legal authority in the Russian Empire. The article's main argument is that Huseyn ughli developed a flexible approach to legal reasoning in ways that deviated from mainstream or traditional Ḥanafī thought. This deviation underscores Huseyn ughli's autonomy in shaping legal outcomes during this period. In sum, the core contribution of the article lies in its nuanced exploration of the negotiation and coping mechanisms that women employed, the influence of community values on law, and the autonomous decision-making by *ākhūnds* (scholars and jurists) in their pursuit of justice in the nineteenth-century Russian Empire.

Conclusion

The essays in this issue illustrate the interaction of *sharīʿa* within the imperial and nascent nation-state legal systems with the coming of modernity. Together, the authors' conclusions contribute to a new wave in the study of Islamic legal dynamism and resilience. They powerfully push against the prevailing demise-of-*sharīʿa* thesis. Namely, Wright demonstrates the continued importance of *sharīʿa* as a frame of reference for modern state codes and judicial practice, Bumann highlights the agency of local *qāḍīs* and plaintiffs in modern judicial institutions with reference to Islamic law, and Garipova underscores the continued use of legal reasoning and sustained influence of local Muslim scholars of Islamic law, *ākhūnd*s, in shaping legal outcome.

Collectively, these essays expand the scholarly inquiry by offering fresh perspectives on the negotiation, borrowing, and intertwining of Islamic legal practices with non-Islamic traditions, emphasizing the agency of Islamic legal practitioners and principles in the old world and the new.