

## WHAT IS ISLAMIC LAW? HOW SHOULD WE STUDY IT?

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### Abstract

*“When did pious speculation by Muslim individuals become Islamic law?,” asks Professor Joseph Lowry in his essay. He suggests that formal institutions applying legal norms historically may not have been necessary for the formation of Islamic law, especially if we understand that term to mean a collection of “juristic discourses.” Although we should not assume that the Qur’an and the prophetic sayings inevitably culminated in a legal tradition, we can certainly see these sources as contributing to a “distinctively Islamic legal hermeneutics.” Read more to see how, and why scholars should clarify their own working definitions of “Islamic law” in their own discourse and use of the early sources.*

I study the legal doctrine and legal theory, broadly construed, found mostly in formal written works produced by qualified Muslim jurists (*‘ulamā’*, *fuqahā’*), that may or may not have been practiced, enacted, or enforced. Other literary and documentary evidence may shed light on that body of doctrine and theory and on practices derived from them.<sup>1</sup> Khaled Abou El Fadl has referred to such materials as “juristic discourses.”<sup>2</sup>

When did pious speculation by individual Muslims evolve into the formal, organized production of Islamic legal knowledge? Ibn al-Muqaffa’ (d. ca. 139/757), in his *Risāla fī al-ṣaḥāba*, highlights one negative consequence of that evolution—legal disagreement—as an impediment to efficient imperial administration. So the very late 1st/early 8th centuries seems like a reasonable starting point, but determining precisely how and why that process commenced will require painstaking study of compilations such as the *Muṣannafs* of ‘Abd al-Razzāq al-Ṣan‘ānī (d. 211/827) and Ibn Abī Shayba (d. 235/849) with careful attention to individual doctrinal complexes, critical scrutiny of pathways of transmission, and appropriate contextualization relative to neighboring legal traditions (West Arabian, South Arabian, Roman, Christian, Jewish, Zoroastrian). Marion Katz and Kecia Ali have provided model studies of early Islamic

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1 There is much to study outside the literature of *fiqh*, *uṣūl al-fiqh*, and related genres, such as Ottoman court records, the *madhhabs’* own prosopographical literature, to say nothing of the recent, important work on documentary evidence (including that drawn from the Cairo Geniza, as in Uriel Simonsohn’s *A Common Justice: The Legal Allegiances of Christians and Jews under Early Islam* (Philadelphia: University of Pennsylvania Press, 2011)). I cannot cite all the new and exciting scholarship in these and many other areas, so I have limited myself to a few representative works (not all of them recent) to illustrate the limited number of points I am trying to make in this short, informal essay.

2 Abou El Fadl distinguishes between Islamic law, Muslim law, and juristic discourses. He uses “Muslim law” for “the way in which the political and legal order actually dealt with” specific legal issues, as “qualified by specific historical and social practices.” By “Islamic law” he seems to mean an authoritative rule presented as capable of actualization in response to certain facts—a univocal rule of the kind that juristic discourse does not really produce. By “juristic discourses” he means the totality of the products of the jurists’ intellectual efforts and imaginations, which include their expressions of commitments to moral, political, or theological principles. Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2001), 2–3.

legal doctrine, studies that are sensitive to the logics of the early sources and contexts while employing productive and modern critical lenses.<sup>3</sup> Harald Motzki and others have pursued a method for dating early legal dicta that is defensible and potentially fruitful for reconstructing that early history, but the history of the emergence and early development of individual areas of doctrine remains to be written.<sup>4</sup>

The appearance toward the end of the 2rd/8th century of law books that share similar principles of organization and extensive presentations of doctrine (such as Mālik's (d. 179/795) *al-Muwaṭṭa'* and the works of al-Shaybānī (d. 198/804-5) and al-Shāfi'ī (d. 204/820)) signals an advanced state of sophisticated and self-conscious legal expertise and thus the emergence of jurists and their legal literature as institutions in their own right. In addition to jurists and doctrine, Wael Hallaq would require a judiciary and a clearly articulated legal theory before we can speak of Islamic law as fully formed.<sup>5</sup> Legal theory is evidence of the jurists' consciousness of being involved in an enterprise governed by rules (in this case, rules of interpretation, broadly construed), so that may be a useful criterion, but I am not sure a judiciary is required before we can speak of

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3 Kecia Ali, *Marriage and Slavery in Early Islam* (Cambridge: Harvard University Press, 2010); Marion Katz, *Body of Text: The Emergence of the Sunnī Law of Ritual Purity* (Albany: SUNY Press, 2002).

4 Harald Motzki, *The Origins of Islamic Jurisprudence: Meccan Fiqh before the Classical Schools*, tr. Marion Katz (Leiden: Brill, 2002). In his short "Afterword" (at p. 299), Motzki notes that the history of early Islamic legal doctrine remains to be written. For some relevant reservations about Motzki's methodological assumptions, see Paul Gledhill, "Motzki's Forger: The Corpus of the Follow-er 'Aṭā' in Two Early 3rd/9th-Century Ḥadīth Compendia," *Islamic Law and Society* (2012) 19:1/2, 160–193. A recent study exploring techniques for dating early legal *ḥadīths* is Hiroyuki Yanagihashi, *Studies in Legal Hadith* (Leiden: Brill, 2019). A geographically oriented method for dating early traditions is offered by Behnam Sadeghi, "The Traveling Tradition Text: A Method for Dating Traditions," *Der Islam* 85.1 (2008), 203–42. Patricia Crone's learned attempt to locate the Islamic patronate in Roman Provincial Law yielded only ambiguous results. Patricia Crone, *Roman, Provincial and Islamic Law: The Origins of the Islamic Patronate* (Cambridge: Cambridge University Press, 1987).

5 Hallaq requires these "essential attributes" to be in place before the "formation" of Islamic law can be called complete. Hallaq understands the *madhhabs*, not merely the jurists, as an essential component. Wael Hallaq, *Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005), 3.

Islamic law. On the one hand, the histories of early judges by al-Kindī (d. 350/961) and Wakīʿ (d. 306/918) can be illuminating for studying the early evolution of doctrine.<sup>6</sup> The early judges' activities provide a window onto what Schacht famously labeled "Umayyad administrative practice."<sup>7</sup> On the other hand, there is something to Norman Calder's point that much of what is distinctive about Islamic law—conceived of as juristic discourses—may remain distinctive in the complete absence of real-world application.<sup>8</sup> Perhaps the jurists' pious speculation about norms is sufficient for Islamic law to exist.

It may be instructive to compare the modern study of premodern Islamic law with the modern critical study of Rabbinic law in its Palestinian and Sasanian-Babylonian settings. Recent studies of the Rabbis suggest that their own self-presentation may vastly overstate their social importance and thus the social footprint of Rabbinic law in the Jewish communities of those two areas.<sup>9</sup> If Rabbinic law were not actually applied and enforced in Roman Palestine and Sasanian Babylonia in the

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6 Matthieu Tillier's many studies of the early judiciary are important. See, for example, his translation of al-Kindī's history of judges, *Histoire des cadis égyptiens: Aḥbār quḍāt Miṣr* (Cairo: IFAO, 2012).

7 Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1967), esp. 190–213. On Islamic tort law as product of the administration of the garrison cities, rather than a survival of pre-Islamic Arabian custom, see Norman Calder, *Studies in Early Muslim Jurisprudence* (Oxford: Clarendon Press, 1993), 202–08. Al-Kindī's portrayal of the activities of judges in early Islamic Egypt seems to support Calder's suggestion.

8 Norman Calder referred to works on positive law, *fiqh*, as "a literary tradition, abstracted from reality" and held that the jurists exhibited, in their writings, "a literary purpose [that does] not include reference to the contingent world of social events." Norman Calder, *Islamic Jurisprudence in the Classical Era*, ed. C. Imber (Cambridge: Cambridge University Press, 2010), 35, 47.

9 Seth Schwartz has argued that the Rabbis were "neither the political nor the religious leaders of the Jews... [the Rabbis were] little more than a marginal sect, with little or no constituency or influence" [83] and that their texts were "propagandistic fictions composed to serve the interests of later rabbis" that sought "to create a fictive sense of reality for polemical purposes." Seth Schwartz, "The Political Geography of Rabbinic Texts," in *The Cambridge Companion to the Talmud and Rabbinic Literature*, ed. C. Fronrobert, M. Jaffee (Cambridge: Cambridge University Press, 2007), 75–96 (quotations from pp. 83 and 86). Another author in the same volume describes Rabbinic depictions of instruction as "exaggerated or utopian projections of Rabbinic ideals." Jeffery Rubinstein, "Social and Institutional Settings of Rabbinic Literature," 58–74, at 58.

ways implied by the Mishna and the Talmuds and related texts, would we think, as a result, that there was no such thing as Rabbinic law?

One consequence of locating the “beginnings” of Islamic law in the decades of the late 1st/early 8th centuries may be that legal materials datable to a time before the rise of jurists and doctrine require separate handling and conceptualization. Qur’anic legal material, considered in its original Meccan and Medinan setting, emerged in Arabia as part of the Biblical literature of Late Antiquity. Likewise, the Prophet’s acts, such as ransoming rather than executing prisoners of war, belong to the law of early 7th-century Medina (in this case, the law of armed conflict).<sup>10</sup> Early jurists’ efforts to accommodate Qur’anic doctrines and formally collected Prophetic precedents (*ḥadīth*) represent the inception of a distinctively Islamic legal hermeneutics. We should not assume that Islamic law was an inevitable outcome of the early Qur’anic-Prophetic community in Mecca and Medina. Some will probably find my working definition (and that’s all it is) of Islamic law too narrow; no doubt there are other valid ways of conceptualizing and studying Islamic law. The most important thing is to explain, when we write, what we mean by Islamic law, what sources we study and why, and why we hold the views we do. That is how we signal the bodies of evidence to which our conclusions may validly be applied. Of course we should argue about definitions, about what counts as evidence, and about our assumptions, language, conclusions, method, theoretical orientation, and so on. Everyone’s views are contestable, which quality may be what makes everyone’s views valuable (in this or any other field of humanistic inquiry).

Can ‘law’ be defined so narrowly—as the literary output of private scholars—without reference to the state? Knut

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10 Lena Salaymeh shows that Islamic legal doctrine deviated from the Prophet’s practice on this point. Lena Salaymeh, *The Beginnings of Islamic Law: Late Antique Islamic Legal Traditions* (Cambridge: Cambridge University Press, 2016), ch. 2, 43–83. I borrow the useful term “beginnings” from the title of her provocative book. She refers to “Islamicate” law, which is a good way to avoid an over-theologization of the wide range of legal practices attested in premodern Muslim societies and to leave space for, among other things, non-Muslim legal practices. I reviewed Salaymeh’s book in *Marginalia* <https://marginalia.lareviewofbooks.org/breaking-law-criticizing-modern-study-islamic-law/>

Vikør, in his Islamic law textbook, begins by suggesting that there may be no such thing as Islamic law.<sup>11</sup> He says this because he recognizes that, in regard to doctrine, Islamic law is multi-vocal (as Ibn al-Muqaffa<sup>ʿ</sup> complained), but also because he *assumes* that ‘law’ must always be state law and therefore *univocal*. It is definitely possible to make the case for an Islamic legal system, in which doctrine and public law are equally relevant, and equally ‘Islamic’ in some sense.<sup>12</sup> But is every decisory or administrative action of a Muslim holder of executive or administrative authority, in a political context in a premodern Muslim society, an *Islamic* act such that it deserves to be deemed a part of Islamic law?

That would be one way to understand the question posed by the 7th/13th-century jurist Shihāb al-Dīn al-Qarāfī (d. 684/1285) in his work on adjudication and legal opinions, recently translated by Mohammad Fadel.<sup>13</sup> I worry about this question for reasons different than those that drove al-Qarāfī to grapple with it. I worry that public discourse (including academic discourse) often threatens to impute religious motives, sensibilities, or doctrines to Muslims in a way that makes them paragons of unrelenting religiosity—exoticized, hyper-religious actors who serve as foils for an ideologically driven picture of secular modernity. (As an aside, and back to the topic of “beginnings,” a noteworthy trend in the historiography of Late Antique Arabia proposes accounting for Arab political domination of Western Asia without assuming that religious ideology played

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11 Knut S. Vikør, *Between God and the Sultan: A History of Islamic Law* (Oxford: Oxford University Press, 2005), 1.

12 For a study conceived and executed along such lines, in which public law figures prominently, see Kristen Stilt, *Islamic Law in Action: Authority, Discretion, and Everyday Experiences in Mamluk Egypt* (Oxford: Oxford University Press, 2011). For a complementary study in which the connectedness of *fatwā*-giving and litigation is explored in an exemplary manner, see David Powers, *Law, Society, and Culture in the Maghrib, 1300–1500* (Cambridge: Cambridge University Press, 2002). Noah Feldman makes a convincing case for a pre- and early-modern Islamic constitutional order in which Muslim jurists played a key role. Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton: Princeton University Press, 2008).

13 Mohammad Fadel, tr., *The Criterion for Distinguishing Legal Opinions from Judicial Rulings and the Administrative Acts of Judges and Rulers* (New Haven: Yale University Press, 2017).

a primary role.<sup>14)</sup>

For some, even defining ‘law’ as *necessarily* including power and enforcement is too narrow. Wael Hallaq makes Islamic law stand, metonymically, for premodern Muslim societies. Doing so allows him to argue that the dismantling of Islamic legal institutions by European colonizers should be understood as the wanton destruction of whole societies. Hallaq’s approach is politically attractive in some respects, but it flattens out the Islamic legal tradition and robs actors of agency and the capacity to innovate. The Ottomans, for example, with their codified administrative law and routinization of penal law, might have been portrayed, in a Foucauldian vein, as modernizers.<sup>15</sup> Hallaq’s critical stance toward modernity and the state seems also to preclude considering elements of modern legal systems that draw on the tradition of *fiqh* as authentic.<sup>16</sup>

The humanistic study of pre-modern Islamic legal thought in the present moment presents a dual challenge. Careful examination of the rich Islamic legal tradition through the lens of current travails will reveal familiar injustices, to be sure, and perhaps illuminate important aspects of this moment of social and political turmoil and upheaval. But we must also take care not to reduce our sources to a mirror of our own pressing predicaments, howsoever urgent.

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14 See Greg Fisher, ed., *Arabs and Empires Before Islam* (Oxford: Oxford University Press, 2015) and Robert Hoyland, *In God’s Path: The Arab Conquests and the Creation of an Islamic Empire* (Oxford: Oxford University Press, 2015).

15 In his important history of Islamic law, Hallaq studiously avoids viewing pre-colonial Muslim societies through a Foucauldian lens. Wael Hallaq, *Shari’a: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009).

16 The modern claim, made recently in Egypt and elsewhere, that dissolution of marriage through the doctrine of *khul’* is a wife’s right under Islamic law rather than something that requires a husband’s agreement certainly draws on *fiqh* doctrine. See, for example, Nadia Sonneveld, *Khul’ Divorce in Egypt: Public Debates, Judicial Practices, and Everyday Life* (Cairo: American University of Cairo Press, 2012). However, the criminalization of polygamy in the Tunisian law of personal status, which obviously has Islamic law in mind, is something I would be hesitant to include as part of Islamic law (see Tunisian Code of Personal Status (*Majallat al-aḥwāl al-shakṣiyya*) of 1956, Art. 18, as amended). The seriousness with which Islamic law was discussed as an element in modern legal systems in the late 19th and early 20th centuries is well illustrated by Leonard Wood in his monograph *Islamic Legal Revival: Reception of European Law and Transformations in Islamic Legal Thought in Egypt, 1875–1952* (Oxford: Oxford University Press, 2016).