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Triple-*Ṭalāq* and the Political Context of Islamic Law in India

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Abstract

*The 2019 passage of the 'The Muslim Women Protection of Rights on Marriage Act' criminalizing the practice of triple-*ṭalāq *has been actively debated in both political and academic spheres. For some, the act signals a much-awaited victory for the Muslim women of India who have suffered the consequences of instantaneous and irrevocable divorces; while for others, it signals the continued marginalization of the Muslim community and the willingness of the Indian government to encroach upon their rights as a distinct religious community. To understand the passage of this Act in context, this article explores the larger context surrounding debates over Islamic Law in India, prior watershed Supreme Court decisions, and the recent political agenda of the BJP. These explorations reveal that 'The Muslim Women Protection of Rights on Marriage Act' is a red herring that, if fully enacted, can exacerbate the social and legal challenges women face when seeking divorce while also encroaching upon the rights of the increasingly politically marginalized Muslim community.*

Introduction

The recent passing of 'The Muslim Women Protection of Rights on Marriage Act 2019' in India's two houses of Parliament—the Lok Sabha and the Rajya Sabha—has been actively debated both in India and abroad. Is the Act a much-awaited victory for the Muslim women of India who have suffered the consequences of instantaneous and irrevocable divorces? Or is the Act another sign of the increasing marginalization of the Muslim community and the willingness of the Indian government to encroach upon their rights as a distinct religious community? In order to understand the current controversy over the passing of the Act, one must understand the status of Muslims in India and the longstanding debates surrounding triple-*ṭalāq*.[1]

1 Triple-*ṭalāq* is a specific form of divorce in Islamic law. It is based on Quran 2:229–30 which states, "The divorce is twice, after that, either you retain her on reasonable terms or release her with kindness…And if he has divorced her (a third time), then she is not lawful unto him thereafter until she has married another husband. Then, if the other husband divorces her, it is no sin on both of them that they reunite, provided they feel that they can keep the limits ordained by Allah." Based on this Quranic verse, all four Sunni legal schools agree that the pronouncement of a third divorce by the husband is final and irrevocable. However, there was a scholarly discussion on whether pronouncing three divorces in one sitting constitutes a single divorce, or three separate divorces. Before turning to this discussion, it is important to understand the various forms of divorce in Islam and how the debate on triple-*ṭalāq* developed historically. There are two types of divorces in Islam: *ṭalāq al-sunnah* (the recommended form of divorce) and *ṭalāq al-bidʿa* (the innovated divorce—in South Asia it is referred to as *ṭalāq-e-biddat*). In the first form, the husband divorces the wife outside of her menstrual period, considered the time of ritual purity (*ṭuhr*), with a single divorce, without having had sexual relations. This form of divorce is then further subdivided into *aḥsān* (the best form) and *ḥasan* (the good form). In the *aḥsan ṭalāq al-sunnah,* after the husband pronounces the first divorce, he abstains from sexual intercourse until the completion of two additional menstrual cycles, or until the wife has reached her third cycle of *ṭuhr.* If the husband does not revoke the divorce in this time period or engage in sexual intercourse, the divorce is complete. In the *ḥasan ṭalāq al-sunnah,* the husband pronounces divorce a second time, in the next cycle of *ṭuhr,* and a third divorce, in the third cycle of *ṭuhr*—making the divorce irrevocable at this point. The husband is not *required* to pronounce divorces in successive periods of ritual purity as reconciliation is always recommended. In *ṭalāq al-bidʿa,* the husband pronounces divorce when the woman is menstruating, or when she is in her time of ritual purity, but the spouses have engaged in sexual activity. Jurists agree

This article will provide an overview of (1) the place of Muslim Personal Law in India; (2) the various Muslim institutions and players that have historically shaped the Law; (3) the debates on Muslim Personal Law by Muslim and non-Muslim activists in the past decade; and (4) the circumstances behind the passing of the Muslim Women (Protection of Rights on Marriage) Act 2019 that has outlawed triple-*ṭalāq*. Though the Indian Muslim community has not yet felt the social and legal ramifications of the Act, given that it does not provide women with any additional rights that many have been advocating for, and it criminalizes men for pronouncing triple-*ṭalāq*, the Act has the potential of leaving Muslim women even more vulnerable.

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that triple-*ṭalāq,* when it is pronounced three separate times, in three periods of ritual purity, results in an irrevocable divorce (*ṭalāq rajʿī*); however, they questioned the consequences of pronouncing three divorces simultaneously, or using a phrase that indicates three divorces such as, "I divorce you three times." Eventually all four of the Sunni legal schools agreed that although this form of divorce is classified as *ṭalāq al-bidʿa,* it is valid and results in an irrevocable divorce. It is this form of triple-*ṭalāq* in a single-sitting that is the source of the legal debates in India. The relative consensus amongst the four legal schools on the efficacy of this form of divorce remained until Ibn Taymiyya (d. 728/1328) and Ibn al-Qayyim (d. 751/1350). Both scholars argued that three divorces simultaneously, or a single phrase indicating three divorces, do not effectuate an irrevocable divorce. Despite the near unanimous consensus of jurists, modern states when codifying Islamic family law, have adopted the position of Ibn Taymiyya and Ibn al-Qayyim, either outlawing triple-*ṭalāq* entirely or treating it as a singular pronouncement. In 1929, Egypt became the first country to count three simultaneous divorce pronouncements as one. This was quickly followed by Sudan (1935), Sri Lanka (1951), Syria (1953), Tunisia (1956), Morocco (1957), Iraq (1959), Pakistan (1961), Bangladesh (1961), Jordan (1976), Afghanistan (1977), Libya (1984), Kuwait (1984), and Yemen (1992). Since 1992, almost all other countries that apply Islamic law to issues of marriage and divorce have legislated against the efficacy of triple-*ṭalāq.* For an overview of the classical legal discussion on triple-*ṭalāq, see* Muhammad Munir, "Triple 'Talāq' in One Session: An Analysis of the Opinions of the Classical Medieval and Modern Muslim Jurists under Islamic law," *Arab Law Quarterly* 27, no. 1 (2013): 29–49; Khaled al-Azri, "One or Three? Exploring Scholarly Conflict over the Question of Triple Talāq (Divorce) in Islamic Law with Particular Emphasis on Oman," *Arab Law Quarterly* 23, no. 3 (2011): 277–96. For more contemporary developments, *see* Nehaluddin Ahmad, "A Critical Appraisal of 'Triple Divorce' in Islamic Law," *International Journal of Law, Policy and the Family* (2009): 53–61 and Lynn Welchman, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsterdam: Amsterdam University Press, 2007).

Current Status of Muslims in India

Based on the 2001 Indian Census, the 140 million Muslims living in India comprise 13.4% of India's population.[2] According to more recent data, India's Muslim population has increased to 14% and is only expected to grow further. Indeed, Pew Research Center estimates that by 2050 India will have the largest population of Muslims in the world, surpassing Indonesia, with a projected 311 million Indian Muslims.[3] Despite steady growth of the Indian Muslim population, Muslim representation in government has declined. In the 2019 election, only 27 Muslims were elected representatives into the 545 seat lower house of parliament, the Lok Sabha, an increase of only five since the last election in 2014. As such, there is mounting concern that India's largest minority population is not adequately represented in Parliament.[4] This concern is further exacerbated by Hindu nationalist polices and rhetoric of the ruling party, the Bharatiya Janata Party (BJP), and the Prime Minister, Narenda Modi.[5]

2 "2001 Indian Census Data: Distribution of Population by Religion," *Office of the Registrar General & Census Commissioner*, Accessed August 10, 2019, http://censusindia.gov.in/Census_And_You/religion.aspx.

3 "By 2050, India to have world's largest populations of Hindus and Muslims," *Pew Research Center*, Accessed August 10, 2019, https://www.pewresearch.org/fact-tank/2015/04/21/by-2050-india-to-have-worlds-largest-populations-of-hindus-and-muslims/.

4 In addition to disproportionate Muslim representation in the legislature, the Centre for Research and Debates in Development Policy in India has analyzed electoral data which reveals that large portions of eligible Muslim voting population are excluded from voting. The report states, "the empirical analysis presented in this article brings to light a dimension which has hitherto only been vaguely suspected. It is likely that over 15% of all adults are either left out or excluded from voting lists in India. There is a strong empirical indication, as described below, that this percentage is much higher among Muslims." Abusaleh Shariff and Khalid Saifullah, "Electoral Exclusion of Muslims Continues to Plague Indian Democracy," *Economic & Political Weekly* 53, no. 20 (2018).

5 *See* generally Angana Chatterji, Thomas Blom Hansen and Chirstophe Jaffrelot (eds), *Majoritarian State: How Hindu Nationalism is Changing India* (London: Hurst, 2018); Lars Tore Flåten, *Hindu Nationalism, History and Identity in India*: *Narrating a Hindu past under the BJP* (New York: Routledge, 2018); Nitasha Kaul, "Rise of the Political Right in India: Hindutva-Development Mix, Modi Myth and Dualities," *Journal of Labor and Society* 20, no. 4 (2017): 523–28.

Saloni Bhogale, a Research Fellow at Ashoka University in Delhi, examined the extent to which issues directly affecting the welfare of Muslims were addressed in parliament. She analyzed a set of 276,000 parliamentary questions raised in the Lok Sabha from 1999 to 2007.[6] Her findings reveal that Muslim MPs asked far more questions about the Indian Muslim population as compared to the non-Muslim MPs. However, when Muslim MPs raised concerns, they focused on specific issues such as the Hajj and Muslim education. On the other hand, when non-Muslim MPs raised concerns related to the Muslim population, they focused on questions related to domestic terrorism. What Bhogale's research reveals is that not only are Muslims under-represented in Parliament, but issues related to their welfare are not adequately addressed. Furthermore, when questions about Muslims do arise, they concentrate on a narrow subset of issues of concern to the national government. Bhagole's research also reveals something particularly illuminating for the current debate of triple-*ṭalāq*. She finds that over the eight-year period, only 1.5% of all questions about Indian Muslims surveyed pertain to Muslim women. If historically both Muslim and non-Muslim MPs in the Lok Sabha paid little attention to questions of gender and the welfare of women, then why was the triple-*ṭalāq* Act the first bill to be passed in the new parliamentary session?

The urgency in passing the Bill would suggest that triple-*ṭalāq* is a widespread practice afflicting Muslim women, but data provided by the Center for Research and Debates in Development Policy (CRDDP) in Delhi seems to suggest otherwise. Before the 2017 landmark Supreme Court decision—discussed below—the CRDDP reported the results of its survey on triple-*ṭalāq*. The Center surveyed 20,671 Muslims (16,860 men and 3, 811 women). From the 20,671 respondents, 311 divorces were

6 Saloni Bhogale, "Querying the Indian Parliament: What can the Question Hour tell us about Muslim Representation in India," *Trivedi Center for Political Data at Ashoka University*, Working Paper No. 2018-1, Accessed August 1, 2019, http://tcpd.ashoka.edu.in/wp-content/uploads/2018/10/Bhogale_WP_QH-1.pdf. Also *see* Saloni Bhogale, "What can Question Hour tell us about representation in the Indian Parliament?" *Ideas for India*, Accessed March 23, 2021, https://www.ideasforindia.in/topics/social-identity/what-can-question-hour-tell-us-about-representation-in-the-indian-parliament.html.

reported, and only 1 of the 311 noted an oral triple-*ṭalāq* was used.[7] If this sample is reflective of the population, why has the government made triple-*ṭalāq* its signature legislation to enhance the welfare of Muslim women? And why has it dominated the public and legislative discourse about the Muslim community in India? To answer these questions, we must understand the complex history of Islamic family law in India.

The Introduction of Islamic Family Law in India

The current architecture of Islamic family law in India is often assumed to be a vestige of India's colonial past wherein the British recognized the personal religious laws of Muslims, Hindus, Christians, and other minority religious groups. Generally, post-colonial states supported legal monism as opposed to legal plurality, overseen by centralized organs of state, the legislature and the judiciary. However, normative unification failed in certain post-colonial states such as India. Some scholars have attributed this failure to the inability to disinherit the colonial legacy, but others have noted that for certain post-colonial states, it was politically exigent to continue to accommodate the legal needs of minorities.[8] In the case of India, it was likely a combination of both—the colonial legacy established the foundation for legal pluralism, but the bloody

7 Seema Chishti, "Triple Talaq Exception Rather than Rule: Survey," *Indian Express,* Accessed August 15, 2019, https://indianexpress.com/article/india/triple-talaq-exception-rather-than-rule-survey-muslim-divorce-4659358/. *See* also Abusaleh Shariff and Syed Khalid, "Abandoned Women Vastly Outnumber Victims of Triple Talaq and It's Time Modi Spoke Up for Them," *The Wire,* Accessed August 15, 2019, https://thewire.in/gender/abandoned-women-triple-talaq.

8 Mirjam Kunkler and Yüksel Sezgin, "The Unification of Law and Postcolonial State: The Limits of State Monism in India and Indonesia," *American Behavioral Scientist* 60, no. 8 (2016): 987–1012; Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge: Cambridge University Press, 2013); Yüksel Sezgin, *Human Rights under State-Enforced Religious Family Laws in Israel, Egypt and India* (Cambridge: Cambridge University Press, 2013). For the specific case of family law in India, *see* Narendra Subramanian, *Nation and Family: Personal Law, Cultural Pluralism, and Gendered Citizenship in India* (Stanford: Stanford University Press, 2014); Gopika Solanki, *Adjudication in Religious Family Law: Cultural Accommodation, Legal Pluralism and Gender Equality in India* (Cambridge: Cambridge University Press, 2011).

partition of 1947, with its heavy evocation of religious sentiment, made religious accommodation of Indian Muslims a political necessity.

Accommodation of certain Islamic laws were enshrined in the constitution by Articles 13 and 372.[9] Article 13 states, "All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void."[10] Though the constitution ensured the legal validity of the religious laws of Muslims prior to independence, Article 13 added an important qualification—laws were only recognized to the extent that they did not violate the Fundamental Rights of the constitution as outlined in Article 15. These rights include: the right to equality, the right to freedom, the right against exploitation, the right to freedom of religion, the right of culture and education, and the right to constitutional remedies.

The constitutional recognition that religious laws could be restricted on the basis of their violation of Fundamental Rights provided an important legal opening for activists to argue against certain religious laws. However, in reality, courts

9 Article 372 of the constitution does not directly address Islamic law, but similar to Article 13, it notes that all laws prior to the establishment of the constitution remain in effect unless expressly changed. This means that many of the laws established by the British continue to be effective post-independence. This includes Islamic family law. Article 372 states, "Continuance in force of existing laws and their adaptation: (1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority; (2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law." "Constitution of India*," National Portal of India*, Accessed August 1, 2019, https://www.india.gov.in/my-government/constitution-india/constitution-india-full-text.

10 Ibid.

unevenly exercised this authority. In 1952, in the *State of Bombay* v. *Narasu Appa* decision,[11] the Bombay High Court ruled that the personal laws of religious communities are *not* subject to the Fundamental Rights enshrined in the constitution. This decision was challenged in 1956 in the Bhopal High Court in *Abdullah Khan* v. *Chandi Bi,* [12] and again in 1991 in the Bombay High Court in *Smt. Amina* v. *Unknown.*[13] In both cases, the courts ruled that personal laws *were* subject to the Fundamental Rights, however the judiciary was always keen to note that the ultimate redress should be legislative and not judicial.[14] In addition to qualifying personal laws on the basis of the Fundamental Rights, personal laws could also be qualified by the Constitution's 'Directive Principles of State Policy.' One of these principles, stated in Article 44, is that "The State shall endeavor to secure for the citizens a uniform code throughout the territory of India."[15] While a Uniform Civil Code (UCC) was supported by many during constitutional discussions and debates, it was vehemently opposed by minority groups, with Muslims being especially vocal.[16] As a result, instead of enforcing the establishment of a UCC as a justiciable article, drafters of the constitution made it a non-justiciable aspirational clause, demonstrating that despite the adoption of legal pluralism, the aspirational intent during the drafting of the constitution was a uniform code, regardless of religious affiliation. This means Articles 13 and 372,[17] which recognize the religious laws of communities, were qualified both by the Fundamental Rights of each individual, and by the desire to eventually have a uniform civil code. Those opposing the legal accommodation of religious minorities, or advocating

11 *All India Reporter* (AIR) 1952, Bombay, p. 84. https://indiankanoon.org/doc/54613/

12 *Criminal Law Journal* 1956, p. 1395. https://indiankanoon.org/doc/392646/.

13 *AIR* 1992, Bombay, p. 214. https://indiankanoon.org/doc/1580596/.

14 *See* Vrinda Narain, *Reclaiming the Nation: Muslim Women and Law in India* (Toronto: University of Toronto Press, 2008): 100–03.

15 Ibid.

16 For more on these debates, *see* Archana Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (New Delhi: Sage Publications, 1992).

17 See *supra* note 9.

for the reform of religious laws, were therefore given two constitutional grounds for their arguments.

Muslim religious laws governing marriage, divorce and property are preserved in the Muslim Personal (Shariat) Application Act of 1937, passed during British rule. This act, which is recognized under Articles 13 and 372 of the constitution, continues to form the basis of Muslim personal law today. In an attempt to move towards a more uniform code, the government passed a series of laws that citizens can opt into that circumvent religious laws on personal matters. For example, the Special Marriage Act of 1954 is a civil code for citizens to register their marriages voluntarily at civil registries. While this and other acts give a nod towards the Directive Principle of fashioning a uniform civil code, Muslim personal status laws continue to function. This creates a tension between certain laws that attempt to harmonize and unify the existing laws, and the constitutional legitimacy of pluralism which facilitates the creation of legal precedents compelling the judiciary to recognize multiple legal groups. Important questions arise regarding interpretation—is it the secular government of India that has the final word on the interpretation and adjudication of Islamic laws, or are certain Muslim institutions also legally sanctioned to operate in this space? And if there is a desire to change certain religious laws, what is the process whereby these changes are legally recognized?

Muslim Institutions and Muslim Personal Status Law

Though the constitution recognized the Muslim Personal (Shariat) Application Act of 1937, no additional provisions were made with regards to the interpretation and adjudication of the laws preserved in the act. It was assumed that the secular judiciary of India would assume the responsibility of interpreting and adjudicating matters of Muslim personal law just as British judges adjudicated Muslim personal status law during the colonial period. Though this was accepted by Muslim groups, Muslims set up institutions that could provide legal and religious

guidance for individuals *outside* the formal organs of the state. The State of India *did not* expressly sanction any of these institutions or bodies; the government nevertheless encouraged and conferred protection to them under the Fundamental Rights of the Constitution which states "All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice."[18] Notwithstanding that these educational institutions were subject to the same laws governing all other institutions, the right to establish such institutions was enshrined by the constitution.

The most lasting institution connected to Muslim personal status law in India has been the All India Muslim Personal Law Board (AIMPLB).[19] Though it has *never* received formal state recognition, and its power has been increasingly contested with the rise of new institutions representing the Muslim community, it has played a crucial role in the history of triple-*talāq*. The AIMPLB was founded in 1972 by Muhammad Tayyab, the then director of the *madrasa* at Deoband (Darul Uloom Deoband), in response to growing lobbying in parliament for a uniform civil code and an adoption bill that would override certain Islamic laws.[20] Though the AIMPLB never received formal status or authority as representative of the will of Indian Muslims, their vocal outrage at the attempt to override Muslim personal law with a uniform civil code quickly generated support and endorsement by Indian Muslims, especially more conservative ones. The group was thrust into public debates surrounding the Shah Bano case between 1985-6, where they resisted changing elements of Islamic personal status law, in this case spousal maintenance and

18 Ibid., "Article 30: Cultural and Educational Rights."

19 For more on the development of the AIMPLB, *see* Justin Jones, "'Signs of Churning': Muslim Personal Law and Public Contestation in Twenty-First Century India" *Modern Asian Studies* 44, no. 1 (2010): 175–200; Salima Elizabeth Burke, *Sharia Uncodified: India's Muslim Women, the Supreme Court and the All India Muslim Personal Law Board, 1993-2006* (Unpublished Dissertation, Georgetown University, 2007).

20 For the history of the Deoband *madrasa* and the various social roles it undertook, *see* Barbara Metcalf, *Islamic Revival in British India, Deoband 1860-1900* (Princeton: Princeton University Press, 2014), 87-137; Muhammad Qasim Zaman, *The Ulama in Contemporary Islam: Custodians of Change* (Princeton: Princeton University Press, 2002), 17-37.

divorce laws. In the decision, the Supreme Court ruled in favor of Shah Bano, extending her spousal maintenance beyond the period required by Islamic law.[21] This upset the AIMPLB and other conservative groups who saw it as judicial encroachment on the personal laws of Muslims. In response, the AIMPLB staged protests, increasing pressure on the government to promulgate legislation that would annul the Supreme Court decision.

Eventually, the government passed the Muslim Women's Protection of Rights on Divorce Act[22] which exempted Muslim women from maintenance rights. The Act was instrumental in cementing the position of the AIMPLB; the government had succumbed to the lobbying of a non-state group that was not considered entirely representative of Indian Muslims. In the late 80s and 90s, the AIMPLB, recognizing the social and religious power they held, commentated on various legal issues related to Indian Muslims and facilitated the creation of the Islamic Fiqh Academy, a council of legal scholars devoted to discussing and reaching consensus on various legal issues. Though the AIMPLB made some attempts at inclusivity, their scholars remain primarily affiliated with the Deoband *madrasa*. Further, they adopt rigid and conservative opinions on most matters of Islamic personal status law. Consequently, resistance to the AIMPLB persists through the creation of parallel Muslims institutions that challenge their authority as the de facto representatives of the Muslim voice.

21 For more on the Shah Bano case and the efforts of commissions and committees to reform Islamic law prior to the Supreme Court case, *see* Sylvia Vatuk, "A Rallying Cry for Muslim Personal Law: The Shah Bano Case and Its Aftermath," in *Islam in South Asian in Practice,* ed. Barbara Metcalf (New Jersey: Princeton University Press, 2009), 352–67. Her section on 'further reading' has additional articles and books focused on the Shah Bano case. *See also* Saumya Saxena, "Commissions, Committees and Custodians of Muslim Personal Law in Postindependence India," *Comparative Studies of South Asia, Africa and the Middle East* 38, no. 3 (2018): 423–38; Asghar Ali Engineer, *The Shah Bano Controversy* (Bombay: Sangam Books, 1987).

22 The newly-passed triple-*ṭalāq* bill echoes the name of the 1986 Muslim Women's Protection of Rights on Divorce Bill. It is tiled the Muslim Women's Protection of Rights on Marriage Bill 2019.

Challenges to the Authority of the AIMPLB

The greatest challenge to the status of the AIMPLB came in 2005 when a private attorney, Vishwa Madan, petitioned the Supreme Court to shut down the network of Muslim dispute resolution centers, *dār ul qazas,*[23] which were established by the AIMPLB.[24] Madan argued that these alternative 'courts' undermined the legislative sovereignty of the state and thus, the rule of law. Beyond issues of state power and rights, Madan also took umbrage with a series of *fatwas* that had been issued, arguing that they violated the Fundamental Rights of women and subverted the broad constitutional commitment to justice. Central to his complaint was the *fatwa* issued in the Imrana rape case of 2005. The case involved a young woman, Imrana, who was raped by her father-in-law. After filing a police report, the *madrasa* at Deoband released a *fatwa* stating that Imrana's marriage to her husband was no longer valid. The AIMPLB, supported the *fatwa.* In addition to outrage at the *fatwa,* many were angered because the litigants involved in the case did not actually request a *fatwa* either from the *madrasa* or from

23 For more on these *dār ul qazas,* their utility for Muslim women and the manner in which they interact with the secular rule of law, *see* Jeffrey Redding, *A Secular Need: Islamic Law and State Governance in Contemporary India* (Seattle: University of Washington Press, 2020); Ibid., "The Case of Ayesha, Muslim 'Courts,' and the Rule of law: Some Ethnographic Lessons for Legal Theory," *Modern Asian Studies,* 48, no. 4 (2014): 940–85; Sabiha Hussain, "Shariat Courts and the Question of Women's Rights in India," *Pakistan Journal of Women's Studies: Alam-e-Niswam,* 14, no. 2 (2007): 73–102. In addition to *dār ul qazas,* there are other alternative dispute institutions present in India for Muslim women seeking divorce. Katherine Lemon's recent monograph, *Divorcing Traditions,* provides a rich ethnography of these institutions and details how these institutions function alongside state law and Indian secularism. *See* Katharine Lemons, *Divorcing Traditions: Islamic Marriage Law and the Making of Indian Secularism* (New York: Cornell University Press, 2019); idem, "Sharia Courts and Muslim Personal Law in India: Intersecting Legal Regimes," *Law & Society Review* 52, no. 3(2018): 603–29. *See also* Ebrahim Moosa, "Shari'at Governance in Colonial and Postcolonial India," *Islam in South Asian in Practice,* ed. Barbara Metcalf (Princeton: Princeton University Press, 2009): 317–25.

24 For more on the specifics of the case, *see* Jeffrey Redding "Secularism, The Rule of Law, and 'Shari'a Courts': An Ethnographic Examination of a Constitutional Controversy" *St. Louis University Law Journal* 57 (2013): 339–76. The full decision, *Vishwa Lochan Madan v. Union of India*, is accessible at, https://beta.shariasource.com/documents/2246.

the AIMPLB. Both institutions chose to intervene despite the absence of a request from the litigants. Madan saw the social and legal power of the AIMPLB and other institutions as encroaching on the sovereignty of the state and interfering in the rights of individuals to pursue legal recourse as they saw fit. To address both of these concerns, he demanded that all *dār ul qazas* be closed.

In 2014, the court finally ruled, dismissing Madan's plea to formally ban all *dār ul qazas.* Speaking directly to the verdicts of *dār ul qazas,* the court judgement refers to them as "an informal justice delivery system with an objective of bringing about an amicable settlement of matrimonial disputes between the parties…. It is within the discretion of the persons or the parties who obtain Fatwas to abide by it or not."[25] The judgement classifies the *dār ul qazas* as an informal 'alternative dispute resolution' mechanism whose judgements are non-enforceable and non-binding—emphasizing that individuals always have recourse to the formal judicial system if they desire. Then speaking of the *fatwas* directly, the Justices state, "We would like to advise the *dār ul-qaza* or for that matter anybody not to give any response or issue *fatwa* concerning an individual, unless asked for by the person involved or the person having direct interest in the matter."[26] The Court did not challenge the authority of the *dār ul qazas* or the AIMPLB, but it emphasized that neither had any formal legal status.

As for the practice of triple-*ṭalāq,* the perspective of many legislators and members of the judiciary is that it primarily disadvantages women, violating their Fundamental Rights enshrined in Article 15 of the constitution. However, given the constitutional recognition of the personal laws of Muslims, of which triple-*ṭalāq* is considered a part, the most that the judiciary and legislators can do is exert pressure on Muslim organizations, such as the AIMPLB, to undertake the task of reforming these laws. The most widely-cited case of *ṭalāq* heard before the Supreme Court of India after the Shah Bano case involved

25 *Vishwa Lochan Madan v. Union of India*, paragraph 7 and 8.
26 Ibid., paragraph 15.

Shahmim Ara.[27] She and her husband, Abrar Ahmed, were married in 1968. In 1979 she filed a complaint against him in the Family Court in Allahabad under Section 125 of the Criminal Procedure Code on the basis that he failed to provide her with financial marital support.[28] Mr. Ahmed rebutted her claim in a response in 1990 by arguing that he divorced her in 1987. He further produced a written court affidavit attesting to the divorce. The Allahabad Family Court ruled in 1993, fourteen years after Ms. Ara filed her complaint, and dismissed her demand for maintenance on the grounds that she had been divorced. Ms. Ara contested the divorce and appealed the subsequent higher court rulings, which only gave her partial maintenance, until her case landed before the Supreme Court.[29]

According to Jeffrey Redding, the Supreme Court eventually had to rule on the very narrow question of "whether or not a Muslim husband's written submissions to a state court indicating his clear desire to be divorced can—from the date of their filing in the state court—effectuate a *talaq*."[30] If the Court ruled in the affirmative, it would mean that Mr. Ahmed's court affidavit would be considered a formal divorce and Ms. Ara could not claim financial martial support. The court, however, ruled in the negative, effectively leaving the practice of *ṭalāq* as a non-state matter that should be resolved using the religious

27 The case is cited as "Shahmin Ara. V. State of Uttar Pradesh, 2002, S.C. 3551." The judgement is accessible at, https://beta.shariasource.com/documents/309.

28 Under Section 125 of the Criminal Procedure Code, if for the "order of maintenance of wives, children and parents" for individuals of "sufficient means." Clause 3 notes, "If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowances remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made." From "The Code of Criminal Procedure, 1973." Accessed August 15, 2019, https://www.oecd.org/site/adboecdanti-corruptioninitiative/46814340.pdf.

29 For a full overview of the case, *see* Jeffrey Redding, *Shamim Ara and the Divorce Politics of a Secular and Modern India*, SHARIAsource, Harvard Law School. Accessed August 1, 2019, https://islamiclaw.blog/2016/10/28/case-commentary-shamim-ara-and-the-divorce-politics-of-a-secular-and-modern-india/#_ftn1.

30 Ibid.

institutions available to Muslims. The court did, however, make certain clear suggestions about *ṭalāq,* stating, "The correct law of *ṭalāq* as ordained by the Holy Quran is that *ṭalāq* must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters—one from the wife's family and the other from the husband's; [only] if the attempts fail, *ṭalāq* may be effected."[31] Beyond this, in the *obiter dicta,* the judges noted that triple-*ṭalāq* was commonly referred to as *ṭalāq-e-biddat* (an innovated divorce)—indicating that the practice was an aberration.[32] If the name of the *ṭalāq* itself acknowledges that it is an aberration, then it can be assumed to be antithetical to the Sharīʾa and should not be upheld by courts. However, because the discussion on triple-*ṭalāq* was *obiter dicta* and the primary matter of the case was of maintenance and court petitions for divorce, the critique of triple-*ṭalāq* had no legal consequence. The judgement was careful not to pronounce certain forms of *ṭalāq* legal and others illegal while still laying down parameters for 'correct *ṭalāq*.' On Redding's reading, this is because any interference by the government or courts would have been seen as contravening the image of a secular and modern state that the Indian government wished to project.[33]

A few years later, in 2005, the AIMPLB adopted a model marriage contract (*nikahnama*) that echoed the court's recommendations in the Shamim Ara decision. The model marriage contract contained a clause that made it *mandatory* to approach a *qazi* or *dār ul qaza* in the case of marital discord before pronouncing divorce.[34] However, this did not stop men from pronouncing a triple-*ṭalāq* in contravention to the recommendations of the AIMPLB. In 2007, a high-profile case on triple-*ṭalāq* surfaced, this time in the High Court of Delhi. In this case, *Masroor Ahmed* v. *State (*NCT of Delhi) 2007, Masroor Ahmed claimed to have thrice-divorced his wife in the presence

31 Ibid.

32 For overview of the types of divorce in Islamic law, *see supra note* 1.

33 Ibid.

34 The model *nikahnama* is readily available on the AIMPLB website. Accessed August 15, 2019, http://www.aimplboard.in/images/book/pdf/Nikah%20Nama.pdf.

of his brother-in-law and another man. In the ruling, the High Court of Delhi relied upon the *obiter dicta* in Shahmim Ara noting that the pronouncement of *ṭalāq* is not sufficient to effectuate a divorce and both reasonable cause and attempts at reconciliation must be demonstrated. The court also went further to rule that the utterance of a triple-*ṭalāq* is considered one revocable *ṭalāq* and allows for spousal reconciliation. Though the judgement directly addressed the triple-*ṭalāq* pronounced by Masroor Ahmed, the judgement was limited to the case and did not go further to challenge the legality or constitutionality of triple-*ṭalāq*. As cases continued to emerge in the courtrooms, activist groups called for legislative intervention and pointed to other countries that outlawed triple-*ṭalāq*, especially neighboring South Asian countries such as Pakistan and Bangladesh. Throughout this time, the judiciary remained reticent to encroach on the personal laws of Muslims; the Parliament deemed passing legislation on the matter unnecessary; and the most powerful Muslim legal institution, the AIMPLB, hesitated to speak directly on immediate triple-*ṭalāq*.

Given that the model *nikahnama* was not effective in reducing the cases of triple-*ṭalāq,* these cases continued to find themselves in the courtroom. Zubair Abbasi has noted that in 2016 alone, at least ten judgements were issued by the High Courts in which they rejected the validity of triple-*ṭalāq*. [35] The mounting pressure on the AIMPLB led them to issue a series of statements regarding triple-*ṭalāq*. In April 2017, the most emphatic of these statements, stated:

> The stand of the Shariat is clear about divorce, that the pronouncement of divorce without any reason, and that three divorces in one go, are not the correct methods of pronouncing divorce. Such a practice is strongly condemned by the Shariat. That is why the All India Muslim Personal Board will start a grand public

35 Zubair Abbasi, "In Response to the Indian Supreme Court's Recent Decision on Triple Ṭalāq: A Legislative Proposal," SHARIAsource at Harvard Law School, Accessed August 1, 2019, https://beta.shariasource.com/documents/2984.

> movement desisting the people from pronouncing divorce without any reason and that in case of necessity only one divorce should be resorted to and in any case three divorces in one go should not be resorted to.[36]

AIMPLB continued on to claim that those who are discovered to have invoked the triple-*ṭalāq* will be 'socially boycotted.' For some, the statement did not go far enough to actually establish that this method of divorcing was invalid. For others, though they were satisfied with the wording of the statement by the AIMPLB, they recognized that the lack of the Board's formal legal status meant that their censure of triple-*ṭalāq* had little legal consequence. And the social consequence of 'boycotting' would not act as a sufficient deterrent for men who wished to pronounce the triple-*ṭalāq*.

This complex history formed the backdrop for the decision by the Supreme Court in 2017 in *Shayara Bano* v. *Union of India*. At the time of adjudication, numerous courts had already ruled on the invalidity of the triple-*ṭalāq* and the AIMPLB recognized it as a detrimental practice; yet the legislature remained conspicuously silent, attempting to balance between the fundamental rights enshrined in the constitution and the legal autonomy given to religious groups by that same constitution. The task of the court was to somehow navigate these competing needs and put an end to the longstanding stalemate regarding the issue of triple-*ṭalāq*. The first question the court had to address was whether triple-*talāq* was considered codified into statutory law by the 1937 Shariat Act. If it was codified, then it was subject to the fundamental rights enshrined in the constitution. If it was not considered codified as statutory law, then the judges had to rule on whether uncodified law was subject to the same constitutional texts, namely the Fundamental Rights, as codified law.

On August 22nd, 2017, the Supreme Court published its

36 Ananthakrishnan G, "Muslim Board Calls for Social Boycott of Those Who Resort to Triple Ṭalāq," *Indian Express,* 23rd May 2017, http://indianexpress.com/article/india/muslim-board-aimplb-calls-for-social-boycott-of-those-who-resort-to-triple-ṭalāq-4668986/

judgements. The court was divided—two of the Justices upheld the validity of triple-*ṭalāq,* and the other three argued for its unconstitutionality. The dissenting judges, Chief Kehar and Justice Nazeer argued that triple-*talāq* was not codified by the 1937 Act and is classified as uncodified Muslim personal law. As a result, it *cannot* be measured against the Fundamental Rights and moreover, it is protected by Article 25. Justices Nariman and Lalit argued that triple-*talāq* is considered codified and *can* thus be measured against the Fundamental Rights. Moreover, because it is not an essential religious practice, and not Quranically sanctioned, it is not protected under Article 25. The final Justice, Justice Joseph, agreed with Justices Kehar and Nazeer that triple-*talāq* was not codified by the 1937 Act, but agreed with Justices Nariman and Lalit that it was a non-essential law that *can* be measured against the Fundamental Rights enshrined in the constitution. As a result, in the final account, he voted with Justices Nariman and Lalit that triple-*talāq* was justiciable according to the constitution. In the 397-page judgement, the Justices reviewed Islamic scriptural sources, the experiences of other countries in addressing triple-*ṭalāq*, and previous judicial judgments regarding triple-*ṭalāq* in India.

In the final account, the majority decision notes that the practice of triple-*ṭalāq* is in violation of the Fundamental Rights enshrined in the constitution. Speaking more directly to the 1937 Shariat Act, in the decision penned by Justices Nariman and Lalit, they state, "In our opinion, therefore, the 1937 Act, insofar as it seeks to recognize and enforce Triple Talaq, is within the meaning of the expression 'laws in force' in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq."[37] In the minority opinion, penned by Justices Kehar and Nazeer, they emphasize that any reform to the personal law cannot be through the judiciary but rather through the legislature. Later in their judgment they emphatically state, "Interference in matters of 'personal law' is clearly beyond judicial examination. The judiciary must therefore, always exercise absolute restraint, no matter how

37 Ibid., 393.

compelling and attractive the opportunity to do societal good may seem."[38] Taking cue from the examples of other countries wherein Muslim personal status law is practiced, they argue that the practice of triple-*ṭalāq* was addressed 'by way of legislation' and therefore the parliament should 'consider appropriate legislation, particularly with reference to 'ṭalāq-e-biddat.'" Recognizing, however, that legislative changes are laborious, Justices Kehar and Nazeer suggested a six-month injunction on triple-*ṭalāq*, stating,

> Till such time as legislation in the matter is considered, we are satisfied in injuncting Muslim husbands, from pronouncing 'ṭalāq-e-biddat' as a means for severing their matrimonial relationship. The instant injunction, shall in the first instance, be operative for a period of six months. If the legislative process commences before the expiry of the period of six months, and a positive decision emerges towards redefining 'ṭalāq-e-biddat' (three pronouncements of 'ṭalāq,' at one and the same time)—as one, or alternatively, if it is decided that the practice of 'ṭalāq-e-biddat' be done away with altogether, the injunction would continue, till legislation is finally enacted. Failing which, the injunction shall ease to operate.[39]

The deeply divided decisions of the Supreme Court led to the final 'Order of the Court' stating, "In view of the different opinions recorded, by a majority of 3:2 the practice of 'talaq-e-biddat'—triple talaq is set aside."[40] The final decision of the Supreme Court that the triple-talaq be "set aside" remains vague at best. Effectively, the Supreme Court decision placed the responsibility for legal and *permanent* change to the laws of triple-*ṭalāq* on the legislative branch. The challenge confronting the legislature was that historically Muslim institutions, like

38 Ibid., 268.
39 Ibid., 271–72.
40 Ibid., 395.

the AIMPLB and others, actively resisted legislative reforms to Muslim personal status law, and larger attempts to create a uniform civil code—exemplified best by response to the Shah Bano decision. Though the social and religious power of the AIMPLB decreased by the time of the Supreme Court decision, and other advocacy groups supported legislative reforms to Muslim personal law,[41] the divided Supreme Court decision provided grounds for resistance to any attempts at reform. This left legislators in a precarious position—if they were to pass a bill that made triple-*ṭalāq* illegal, how would this change be received, and what mechanisms of enforcement would be introduced to ensure that unwilling parties assented to the law?

The 2019 Muslim Women Protection of Rights on Marriage Bill

Almost immediately after the 2017 Supreme Court decision, the legislature began to address the issue of triple-*ṭalāq*. From 2017 until 2019, various Executive Ordinances and Bills were promulgated before the final Bill was successfully passed in both the Lok Sabha and the Rajya Sabha, making it an official Act of Parliament. In India, an Executive Ordinance is a law that is promulgated by the President when the Parliament is not in session. It allows for immediate legislative action, but still requires Parliamentary assent within six weeks of the Parliament resuming their sessions. A Bill on the other hand is a draft of a legislative proposal that is proposed in one of the two Parliamentary houses—the Lok Sabha or the Rajya Sabha. Once

41 This article has deliberately not discussed the many civil-society activist groups that are involved in the debate on triple-*ṭalāq* as it is beyond the scope of the article. However, they are key players and their role has become more prominent over time. For an overview of the organizations and their modes of lobbying, *see* Sylvia Vatuk, "Islamic Feminism in India: Indian Muslim Women Activists and the Reform of Muslim Personal Law," *Modern Asian Studies* 42, no. 2 (2008): 489–518; Nida Kirmani, "Claiming their Space: Muslim Women-led Networks and the Women's Movement in India," *Journal of International Women's Studies* 11, no. 1 (2009): 72–85. For an overview of the legal status of Muslim women and the impact on Islamic family law in India, see Vrinda Narain, *Gender and Community* (Toronto: University of Toronto Press, 2001).

it passes both houses, the Bill becomes an Act of Parliament.

Following is the timeline of legislative interventions after the Supreme Court decision:

Date	Bill Name	Ordinance Name	Lok Sabha	Rajya Sabha	Status
December 28th, 2017	The Muslim Women (Protection of Rights on Marriage) Bill 2017		Introduced December 28th 2017, Passed December 28th, 2017	Circulated August 9th, 2018, Amendments made	Amendments required.
September 19th, 2018		The Muslim Women (Protection of Rights on Marriage) Ordinance 2018			Presidential Promulgation on September 19th, 2018; subsequently withdrawn. At the time, the 2017 Bill was pending in the Rajya Sabha
December 17th, 2018	The Muslim Women (Protection of Rights on Marriage) Bill 2018		Introduced December 17th 2018; Passed December 27th, 2018		
January 12th, 2019		The Muslim Women (Protection of Rights on Marriage) Ordinance 2019			Presidential Promulgation on January 12th, 2019; subsequently lapsed. At the time, the 2018 revised Bill was pending in the Rajya Sabha
February 21st, 2019		The Muslim Women (Protection of Rights on Marriage), Second Ordinance 2019			Presidential Promulgation on February 21st, 2019; subsequently Negatived on July 25th, 2019
July 21st, 2019	The Muslim Women (Protection of Rights on Marriage) Bill 2019		Introduced June 21st, 2019; Passed July 25th, 2019	Passed July 30th, 2019	Passed as an Act of Parliament

What is evident in the legislative history of the Act is the continuous intervention of Prime Minister Modi when the bill faced resistance in the Rajya Sabha.[42] At the time of the Supreme Court decision, the BJP party, the party of the Prime Minister, had a majority in the Lok Sabha, but in the Rajya Sabha, they were vulnerable to the opposition party. Thus, while the Muslim Women Protection of Rights on Marriage Bill easily passed the Lok Sabha, it was met with resistance in the Rajya Sabha. Opposition party members in the Rajya Sabha argued that given the gravity of the Bill, a special committee should be assembled to scrutinize it. On this basis, the Rajya Sabha would not pass the Bill and the parliamentary session would come to an end. Not wishing to remove the Bill from the legislative docket, the Prime Minister would take it upon himself to issue an Ordinance thereby pressuring the Rajya Sabha to eventually concede.

The three ordinances enacted by Prime Minister Modi were essentially stop-gap measures to address the issue of triple-*ṭalāq* until the Bill was passed by both houses of Parliament. Executive Ordinances are typically used in emergency circumstances where the Prime Minister needs to take immediate action while the Parliament is not in session. However, in the case of triple-*ṭalāq,* the Ordinances were a way to supervene the opposition's directive in the Rajya Sabha. After the 2019 election, and the sweeping mandate given to Prime Minister Modi and the BJP in the Lok Sabha, not only did opposition numbers in the Rajya Sabha decrease, but the willingness of the oppositional minority to resist the desires of the ruling party also decreased. Thus, in the first parliamentary session of the Lok Sabha after

42 Journalists have noted that in Modi's first term in office, his party faced greater opposition in the Rajya Sabha, with only 45 BJP Ministers out of the 250 member-house. This meant that BJP Ministers who sought to pass legislation had to form alliances with the opposition which often proved difficult, as was the case of the triple-*ṭalāq* bill. Modi's use of Ordinances is not unprecedented, but the consistent historical use of Presidential Ordinances to achieve political ends is increasingly being scrutinized. "Modi government passes 22nd Ordinance, still short of UPA number," *The Hindu,* Accessed August 15, 2019, https://www.thehindu.com/news/national/Modi-govt.-passes-22nd-Ordinance-still-short-of-UPA-number/article14596574.ece; "Why Narenda Modi government is in such a rush to issue ordinances before elections," *The Print,* Accessed August 15, 2019, https://theprint.in/opinion/why-narendra-modi-govt-is-in-such-a-rush-to-issue-ordinances-before-elections/200956/.

Prime Minister Modi's victory, all Executive Ordinances were ratified, including the Muslim Women Protection of Rights on Marriage Bill. The Bill then went on to the Rajya Sabha where it also passed with a narrow margin of 99 for, 88 against. Aside from the problematic politics surrounding the passing of the Act, Muslims advocating for a reform of the laws on triple-*ṭalāq* also had cause for concern owing to the substance of the Act itself.

As noted in the court cases above, both the Supreme Court and the High Courts have historically ruled against the efficacy of the triple-*ṭalāq*. This has usually led to re-establishing a marital relationship between the litigants, or at least awarding the women financial restitution. The Act, on the other hand, goes beyond declaring triple-*ṭalāq* ineffective to declaring it a criminal act that is punishable by the state with up to three years' imprisonment and a monetary fine.

By criminalizing triple-*ṭalāq* and potentially imprisoning men who pronounce it, women may be left in a situation in which their husbands are imprisoned and the women are both unable to remarry and unable to secure financial support for their family—leaving them potentially even more economically and socially vulnerable than before. Here, it is important to note that the Act does attempt to mitigate the possibility for malicious prosecution by three mechanisms: (1) limiting prosecution of the husband to the wife or a blood relative; (2) allowing for bail if the Magistrate deems it is appropriate after listening to the wife and; (3) allowing for the woman to stop legal proceedings. But, despite instating these safeguards, there is still worry that women who pursue a litigious route will be further ostracized and could find themselves in a situation where they are considered religiously divorced, but are considered married according to state law. And while advocates point towards other elements of the Act as empowering and safeguarding Muslim women, such as the clause on the custody of minors and a subsistence allowance, activists are quick to remind them that these rights are already available to Muslim women under previously passed legislation. Moreover, the Act does nothing to afford Muslim women the right to divorce, nor does it introduce procedural

mechanisms that place a check on the husband's unilateral right to divorce. After the passing of the Act, Prime Minister Modi tweeted, "An archaic and medieval practice has finally been confined to the dustbin of history! Parliament abolishes Triple Talaq and corrects a historical wrong done to Muslim women. This is a victory of gender justice and will further equality in society."[43] However, the Act does nothing to give women the equal right to divorce; in fact, it problematically equates gender justice with the criminalization of Muslim men, which can in effect leave women in a worse situation.

Long before the criminalization of triple-*ṭalāq,* the courts had enacted limitations that sought to alleviate some of the harms of both unilateral and irrevocable divorces. Importantly, in Shahmim Ara, the Supreme Court held that for a divorce to be valid, it needed to be reasonable and evidence of attempts at reconciliation must be presented. This decision was upheld by Lower Courts, as evidenced in *Masroor Ahmed* vs. *State* (NCT of Delhi). This latter case went even further to establish that triple-*ṭalāq* would be treated as a single revocable divorce. As Zubair Abbasi has noted, "the legislature should have passed a procedural law to provide an institutional mechanism for the process of reconciliation before divorce"[44] instead of passing a law criminalizing triple-*ṭalāq* without affording women any substantive rights. Furthermore, the Act does not address any of the procedural restraints that the courts had placed on divorce, regardless of whether it was an irrevocable triple-*ṭalāq* or not.

If the Act does not in fact deliver on gender justice as it was heralded to do, why is Prime Minister Modi so committed to passing the legislation? The answer lies in the manifesto of the BJP party which argues for a Uniform Civil Code (UCC) as one of its key goals. The manifesto points to Article 44 of the

43 Narenda Modi, Twitter post, July 30, 2019, 6:52 a.m., https://twitter.com/narendramodi/status/1156200911426875393?lang=en.

44 Zubair Abbasi, "Commentary: Criminalization of Triple-Ṭalāq in India: A Dilemma for Religiously Divorced but Legally Married Muslim Women," *Islamic Law Blog*, Accessed August 9, 2019, https://islamiclaw.blog/2019/08/08/commentary-criminalization-of-triple-ṭalaq-in-india-a-dilemma-for-religiously-divorced-but-legally-married-muslim-women/.

Constitution, the Directive Principles, which notes that it is a 'duty of the state' to establish a Uniform Civil Code.

In 2016, under the direction of the Prime Minister, the Ministry of Law and Justice enlisted the Law Commission of India to investigate the potential of a UCC in India. The Law Commission took two years to investigate and delivered their report on the 31st of August 2018—just weeks before the Prime Minister issued his first Ordinance regarding triple-*ṭalāq*. In the published report, the Commission discouraged the establishment of a UCC.[45] The report states,

> In the absence of any consensus on a uniform civil code the Commission felt that the best way forward may be to preserve the diversity of personal laws but at the same time ensure that personal laws do not contradict fundamental rights guaranteed under the Constitution of India. In order to achieve this, it is desirable that all personal laws relating to matters of family must first be codified to the greatest extent possible, and the inequalities that have crept into codified law, these should be remedied by amendment.[46]

Addressing the reform of religious personal law, the report states,

> The State is 'an enabler of rights rather than an initiator,' particularly in sensitive matters such as that of religious personal laws. At this stage one can conclude with conviction the Commission's initiative towards reform of family law is driven by civil society organisations, educational institutions, and vulnerable sections of the

45 There have been other academic studies on the possible implementation of a Uniform Civil Code. *See* Shimon Shetreet, "Academic Blueprint for the Implementation of a Uniform Civil Code for India," *Utah Law Review* 1(2011): 97–120; idem; Hiram E. Chodosh, *Uniform Civil Code for India* (Oxford: Oxford University Press, 2015).

46 "Government of India, Law Commission of India, Consultation paper on Reform of Family Law," *Law Commission of India,* Accessed August 1, 2019, http://www.lawcommissionofindia.nic.in/reports/CPonReformFamilyLaw.pdf, 1-2.

> society themselves, rather than by legislative mandate.[47]

In summarizing the position on a UCC, the report states,

> While diversity of Indian culture can and should be celebrated, specific groups, or weaker sections of the society must not be dis-privileged in the process. Resolution of this conflict does not mean abolition of difference. This Commission has therefore dealt with laws that are discriminatory rather than providing a uniform civil code which is neither necessary nor desirable at this stage. Most countries are now moving towards recognition of difference, and the mere existence of difference does not imply discrimination, but is indicative of a robust democracy.[48]

After these remarks, the report addressed specific issues of family law that have been the subject of sustained debate, and triple-*ṭalāq* was one such issue. The commission noted that triple-*ṭalāq* is "ALREADY OUTLAWED (emphasis in original)" and "has no effect on marriage."[49] The report then emphasized the need for women to have the same rights and grounds for divorce as men and highlighted that unilateral divorce is already a penalizable offense under the provisions of the Protection of Women from Domestic Violence Act of 2005.[50] The report also engaged with the *nikahnama* promoted by the AIMPLB and emphasized that "THE ISSUE OF FAMILY LAW REFORM DOES NOT NEED TO BE APPROACHED AS A POLICY THAT IS AGAINST THE RELIGIOUS SENSIBILITIES OF INDIVIDUALS BUT SIMPLY AS ONE PROMOTING HARMONY BETWEEN RELIGION AND CONSTITUTIONALISM (emphasis in original)."[51]

However, against the advice issued by the Law Commission in August 2018, further Ordinances and Bills criminalizing triple-*ṭalāq* were promulgated. It is thus no surprise

47 Ibid., 6.
48 Ibid., 7.
49 Ibid., 49.
50 Ibid., For the discussion, *see* 46–50.
51 Ibid., 47-48.

that the AIMPLB and women's activists alike are questioning the motives of the legislators and pointing to the hidden BJP agenda of a uniform civil code that by all accounts, is "neither necessary nor desirable."[52] If the data gathered by Abusaleh Shariff which reveals just 1 in 300 divorces are achieved through triple-*ṭalāq* is reflective of the usage of triple-*ṭalāq* in India, one must wonder if criminalizing triple-*ṭalāq* is indeed the most pressing issue affecting the welfare of Muslim women.[53]

For many women's welfare activists, the current administration has actually failed in its efforts to improve the most pressing concerns for women such as proportional representation in Parliament,[54] adequate education and healthcare for rural women, and justice for victims of sexual violence. In fact, in the 2018 poll by the Thomson Reuters Foundation, India ranks as the world's most dangerous country to be a woman.[55] The survey notes that India is the worst when it comes to human trafficking, sexual violence and gender discrimination, and attacks based on culture and religion. In light of the general plight of women in India and the clear judicial precedent established by the courts against the efficacy of triple-*ṭalāq,* the fixation on the triple-*ṭalāq* Act and its hurried passage through Parliament is confounding at best. Especially so because the Act provides women with no additional rights or protections, and it does so while marginalizing Muslim organizations and activists, undermining directives

52 Ibid., 7. While some women's advocacy groups are heralding the Bill as a monumental step for the rights of women in India, others are pointing towards the ways in which the Bill can leave women more vulnerable, and fails to give them equal divorce rights. The AIMPLB, since the first iteration of the Bill, claims to have collected 50 million signatures of Muslims against the Bill. Since the Bill's passing, they have noted that they will challenge it, but it is unclear how. Danish Raza, "What the Criminalization of Instant Divorce Means for India's Muslims," *The Atlantic,* Accessed August 14, 2019, https://www.theatlantic.com/international/archive/2019/08/india-triple-talaq/595414/; Murali Krishnan, "Triple-talaq ban divides Muslims," *Qantara,* https://en.qantara.de/content/instant-islamic-divorce-in-india-triple-talaq-ban-divides-muslims?nopaging=1.

53 *Supra note* 7.

54 The Women's Reservation Bill which calls to reserve one-third of the legislative seats in the Lok Sabha for women has failed to pass for two decades.

55 "India: The World's Most Dangerous Country to be a Woman," *Thomson Reuters Foundation,* Accessed August 15, 2019, http://poll2018.trust.org/country/?id=india.

of the law commission, and pushing forward legislation that only further diminishes the rights and standing of an already vulnerable minority population. Heralding the recent Act as a victory for women, or a victory for gender justice, is to obfuscate the truth which is that the legitimate concerns of women have been manipulated to advance the political agendas of a party that is unconcerned with the plight of Muslim women and is all too ready to encroach upon the rights of its growing Muslim minority population.[56]

56 After receiving the final proofs for this article, an important article was published by Ummul Fayiza in which she traces the positions of three feminist scholars in India regarding Muslim Personal Status Law. Her research reveals that between the Shah Bano case (1985) and the Shayara Bano case (2017), "feminist positions on Muslim women's rights have shifted from a 'women's rights only' framework to an entangled position that critically evaluates the politics of majoritarian Hindu nationalism in shaping the politics of MPL, women's rights and minority rights in India." Her findings, based on a careful reading of three feminist scholars, largely aligns with the conclusion of this article which similarly highlights the larger majoritarian Hindu politics at play in the passage of the 2019 Act. Unfortunately, given the timing of her publication, a more thorough engagement with her work in this article is not possible, but her article importantly charts the discourse of feminist scholars and other non-state organizations which have a stake in this debate. *See* Ummul Fayiza, "From Shah Bano to Shayara Bano (1985-2017): Changing Feminist Positions on the Politics of Muslim Personal Law, Women's Rights and Minority Rights in India," *Journal of Muslim Minority Affairs* 41:1 (2021): 1-19.

Lost in Translation? *Mahr*-Agreements, US Courts, and the Predicament of Muslim Women

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Abstract

*As a reciprocal contract, Islamic marriage (*nikāḥ*) furnishes rights and obligations for both spouses. Usually split into two portions, the deferred part of the bridal dower (*mahr muʾakhkhar*)—a one-time financial liability that both spouses agree on during the wedding proceedings—is customarily received by the Muslim wife where her husband seeks to divorce her unilaterally (*ṭalāq*). However, US courts faced with construing* mahr*-agreements have been reluctant to enforce the financial promises stipulated in such agreements. Based on evidence gathered from case law, this article argues that a combination of several factors, most importantly, the judicial anxiety to get involved in religious doctrinal interpretation, as well as the misinformed analogizing of bridal dowers to prenuptial agreements, adversely affects Muslim women as courts increasingly adhere to the presumption that* mahr*-agreements are non-enforceable, squarely placing the burden of proof to the contrary on women. Moreover, women's financial hardship is often the immediate result of the court's refusal to uphold a husband's commitment to pay dower. As a critical feature of Islamic marriage, the agreed-on dower payment assures financial stability after divorce, predictability, and women's bargaining power throughout a marital relationship. Since 2013, state legislators' partially successful endeavors to bar state courts from applying Islamic law under comity function as a compounding factor that has created dire prospects for the future of* mahr*-agreements in the US, posing a substantial risk not only to the institution of Islamic marriage, but also the parties' freedom of contract.*

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Introduction

A dower[1] (usually: *mahr*;[2] sometimes: *ṣadāq*) or bridal gift is central to the institution of Islamic marriage. It usually consists of a considerable financial sum or number of assets. Where a dower is stipulated, a husband must confer it to the wife directly and nobody but the wife herself. Dowers are usually split into two portions, an immediate (*muʿajjal*) and most often symbolic portion due before consummating a marriage, and a deferred (*muʾakhkhar*) portion due at the latest upon divorce or a husband's death. Dower-splitting historically evolved to ensure the financial integrity of women in the case of divorce (*ṭalāq*). Because under Islamic law,[3] spouses remain separate legal, financial, and social entities when married, women do not exercise the option of making alternative claims to their ex-husband's financial assets upon divorce.

This paper argues that the ways in which US courts have construed *mahr*-agreements pose significant legal barriers for Muslim women to succeed in having such agreements enforced, and thus securing the financial compensations that their husbands had agreed to as part of their marriage. The current translation of Islamic marriage (and divorce) into the US legal system has been unsuccessful on at least two levels. First, by seeking to comprehend Islamic marriage through the legal categories of secular marriage, especially prenuptials, judges have not only

1 Secondary literature and courts regularly confuse dowers with dowries. The dower is a bridal gift that is conferred by the husband or the husband's family to the bride. The dowry is the property that a wife brings into the marriage; Melford E. Spiro, *Marriage Payments: a Paradigm from the Burmese Perspective*, in 31 Journal of Anthropological Research 89, 89 (1975).

2 Throughout this paper, I provide transliterations of Arabic and Persian *termini technici* in parentheses. The transliterations are in accordance with the *IJMES Transliteration System for Arabic, Persian and Turkish*; accessed March 2, 2019, https://ijmes.chass.ncsu.edu/docs/TransChart.pdf.

3 It is important to note that by Islamic law, I am not suggesting a monolithic Islamic legal tradition but am, in fact, always referring to a multiplicity of legal, cultural and discursive traditions which conceive of themselves as Islamic. Despite this limitation, we cannot shy away from establishing certain basic understandings about Islamic marriage and *mahr*-agreements which most Islamic legal schools agree on.

infused the assumptions that secular marriage is predicated on into the institution of Islamic marriage, but also tacitly reproduced the adverse effects that prenuptials tend to have on women. Second, as a result of the mistaken analogy to secular marriage, the court's construction of *mahr*-agreements systematically pushes women (and men) into settling their divorce cases under state property rules, which often diametrically contravene both spouses' marital intent, their freedom of contract, and the nature of Islamic marriage. Furthermore, flagging equitable distribution and community property rules as the only proper legal recourse jeopardizes the livelihoods of those women whose Islamic marriage is not also registered as a civil marriage and who would, therefore, typically end up not being able to claim any financial award, neither under their *mahr*-agreement, nor state property rules.

This paper's analysis shows that courts tend not to enforce *mahr*-agreements because

(1) they will try to refrain from interpretations of religious doctrine out of fear of violating the Establishment Clause,
(2) have public policy concerns, or
(3) find the *mahr*-agreement to be non-compliant with contract law requirements.

While each of these reservations is in and of itself legitimate, it is important to understand how they function together as a seemingly concerted shield to dismiss the enforceability of *mahr*-agreements. This is especially problematic because, if one assumes that it is advantageous for women to have their *mahr*-agreements enforced, the undue burden to show that such agreements are enforceable is not on men, but women.

Yet case law indicates that it is not always a wife's counsel arguing that a *mahr*-agreement is enforceable, primarily because US courts have more than once understood them to be mutually exclusive with state property rules. Nontheless, it is erroneous to assume that women are subjectively better off under state property rules because *mahr*-agreements are often considerable in amount and may significantly outweigh what ex-wives

would be entitled to under community property or equitable division.[4] For instance, in *Soleimani*, the *mahr*-agreement amounted to 1,354 gold coins, the equivalent of $677,000 and thus significantly exceeded what the wife was entitled to under equitable division. Also, the courts have not recognized the predictable financial security that a *mahr* provides to a woman and how it is conducive to her decision-making and planning in and outside of marriage.

It is certainly not news that Islamic divorce in US courts has historically been messy. This messiness is reflected in the inconsistency with which courts construe *mahr*-agreements, and a lack of reliable precedents, legal standards, and theories of construction that a court will grant.[5] As others have noted,[6] courts will typically classify a *mahr*-agreement as either a prenuptial, a marriage certificate, or a simple contract.[7] Whereas many articles and organization reports have addressed the inconsistency surrounding Islamic divorce in US courts and made propositions as to how courts should construe *mahr*-agreements,[8] little has

4 *Soleimani v. Soleimani*, No. 11CV4668, 15 (Johnson County Dist. Ct. 2013).

5 *See* Tracie Rogalin Siddiqui, *Interpretation of Islamic Marriage Contracts by American Courts*, 41 Family Law Quarterly 639, 639 (Fall 2007).

6 *See* Abed Awad, *Islamic family law in American courts. A rich, diverse and evolving jurisprudence*, in Elisa Giunchi, ed, *Muslim Family Law in Western Courts* 168, 170 (Routledge 2014).

7 For instance, in *Akileh v. Elchahal* (1996), the Court held that a *mahr*-agreement qualifies as an *antenuptial*, arguing that Florida contract law may be applied to its "secular" terms and that the stipulation of a previously agreed-on payment to the wife upon divorce, being part of these secular terms, was valid and enforceable; *Akileh v. Elchahal*, 666 So. 2d 246, 248 (Fla. Dist. Ct. App. 1996). Yet in 2001 in *Shaban*, the California Court of Appeals noted that the financial provisions of a *mahr*-agreement were unenforceable because it ostensibly constituted only a *marriage certificate*. The Court held that the spouses' agreement to have "Islamic law" applied to their contract is "hopelessly uncertain as to its terms and conditions" and applied state community property laws in line with California divorce laws instead; *In re Marriage of Shaban*, 88 Cal. App. 4th 398, 401, 105 Cal. Rptr. 2d 863, 864 (2001). Only a year later in *Odatalla*, the New Jersey Superior Court enforced a *mahr*-agreement on the argument that it is essentially a *simple contract*; *Odatalla v. Odatalla*, 355 N.J. Super. 305, 314, 810 A.2d 93, 98 (Ch. Div. 2002).

8 *See* Emily Sharpe, *Islamic Marriage Contracts as Simple Contracts Governed by Islamic Law: a Roadmap for U.S. Courts*, 14 The Georgetown Journal of Gender and the Law 189 (2013) (arguing that *mahr*-agreements should be interpreted as simple contracts under Islamic law and that *mahrs* should not be factored into eq-

been written on the gendered and highly unequal consequences that result from the court's dismissal of *mahr*-agreements.[9] This paper contributes to the study of Islamic divorce in the US legal system by trying to fill this literature gap. Specifically, it argues that the impacts of the courts' rulings are gendered and adversely affect women because they will usually relinquish either their *mahr*-claim or alternative claims that might have existed under state property rules.

Focusing on Islamic marriage as a case study, we can thus catch a glimpse of the legal, social, and cultural reconfiguration that occurs in the process of translating legal institutions. As will be apparent, in that process, new meanings are being created; meanings that redefine Islamic marriage and turn the individuals practicing it into virtually new legal and sociocultural subjects.

This paper makes three normative suggestions. First, it suggests that instead of construing *mahr*-agreements as prenups or marriage certificates, courts should treat them as simple contracts under Islamic law. The simple contract interpretation should be combined with the nexus-test the court applied in *Chaudry v. Chaudry* to determine whether a divorced wife may be entitled to additional compensations under state property rules.[10] I argue that the adoption of a combined approach to dealing with *mahr*-agreements as simple contracts under Islamic law and the nexus-test would (1) in most cases honor the original intent of the parties to have Islamic law applied when they entered the marriage contract, (2) allow women to rely on the enforcement of their *mahr*-agreements, especially when divorce is initiated by the husband, and (3) lead to a fair distribution of the resources

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uitable distributions of marital property).

9 Azizah al-Hibri has perhaps been most attentive to the gendered issues surrounding Islamic marriage; Azizah Y. al-Hibri, *The Nature of the Islamic Marriage: Sacramental, Covenantal, or Contractual,* in John Witte Jr, and Eliza Ellison, eds, *Covenant Marriage in Comparative Perspective* 182 (William B. Eerdmans Publishing Company 2005).

10 *Chaudry v. Chaudry*, 159 N.J. Super. 566, 577, 388 A.2d 1000, 1006 (App. Div. 1978) (arguing that if there exists a sufficiently strong nexus between the marriage and the state where the married parties resided for a substantial period of time, claims for alimony and equitable distribution will be considered even if such relief could not be obtained in the state or country granting the divorce).

the parties may have additionally acquired due to changed life circumstances in the course of their marriage.

Second, I emphasize that bridal dowers need to be understood within the institution of Islamic marriage more broadly and particularly in isolation from divorce. Unlike courts in other Western countries, US courts are yet to be confronted with more challenging legal problems arising from *mahr*-agreements against which hitherto constructions of such agreements would be insufficient. For instance, German courts in the past dealt with the question of whether a wife is entitled to receive her *mahr*-payment without a divorce. The Berlin Kammergericht (KG) argued that a wife acquires ownership of her *mahr* when the marriage is contracted, and not when the parties are divorced. The court reasoned that *mahr*-claims cannot be considered contingent on the termination of a marriage. Instead, how marriage is terminated merely influences whether an unclaimed *mahr*-payment can be fully or partially sustained.[11] Other legal issues such as whether women may claim the rate of inflation on their dowers are yet to reach US family courts.[12]

Third, it is necessary that courts begin to account for the social function of *mahr*-agreements. The distinct purpose of a *mahr* in Islamic marriage is to preserve equal bargaining abilities of husband and wife and enable them to make real compromises by using its material and discursive force in cases of dispute. I argue that by failing to acknowledge how gender relations and equality in Islamic marriage are intricately tied to the *mahr*, US courts have effectively made women who currently find themselves in Islamic marriages more vulnerable. That is, the systematic dismissal of *mahr*-agreements and increasing public knowledge thereof has made Muslim women more prone to be divorced with lighthearted unconcern or threatened with divorce by their husbands, and has significantly reduced their ability to

11 Kammergericht, *Beschluss vom 06.10.2004 – 3 WF 177/04,* accessed March 2, 2019, https://openjur.de/u/271640.html.

12 The Iranian Parliament (*majles-e shora-ye eslami*) resolved the issue in 1997 passing a law that provides for the indexation of *mahrs*; M.A. Ansari-pour, *Indexation of Mahr (Dower): A Precursor of the Law of Inflation in Iran*, 31 Arab Law Quarterly 187, 195 (2017).

bargain more favorable terms in marriage.

By analyzing the legal and social aspects implicated in the enforcement of *mahr*-agreements, this paper argues that enforcing and ensuring the implementation of such agreements is neither unconstitutional nor creates legitimate public policy concerns for courts or legislators. To be sure, that does *not* mean that this paper advocates the import of other Islamic legal institutions, arrangements, or rules. Any import will have to be analyzed carefully and in light of the public policy concerns that each of them might or might not give rise to. That is to say that I fully recognize that *parts* of Islamic law would, without a doubt, create such concerns, particularly in the realms of equity and gender equality. Nevertheless, to understand the particular ways in which Islamic law, in spite of imposing certain structural constraints, does create agency for women is essential for courts and legislators to realize what is individually at stake for women and how the dismissal of *mahr*-agreements may erode the particular forms of claim-making that Muslim women have historically mobilized.

This paper is divided into seven sections. Following the introductory section 1, section 2 discusses *mahr*-agreements in the context of marriage and divorce as practiced in Islamic law. This prelude seeks to comprehend the role of bridal dowers in the institution of Islamic marriage and anticipate how dowers organize marital relationships by creating leverage for both sides. The section shows that the practice of contracting dowers is designed to increase the bargaining power women exercise in an Islamic marriage. In sections 3 and 4, I attend to the obstacles that women face with regard to having their *mahr*-agreements enforced by scrutinizing the specific arguments based on which US courts usually dismiss them. Section 3 reveals that the statute of fraud and parol evidence create specifically gendered problems. Section 4 argues that the judiciary's concerns of violating the Establishment Clause are largely unfounded, illustrating that the secular provisions of *mahr*-agreements can be separated neatly. In Section 5, I focus on the legal analogies and parallels courts have drawn to construe *mahr*-agreements. I show that courts have

hitherto construed them as either prenuptials, simple contracts, or marriage certificates. I argue that the prenuptial and marriage certificate-theories are particularly unsuitable to capturing the substantive provisions intended by those agreements. These theories result in highly inequitable outcomes and put women in the position of having to choose between going after either the *mahr* or community property/equitable distribution and thus risk forfeiting financial compensation from their husbands entirely. Section 6 focuses on the recent anti-foreign law bills passed by several state parliaments. I argue that such legislation, despite public claims to the opposite, has increased the legal burden on Muslim women and threatens to obliterate the purpose of *mahr*-agreements as well as derail the institution of Islamic marriage more broadly.

I. Setting the Scene: Marriage and Divorce in Islamic Law

a. Getting married

i. Requirements and procedural formalities

In Islamic law, marriage (*nikāḥ*) is a contractual agreement (*ʿaqd*) between a wife and husband.[13] For a marriage to be contracted, a woman's guardian (*walī*) usually makes an offer (*ījāb*) on her behalf to the family of the prospective bridegroom.

13 Kecia Ali, *Marriage in Classical Islamic Jurisprudence: a Survey of Doctrines*, in Asifa Quraishi and Frank E. Vogel, eds, *The Islamic Marriage Contract. Case Studies in Islamic Family Law* 12, 12 (Harvard University Press 2008). Islamic law knows other forms of marriage, many of which have either historically fallen out of use or are only practiced to a limited extent. The most widely known is perhaps the temporary marriage (*mutʿa*). This type of matrimonial agreement is practiced primarily among Shīʿī Muslims in Iran, Iraq, and Lebanon. A temporary marriage is contracted with a stipulated duration that can reach from one hour to 99 years. That is, the married parties knowingly enter a matrimonial alliance which expires after a previously agreed-on duration. Although temporary marriages may seem outlandish to the Western beholder, they are rather important because they create legal frameworks within which trial period marriages, temporary sexual encounters, and sex work can be legitimized; Dietrich von Denffer, *Mutʿa – Ehe oder Prostitution*, 128 Zeitschrift der Deutschen Morgenländischen Gesellschaft 299, 325 (1978).

For a marriage to be initiated, the offer must be followed by their acceptance (*qubūl*). Depending on several criteria, the approval of a woman's guardian to her marriage may be considered either mandatory or recommended for that marriage to be lawful.[14] The wedding itself must be conducted in the presence of witnesses (*shāhid*), usually two male ones or, alternatively, one male and two female witnesses.[15]

The issue of consent (*riḍā*) has historically been complicated. Judith Tucker notes that, in classical Islamic law, most Muslim jurists agreed that the consent of a bride who had reached legal majority (*bulūgh*) was mandatory to ensure the validity of a marriage contract.[16] However, a prospective bride's silence or laughter could be interpreted as her giving consent.[17] The Sunni legal schools' discussions of consent in marital affairs especially focus on a bride's puberty and virginity, with each school prioritizing either or a combination of these aspects. The Ḥanafīs squarely tie consent to the attainment of puberty. If puberty has been reached, then a woman's consent is necessary for a marriage's validity with the implication that non-pubescent girls could be married off against their will.[18] Concerning the pubescent daughter's consent, Aḥmad ibn Ḥanbal (d. 241 H./855) held a similar position, noting that: "There is disagreement on this question. I prefer that he [the father] consult her, and if she is silent, that is her consent."[19] On the contrary, the Shāfiʿīs

14 Judith Tucker, *Women, Family, and Gender in Islamic Law*, 42 (Cambridge University Press, 2008).

15 Jamal J. Ahmad Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* 61 (Brill 2009).

16 Judith Tucker, *Women, Family, and Gender in Islamic Law*, 42 (Cambridge University Press, 2008). Legal majority was usually attained upon the body's showing of the signs of puberty. For a discussion of the concept of legal majority (*bulūgh*), *see* Nayel A. Badareen, *Shīʿī Marriage Law in the Pre-Modern Period: Who Decides for Women?* 23 Islamic Law and Society 368, 378-381 (2016).

17 Burhān al-Dīn ʿAlī b. Abī Bakr al-Marghīnānī, *al-Ḥidāya*, quoted in Judith Tucker, *Women, Family, and Gender in Islamic Law*, 42 (Cambridge University Press 2008).

18 Kecia Ali, *Marriage and Slavery in Early Islam*, 33 (Harvard University Press, 2010).

19 ʿAbd Allāh b. Aḥmad b. Ḥanbal, *Chapters on Marriage and Divorce. Responses to Ibn Ḥanbal and Ibn Rāhwayh*, tr. by Susan A. Spectorsky, 97 (University of Texas Press, 1993).

conceptually link the necessity of a girl's legal consent to her virginity (*bakāra*). If a girl had lost her virginity, she could not be married off without her consent, even if she was a legal minor. As explained by al-Sarakhsī (d. c500 H./1106), the reasoning behind this is that being a non-virgin (*thayyib*) negates a woman's legal guardian's independent authority (*nafy wilāyat al-istibdād*) to interfere in her marital affairs.[20] By implication, a woman who had reached puberty, but was a virgin, could be married off without her consent due to her virginity. The Mālikī jurist Saḥnūn b. Sāʿīd al-Tanūkhī (d. 240 H./854) notes that Mālik (d. 179 H./796) advocated against compulsion (*ijbār*) in marriage, "except where the father [compels] his virgin daughter, his little son, his slave girl and slave, and the guardian his orphan child."[21] Similar to the Shāfiʿī opinion, the Mālikīs took virginity to be the decisive factor concerning the necessity of bridal consent.[22] On the whole, marriage without consent was less problematic in the case of pre-pubescent legal minors. Although classical legal works do consider the question of whether a non-virgin legal minor should provide consent, because male and female children were deemed to have limited legal capacity, they could mostly be married off non-consensually.[23]

Bridal consent was discounted by male guardianship (*wilāya*). A male guardian was assumed to have authority over the persons whose guardianship he possesses and would thus get involved in decisions concerning marriage. Although sometimes confused, the concept of male guardianship is distinct from a husband's authority over his wife (*qiwāma*). Thanks to the genealogical study of *qiwāma* by Omaima Abou-Bakr, we now

20 Shams al-Dīn al-Sarakhsī, 5 *Kitāb al-Mabsūṭ*, 2 (Dār al-Maʿrifa, 1989).

21 Saḥnūn b. Saʿīd al-Tanūkhī, 2 *al-Mudawwana al-Kubrā*, 100 (Dār al-Kutub al-ʿIlmīya, 1994).

22 Kecia Ali, *Marriage and Slavery in Early Islam*, 34 (Harvard University Press, 2010).

23 Judith Tucker, *Women, Family, and Gender in Islamic Law*, 43 (Cambridge University Press 2008). A guardian's right to compulsion is eliminated when the woman whose guardianship he possesses is a spinster or was previously married. In many Muslim-majority countries including Morocco and Iraq, the right to compulsion has been explicitly prohibited; Jamal J. Ahmad Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* 49 (Brill 2009).

know that Muslim exegetes and jurists of the classical period, beginning with Abū Jaʿfar al-Ṭabarī (d. 310 H./923), gradually transformed the Quranic notion of men serving as women's protectors or maintainers (*qawwāmūn*) into a prescriptive norm that entailed a husband's comprehensive authority over his wife.[24] With the exception of Abū Ḥanīfa (d. 150 H./767), the majority opinion was that for an Islamic marriage to be contracted, women would have to gain approval by their fathers, a guardian (*walī*) from their agnatic line, or in the absence of both, a public official.[25]

In classical Islamic law, lawful marriage was predicated on the equality of the spouses (*kafāʾa*). By taking into consideration aspects of class, profession and wealth, the jurists' proclaimed goal was to ensure conjugal harmony.[26] In his *Mughnī*, the Ḥanbalī Ibn Qudāma (d. 620 H./1223) lists five criteria for establishing spousal equality: lineage (*nasab*), degree of freedom (*ḥurriya*), property (*māl*), occupation (*ḥiraf*), and public esteem (*ḥasab*).[27] Although many of these criteria have been abandoned with modernizing reforms throughout the Islamic world, some endure. In Syria and Morocco, spousal equality now remains a matter of local custom. In Jordan, the amount of property held by the intended spouses might figure into considerations of marriage. Kuwaiti law considers only

24 Omaima Abou-Bakr, *The Interpretive Legacy of Qiwamah as an Exegetical Construct*, in Ziba Mir-Hosseini, Mulki Al-Sharmani, and Jana Rumminger, eds, *Men in Charge? Rethinking Authority in Muslim Legal Tradition* (Oneworld Publications, 2015). Q 4:34 states "Men are legally responsible (*qawwāmūn*) for women, inasmuch as God has preferred some over others in bounty, and because of what they spend from their wealth. Thus, virtuous women are obedient, and preserve their trusts, such as God wishes them to be preserved. And those you fear may rebel, admonish, and abandon them in their beds, and smack them. If they obey you, seek no other way against them. God is Highest and Mightiest;" *The Qur'an*, tr. Tarif Khalidi, 66 (London: Penguin Classics, 2008).

25 Kecia Ali, *Marriage and Slavery in Early Islam*, 30 (Harvard University Press, 2010).

26 Also, *see* Judith Tucker, *Women, Family, and Gender in Islamic Law*, 45 (Cambridge University Press 2008) (stating that a woman only had a real choice to choose a marriage partner within the parameters set by the social and economic status of her family).

27 Ibn Qudāma, 5 *Al-Mughnī. Sharḥ Mukhtaṣar al-Khiraqī*, 24-25 (Dār ʿĀlam al-Kutub, 1997).

religious devotion—clearly a legacy of classical Islamic law—as a criterion for ensuring spousal equality.[28]

Nowadays, countries in which Islamic law is currently exercised generally have different regulations as to how an Islamic marriage contract must be filed and what its precise legal implications are.[29]

ii. Mahr-agreements

Dowers are usually split into two portions, an immediate (*muʿajjal*) and most often symbolic portion due before consummating a marriage, and a deferred (*muʾakhkhar*) portion that is usually paid upon divorce or a husband's death. The splitting of dowers is designed to ensure the financial integrity of women in the case of divorce (*ṭalāq*). Even though the deferred portion (*muʾakhkhar*) of the dower is customarily paid upon divorce, the Mālikīya required it to be specified in scheduled installments. In modern times, pre-divorce claims for a dower's deferred portion may arise if the wife becomes doubtful about her husband's continued commitment or ability to pay in case they get divorced.[30] Because US courts tend to analogize dowers primarily to prenuptials, they have failed to recognize that under Islamic law, a wife may be entitled to claim the deferred portion of the dower before a marriage is terminated.

In line with the Quranic injunction to "give women their dower,"[31] the Muslim majority view prescribes that

28 Jamal J. Ahmad Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* 59 (Brill 2009); Aharon Layish and Ron Shaham, *Nikāḥ. II. In the Modern Islamic World*, in *Encyclopaedia of Islam*, Second Edition, accessed February 26, 2021, http://dx.doi.org/10.1163/1573-3912_islam_COM_0863.

29 Id. at 59.

30 For instance, in one Iranian marriage, the wife filed a complaint against her "very stingy husband" who allegedly would not even pay for a cup of coffee claiming from him her entire dower of 124,000 roses; *Iranian to pay 124,000-rose dowry*, BBC News (March 3, 2008), accessed May 25, 2019, http://news.bbc.co.uk/2/hi/middle_east/7275506.stm.

31 *The Qur'an*, tr. Tarif Khalidi, 62 (London: Penguin Classics, 2008), Q 4:4: "Give women their dowry [sic! dower], a free offering (*ṣaduqātihinna niḥlatan*). And if they willingly offer you any of it, then consume it in peace of mind and wholesomeness."

mahr-agreements are obligatory (*wājib*).[32] Yet, classical legal discussions feature instances where marriages were contracted without the explicit mention of a dower. Al-Shāfiʿī (d. 204 H./820), the eponym of one of the Sunni legal schools, argued that even where a marriage is concluded without a dower, it should not be annulled.[33] Most schools developed the doctrine that where a marriage had been consummated without the explicit mention of a dower, the husband would be required to provide to his wife a fair dower (*ṣadāq al-mithl*).[34] Nowadays, it is without a doubt most common for prospective Muslim spouses to negotiate a bridal dower when contracting marriage. In the process of doing this research, I did not come across a single case where a US court was confronted with an Islamic divorce in which a *mahr*-agreement had not been part of the spouses' marriage contract.

iii. Legal and sociological dimensions of Islamic marriage

The bridal dower should also be understood in sociological terms. That is, a dower creates extensive leverage on the part of Muslim wives by creating enhanced opportunities for them to bargain their positionality in marriage, sexual pleasure, and divorce. For instance, in the case a husband seeks an immediate divorce, an outstanding dower-payment would in most cases prevent him from quickly moving ahead with divorce proceedings and would require him to consult and bargain with his wife. Many studies show that a high *mahr* often induces men to push their wives into applying for divorce (*khulʿ*), which is penalizing for women as it often, though not always, causes

32 For instance, Emily Sharpe, *Islamic Marriage Contracts as Simple Contracts Governed by Islamic Law: a Roadmap for U.S. Courts*, 14 The Georgetown Journal of Gender and the Law 189, 193 (2013).

33 Muḥammad b. Idrīs al-Shāfiʿī, *The Epistle on Legal Theory* [*Risāla fī uṣūl al-fiqh*] 250 (New York University Press 2013): "Marriage should not be annulled because the dower [*ṣadāq*] is omitted since God confirmed in his scripture [the validity] of marrying without a dower and this is written in other places than this."

34 Judith Tucker, *Women, Family, and Gender in Islamic Law*, 48 (Cambridge University Press 2008).

them to lose all or some financial rights under Islamic doctrine[35] and under the law of most Muslim-majority countries.[36]

According to classical Islamic jurisprudence, a husband generally did not need his wife's approval to enter an additional marriage. However, on several occasions, classical doctrine explicitly configures a wife's dower as a weapon against undesired additional marriages of her husband. In one example, Saḥnūn b. Saʿīd al-Tanūkhī features a hypothetical where a wife, after the marriage has been performed, demands from her husband that he refrain from taking additional wives. In his response to Saḥnūn, Mālik notes that the wife can legitimately give up part of her dower in exchange for her husband's promise not to take additional wives. If he takes an additional wife despite such a promise, the money the first wife gave him would be used to purchase her divorce from him.[37] The example illustrates that although Mālikī doctrine enjoined wives from imposing conditions on their husband in their marital contracts, it furnished opportunities for them to use their dowers for intramarital bargaining. Even though such hypotheticals may not be the norm, they substantiate the point that the dower's value should not be misconstrued as subsisting primarily in its face value but also lies in its *inherent quality to be exchanged against enhanced rights and conditions in marriage*.

Even though Muslim men were mostly at liberty to stipulate additional marriages, documentary evidence from ninth century-Egypt shows that women regularly inserted clauses in their marriage contracts that prohibited their husbands from taking additional wives.[38] Meanwhile, in contemporary Muslim

35 *See* Muhammad Ahmad Munir, *Development of Khul' Law: Legal, Judicial and Interpretive Trends in Pakistan*, 34-35 (PhD dissertation, McGill University, 2020), archived at https://escholarship.mcgill.ca/downloads/dn39x556t?locale=en.

36 Anthropological fieldwork conducted in Zanzibar, Egypt, Indonesia, Morocco, India, Germany and the Netherlands shows that in all of these diverse settings, "the practice of khulʿ consistently requires the wife to compensate her husband for the divorce," Nadia Sonneveld and Erin Stiles, *Khulʿ: Local Contours of a Global Phenomenon*, in 26 Islamic Law and Society 1, 6 (2019).

37 Saḥnūn b. Saʿīd al-Tanūkhī, 2 *al-Mudawwana al-Kubrā* 132 (Dār al-Kutub al-ʿIlmīya, 1994) (*shurūṭ al-nikāḥ ayḍan*).

38 Yossef Rapoport, *Matrimonial Gifts in Early Islamic Egypt*, 7/1 Islam-

jurisdictions such as Iran and Pakistan, a husband will, at least officially, require his first wife's consent before contracting an additional marriage. In Egypt, where polygyny is generally allowed, Sheikh Ahmed El Tayib's 2019 announcement, in which he emphasized that polygyny is governed by narrow conditions and is often practiced in ways unfair for women, sparked an ongoing public controversy and fueled legal efforts to curb men's ability to enter such marriages without constraints.[39]

A critic might argue that the alleged financial and personal integrity achieved by stipulating for the Muslim wife a dower is not apparent. Her integrity can, one may hold, be eroded easily because even though a wife is formally entitled to retain her dower, it might be merged with her parents' property in the case of divorce because she would often have to move back into her parental home in line with cultural expectations.

There are several problems with this argument. First, it is widely recognized in Islamic legal scholarship that a *mahr* does provide financial security and leverage to the wife.[40] Historical evidence suggests that the practice of conferring dowers to women directly, rather than their guardians (*walī*), came about in the early seventh century either with the rise of Islam or shortly before.[41] Spies has noted that the change in the way dowers were conferred obliterated the pre-Islamic conception of the *mahr* being the price paid for a bride.[42] By reconfiguring the role of the *mahr* in marriage, women's lot was ameliorated by turning them into the beneficiaries of the property released by their husbands and significantly increasing their financial and

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ic Law and Society 1, 16 (2000).

39 George Sadek, *Egypt: Grand Imam Issues Religious Opinion Calling Polygamy Oppression of Women* (Global Legal Monitor, 2019), accessed February 27, 2021, https://www.loc.gov/law/foreign-news/article/egypt-grand-imam-issues-religious-opinion-calling-polygamy-oppression-of-women/. Also, *see* Ahmed El Tayib, *Twitter post from March 2, 2019*, accessed February 27, 2021, https://twitter.com/AlAzhar/status/1101914023795326976.

40 *See*, for instance, Joseph Schacht, *An Introduction to Islamic Law*, 167 (Clarendon Press 1964) or Kecia Ali, *Marriage and Slavery in Early Islam*, 49 (Harvard University Press 2010).

41 Otto Spies, *Mahr*, in Peri Bearman, et al, *Encyclopaedia of Islam, Second Edition*.

42 Id.

social independence and decision-making.

Apart from historical arguments, ethnographic evidence collected by Hoodfar among low-income communities in Egypt in the 1990s suggests that women do take *mahr*-negotiations seriously, realizing "the importance of these negotiations for their future relationship with their husband."[43] The women interviewed by Hoodfar perceived these negotiations as crucial in order to avoid foreseeable problems in marriage.[44] Hoodfar finds that by negotiating substantial *mahrs*, women come to utilize the *mahr* as a strategy to secure financial integrity and protect themselves from some of the legal restrictions they face in the institution of Islamic marriage, particularly their limited ability to initiate divorce.[45]

Second, no evidence suggests that women's dowers are customarily merged into family property upon divorce. The argument subscribes to the assumption that Muslim women lack agency to protect their interests. While an extensive critique is not in order here, the argument denies the ways in which women, in Western as well as non-Western societies, engage in making claims despite the structural limitations they confront. To deny the recognition of these forms of claim-making is to deny that Muslim women do actively negotiate and utilize dower-arrangements to secure social and economic benefits.

Entering an Islamic marriage creates rights and obligations for both parties. A husband becomes obliged to provide maintenance (*nafaqa*) to his wife, which at the minimum must include adequate clothing, food, and shelter.[46] Breaching his obligation to provide support, in all but the Ḥanafī and Shīʿī legal schools, creates the grounds for a wife to divorce her husband.[47] In classical jurisprudence, the married parties were

43 Homa Hoodfar, *In the Absence of Legal Equity: Mahr and Marriage Negotiation in Egyptian Low Income Communities*, 6/7 The Arab Studies Journal 98, 107 (1998/1999).

44 Id. at 108.

45 Id. at 109.

46 Jamal J. Ahmad Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* 105 (Brill 2009).

47 Rudolph Peters, *Nafaḳa*, in *Encyclopaedia of Islam*, Second Edition, accessed February 27, 2019, http://dx.doi.org/10.1163/1573-3912_islam_COM_1436

both considered to have a right to sexual intimacy. If a husband failed to consummate the marriage due to impotence, his wife could demand the dissolution of their marriage. However, once the marriage had been consummated, there was no official legal recourse for her to end the marriage unilaterally, and she would have to endure her husband's sexual incapacitation[48] just like any other medically disabling condition that he might develop. Of course, wife-initiated divorce (*khul'*) could be an option, but it likely came at the cost of forfeiting parts of her dower and requiring her husband's consent.

In stark contrast to the Western historical conception of a singular legal identity of the spouses,[49] when entering an Islamic marriage, husband and wife maintain their individual identities, legally, financially, and socially.[50] The parties remain separate legal entities, enter no community of property, and most often do not take on the other spouse's last name.[51] The continuing separateness of the spouses after getting married matters because it implies that, under Islamic law, the primary legal recourse for Muslim women to make claims for financial support is through their *mahr*-agreements.

b. Getting divorced

Islamic marital jurisprudence mainly knows three ways for spouses to obtain a divorce. Islamic divorce is explicitly gendered in that it constitutes a matter of rights for husbands and can only be demanded by wives under certain circumstances.[52]

(obligation to maintenance arises from kinship, ownership or marriage).

48 Kecia Ali, *Sexual Ethics and Islam. Feminist Reflections on Qur'an, Hadith and Jurisprudence*, 12–13 (Oneworld Press, 2006).

49 Hendrik A. Hartog, *Marital Exits and Martial Expectations in Nineteenth Century America*, 80 Georgetown Law Journal 95, 97 (1991) (arguing that in 19th-century America, the spouses were thought of as having a singular and permanent legal and social identity).

50 Azizah Y. al-Hibri, *The Nature of the Islamic Marriage: Sacramental, Covenantal, or Contractual*, in John Witte Jr, and Eliza Ellison, eds, *Covenant Marriage in Comparative Perspective* 182, 199 (William B. Eerdmans Publishing Company 2005).

51 Id. at 199.

52 Judith Tucker, *Women, Family, and Gender in Islamic Law*, 92 (Cam-

The first and probably most common type is a husband-initiated divorce (*ṭalāq*). The majority legal opinion is that to perform *ṭalāq*, a husband must be in a state of majority, sanity, free from coercion, and free from intoxication.[53] Having made the intent (*nīya*) to obtain a divorce, he must verbally express or write down the *ṭalāq*-formula three times. The legal schools hold different opinions on whether a triple pronunciation of *ṭalāq* may be performed all at once. Generally, it is recommended to refrain from such practice so that the spouses will have an opportunity to reconcile.[54] The performance of *ṭalāq* usually obliges the husband to come up with the full amount of the deferred *mahr*-portion.

The second form of divorce is wife-initiated (*khulʿ*). This type of divorce has undergone significant changes in modern times. In classical law, the *khulʿ* was permissible in circumstances where the husband was "blameless" and generally required his consent. Once a husband agreed to his wife's divorce proposal, she would become liable for financial compensation of him.[55] In other words, a wife essentially purchased her divorce. Concerning a wife's financial rights, Abū Ḥanīfa argued that a *khulʿ* forfeits all her financial claims, including her dower and maintenance. According to Jamal A. Nasir, his position differed from the Mālikis, Shāfiʿīs and other Ḥanafī jurists who held that "the effects of the *khula* contract shall be confined solely to those specified, which is the practice adopted by the court."[56] In practice, a wife's compensation payment was

bridge University Press 2008).

53 Jamal J. Ahmad Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation*, 121–122 (Brill 2009). Classical Ḥanafī jurisprudence considers repudiation by an intoxicated husband permissible, id. at 122.

54 Triple *ṭalāq* was recently criminalized in India, Kai Schultz, *India Criminalizes Instant 'Talaq' Divorces for Muslim Men*, New York Times (Sep 20, 2018), accessed May 14, 2019, https://www.nytimes.com/2018/09/20/world/asia/india-talaq-muslim-divorce.html.

55 Jamal J. Ahmad Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* 129–130 (Brill 2009).

56 Id. at 133. Also, *see* Mohammad H. Fadel, "Political Liberalism, Islamic Family Law, and Family Law Pluralism," in Joel A. Nichols, ed, *Marriage and Divorce in a Multicultural Context. Multi-tiered Marriage and the Boundaries of Civil Law and Religion* 164, 177 (Cambridge University Press 2012) (arguing that the

usually made by giving up the deferred portion (*muʾakhkhar*) of her dower. Consequently, wife-initiated divorce often came at the considerable disadvantage of a wife forfeiting the financial security she was promised in her *mahr*-agreement and to which she would have been entitled if her husband had initiated divorce (*ṭalāq*).

In today's Muslim majority-jurisdictions, a husband's consent for a *khulʿ* is not always needed. As part of the amendment of the personal status laws in 2000, the Egyptian parliament passed a law that allows women to file for *khulʿ* even if their husband does not consent. The law specifies that under such circumstances, the court will grant the wife a divorce based on "waiving all her financial legal rights and returning to him the dower (*ṣadāq*) that he gave her (*bi-tanāzul ʿan jamīʿ ḥuqūqihā al-māliyya al-sharʿiyya wa-raddat ʿalayhi al-ṣadāq alladhī aʿṭāhu lahā*)."[57] Jordan followed suit with a similar law in 2001. Meanwhile, in Morocco, after the 2004 family law code reforms, consensual *khulʿ* was much less practiced as other forms of divorce such as *shiqāq* (divorce by discord) and *al-ṭalāq bi-l-ittifāq* (divorce by agreement) became women's preferred methods of terminating a marriage.[58]

The third most common form of divorce is through a court order (*tafrīq*). Nasir states that various Arab countries have specified the occasions under which a woman may seek to obtain a divorce through court-order. These usually include injury or discord, a physical or mental defect of one of the spouses, a husband's failure to pay maintenance, his imprisonment, and his absence without an acceptable excuse.[59] This kind of divorce sustains a husband's liability for payment of the dower's

legal differences between Mālikīs and Ḥanafīs on the issue of *khulʿ* divorce reflect a broader disagreement over judicial divorce, which the former permit whenever the wife can prove harm, but the latter only grant under very limited circumstances).

57 *Law Nr. 1/2000 (Qānūn raqm 1 li-sanat 2000)*, article 20, accessed March 2, 2021, https://www.egypt.gov.eg/arabic/laws/download/قانون%20رقم%201%20لسنة%202000%20باصدار%20قانون%20تنظيم%20بعض%20اوضاع%20واجراءات%20.pdf.

58 Nadia Sonneveld, *Divorce Reform in Egypt and Morocco: Men and Women Navigating Rights and Duties*, 26 Islamic Law and Society 149, 161 (2019).

59 Jamal J. Ahmad Nasir, *The Status of Women* at 137.

deferred portion and thus furnishes a significant advantage for women seeking a divorce when compared to wife-initiated divorce (*khulʿ*). The number of circumstances in which court order divorces will be granted again varies depending on the legal school, with the Ḥanafīs generally allowing many fewer than the Mālikīs. However, today many of these differences have been obfuscated due to the fact that in matters of divorce, the legislations of most Muslim majority countries have adopted the Mālikī view.

II. Whence Islamic Law?

a. The multitude of Islamic legal opinions and authorities causes uncertainty in courts

There is no orthodoxy in Islam or Islamic law. That is, there exists no singular authority or Islamic legality that is generally considered binding or authoritative for all Muslims. Nevertheless, the Islamic tradition's heterogeneity does not imply formlessness, since Islamic legal practice is controlled and policed by a range of reasonable interpretations and norms.[60] The notion of Islamic justice is grounded in religious ethics that are predominantly Quranic, and social ethics of the community's integrity and social harmony.[61] For most Muslims, the Quran and the traditions and sayings of the Prophet (*sunna*) constitute foundational texts. Additionally, the scholarly opinions from the Islamic legal schools (*madhāhib*) may be employed as additional guidelines or rules for deciding legal issues. The Islamic professions of legal scholar (*faqīh*), jurisconsult (*muftī*), and judge (*qāḍī*) are tasked with, among other things, establishing whether and how the Muslim community's social practices can be reconciled with the legal and ethical demands inscribed in

60 Mohammad H. Fadel, *The Challenges of Islamic Law Adjudication in Public Reason*, in S. Langvatn, M. Kumm, and W. Sadurski, eds, *Public Reason and Courts* 115, 130 (Cambridge University Press, 2020).

61 Wael B. Hallaq, *Sharīʿa. Theory. Practice. Transformations*, 16 (Cambridge University Press 2009).

the Islamic foundational texts and traditions.[62] Yet "Islamic" law as applied in Muslim majority-countries varies significantly and depends on the particular political system under which Islamic laws may be fully, partially, or not at all, applied.[63]

The multitude of Islamic legal opinions about Islamic marriage, divorce, and *mahr*-agreements complicates the process of translating Islamic marriage into the US legal system. For instance, suppose the married parties are US citizens with an Iranian cultural background and concluded an Islamic marriage in a local mosque in Minnesota. Suppose also that the spouses had agreed on a bridal dower and now seek a divorce. Should the court enforce the *mahr*-agreement applying Iranian law under comity? Should it construe it using Islamic law? If it aims to apply Islamic law, which Islamic legal doctrine would prevail?[64]

The application of Islamic law on US soil generally falls under the principle of comity. Parties, therefore, do not have a legal right to have foreign laws apply to their litigation but the court will consider it to be a matter of courtesy that is based on the "recognition of legislative, executive, and judicial acts" by other political entities.[65] Of course, enforcing the terms of a

62 In that regard, Islamic law is similar to the US legal system in which lawyers endorse, question, or intervene into social practices by balancing them against legal doctrines prescribed by the US Constitution and legal precedents.

63 For instance, in Lebanon, legal issues related to personal affairs are handled by sectarian courts depending on the religious confession of an individual. In Iran, the courts combine civil and religious authority. In Turkey, religious courts have long been abolished and entirely been replaced by civil courts.

64 The perplexing outcomes of the courts' interpretations of what Islamic marriage is or might be under Islamic law became alarmingly obvious in *S.D. v. M.J.R* (2010) where a Muslim husband had raped his wife and argued that his religious beliefs, which ostensibly demanded that a husband does not require consent to have sexual intercourse with his wife, created an exception to his being found guilty of sexual assault or criminal sexual conduct. Although the New Jersey Superior Court later repealed the judgement, the argument was granted by the trial judge; *S.D. v. M.J.R.*, 415 N.J. Super. 417, 432–33, 2 A.3d 412, 422 (App. Div. 2010). The judicial confusion and helplessness of how to deal with and translate Islamic marriage into the US legal system can hardly be missed.

65 "Comity," in: *Black's Law Dictionary*, edited by Brian A. Garner (West Group, 2014). The Supreme Court was confronted with the issue of comity in *Hilton v. Guyot* holding that "'[c]omity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative,

mahr-agreement is not necessarily contingent on the application of Islamic law. Other theories of why a *mahr*-agreement is enforceable, even without applying Islamic law, might yield the same outcome. But the issue of Islamic law has often been raised in Islamic divorce trials. The problem that US courts regularly face is establishing what the parties' stated intent to have "Islamic law" govern their marriage contract actually means. In determining what Islamic law is and whether it can be applied, the courts frequently confront two related issues, a substantive and a procedural one. The first is whether the spouses' stated intent to have Islamic law apply to a *mahr*-agreement satisfies the statute of frauds. The second is whether parol evidence is admissible to determine what the parties meant by "Islamic law."

b. Statute of frauds

i. Does "Islamic law" state the choice of law with reasonable certainty?

First, when determining what legal system or legal code a *mahr*-agreement falls under, the court will typically look to the "writing" of a contract. Generally, to satisfy the statute of frauds, the contract itself must indicate its terms, including the choice of law the parties agreed on.[66] But establishing the parties' choice of law for *mahr*-agreements has proved to be an arduous undertaking. In *In re Marriage of Shaban*, the Court held that the phrases "in Accordance with his Almighty God's

executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws;" *Hilton v. Guyot*, 159 U.S. 113, 163–64, 16 S. Ct. 139, 143, 40 L. Ed. 95 (1895).

66 In *Habibi-Fahnrich v. Fahnrich*, the New York Supreme Court applied a three-pronged test, based on the New York General Obligations § 5-701, to determine whether a *mahr* (*ṣadāq*)-agreement satisfies the requirements of the statute of frauds; *see Habibi-Fahnrich v. Fahnrich*, No. 46186/93, 1995 WL 507388, at *2 (N.Y. Sup. Ct. July 10, 1995) (establishes that for a contract to satisfy the statute of frauds [1] parties must have reached a mutual understanding to be evidenced by a written instrument, [2] the material terms of the contract must be specific enough that anyone can understand them, and [3] the writing must be plainly sufficient on its face).

Holy Book and the Rules of the Prophet" and "[the] two parties [having] taken cognizance of the legal implications" do not satisfy the California statute of frauds because they do not state with reasonable certainty what the material terms of the parties' contract are under Islamic law.[67]

The court's concern here was not that the parties had failed to expressly state that they seek for their contract to fall under "Islamic law." Instead, the court demanded that the spouses specify what they mean by "Islamic law." Put differently, even if the spouses had explicitly stated that they seek for their contract to be governed by "Islamic law," the *Shaban* Court would have probably ruled in the same vein, holding that such a reference alone does not suffice to establish what the material terms of the contract are. However, what other options do the married parties have other than to mention, explicitly or implicitly, that Islamic law is to govern the marriage contract? Of course, spouses may state that they seek for their agreement to fall under the laws of a specific country or legal code. But especially in the case of *Shaban*, where both spouses were Egyptian and where the marriage contract had been concluded in Egypt long before the parties had migrated to the US, it seems reasonable to assume that the implicit reference to Islamic law functioned as a placeholder for Egyptian (Islamic) law as the spouses' intended choice of law.[68]

Would Egyptian (Islamic) law suffice as a descriptor to state the choice of law? At the time of the Shabans' divorce, Egyptians' personal affairs such as family disputes were governed by the 1929 personal status laws (*qawānīn al-aḥwāl al-shakhṣīya*) and their amendments.[69] In Egypt, the case would have likely been submitted to a Family Dispute Resolution office for the parties to settle before being forwarded to a court.[70] If it

67 *In re Marriage of Shaban*, 88 Cal. App. 4th 398, 401, 105 Cal. Rptr. 2d 863, 864 (2001), *as modified on denial of reh'g* (May 9, 2001).

68 Id. at 865.

69 Nathalie Bernard-Maugiron, *Courts and the Reform of Personal Status Law in Egypt. Judicial Divorce for Injury and Polygamy*, in Elisa Giunchi, ed, *Adjudicating Family Law in Muslim Courts* 106, 106 (Routledge 2014).

70 Nathalie Bernard-Maugiron, *Promotion of Women's Rights (Egypt). Personal Status Laws in Egypt. FAQ* at 15, accessed May 15, 2019, http://horizon.

had reached the court, an Egyptian judge would have first looked to the personal status laws. Art. 3 of Law 1, passed in 2000, reaffirmed that judges must first consult personal status law in matters of personal affairs. Then, in case an issue cannot thereby be resolved, they should rule in accordance with the predominant opinion (*bi-arjaḥ al-aqwāl*) of Ḥanafī jurisprudence.[71]

One can argue that assuming Egyptian law to be the reference point in *Shaban* simply evades the question of "what Islamic law is" or, in other words, construes the spouses' request for Islamic law to be indicative of their intent to have the marriage contract fall under Egyptian law. There are two objections to this argument. First, I believe that the question of "what Islamic law is"—if we must ask it—has no generic answer and needs to be decided contextually and on a case-by-case basis. The mention of Islamic law, as the *Shaban* Court noted,[72] rarely stands on its own. In *Shaban*, the Islamic law reference was accompanied by information about the married parties' names, the witnesses to the marriage, the amounts of the advanced (*muʿajjal*) and deferred (*muʾakhkhar*) portions of the dower, the married parties' and witnesses' signatures, and official seals of the court clerk or ministry.[73] In other words, a contractual reference to "Islamic law" is most often likely to be embedded in a broader context of other epistemic signposts that indicate the intent to have *a certain kind* of Islamic law enforced. In the case of *Shaban*, using these to figure out the type of Islamic law the spouses intended to have applied to their contract would have been relatively straightforward.

Second, the question of "what Islamic law is" is essentially a modern predicament generated by an epistemological condition that requires the asking of that very question. Yet historically,

documentation.ird.fr/exl-doc/pleins_textes/divers17-07/010048687.pdf.

71 *Law Nr. 1/2000 (Qānūn raqm 1 li-sanat 2000)*, article 3, accessed May 15, 2019, https://www.egypt.gov.eg/arabic/laws/download/%20مقر%20نون%20اق%20ع%20اض%20و%201%20ن%20س%20ه%20200%20ر%20ادص%20اب%20ض%20ع%20ب%20م%20ي%20ظنت%20ن%20ون%20اق%20ت%20اءار%20ج%20او.pdf.

72 *In re Marriage of Shaban*, 88 Cal. App. 4th 398, 403, 105 Cal. Rptr. 2d 863, 864 (2001), *as modified on denial of reh'g* (May 9, 2001).

73 *See* the *mahr*-agreement translated into English which is appended to the Court's judgement in *Shaban*, id., footnote 1.

and until the dawn of modernity, Islamic law (*sharīʿa*) was never homogenous and functioned primarily as a moral imperative that was embodied by a multitude of localized practices and customs.[74] Arguably it is only under conditions of the modern nation-state that the demand for an identifiable and unified body of laws became intimately bound up with the idea of sovereignty. In the wake of modernizing reforms, attempts to turn Islamic legal practices into a form of modern governance were made abundantly. But most of these failed. As Wael Hallaq states,

> the Sharīʿa itself was eviscerated, reduced to providing no more than the raw materials for the legislation of personal status by the modern state.[75]

While that might seem like an unsatisfactory answer to the question of "what Islamic law is," it sharpens our understanding of why that question is asked in the first place and, more importantly, why the answer should remain idiosyncratic to the particular legal case at hand.

ii. Should spouses commit to a foreign legal system or code instead of Islamic law?

An argument to consider is that whereas in *Shaban*, the choice of law was apparent because it could reasonably be inferred from the context in which the marriage contract was entered, in many cases of Islamic marital dispute, it is not. As an alternative to the expression "Islamic law," the contracting parties could commit to the laws of a specific country. But should spouses be obliged to commit to a foreign legal system that they might at best be vaguely familiar with, merely to ensure that a US court will enforce a *mahr*-agreement in future?

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74 Wael Hallaq, *The Impossible State. Islam, Politics, and Modernity's Moral Predicament* ix (Columbia University Press, 2013).

75 Id. Also, *see* Wael Hallaq, *Sharīʿa. Theory, Practice, Transformations* 19 (Cambridge University Press, 2009) (arguing that the discursive and cultural practices of the classical Sharīʿa met their structural death at the dawn of modernity).

As the example of *Obaydi v. Qayoum* shows,[76] spouses often do not have extensive knowledge about Islamic legal practices and their consequences, let alone the application of foreign laws that might pertain to their Islamic marriage in the case of divorce.

The requirement to commit to a foreign legal system to ensure the payment of bridal dowers would likely have a chilling effect on spouses. That is, the expectation to expressly commit to a foreign state's legal system or code about which the spouses have only vague ideas might deter them into refraining from Islamic marital arrangements altogether because of the legal consequences they might unintentionally and unwillingly subscribe to.[77]

One might counterargue that parties who are unwilling to explicitly commit to a specific foreign legal system or code to have their Islamic marriage contract enforced, should refrain from stipulating such contracts if they want to avoid liability for the unintended consequences that such commitment entails. However, the argument is discounted by the point that the only solution to ensure that US courts enforce *mahr*-agreements under Islamic law cannot simply be to oblige the parties to commit to a foreign legal system that they are mostly unfamiliar with. Apart from ignorance, such a requirement would unreasonably assume that the applicability of Islamic law and its customs is contingent on the existence of foreign states in which these laws are already being enforced, rather than infer its legitimacy from the reality that Muslim communities exist and actively practice Islam in the United States.

iii. Is a reference to US federal or state law more reasonably certain than "Islamic" law?

76 *In re Marriage of Obaidi & Qayoum*, 154 Wash. App. 609, 612, 226 P.3d 787, 789 (2010) (husband arguing that he was unfamiliar with the concept of the *mahr* and ignorant of what he was signing at the wedding despite being a Muslim and having previously attended a Muslim wedding).

77 These can be quite significant such as unintentionally acquiring another country's citizenship, e.g., when marrying a male Iranian citizen.

I believe that the argument about the reference to Islamic law not stating the choice of law with reasonable certainty is flawed for other reasons. One can argue that a contract in which the parties imply or explicitly state that they seek it to be enforced under US state or federal law, would not necessarily create significantly more reasonable certainty. Any choice of law merely establishes a likelihood of a contract being enforced in a certain way. In other words, a reference to a specific body of substantive and procedural laws only makes it more likely that a contract will be interpreted by a court in one way or the other. It is unreasonable to assume that spouses seeking to apply California law to their marriage contract would be able to foresee or have exact knowledge of how their agreement will be construed, interpreted, and enforced under that legal system. Consequently, even where parties enter a contract under California law, they cannot be expected to anticipate with absolute certainty of what materials, statute or theory of construction a court might avail itself in case they have a legal dispute concerning their contract.

A reference to Islamic law achieves a similar result in that it specifies for the judge a body of substantive and procedural rules to take into account in the process of construing the *mahr*-agreement. It increases the likelihood that the contract will be interpreted in a certain way, without creating absolute certainty.

c. Parol evidence

i. The essential terms of a mahr-agreement should be stated, the particulars need not be

The ostensible lack of specificity in the expression "Islamic law" and the multiplicity of Islamic legal practices have occasionally made it necessary for parties to Islamic divorce proceedings to call on expert-witnesses to testify about particular understandings and concepts in Islamic marriage.[78] The courts in

78 *Akileh v. Elchahal*, 666 So. 2d 246, 247 (Fla. Dist. Ct. App. 1996) (expert witness of the wife's counsel testifying that a *mahr* is not forfeited if a wife

Soleimani (2013) and *Shaban* (2001) recognized the potential dangers of admitting parol evidence to allow the married parties to clarify the terms of their contract. The *Shaban* Court refused to hear the expert the husband's counsel had tried to introduce arguing that he would virtually (re)write the marriage contract for the parties.[79] The Court's opinion was effectively overruled in *Sterling v. Taylor* (2007). In *Sterling*, the California Supreme Court held that *even in the absence* of a written contract, the parties will nevertheless be considered to have contracted with each other if they produced a memorandum. Specifically, the court made two arguments that are relevant to the case of *mahr*-agreements.

First, it held that a memorandum regarding the sale of several apartments satisfies the statute of frauds when it establishes that (1) the parties made a contract, (2) specifies the subject of that contract, and (3) the essential terms it is governed by with reasonable certainty.[80] The Court clearly states that only the essential terms of the contract must be stated, "details or particulars" need not be.[81]

Second, the *Sterling* Court argued that the writing requirement of the statute of frauds has an evidentiary purpose, serving merely "to prevent the contract from being unenforceable; it does not necessarily establish the terms of the parties' contract."[82] Thus, the Court concluded that when an ambiguous term in a memorandum is disputed between the parties, extrinsic

initiates divorce); *Rahman v. Hossain*, No. A-5191-08T3, 2010 WL 4075316 (N.J. Super. Ct. App. Div. June 17, 2010) (expert testifying that where a wife constitutes an impediment to the marriage, she must refund a previously paid *mahr*).

79 *In re Marriage of Shaban*, 88 Cal. App. 4th 398, 400, 105 Cal. Rptr. 2d 863, 864 (2001), *as modified on denial of reh'g* (May 9, 2001) (Court refusing to hear the expert introduced by the husband's counsel on the argument that he would effectively write a contract for the parties); *Soleimani v. Soleimani*, No. 11CV4668, 26 (Johnson County Dist. Ct. 2013) (arguing that parole evidence cannot be used to aid the court in the construction of the contract before it has determined where ambiguities exist); *Blackhawk Heating & Plumbing Co. v. Data Lease Fin. Corp.*, 302 So. 2d 404, 408 (Fla. 1974) (holding that subsequent party differences concerning the construction of a contract do not affect the contract's validity).

80 *Sterling v. Taylor*, 40 Cal. 4th 757, 766, 152 P.3d 420, 425 (2007).

81 Id. at 766.

82 Id. at 767; based on court opinion in *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 345, 9 Cal.Rptr.3d 97, 83 P.3d 497.

evidence is admissible to resolve the uncertainty.[83]

But is a *mahr*-agreement like a memorandum and should it be considered as satisfying the statute of frauds? It is, in fact, more than a memorandum. It is intended to serve as the actual written contract between the parties. Its content establishes that (1) the parties did enter a marriage contract entailing financial obligations for the husband and (2) specifies that financial obligation as the subject of that contract. However, does a *mahr*-agreement also (3) specify the essential terms the contract is governed by with reasonable certainty? That depends. It usually states the parties and witnesses' names, the negotiated sum, and makes an explicit or implicit reference to "Islamic law." As argued previously, such reference would not determine the body of laws that should be applied to a *mahr*-agreement with less reasonable certainty than a reference to US state or federal law.[84]

Even if a court rejects the argument that a *mahr*-agreement is a written contract, under the memorandum precedent, the stipulations of a *mahr*-agreement could be considered valid on the theory that it is a memorandum fulfilling the criteria set out by the court for memorandums to effectuate contracts.

ii. The court is granted extensive liberties in construing mahr-agreements under FRCP 44.1

The *Sterling* opinion echoes Rule 44.1 of the Federal Rules of Civil Procedure which implies a more liberal understanding about using and admitting parol evidence than what the Court's opinion in *Shaban* suggested:

> […] In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.[85]

83 *Sterling v. Taylor*, 40 Cal. 4th 757, 767, 152 P.3d 420, 425 (2007).
84 See section on statute of frauds.
85 Fed. R. Civ. P. 44.1.

The *Notes of the Advisory Committee* on Rule 44.1 support that impression stating that the ordinary rules of evidence applied to determine foreign law had proved to be inapposite. To create an effective remedy to this situation, Rule 44.1 was drafted by the legislator with the intent to permit courts to include "*any* relevant material, including testimony, without regard to its admissibility under Rule 43 ["Taking Testimony"]."[86]

Considering FRCP 44.1 and the *Sterling* opinion, courts dealing with *mahr*-agreements can be expected to more freely avail themselves of additional material in cases where the term "Islamic law" is not further specified in the contract and where the parties' choice of law may not be inferred from the circumstances in which that contract was entered. The *Soleimani* Court's decision is instructive because it states that courts' concern about parol evidence is more narrowly related to when and by whom an ambiguous contractual term is identified. Such terms, the Court states, need to be identified *by courts* and *before* the parties introduce parol evidence.[87] It thus affirmed the standard the Kansas Supreme Court applied in *Robertson v. McCune* according to which parol evidence may be used to clarify an ambiguous provision but not to nullify one that is "clear and positive."[88] That is, a court must determine what parts of a *mahr*-agreement it considers ambiguous and in need of clarification. These must provide the grounds for parol evidence. It cannot be the parties who tell the court which parts of their agreement they hold to be ambiguous and which they do not.

d. Statute of frauds and parol evidence as gendered problems

When enforcing contracts under "Islamic" law, the discomfort of US courts, as David Forte has noted long ago, tends to increase when the laws they are expected to enforce are

86 Id. (Advisory Committee Notes).

87 *Soleimani v. Soleimani*, No. 11CV4668, 26 (Johnson County Dist. Ct. 2013).

88 *Robertson v. McCune*, 205 Kan. 696, 699, 472 P.2d 215, 218 (1970).

not expressed in the form of statutes, codes, or legal decisions.[89] Also, the application of foreign laws becomes much easier where the Islamic laws to be enforced belong to a country whose laws are essentially based on European legal codes. According to Forte, courts tend to be more reluctant when they are supposed to enforce substantive laws based on a mixture of European and Islamic legal systems.[90]

It is important to realize the gravity of a court's dismissal of the married parties' choice of law that is stated in a *mahr*-agreement. Dismissing the spouses' stated choice of law because a court finds the expression "Islamic law" too vague to satisfy the statute of frauds and because such agreements ostensibly do not specify "the essential terms" of the contract is questionable. It is questionable because (1) it would in many cases contravene the married parties' original intent to have their contract enforced under Islamic law, and (2) fails to adequately take into account FRCP 44.1 or equivalent state procedural rules which grant courts significant liberties in using and having the spouses use parol evidence to clarify what "Islamic" law was intended to mean. Emily Sharpe and others have noted that dismissing the married parties' stated choice of law in a contractual dispute will often be "outcome determinative."[91] Not granting the spouses' stipulated choice of law will create a significant obstacle, albeit not an absolute one, for the enforcement of a *mahr*-agreement.

In less obvious ways, statute of frauds and parol evidence issues constitute specifically gendered problems. This is so mainly because the available alternative theories under which a court may enforce a *mahr*-agreement are not particularly weighty. If one assumes that the enforcement of a *mahr*-agreement creates a benefit for Muslim women, statute of frauds and parol evidence issues raised by the court are gendered because they tend to negatively affect women, not men, making

89 David F. Forte, *Islamic Law in American Courts*, 7 Suffolk Transnational Law Journal 1, 7 (1983).

90 Id. at 11.

91 Emily Sharpe, *Islamic Marriage Contracts as Simple Contracts Governed by Islamic Law: a Roadmap for U.S. Courts*, 14 The Georgetown Journal of Gender and the Law 189, 193 (2013).

the enforcement of *mahr*-agreements much less likely.

While in many cases, wives might be entitled to community property or equitable distribution schemes, the enforcement of *mahr*-agreements, I think, should be regarded as a strictly separate legal issue. This has rarely been the case because US courts predominantly tend to think of *mahr*-agreements as prenuptials. If enforceable as a prenup, the court, in most cases, does not also apply community property or equitable distribution of assets.

The failure to neatly separate *mahr*-claims from other marital claims has turned Islamic divorce proceedings in US courts into matters of the-winner-takes-it-all. The spouses will usually opt for the theory that promises them a higher financial outcome. If a wife's *mahr* is higher in value than what she would receive under community property or equitable distribution, the wife's counsel will almost always argue based on a theory that seeks to establish the enforceability of the *mahr*-agreement, while a husband will argue that the contract does not satisfy the statute of frauds, was made under duress, or that its enforcement would violate the Establishment Clause. If the *mahr* is below the financial value the wife would be compensated with under community property or equitable distribution of assets, each party will essentially argue the opposite.[92]

But there is a real legal as well as moral danger emanating from this sort of legal practice. For a Muslim wife, having her *mahr*-agreement enforced should, in most circumstances, be paramount because her entering of the marriage was predicated on the husband's promise to pay a monetary sum or to release a previously negotiated set of his assets in the case of divorce. That is, the *mahr* constitutes the husband's reverse contractual obligation of an Islamic marriage whose obligations a Muslim wife has *already* performed.[93]

92 Nathan Oman has made similar observations, Nathan Oman, *Bargaining in the Shadow of God's Law: Islamic Mahr Contract and the Perils of Legal Specialization*, 45 Wake Forest Law Review 579, 593 (2010).

93 *Akileh v. Elchahal*, 666 So. 2d 246, 248 (Fla. Dist. Ct. App. 1996) (noting that the wife performed under the *mahr*-agreement by having entered the marriage in the first place).

Entitlements under state property rules should be considered separately.[94] Courts should not put Muslim women in the awkward position where prior to the divorce trial they must choose whether they will seek the enforcement of the bridal dower or of community property/equitable distribution of assets because they will potentially forfeit claims if they end up choosing the "wrong" option. That became painfully obvious in *Zawahiri v. Alwattar* where the wife ended up with no financial compensation at all because she had relied on the theory that a *mahr*-agreement constitutes a prenuptial.[95]

When two parties contract a marriage, they make a deliberate choice to contract according to Islamic law. Rejecting such a choice often creates an undue substantive and procedural advantage for husbands in Islamic divorce proceedings. That is, if the court holds that a *mahr*-agreement does not satisfy the statute of frauds because "Islamic law" is not a reasonably certain expression, ex-wives will be compelled to revert to other theories based on which their *mahr*-agreement could be enforced. But as this study shows, none of those theories is particularly suitable to succeed in court because they do not adequately capture the substantive aspects and implications of a *mahr*-agreement.

III. Blessing or Quagmire: Religious Doctrinal Interpretations

a. Adjudicating on matters of religion cannot be entirely avoided

Are secular courts qualified to interpret *mahr*-agreements given that they originate in religious contexts? Should spouses who entered a contract in the context of a religious ceremony have a right to have that contract enforced by civil courts? And, just how much should a court get involved in interpreting *mahr*-

94 Especially since in some cases, insisting on the enforcement of the *mahr*-agreement will be the only recourse a wife has to her ex-husband's assets.

95 *Zawahiri v. Alwattar*, 2008-Ohio-3473. Also, Nathan Oman, *Bargaining in the Shadow of God's Law: Islamic Mahr Contract and the Perils of Legal Specialization*, 45 Wake Forest Law Review 579, 595 (2010).

agreements?

First, the idea of dealing with religious doctrine could be considered a matter of historical continuity. Najmeh Mahmoudjafari notes that "family law has had a long history [in the US] of accommodating religious practices while still upholding the principles of the Constitution and the US legal system generally."[96] Her statement gains credence when considering the historical argument that normative conceptions of civil marriage in the West arguably emerged from a historical trajectory which has been infused with and significantly shaped by Western Christian attitudes of partnership and monogamy.

But even if one finds the argument about historical continuity persuasive, the adjudication of religious matters does present a special challenge for courts because of the precarious balance that state institutions must strike in order not to get entangled in matters of religion and religious doctrine.[97] As Justice Rehnquist wisely noted in his dissent in *Serbian E. Orthodox Diocese v. Milivojevich* (1976), civil courts "obviously cannot avoid all such adjudications."[98] In other words, the hands-off rule concerning religious matters, justified by the argument that state involvement may "corrupt" religion, cannot reasonably be applied to *all* decisions which a court must make and in which religion is involved.[99]

b. Is the enforcement of contractual obligations that arise from contracts made in religious contexts constitutional?

96 Najmeh Mahmoudjafari, *Religion and Family Law: The Possibility of Pluralistic Cooperation*, 82 UMKC Law Review 1077 (2014).

97 U.S. Constitution, 1st Amendment ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

98 *Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 735, 96 S. Ct. 2372, 2392, 49 L. Ed. 2d 151 (1976) (Rehnquist dissenting).

99 Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What are we Talking About?*, 84 Notre Dame Law Review 837, 858 (2009) (arguing that in some cases courts' failure to adjudicate matters involving religious questions presents a danger of its own).

i. Outlining the Lemon test

Let us consider the question of whether the courts' enforcement of contractual obligations arising from contracts of religious provenance such as *mahr*-agreements is constitutional. Fortunately, the court previously introduced a test to determine what kind of government activity constitutes the establishment of religion. In *Lemon v. Kurtzman*, the Supreme Court applied a three-pronged test for determining the constitutionality of *statutes* regarding the establishment of religion. It held that a statute is unconstitutional when (1) it does not have a secular legislative purpose, (2) when its principal or primary effect is the advancement or inhibition of religion, and (3) when it constitutes "excessive government entanglement with religion."[100] Presupposing that the *Lemon* test applies to court actions, three questions concerning *mahr*-agreements emerge:

1. Does the enforcement of a mahr-agreement have a non-secular purpose?
2. Does its enforcement primarily advance or inhibit religion?
3. And does the enforcement of such an agreement constitute excessive government entanglement with religion?

ii. Does the enforcement of a *mahr*-agreement have a non-secular purpose?

In *Avitzur v. Avitzur* (1983), a Jewish couple had signed a *Ketubah* (premarital agreement) which stipulated the condition that the spouses submit to the jurisdiction of the Beth Din of the Rabbinical Assembly regarding marital affairs. After obtaining a civil divorce, the wife sought to execute a religious divorce through the Beth Din. The New York Court of Appeals ruled that the ex-husband's refusal to appear before the Beth Din when summoned for religious divorce constituted a breach of

100 *Lemon v. Kurtzman*, 403 U.S. 602, 612–13, 91 S. Ct. 2105, 2111, 29 L. Ed. 2d 745 (1971).

the spouses' contract.[101] The ex-husband's counsel had argued that because of the religious provenance of the *Ketubah*, any relief granted to the ex-wife would "involve the civil court in impermissible consideration of a purely religious matter."[102] The Court gave no merit to the husband's argument and stated that the ex-wife's appeal for the husband to appear before the Beth Din constituted a demand within the secular obligations that he had contractually bound himself to.[103]

The Court's ruling in *Avitzur* might be seen as having a non-secular purpose, but only *indirectly*. The wife sought a religious divorce from her husband, which could only be obtained by compelling him to appear before the Beth Din. The Court enforced the contract to ensure the husband does uphold his contractual obligation to *appear* before the Beth Din. Only the husband's appearance was a matter at trial. His appearance was the direct result of having the *Ketubah* enforced by the Court. The Court's enforcement of the *Ketubah* entailed no guarantee that the parties would actually attain a religious divorce through the Beth Din.

When applying this reasoning to the fact pattern of *mahr*-cases, the secular purpose of court involvement should become more apparent. Just as in the *Ketubah*-agreement in which the spouses had stipulated submission to the Beth Din, in a *mahr*-agreement, the spouses specify the husband's provision of a previously negotiated monetary sum or asset in the event of divorce. But contrary to the religious divorce that at least indirectly results from the Court's enforcement of the *Ketubah*, there is no religious divorce the spouses seek to obtain here. The purpose of court involvement is secular in that the litigation between the spouses primarily rests on the hope that the court will either grant or dismiss a monetary transaction between the parties.

But what if spouses do not care primarily about the monetary value of the *mahr* but the spiritual benefits attached

101 *Avitzur v. Avitzur*, 58 N.Y.2d 108, 112, 446 N.E.2d 136, 137 (1983).
102 Id. at 112–13.
103 Id. at 115.

to it? After all, one might argue that for a devout Muslim, endowing or receiving the *mahr* may be considered a religious obligation. Indeed, in Islamic legal theory, the fulfillment of religious obligations is always associated with the creation of benefit (*niʿam*) for the believer in the afterlife (*al-ākhira*). However, the argument is discounted by the fact that Islamic legal collections are by convention separated into matters of religious worship (*ʿibādāt*) and social transactions (*muʿāmalāt*). Issues on marriage and divorce are commonly found in the latter category, and do not have a direct bearing on one's relationship with God. As Mohammad Fadel notes, the laws governing social transactions "disclose an inner rationality that is instrumentally related to particularly human ends, such as the protection and enhancement of property."[104] This is by no means to argue that everything pertaining to social transactions in Islamic law is clear-cut secular with no spiritual value attached. Rather, it shows that argued from the vantage point of the Islamic tradition itself, marriage and divorce are primarily conceived as mechanisms for regulating and ordering society.

One should not underestimate the debilitating effects of conceptualizing bridal dowers exclusively as vestiges of religion. That is, by declaring them to be of "religious" or "divine" character, courts implicitly subscribe to an oversimplified logic that collapses the world into the religious and the secular. As Fournier has noted, this dichotomy tends to render invisible the similarities that do exist between Islamic and Western laws and the overlapping purposes that specific legal institutions often fulfill.[105] The message often driven home becomes not only that a *mahr* is supposedly religious and foreign, but also that the legal system into which that institution is translated is ostensibly the opposite, secular and home-grown.

A more forceful objection in the debate on secularism is that the whole controversy about which Islamic law to apply

104 Mohammad H. Fadel, *The Challenges of Islamic Law Adjudication in Public Reason*, in S. Langvatn, M. Kumm, and W. Sadurski, eds, *Public Reason and Courts* 115, 128 (Cambridge University Press, 2020).

105 Pascale Fournier, *Muslim Marriage in Western Courts. Lost in Transplantation* 131 (Ashgate 2010).

indicates that the enforcement of *mahr*-agreements is, in fact, primarily a matter with a non-secular purpose because the court is put in a position where it first needs to interpret religious doctrine in order to adjudicate whether the claim to a *mahr* can legitimately be sustained. If the primary purpose of bringing *mahr*-agreements before courts were to move them to declare certain religious doctrines as either true or false, the argument of a non-secular purpose could be upheld. But *mahr*-litigations are far from being such concerted efforts. Parties tend to be one-shotters who cannot be assumed to care about precedent or public policy when the court rules on the enforceability of their *mahr*-agreements. They are not likely to end up in a similar litigation again and, even if they do, they would have probably learned from previous litigation the lesson that the court will not easily honor such contracts.

iii. Does the enforcement of a *mahr*-agreement advance or inhibit religion?

Honoring bridal dowers, one may object, will encourage prospective spouses to contract *mahr*-agreements and therefore result in more Islamic marriages because couples can reasonably rely on their enforcement by the court. But under that logic, it could be said that even when enforcing an ordinary premarital agreement, more prospective spouses will be encouraged to enter such agreements in the future, resulting in the spread of more secular marriages to the detriment of religious marriages. Thus, enforcing a *mahr*-agreement does not advance or inhibit religion any more than the enforcement of a secular marriage contract or prenuptial.

iv. Does the enforcement of a *mahr*-agreement constitute excessive government entanglement with religion?

Based on the judgment in *Avitzur*, it seems that the secular obligations arising from marital contracts made in

religious contexts can usually be separated neatly. In *Aziz v. Aziz* (1985), the New York Supreme Court followed this line of reasoning holding that the secular terms of an Islamic marriage contract, in which the payment of a dower ostensibly partakes, are enforceable independent of whether the contract was entered in a religious ceremony.[106] But separating what is secular in a contract and what is not cannot always be done easily.

What constitutes "excessive" government entanglement is arguably in the eye of the beholder. However, courts have drawn relatively clear boundaries regarding how much entanglement is constitutional. In *Najmi*, the Ohio Court of Appeals stated that "evaluating the merits of religious doctrine or defining the contents of that doctrine" is flatly prohibited.[107] The concern with evaluations of the merits of religious doctrine is obvious: evaluation creates ostensibly objective criteria against which religious beliefs can be measured making the idea of religion obsolete in that non-compliance necessarily indicates falsehood and results in the quasi-elevation of religious beliefs that do comply with criteria of "objectiveness."

In *Thomas v. Review Board* (1981), the Supreme Court was confronted with the question of whether an employee who is a Jehovah's Witness and who had been transferred to a department that manufactured turrets for military tanks could claim unemployment compensation benefits after quitting his job on the grounds of his religious beliefs.[108] The dissent, written by Justice Rehnquist, drew the line of court involvement at the employee's religious sincerity:

> By granting financial benefits to persons solely on the basis of their religious beliefs, the State must necessarily inquire whether the claimant's belief is "religious" and whether it is *sincerely* held.[109]

106 *Aziz v. Aziz*, 127 Misc. 2d 1013, 1013, 488 N.Y.S.2d 123, 124 (Sup. Ct. 1985).

107 *Najmi v. Najmi*, 2008-Ohio-4405, ¶ 12.

108 *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 707, 101 S. Ct. 1425, 1426, 67 L. Ed. 2d 624 (1981).

109 Id. at 726/1436 (Rehnquist dissenting).

The Rehnquist dissent would allow for more court involvement in *mahr*-litigation than has hitherto been the case. Yet courts have not endeavored to inquire into the sincerity of the spouses' religious beliefs. They certainly could have, given that parties in *mahr*-litigations often make *ex post* claims that seem to precisely aim at discounting the religious sincerity with which they signed *mahr*-agreements.

For instance, the husband in *Obaidi v. Qayoum* argued that, despite being a Muslim and having attended Muslim wedding ceremonies prior to his own, he was unfamiliar with the concept of the *mahr* and did not know what he was signing. Because his argument persuaded the Court, his ex-wife lost her *mahr*-claim of $20,000.[110] Similarly, in *Zawahiri v. Alwattar* (2008), the Ohio Court of Appeals granted a husband's argument that his signing of a dower-agreement of $25,000 two hours before the wedding ceremony was coerced because in the negotiation process he was feeling "embarrassed and stressed" and ostensibly had no opportunity to consult an attorney before signing the contract.[111]

In both cases, the judicial refusal to inquire into how sincerely those agreements were made created a procedural and substantive advantage for the parties opposing the *mahr*-agreement—the ex-husbands. But the Court's refusal to address questions such as sincerity because it fears to overstep its judicial competency is dangerous because it allows one spouse to bring forth arguments that discount their religious sincerity without being able to counterargue that their sincerity at the time of signing the *mahr*-agreement might have been a decisive factor outweighing other more circumstantial factors in that situation.

I do not seek to deny that focusing on the parties' religious sincerity causes a seeming paradox: in order to enforce a supposedly *secular* promise that stipulates the payment of a previously agreed-on sum of money, courts end up taking into consideration the Muslim parties' *religious* intentions.[112] But

110 *In re Marriage of Obaidi & Qayoum*, 154 Wash. App. 609, 612, 226 P.3d 787, 789 (2010).

111 *Zawahiri v. Alwattar*, 2008-Ohio-3473, ¶ 23.

112 *See* Pascale Fournier, *Flirting with God in Western Secular Courts:*

that paradox, I think, is inevitable in the current legal culture that refuses to acknowledge that many contracts cannot avoid being made in the shadow of religion. If one collapses the religion-secularism binary, there is minimal ground from which to argue against the enforcement of *mahr*-agreements especially given the sacrosanct assumption in US contract law that "[t]here is no reasonable ground for interfering with the liberty of person or the right of free contract […]."[113]

c. The fear of overstepping judicial authority by enforcing mahr-agreements is unfounded and the court should endeavor to more thoroughly inquire with how much religious sincerity such contracts were made

The *Lemon* test indicates that *mahr*-agreements should raise little concern with regard to constitutionality. Historically, court reluctance to get involved in doctrinal disputes of religion related to questions arising out of the Establishment Clause's prohibition against state interference in ecclesiastical affairs of the churches. However, because in Islam there is no ecclesiastical governance, *mahr*-litigation does not implicate such affairs. When a *mahr*-agreement is brought before the court, the stakes of adjudication are set by the resolution of a judicial dispute between two parties concerning a husband's liability to pay to his wife a bridal dower. As one-shotters to *mahr*-litigations, spouses have little interest beyond the material benefit or loss resulting from the court's judgment. Furthermore, sustaining a wife's dower claim does not advance or inhibit religion any more than the enforcement of a prenuptial would. The real issue that courts should focus on is the spouses' religious sincerity at the time they signed the *mahr*-agreement. Failure to take that sincerity into consideration creates an undue advantage for the

Mahr in the West, 24 International Journal of Law, Policy and the Family 67, 77–78 (2010).

113 *Lochner v. New York*, 198 U.S. 45, 57, 25 S. Ct. 539, 543, 49 L. Ed. 937 (1905).

spouse opposing the *mahr*-agreement—often the husband—because he can make compulsion and ignorance issues at trial without these factors being discountable by his own religious sincerity at the time of signing the contract which might, in fact, have outweighed other factors.

In terms of political philosophy, the judicial act of construing *mahr*-agreements may be understood in terms of Rawls' conception of a politically liberal society, in which judges, as representatives of the ideal of public reason, interpret Islamic legal rules in a way that reconciles the historical complexity of these rules with the political values of the target jurisdiction in which they come to be applied.[114] As Mohammad Fadel aptly notes,

> While it would not be appropriate for a public reason–minded judge to conjecture about the ultimate, theological significance of a particular rule of Islamic law, that judge, having identified the political values vindicated by that rule, should engage in conjecture that seeks to specify how the political value embedded in that rule or case can be appropriately specified or adjusted so as to produce a politically reasonable outcome in the case before him.[115]

The notion of judicial conjecture, of course, implies an increased burden on judges, as it requires not only intimate familiarity with Islamic jurisprudential science and legal doctrines but also discernment as to what political values might be implicated by incorporating Islamic legal aspects or institutions into the target jurisdiction. At any rate, it should have become clear by now that in the case of *mahr*-agreements, there is hardly a (competing) metaphysical or broader political truth at stake when a US court is asked to enforce such agreements.

114 *See* Mohammad H. Fadel, *The Challenges of Islamic Law Adjudication in Public Reason*, in S. Langvatn, M. Kumm, and W. Sadurski, eds, *Public Reason and Courts* 115, 124 (Cambridge University Press, 2020).

115 Id. at 125–126.

IV. Construing *Mahr*-Agreements

a. What is a mahr-agreement?

i. Theory 1: a *mahr*-agreement is a premarital agreement

Since the more widespread recognition and enforcement of premarital agreements in the US, courts and spouses have often analogized *mahr*-agreements to prenuptials. But why is the analogy to prenuptials so compelling to courts? And is the analogy justified?

The recognition of premarital agreements by US courts constitutes a relatively recent phenomenon. In *In re Marriage of Dajani* (1988), a California court held that the spouses' *mahr*-agreement constituted a prenuptial but was void against public policy because it ostensibly facilitated divorce by making the wife profit upon divorce.[116] The divorce-profiteering argument was not specifically directed against *mahr*-agreements. Before the Florida Supreme Court's ruling in *Posner v. Posner* in 1970,[117] courts used to regularly dismiss prenuptial agreements made in contemplation of divorce on the arguments that (1) they encourage divorce-profiteering and (2) because the parties would not know their circumstances at separation at the time they contracted the marriage.

To remove the barriers of enforcing prenuptial agreements, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Premarital Agreement Act (UPAA) which as of 2019 has been adopted by 27 states.[118]

116 *In re Marriage of Dajani*, 204 Cal. App. 3d 1387, 1388, 251 Cal. Rptr. 871, 871 (Ct. App. 1988). Al-Hibri has noted that the argument is flawed because it implies that Islamic marriage creates an incentive for murder given that a *mahr* is also due upon a husband's death; Azizah al-Hibri quoted in Ghada G. Qaisi, *A Student Note: Religious Marriage Contracts: Judicial Enforcement of "Mahr" Agreements in American Courts*, 14 Journal of Law and Religion 67, 78, footnote 61 (2000–2001).

117 *Posner v. Posner*, 233 So. 2d 381, 385 (Fla. 1970) (holding that ante-nuptial agreements cannot *per se* be held unenforceable because they are contrary to public policy).

118 Uniform Law Commission, *Premarital Agreement Act*, accessed

Under the UPAA, prospective spouses may contract premarital agreements on a wide array of matters so long as they are "not in violation of public policy or a statute imposing a criminal penalty."[119] Consequently, court attitudes towards prenuptials began to radically change in the 1990s to the extent that courts started treating them like ordinary contracts, often to the financial detriment of women.[120]

Based on empirical data, Gail Brod argues that premarital agreements increase the gendered distribution of wealth and earnings because they adversely affect women.[121] These agreements put women at the risk of increased economic inequality because they primarily carry the economic and social burden of divorce.[122] In *The Divorce Revolution*, Lenore Weitzman corroborates this impression by showing that men on average experience a 42% rise in their standard of living in the first year after a divorce, while women experience a 73% decline.[123]

With regard to the underlying financial motive, *mahr*-agreements thoroughly differ from prenuptials because the former are bargained to mitigate the adverse effects on women after divorce by ensuring their financial integrity through a one-time financial remuneration by their husbands. Therefore, the premise of stipulating a *mahr* contradicts the premise of a prenuptial. The former is executed because the contracting parties are aware that if it is not, the wife ends up without financial compensation upon divorce. On the contrary, the latter

March 10, 2019, https://www.uniformlaws.org/committees/community-home?CommunityKey=77680803-bd1c-4f01-a03b-64db132a35fa.

119 Uniform Premarital Agreement Act (UPAA), § 3 (a) (8).

120 The adverse effects for women resulting from the unquestioning enforcement of premarital agreements are predicated on the assumption that the *de jure* equality of women, manifest in their equal bargaining position as contracting partners, also implies their *de facto* social and economic equality; Gail F. Brod, *Premarital Agreements and Gender Justice*, 6 Yale Journal of Law and Feminism 229, 266 (1993).

121 Id. at 252.

122 Id. at 248–249.

123 Lenore J. Weitzman, *The Divorce Revolution: the unexpected social and economic consequences for women and children in America* 323 (Free Press 1985).

is usually executed because a husband, realizing that his wife might receive "too much" upon divorce, seeks to curb what she is entitled to.

The procedural formalities of contracting a prenuptial indicate that they serve to contemplate on the nature of spousal assets and determine ownership in the case of divorce. But this argument cannot convincingly be made for a *mahr*-agreement. Because spouses maintain their separate financial and legal identities when entering an Islamic marriage, the spousal assets need not be contemplated on in the first place. Of course, one could argue that premarital *mahr*-bargaining between a prospective Muslim husband and wife involves the mutual consideration of assets. But even then, their bargaining does not aim at mitigating an entitlement that is created for the wife as a legal consequence of marriage, but rather, attempts to strike a balance between what the husband is financially capable of conferring and what the wife will need in accordance with her social class, profession, and previous lifestyle.

The analogy to prenuptials is flawed for other reasons. In *Akileh*, a Florida court held that a *mahr*-agreement was antenuptial and enforceable because it had been executed in *contemplation* of marriage.[124] This echoes the UPAA which defines a prenuptial as "an agreement between prospective spouses made *in contemplation* of marriage and to be effective upon marriage."[125] But can a *mahr*-agreement be said to have been executed in contemplation of marriage? The husband in *Zawahiri* signed the *mahr*-agreement only two hours before the wedding ceremony.[126] This timing of executing *mahr*-agreements is indeed not the exception but rather the rule. While a prenuptial that is made just shortly before the wedding ceremony might not be considered unenforceable *per se*,[127] legal advice recommends

124 *Akileh v. Elchahal*, 666 So. 2d 246, 247 (Fla. Dist. Ct. App. 1996).

125 Uniform Premarital Agreement Act, § 1.

126 *Zawahiri v. Alwattar*, 2008-Ohio-3473, ¶ 23.

127 *In re Marriage of Murphy*, 359 Ill. App. 3d 289, 302, 834 N.E.2d 56, 67 (2005) (holding that the period of time between the execution of a prenuptial and the wedding ceremony is only one factor among many to be considered by the court); also, *In re Estate of Hopkins*, 166 Ill. App. 3d 652, 658, 520 N.E.2d 415, 418–19 (1988).

that spouses sign their prenuptial as much in advance as possible, but at least thirty days before a wedding.[128] In comparison, a *mahr*-agreement is arguably not in *contemplation* of marriage because it is most often executed during or only hours before the prospective spouses' wedding ceremony.

The parallel to premarital agreements is also inaccurate because premarital agreements become effective upon marriage.[129] However, in the case of a *mahr*-agreement, the marriage is effectuated with the husband's payment of the advanced portion (*muʿajjal*) of the *mahr*. Thus, a *mahr*-agreement is unlike a prenuptial in that the institution of Islamic marriage itself is, according to the legal majority view, contingent on the partial payment of the advanced portion of the dower. This logic applies even in the rare case that a bridal dower was not specified in the marriage contract because, as mentioned earlier, most Islamic legal schools assume that the husband, irrespective of his failure to specify a dower, will provide to his wife a fair dower (*ṣadāq al-mithl*). In other words, the husband's payment would merely be considered postponed, with the marriage nonetheless considered effectuated by his will to pay.

The flaws in the analogy between *mahrs* and prenuptials cannot be reduced to mere technicalities. Instead, they lead to real consequences, some of them adversely affecting women. One risk has often been taken for granted. That is, by creating the analogy to prenuptial agreements, claims to community property or equitable distribution might be defeated because prenups are usually made precisely to eliminate the possibility of alternative claims. Thus, where the court grants the argument that a *mahr*-agreement is prenuptial, it is less likely also to grant spousal claims under community property or equitable distribution.

The prenuptial analogy may also result in importing the assumption that the spouses should have had the choice not to choose a prenuptial. But as the *Chaudry* Court noted, the option to choose is unavailable when a *mahr*-agreement is entered in

128 Charles Douglas, 3 *New Hampshire Practice, Family Law* § 1.05 at 13 (Lexis Nexis 3d ed 2002).

129 Uniform Premarital Agreement Act (UPAA), § 4.

a Muslim-majority country such as Pakistan where alternatives to a "prenuptial" do not exist. Stipulating a *mahr* was the 'only choice' the spouses could make. The *Chaudry* Court ruled that the inability to choose among options was counter to New Jersey public policy and thus refused to enforce the *mahr*-agreement.[130] In other words, measuring the observation of a lack of alternatives against his home-grown expectations that there should have been alternative forms of financial remuneration, the judge concluded that the prenuptial was entered under compulsion and was thus unacceptable due to public policy concerns.[131]

US courts have yet to encounter a case in which a wife is claiming her *mahr* before and without a divorce. In 2004, the Berlin Kammergericht (KG) in Germany was faced with the question of whether a wife may claim her *mahr* without a divorce. That Court held that a wife acquires ownership over her *mahr* not when the parties are divorced, but when the marriage is contracted. Thus, she may demand the husband's payment of the deferred portion of her *mahr* at any time during the marriage.[132] The analogy to prenuptials might be difficult to sustain though, if such a case reaches a US court. That is not to say that prenuptials cannot theoretically include stipulations governing an ongoing marriage. However, courts have been somewhat reluctant to recognize causes of action in which a premarital agreement regulates an ongoing marriage.[133] The fear is that judicial interference into family life will increase spousal conflicts and present severe challenges with regard to enforcement.[134]

Another possible litmus test for the prenuptial analogy might arise from the problem of husband-(*ṭalāq*) as opposed to wife-initiated divorce (*khulʿ*). Under Islamic law, a wife's claim to an outstanding *mahr*-payment is usually forfeited when she

130 *Chaudry v. Chaudry*, 159 N.J. Super. 566, 571, 388 A.2d 1000, 1002 (App. Div. 1978).

131 Id. at 571.

132 Kammergericht, *Beschluss vom 06.10.2004 – 3 WF 177/04,* accessed March 2, 2019, https://openjur.de/u/271640.html.

133 Laura P. Graham, *The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage*, 28 Wake Forest Law Review 1037, 1043 (1993).

134 Id. at 1043.

initiates divorce proceedings.[135] In *Akileh v. Elchahal*, the wife's "Islamic expert" incorrectly testified that the wife's right to her *mahr* was sustained despite her filing for divorce.[136] Although it could seem particularly harsh or unfair to recommend that the court refrain from enforcing *mahr*-agreements when a divorce is initiated by the wife, the impression of inequity is contingent on the assumption that wives have no alternative legal recourse in the case of dismissal of their *mahr*-agreements. If community property and equitable distribution claims were taken into account separately, the concern about inequity would probably fade.

The construction of *mahr*-agreements as prenuptials is prone to producing bad law. The only similarities that minimally justify the analogy are that (1) both are executed roughly prior to marriage, and (2) that a *mahr*'s deferred portion (*muʾakhkhar*), similar to payments that might become due under a prenuptial, is customarily due in the event of divorce. Although both these types of financial arrangements are contracted in the "shadow" of marriage, they differ considerably in terms of their purpose, effect, motive, and even time of execution. Prenups tend to increase the financial burden of women after divorce. *Mahr*-agreements curb them. Prenups are made in contemplation of spousal assets in order to determine ownership in the case of divorce. *Mahr*-agreements are often made in the absence of alternative entitlements to a husband's assets. Prenups tend to be made at least a couple of days before a wedding, but preferably more than 30 days in advance. *Mahr*-agreements are almost invariably signed on the day of the wedding ceremony.

The analogy to prenuptial agreements presents a real danger because (1) the courts' understanding of prenups and the interpretive standards used for them do not easily lend themselves to *mahrs*, (2) the adverse effects of prenups tend to spill over to *mahrs*, and (3) the legal and cultural rationales underlying *mahr*-agreements are threatened to be obliterated

135 As previously noted, there are specified grounds based on which a wife can demand a divorce by court order (*tafrīq*) without forfeiting her *mahr*-payment.

136 *Akileh v. Elchahal*, 666 So. 2d 246, 247 (Fla. Dist. Ct. App. 1996).

so that Islamic marriage as such becomes quite meaningless. A more severe problem that arises from the prenuptial theory is that it invariably imports the logic that state community property or equitable distribution rules cannot simultaneously be applied.[137] It thus bears a significant risk for women by making alternative claims moribund.

ii. Theory 2: a *mahr*-agreement is a simple contract

The simple contract approach may be the most promising theory in terms of balancing out adverse effects on women and preserving their ability to make alternative claims under community property or equitable distribution. Unlike a premarital agreement, when decided that a *mahr*-agreement constitutes a simple contract, a wife will not automatically forfeit such claims. In addition, the simple contract theory has the advantage of fewer restrictions. It does not need to have been made either in contemplation of or prior to marriage. On the other hand, choosing to opt for the simple contract theory (under US federal or state law) mandates compliance with contract law requirements which include the "meeting of the minds," conscionability, and the absence of duress.

The simple contract-approach was embraced without reservations in *Odatalla v. Odatalla* (2002) where the New Jersey Superior Court held that:

> Clearly, the Mahr Agreement in the case at bar is nothing more and nothing less than a simple contract between two consenting adults. It does not contravene any statute or interests of society. Rather, the Mahr Agreement continues a custom and tradition that is unique to a certain segment of our current society and is not at war

137 *See* also Lindsey E. Blenkhorn, *Notes. Islamic Marriage Contract in American Courts: Interpreting Mahr Agreements as Prenuptials and their Effect on Muslim Women*, 76 Southern California Law Review 189, 208 (2002).

with any public morals.[138]

But *Odatalla* could be judged with relative ease because evidence was offered in the form of a videotape of the wedding ceremony showing that the husband made an offer to the wife freely and voluntarily and that the wife accepted the proposal with the same terms.[139] The requirements for the validity of the contract could thus be established without any uncertainty.

Obviously not all parties to a *mahr-agreement* would be able to provide videotape evidence to prove that their contract was entered freely, voluntarily, with a "meeting of the minds," and show that it was conscionable. In *Afghahi v. Ghafoorian* (2010), the husband claimed that the marriage contract was unconscionable because it was based on extreme inequity.[140] The husband stated that he had never possessed the financial assets that he committed to paying in the *mahr*-agreement. Failing to present more compelling evidence for ostensible inequity, the Virginia Court of Appeals refused the argument obliging the husband to pay the agreed-on 514 gold coins to his ex-wife.[141] It is difficult to tell whether the Court might not have enforced the *mahr*-agreement if the husband had come up with more compelling arguments that it was indeed based on severe inequity.[142]

The cases in which courts have applied the simple contract-theory are too few to make decisive statements about its potential implications. In *Odatalla*, *Afghahi*, and also *Aziz*,[143] the wives were able to claim their *mahrs* based on this theory.

138 *Odatalla v. Odatalla*, 355 N.J. Super. 305, 314, 810 A.2d 93, 98 (Ch. Div. 2002).

139 Id. at 311.

140 *Afghahi v. Ghafoorian*, No. 1481-09-4, 2010 WL 1189383, 4 (Va. Ct. App. Mar. 30, 2010).

141 Id. at 4. At the time the 514 Bahar-e Azadi gold coins had a value of $141,100; id. at 4.

142 Another possibility would be for the court to make use of the Islamic legal concept of the "fair dower" (*mahr al-mithl*) in such cases and determine a dower in line with husband and wife's social standing, profession, etc.

143 *Aziz v. Aziz*, 127 Misc. 2d 1013, 1013, 488 N.Y.S.2d 123, 124 (Sup. Ct. 1985) (holding that a *mahr*-agreement is a contract the secular obligations of which can be enforced).

When compared to the prenuptial analogy, the simple contract-approach seems preferable based on its outcome and because it is less tailored to a particular social situation and thus provides an interpretive framework that is more amenable.

Nevertheless, to qualify as a simple contract, a *mahr*-agreement will still have to satisfy the US contract law requirements. The theory thus reproduces some of the obstacles inherent in the prenup theory. Given the peculiar cultural format of *mahr*-agreements, mutual assent, offer and acceptance, and consideration can be particularly hard to prove in the absence of evidence that is not written in the marriage contract itself and court reluctance to admit parol evidence.[144] For instance, in *Obaidi v. Qayoum*, the Court held that there was no meeting of the minds on the essential terms of the contract because the husband Qayoum was supposedly unaware of the contract's terms until an uncle had explained them to him after the wedding.[145] Duress, too, can easily arise as an issue given that many *mahr*-agreements would be executed at the wedding ceremony only hours before the parties wed.

The overwhelming advantage of the simple contract theory is its non-interference into women's other claims to communal property. It, therefore, captures the nature of *mahr*-agreements more adequately in that those agreements are simply not made in consideration of communal or spousal assets and are generally based on the assumption that the spouses retain their separate financial identities.

iii. Theory 3: a mahr-agreement is a marriage certificate

In at least one case of Islamic divorce, a court ruled that a *mahr*-agreement is neither a prenuptial nor a simple contract, but rather a marriage certificate. This was in *In re Marriage of Shaban* (2001), a case that was peculiar in some

144 *See supra* note 79.

145 *In re Marriage of Obaidi & Qayoum*, 154 Wash. App. 609, 226 P.3d 787, 788 (2010).

ways. Here, it was the husband who argued for the validity of the government-issued *mahr*-agreement using the prenuptial theory. His insistence to have the bridal dower enforced was not accidental given that his wife would have been entitled to no more than 500 Piasters ($30). Yet, the Court did not grant the husband's argument and instead held that the *mahr*-agreement is a marriage certificate affirming the lower court's application of state community property law to the parties' assets.[146]

For women, a court's granting of the marriage certificate theory will result in a definite loss of the deferred portion of the *mahr*. This is only an advantage if one assumes that, as in *Shaban*, the enforcement of *mahr*-agreements and the application of state community property or equitable distribution are mutually exclusive. As argued in the previous sections, *mahr*-agreements should not generally be understood as superseding state property rules.[147]

In the *Shaban* case, the marriage-certificate theory prevailed because the California Court of Appeal was struggling with the unusual format of the *mahr*-agreement. It did not find the husband's argument that the *mahr*-agreement is prenuptial persuasive because the terms of the contract did not satisfy the statute of frauds.[148] Meanwhile, the Court did not allow the terms it found ambiguous to be clarified at trial by admitting parol evidence. That the Court was consternated by the *mahr*-agreement's format becomes apparent in the section where it states that "all three translations of the document provide far more information about the two witnesses to the wedding than they provide about any agreement of the parties." [149] The Court seemingly felt that a contract stipulating a monetary sum should look more like a "contract" in that its epistemic focus be on the financial transaction. But that misses the point entirely. Although

146 *In re Marriage of Shaban*, 88 Cal. App. 4th 398, 401, 105 Cal. Rptr. 2d 863, 865 (2001).

147 Also, *see* Lindsey E. Blenkhorn, *Notes. Islamic Marriage Contract in American Courts: Interpreting Mahr Agreements as Prenuptials and their Effect on Muslim Women*, 76 Southern California Law Review 189, 208 (2002).

148 *In re Marriage of Shaban*, 88 Cal. App. 4th 398, 401, 105 Cal. Rptr. 2d 863, 865 (2001).

149 Id. at 407.

a *mahr*-agreement indeed stipulates a financial deal, it is also more than that. That is, it is also a certification of the validity of the parties' marriage and frequently has an aesthetic appeal to spouses.

Going forward, *Shaban* is likely to function as a harmful precedent for Muslim wives getting a divorce. Under its theory, a *mahr*-agreement is considered void of any contractual obligations binding the husband. This is especially problematic given that a wife performed consideration of the contract by entering the marriage in the first place. Yet the problem with the marriage-certificate theory is more substantial. It fails to attribute any peculiar meaning to the gendered nature of Islamic marriage and the temporal and cultural situatedness of the *mahr* in the institution of marriage. Islamic marriage, under this theory, is mainly relegated to a cultural footnote without any real consequences. The process of translating Islamic marriage into the US legal system falls through here not because the features of Islamic marriage cannot adequately be imported into the US legal system but due to the marriage-certificate theory's denying any peculiarity to Islamic marriage. Instead, the approach forges the idea that the spouses' entering a *mahr*-agreement is equivalent to a Western-style marriage and even though they did stipulate a *mahr*, the application of state property rules is assumed to be better for them. The paternalizing assumptions, as well as the sense of cultural hegemony inherent in this approach, can hardly be overlooked.

b. Moving forward: identifying alternatives, enforcing mahr-agreements

i. Spouses

Make better mahr-agreements. Muslim community centers in the US have become increasingly aware of the problems that spouses might face concerning the enforcement of *mahr*-agreements in US jurisdictions. Responding to these challenges, some initiatives have sought to create awareness among Muslim

couples that US courts might be charged with adjudicating on bridal dowers in case of a future divorce and ensure the legal recognition of *mahr*-agreements by encouraging couples to add explanatory attachments to them.[150] In those, potentially ambiguous terms are clarified to account for the possibility that a family court might later have to judge on the enforceability of the *mahr*-agreement. Nonetheless, this is not an option available to all Muslim couples, especially not migrants or refugees who simply may not anticipate that their *mahr*-agreement would ever end up in an American courtroom. Lindsay Blenkhorn has claimed that "[all] Muslim women can create prenuptials, just as any other woman or man may."[151] However, her claim fails to take into consideration those women abroad who entered an Islamic marriage in a jurisdiction where a prenuptial may have been unavailable due to legal or cultural reasons.

These suggestions are no cure-all remedies. They do not necessarily translate the cultural implications of Islamic marriage. But they facilitate the recognition of *mahr*-agreements in the US legal system by attempting to frame them in legal terms that are legible and more readily accessible to the judiciary.

ii. Imams and other religious authorities

Insist on spouses' stipulating better mahr-agreements. As wedding officiants and upholders of Islamic marriage, religious authorities assume a central role and responsibility in ensuring that the spouses are aware of the legal consequences a *mahr*-agreement will have on them and all the potential obstacles those agreements may face in court. That creates a special duty to inform and provide adequate counseling to Muslim women

150 *See*, for instance, Iman Center, Islamic Marriage Contract, accessed March 16, 2019, http://iman-wa.org/cms/wp-content/uploads/2009/12/IMAN_Marriage_Contract.pdf; also *see* Kahf.net, Prenuptial Agreement, accessed March 16, 2019, http://monzer.kahf.com/marriage/PRENUPTIAL_AGREEMENT_FORM_REVISED_FEB_2008.pdf .

151 Lindsey E. Blenkhorn, *Notes. Islamic Marriage Contract in American Courts: Interpreting Mahr Agreements as Prenuptials and their Effect on Muslim Women*, 76 Southern California Law Review 189, 208, footnote 108 (2002).

who bear the primary financial burden in case the court does not honor such agreements.

iii. Lawyers and political activists

Consider creative strategies for ensuring enforcement. In *Zawahiri v. Alwattar*, Alwattar argued that the trial court's denial to uphold her *mahr*-agreement violated her right to equal protection.[152] She stated that "the trial court refused to enforce the marriage contract because she is Muslim," contending that the Court would have upheld a non-Muslim marriage contract.[153] The Court rejected her argument, shielding the trial court by referring to the Establishment Clause and stating that the contract was not valid as a prenuptial.[154] While precise strategies for action cannot be fleshed out here, it is worthwhile considering whether claims based on the violation of Muslim women's equal protection rights can be made more persuasively. The court's regular dismissal of *mahr*-agreements does give rise to the impression that the legal system is susceptible to more systemic and cultural biases against Islamic laws, the primary victims of which, coincidental or not, are Muslim women.

iv. Courts

Consider enforcing mahr-agreements as simple contracts under Islamic law or defer to Islamic arbitration courts. Implementing *mahr*-agreements by applying Islamic law under comity would arguably be an effective way to ensure the parties' contractual obligations are upheld in accordance with spousal intent at the time the marriage was contracted and in line with Islamic legal tenets.[155] Yet even where the enforcement of *mahr*-agreements under Islamic law is legally possible, the question of whether spousal claims under state property rules exist requires

152 *Zawahiri v. Alwattar*, 2008-Ohio-3473, ¶24.

153 Id. at ¶26.

154 Id. at ¶26.

155 The next section shows that this option has been severely curbed with the passing of the foreign law ban in 32 state jurisdictions.

further consideration. Should such claims be considered mutually exclusive with bridal dowers or in addition to them? Case law at least partially offers support to the idea that bridal dowers and state property rules may be reviewed together and balanced against each other. In *Chaudry v. Chaudry*, the Court used a nexus-test to balance *mahr*-claims against additional claims that might exist under state property rules:

> where there is a sufficiently strong nexus between the marriage and this State e. g., where the parties have lived here for a substantial period of time a claim for alimony and equitable distribution may properly be considered, in the court's discretion, after a judgment of divorce elsewhere, under N.J.S.A. 2A: 34-23, even though such relief could not have been obtained in the state or country granting the divorce.[156]

The Chaudrys had been married in Pakistan. After moving to the US, the husband obtained a divorce judgment back in Pakistan. The wife argued that in addition to the *mahr*, she was entitled to a claim for equitable distribution under New Jersey state law. The Court denied her request on the basis that a sufficient nexus between the marriage and the state of New Jersey did not exist because she had only resided in New Jersey for about two years before returning to Pakistan.[157]

The nexus test's achievement, though, was an assessment of whether the spouses' move from Pakistan to New Jersey and their residing there created an additional entitlement for alimony and equitable distribution. It presumed the gradual acculturation of the spouses to a jurisdiction that might be at odds with their home jurisdiction. The nexus test implied that the more enduring the acculturation (or, the more prolonged the stay), the more sustainable spousal claims under state property rules become, even if that kind of relief does not exist in their jurisdiction of

156 *Chaudry v. Chaudry*, 159 N.J. Super. 566, 577, 388 A.2d 1000, 1006 (App. Div. 1978).

157 Id. at 577.

origin. It arguably serves as a useful instrument to counterbalance state property rules against *mahr*-payments and could provide the grounds for a more equitable distribution of marital assets in cases where the material life circumstances after contracting Islamic marriage and after the spouses' migration to the US changed significantly.[158]

An alternative and more systemic remedy would be based on the British model of Islamic arbitration courts (so-called *sharīʿa*-courts). That model was enacted in 1996 under the U.K.'s Arbitration Act in order to guarantee parties that their disputes be resolved in whatever manner they seek to address them.[159] State courts cannot interfere with dispute resolutions in these tribunals except if the Act sanctions such interference.[160] Mona Rafeeq argues that Islamic arbitration tribunals could be furnished in the United States in a manner that advances American as well as Islamic ideas of justice.[161] She suggests that by applying certain restrictions, Islamic arbitration tribunals can be prevented from abusing their authority or making judgments that would be at odds with American secular notions of justice.[162] But, as she also notes, that would first require a *meaningful* public debate about Islamic laws in the United States.[163]

In Texas, one Islamic arbitration tribunal was established in 2013. Besides divorce and family matters, the tribunal arbitrates other affairs such as business disputes.[164] The establishment of the tribunal was accompanied by a media outcry that rekindled the public fear of Islamic laws. In the absence of a meaningful debate about how the US judiciary can accommodate Islamic laws and how many of the values embedded in Islamic legal

158 *See* page 92 for a model that shows how bridal dowers can be balanced against state property rules in *mahr*-litigation; *Figure 1.*

159 Mona Rafeeq, *Rethinking Islamic law arbitration tribunals: are they compatible with traditional American notions of justice*, 28 Wisconsin International Law Journal 108, 127 (2010).

160 Id. at 127.

161 Id. at 111.

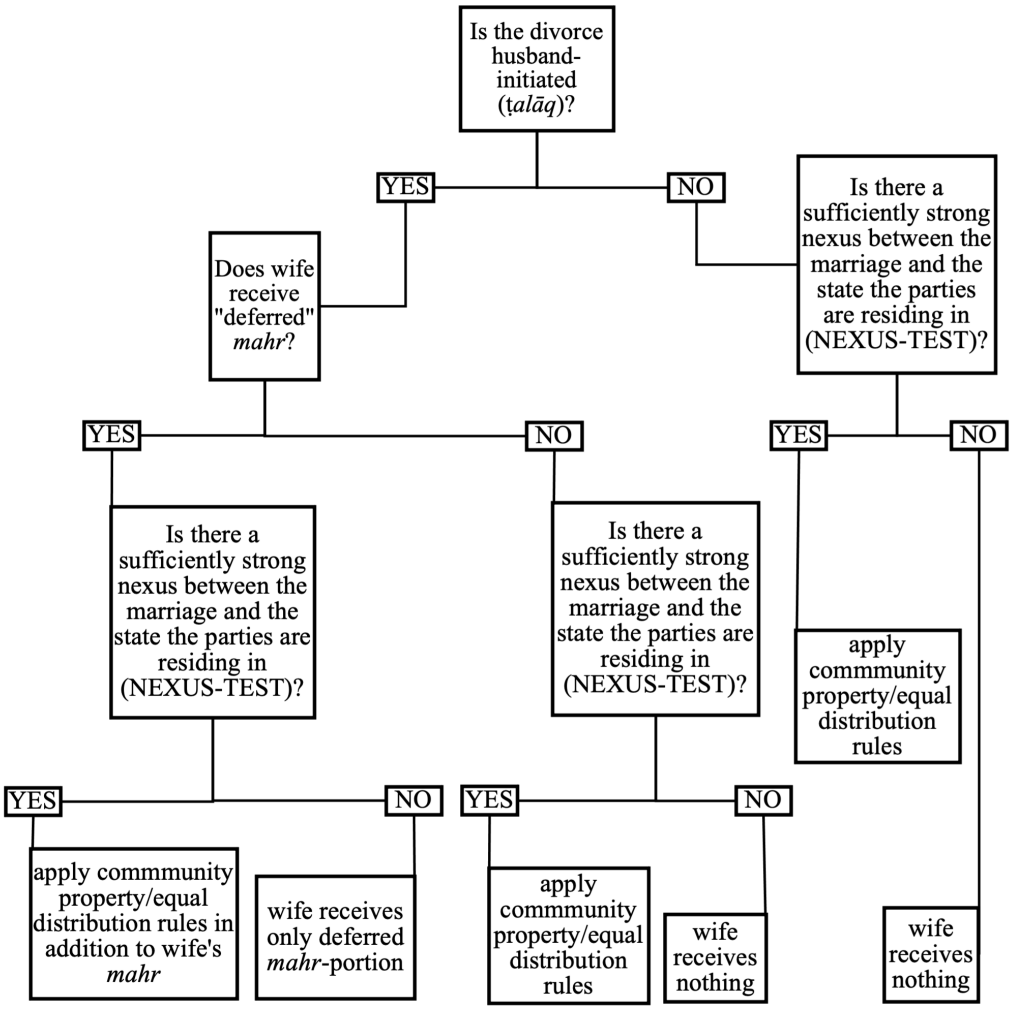
162 Id. at 128.

163 Id. at 110.

164 Islamic Tribunal, accessed March 17, 2019, https://www.islamictribunal.org.

culture could easily be reconciled with the ambitions of the US legal system, the idea of Islamic arbitration courts remains difficult to imagine. At the same time, there is a much broader liberal value at stake that is not merely or at all about Islamic laws, but rather about the citizen's ability to choose in what manner and under what laws she wants to execute contracts, respecting the peculiarity of her choice, and the human dignity that is tied to that choice.

Figure 1: Possible Tests For Mahr-Litigations



V. New Obstacles on the Horizon: *Mahr*-Agreements in the Shadow of Anti-Sharīʿa Bills

In 2012, the Kansas Senate voted to adopt Bill No. 79. Section 4 of the bill specifies that a contract which is partially or fully governed by a foreign law, legal system, or legal code will be considered void and unenforceable if the substantive or procedural law that would be applied in a dispute between the parties violates Kansas' public policy. Such public policy violation is deemed to occur where the contracting parties would not be granted the fundamental liberties, rights, and privileges that they hold under the United States and Kansas laws.[165]

Kansas was not the only state to adopt what is usually referred to in the literature as a "foreign law ban." Thirty-one other states have passed similar bills, most of them banning either reliance on or enforcement of foreign laws.[166] These bills seek to eliminate the court's discretion to decide whether a specific matter would create a public policy concern by transforming certain groups of foreign laws, particularly Islamic laws, into a general public policy concern.

That Islamic laws were at the heart of legislators' concerns becomes apparent when looking to the statutory texts and the legislative history surrounding the passing of the anti-foreign law bills. In Oklahoma, the House passed the 2010 Amendment bill to the Oklahoma constitution which explicitly singled out Islamic (Sharia) law as its intended target:

> [...] The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or *Sharia Law*. The provisions of this subsection shall apply to all cases before the

165 2011 Kansas Senate Bill No. 79, Kansas Eighty-Fourth Legislature 2012 Regular Session (May 15, 2012).

166 Faiza Patel, Matthew Duss, and Amos Toh, *Foreign Law Bans. Legal Uncertainties and Practical Problems*, Brennan Center for Justice, Center for American Progress 1, 18 (May 2013) (clustering states which passed a foreign law ban into four distinct groups based on the ban's scope).

> respective courts including, but not limited to, cases of first impression.[167]

In its judicial review of the resolution in *Awad v. Ziriax*, the Court of Appeals of the Tenth Circuit struck down the Amendment arguing it violated the Establishment Clause.[168] A similar situation prevailed in Idaho. But there, after the legislator's bill had been overruled by the court for singling out "Sharia law," the House eliminated the explicit mention of "Sharia law" enacting its practically identical foreign law ban in the form of House Bill No. 419.[169]

In Kansas, the bill was framed as a matter of citizens' and especially women's rights under US and Kansas laws. This was made clear during the Senate debates. Senator Susan Wagle encouraged members to vote for the bill in order to protect citizens from the "inhumanness" of Islamic laws. On the Senate floor, she explained that "if you vote to not adopt (the bill), it's a vote against women" because "[t]hey stone women to death in countries that have Sharia law."[170] Thus, voting for the Kansas bill was, one would infer, supposedly a matter of advancing (Muslim) women's rights.[171]

The Brennan Center for Justice predicts that foreign law

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167 Enrolled House Joint Resolution 1056, 52nd Legislature, 2nd Regular Session, §1(C), (Oklahoma 2010), accessed March 9, 2019, https://www.sos.ok.gov/documents/legislation/52nd/2010/2R/HJ/1056.pdf.

168 *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012).

169 House Bill No. 419, Legislature of the State of Idaho, accessed February 24, 2019, https://legislature.idaho.gov/sessioninfo/billbookmark/?yr=2018&bn=H0419.

170 *Groups urge veto of anti-Sharia law bill*, Lawrence Journal-World, accessed February 25, 2019, http://www2.ljworld.com/news/2012/may/18/groups-urge-veto-anti-sharia-law-bill/.

171 Such gendered discourses centering on the protection of Muslim women from the inhumane legal and social practices they face in Muslim countries are not a novel phenomenon; Edward W. Said, *Orientalism*, 207 (Vintage Books 1978) (showing that in Orientalist representations women are usually presented with "unlimited sensuality, […] more or less stupid, and above all […] willing"); Lila Abu-Lughod, *Do Muslim Women Need Saving*, 32 (Harvard University Press 2013) (arguing that the stigmatization of Muslim women as oppressed in Laura Bush's radio address on November 17, 2001 justified US military intervention in Afghanistan and the War on Terror).

bans will create significant disruptions in family life, particularly in the realms of marriage licenses, prenuptial agreements, adoption agreements, divorce decrees, and child custody orders which are likely to be held non-enforceable by state courts.[172] The immediate effects of the ban became apparent shortly after the enactment of the Kansas ban. The District Court of Johnson County in Kansas was confronted with the case of *Soleimani* where the wife asserted that her *mahr*-agreement qualifies as a prenuptial. The Court dismissed the argument due to lack of evidence produced by the wife's counsel. But the *dictum* states that if the court were to interpret the *mahr*-contract, it would essentially create "a remedy under a contract that clearly emanates from a legal code that may be antithetical to Kansas law."[173] Thus, regarding marriage contracts under Islamic law, the Brennan report might understate the impact of foreign law bans because, as this paper intended to show, such contracts have historically been challenged by US courts and are now even less likely to be honored.

Wagle's claim is somewhat ironic. By nature, *mahr*-agreements defy the rationales of state property rules because they are intended to secure a woman's livelihood after divorce without consideration of spousal assets. They create predictability, certainty, and fairness because women know what they are entitled to in the case of divorce. The *mahr* is not only central to Islamic marriage, but its enforcement constitutes the primary Islamic legal recourse for women in the absence of alternative claims that can be made to a husband's financial assets when a divorce has been granted. When Wagle claims that not voting for the Kansas Bill is a "vote against women," she underestimates the undue effects the Kansas ban will have on the lives of Muslim women because they are being deprived of that recourse to enforce the contractual obligations their husbands had agreed to. Particularly because these women have already

172 Faiza Patel, Matthew Duss, and Amos Toh, *Foreign Law Bans. Legal Uncertainties and Practical Problems*, Brennan Center for Justice, Center for American Progress 1, 11 (May 2013).

173 *Soleimani v. Soleimani*, No. 11CV4668, 31 (Johnson County Dist. Ct. 2013).

performed their contractual obligations by entering marriage. Refusing to implement *mahr*-agreements systematically threatens to permanently unsettle the ways in which Islamic marriage is crafted as an institution in which the bargaining powers of husband and wife maintained in marriage depend on and are equalized precisely because a dower is stipulated prior to wedlock.

Conclusion

This paper was dedicated to scrutinizing the theories US courts have employed to construe *mahr*-agreements and the adverse effects these constructions have on Muslim women. Although no approach has yet assumed normative status, the analogy to prenuptials has been applied most often due to the ostensible similarities that prenuptials have with *mahr*-agreements. But the analogy is not persuasive because apart from being roughly stipulated prior to a wedding, a *mahr*-agreement differs significantly in terms of intent, effect, motive, and even its precise time of execution. Unlike prenuptials, *mahr*-agreements are *not* made in contemplation of marriage, as is defined by US law, nor do they increase the financial burden on women upon divorce. Most importantly, the analogy to prenuptial agreements risks forfeiting women's claims under state property rules because prenuptials are most commonly made in order to avoid spousal division of assets in case of a divorce.

The simple contract theory is a more promising candidate for enforcing *mahr*-agreements. Under that theory, *mahr*-agreements are subject to less scrutiny with regard to their particular purpose or time of execution. Yet, providing proof that *mahr*-agreements satisfy US contract law requirements can create a burden for those seeking enforcement because not only the manner in which *mahr*-agreements are entered, but also their physical format, can easily create doubt as to whether they were contracted with mutual assent, offer and acceptance, and with spousal consideration. Where there is no videotape evidence from the wedding ceremony such as in *Odatalla*, a

husband's claim that the contract was entered under duress or with ignorance has the potential to be granted by the court.

The marriage certificate theory carries no conceivable advantage, except if a woman seeks to prevent the contractual obligations in a *mahr*-agreement from being enforced by the court. It denies peculiarity to the institution of Islamic marriage by upholding it merely as a cultural practice without any hard consequences.

Under these theories, Muslim women's prospects of getting their *mahr*-agreements enforced by a US court are dire. Although facially neutral, each theory tends to reinforce substantive inequality between men and women by producing effects that are almost exclusively detrimental to women. In addition, gendered inequality is also entrenched in the legal obstacles that women encounter in *mahr*-litigations. At least some of these obstacles may be resolved by the courts. For instance, the court's anxiety to violate the Establishment Clause by getting entangled in religious interpretations is often unfounded. On the one hand, under FRCP 44.1, the court is granted extensive liberties to make use of parol evidence. Thus, where the court first determines what the ambiguous terms in a *mahr*-agreement are and then hears expert witnesses clarify these terms, such contracts are not necessarily being rewritten. On the other hand, instead of religious interpretations that the court sometimes feels it must judge on, it is most often the sincerity with which spouses contracted a *mahr*-agreement that should be part of the court's consideration of whether such contracts are enforceable.

This paper also meant to show that the constructions of *mahr*-agreements, and their regular dismissal, directly impact the institution of Islamic marriage by uprooting the ways in which conceptions of gender and authority in these marriages have traditionally been configured. The construction of *mahr*-agreements, whatever theory the courts avail themselves of, creates precedents to which other courts, lawyers and Muslim couples will look to in *mahr*-litigations. The enforcement problems that pertain to the theories that *mahr*-agreements are prenuptials, simple contracts, or religious marriage certificates

currently convey the message that *mahr*-agreements are unlikely to be honored by courts. The foreign law ban, by casting doubts on whether courts should at all tend to such agreements, reinforces that impression. Thus, the sense that *mahr*-agreements are unlikely to be upheld by US courts increases the real-time bargaining power of Muslim husbands in marriage to the detriment of women because the partners' bargaining abilities are designed to rest on the predictability that a *mahr* will be due in case of unilateral husband-divorce (*ṭalāq*). Against the backdrop of a growing epistemic certainty that *mahr*-agreements have little to no value in the American courtroom, the lives and livelihoods of Muslim women become more disenfranchised and more susceptible to husband-initiated divorce.

Thinking of *mahr*-enforceability in dynamic terms, one should account for how parties to *mahr*-litigations may respond if such agreements were more regularly enforced. If that were the case, women could be induced to negotiate higher *mahrs*. But that argument is discounted by the fact that women currently ending up in *mahr*-litigations often do not seem to have assumed that their *mahr*-agreement would not be enforceable upon divorce. Therefore, standardized enforceability would not necessarily change how women approach *mahr*-negotiations. Things are different for men, though. Because the *mahr*-litigation market currently sends out mixed signals with a tendency towards non-enforcement, certitude that such agreements are enforceable would likely induce men to more carefully consider whether they can afford such agreements. Such certitude arguably could make men want to avoid such contracts, which might make women more seriously consider other options such as state property rules. These arguments, however, assume that enforceability of a *mahr*-agreement on US soil is something the parties can anticipate when they get married and would thus exclude Islamic marriages that are concluded without any knowledge or anticipation that the parties will one day find themselves before a US court.

There is a more disquieting problem underlying the translation of *mahr*-agreements into the US legal system. The

predominant construction of *mahr*-agreements as prenuptials presumes similarity between *mahrs* and prenuptial agreements where there is in fact little. By imposing the prenuptial framework onto *mahr*-agreements, the peculiarities of these contracts tend to be assimilated within a legal philosophy that seemingly defines itself in opposition to and as being incapable of accommodating the needs of the most vulnerable in society. In this process of assimilation, Islamic marriage becomes virtually unrecognizable and meaningless because the very reasons for spouses choosing this particular form of matrimony are relegated into a cultural footnote.

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Case Brief :: Islamic Marriage and Divorce in English Law: On *Her Majesty's Attorney General v. Nasreen Akhter & Anor., Fatima Hussain & Southall Black Sisters intervening*

Thomas Francis

Abstract

This brief considers the February 2020 judgment of the Court of Appeal of England & Wales in Akhter - v - Khan, an appeal brought by the Attorney General against the decision at first-instance to grant the petitioner wife, Akhter, a decree nisi, or provisional decree of divorce. The decision of the Court of Appeal was against the backdrop of the Law Commission holding a public consultation into the status at law of certain 'religious-only' marriages (including Islamic weddings) and whether, absent a contemporaneous or succeeding civil marriage, they are to be regarded as void (entitling petitioners to ancillary relief, such as spousal support) or 'non-marriages'.

In England and Wales, a legally valid marriage or civil partnership can end only by death or dissolution by court order. Where both spouses are still alive, the usual process of dissolving a marriage is by divorce. One or other spouse files an application under s.1 of the Matrimonial Causes Act 1973 for a *decree nisi* that the marriage has "*broken down irretrievably*"[1]. If admitted or otherwise unopposed, the application moves forward as an undefended suit and after 6 weeks can be converted into a *decree absolute*, thereby dissolving the marriage[2]. If contested, the application remains valid but proceeds to a court hearing. A valid divorce entitles a party to apply for financial remedy orders under the 1973 Act[3]; needless to say, such entitlements do not arise where there had never been a legally valid marriage to dissolve.

On 14 February 2020, the Court of Appeal of England and Wales (Sir Terence Etherton MR, Lady Justice King DBE and Lord Justice Moylan) gave judgment in favour of the Attorney General in her appeal against the decision of the High Court to grant a *decree nisi* with respect to the purported marriage in December 1998 ('the 1998 ceremony') of Nasreen Akhter and Mohammad Shabaz Khan[4]. The 1998 ceremony, a *nikāh* or Islamic wedding, had taken place in London and been conducted by an *imam* in the presence of witnesses, including Miss Akhter's father as authorized agent or *walī* (though the marriage certificate bearing his signature was not produced until 2006). At the first-instance hearing, the judge, Mr. Justice Williams, found that at the time of the 1998 ceremony the parties were aware that without a subsequent civil wedding they would not legally be recognized as married. He also found that the parties had agreed to follow their *nikāh* with a valid civil ceremony, but that such a ceremony never took place, despite Miss Akhter raising the issue with Mr Khan on a number of occasions. The couple subsequently had four children and, at some point, moved to Dubai before separating in 2016; on 4 November of the same

1 Matrimonial Causes Act of 1973, s.1(1)
2 Crime and Courts Act of 2013, c. 22
3 Matrimonial Causes Act of 1973, s.25
4 *HM Attorney General v Akhter & Ors* [2020] EWCA Civ 122, [2020] WLR(D) 95

year Akhter petitioned the court for a divorce.

As first pleaded, Akhter's claim relied on the 1998 ceremony to establish a legal marriage between the parties. However, by the time the matter came to trial, her case before the court was that, although the 1998 ceremony had been a *nikāh* and was thus not legally valid unless succeeded or accompanied by a civil or other wedding at or in "*approved premises*"[5], the court could rely on the presumption that a second, legally valid marriage had taken place when the couple were living in Dubai. In the alternative, Akhter argued that she was entitled to a *decree* on the basis that the marriage was null and void for want of formality under s.11 of the 1973 Act rather than being a (legally irredeemable) 'non-marriage'. By contrast, Khan asserted that the *nikāh* was of no legal effect by itself and that, absent any succeeding civil wedding (as the evidence appeared to demonstrate), the parties had never validly been married. In his judgment, Judge Williams rejected Akhter's argument on the presumption of a second ceremony. However, the judge found that the 1998 ceremony, when considered alongside her human rights claims under Article 8 of the European Convention on Human Rights as transposed into English law[6], could be seen "*… as an attempt to comply with the formalities required in English law to create a valid marriage…*"[7]. Adopting this "*more flexible*" approach, the judge concluded that the 1998 ceremony fell within the scope of s.11 – providing for voided marriages rather than 'non-marriages' – and thus entitled Akhter to the decree sought (and to potential 'ancillary relief', such as financial support).

By the time the case came before the Court of Appeal, Akhter and Khan had reached a settlement and thereby ceased to participate in the appeal. The Attorney General, however, had already been granted leave to appeal, and the Court of Appeal also granted leave to participate in the proceedings to Fatima

5 The Marriage Act of 1994

6 The Petitioner had also pleaded a breach of her rights under Articles 12 and 14 and Article 1 of the First Protocol ("A1P1") of the ECHR

7 *Akhter v Khan (Rev 4)* [2018] EWFC 54 (31 July 2018), [2019] Fam 247

Hussain, a petitioner in separate nullity proceedings, and to the Southall Black Sisters, a not-for-profit focusing on domestic violence, immigration issues and forced marriage. After hearing from counsel for the AG, for Miss Hussain and for the Southall Black Sisters, the Court concerned itself with two issues: (1) whether there are ceremonies or other acts that do not create a marriage, even a void marriage, within the scope of s.11 of the 1973 Act; and (2) if there are, whether, *pace* Mr Justice Williams, the 1998 ceremony was one such act (and thus the *decree* wrongly awarded).

By way of background, the Court of Appeal noted in its judgment that the Law Commission of England and Wales, the independent statutory body that reviews the law and recommends reforms, had since 2019 hosted an open consultation on the law governing how and where couples may marry, concerned by "*the perceived rise in religious-only marriages… without legal status*"[8]. (The Law Commission has said that it will publish its recommendations later this year.) To have legal status in England and Wales, a religious marriage other than according to the rites and/or ceremonies of the Church of England, Church in Wales, Jewish or Quaker marriage must take place ("*be solemnized*") in a registered building[9]. As such, the validity in civil law of a 'valid Islamic wedding' is conferred by its non-Islamic component: a contemporaneous or subsequent civil marriage in a registered building. Echoing the Law Commission's concerns – that the parties to such 'non-marriages' "*have no protection in the event of the relationship breaking down*" – the Southall Black Sisters argued that the "*total non-recognition [of such 'marriages']… operates to the detriment of women and children*" and that the very concept in law of 'non-marriage' is discriminatory to those with religious-only marriages, including many Muslims.

That notwithstanding, the Court of Appeal concluded that the question of whether a person is recognized by the state as being legally married "*should be capable of being easily as-*

8 Law Commission, "Getting Married: A Consultation Paper on Weddings Law," Consultation Paper No 247 (2020), p. 13

9 The Marriage Act of 1949, s.44

certained" (by implication without the need for the Court to rely on or entertain a 'presumption' in law or fact). Proceeding on this basis, the Court reversed the 'pragmatic' decision of Judge Williams and re-asserted the 'orthodox' rule(s) on the recognition of (certain) religious marriages under English law. Placing emphasis in its reasoning on the public interest in upholding the formal requirements of a valid marriage as being necessary to the legibility of such marriages in the eyes of the state, the Court of Appeal held that the 1998 ceremony – despite the long subsequent period in which the *decree* parties held themselves out as husband and wife – was a non-qualifying ceremony under s.73 and thus a 'non-marriage'. Refusing to apply by analogy the importance placed on the intention of the parties to follow the 1998 ceremony with a civil wedding (as, say, in the law of contract), the Court held that the *nikāh* had been in non-approved premises, in the absence of a (necessary) authorised person and had not been preceded by a judicial notice. Finally, in regards to Akhter's human rights claims, the Court further held that Judge Williams was wrong to place reliance on the 'horizontal' effect of Art. 12, the right to marry and found a family (i.e. that the right contained no implied right also to divorce); and wrong to find that to deny Akhter the *decree* would be a breach of her rights under Art. 8.[10]

It is unclear whether the respondent interveners – Miss Hussain and the Southall Black Sisters – have been granted leave to appeal to the United Kingdom Supreme Court. Absent such a hearing, the law in this area has been clarified even if the practical result may be, as the interveners argued, an increase in applications on the part of prospective Muslim divorcées to the Islamic Sharia Council or similar organizations. Any change to the position as laid down by the Court of Appeal is likely to turn on the conclusions of the Law Commission's consultation and on the passing, if any, of new legislation in this area.

10 The EWCA also found that a petition for a decree of nullity was not an action "*concerning children*" for the purpose of engaging Art. 3 of the UN Convention on the Rights of the Child as it concerned the status of the wedding ceremony.

Student Notes

Abstract

Student Editor Cem Tecimer (SJD Candidate, Harvard Law School) translates the decision of Turkey's highest administrative appellate court to annul a 1934 presidential decision by Kemal Ataturk to convert Aya Sofya into a museum.

Student Editor Ari Schriber (PhD Candidate, Near Eastern Languages & Civilizations Department at Harvard University) presents historical reflections on Plague, Quarantine, and Islamic Law in Morocco.

Student Editor Limeng Sun (JD candidate, Harvard Law School) analyses the 2017 Xinjiang Uyghur Autonomous Region Regulation on De-Radicalization.

Recent Case: the Turkish Decision on Hagia Sofia

Cem Tecimer (Harvard Law School)

Case Summary

On July 2, 2020, a division of Turkey's highest administrative appellate court unanimously annulled a 1934 presidential decision by Kemal Ataturk, founding president of Turkey, converting Hagia Sophia (tr. Aya Sofya) into a museum. The Court reasoned as follows: the companion law to Turkey's secular Civil Code had provided that the old (Islamic) law would apply to *waqfs* (endowments) established before the new Civil Code came into force. The Hagia Sophia was a mosque, the Court found, that constituted part of Fatih Sultan Mehmed's (aka Mehmed the Conqueror) *waqf*, and under the applicable law at the time, it was forbidden to alter the status of *waqf* property via administrative decisions. The Court therefore ruled that the Cabinet Decision of 1934 had unlawfully changed the status of *waqf* property. The Court struck down the Cabinet Decision of 1934, thus paving the way for restoring Hagia Sophia's status as a mosque for worship.

Days later, on July 10, 2020, Recep Tayyip Erdogan issued a decision based on the court ruling, restoring its status as a mosque open to worship and transferring its maintenance to the country's Presidency of Religious Affairs. Following a Turkish administrative court ruling that revoked an earlier administrative decision (1934) converting the mosque into a museum, President Erdogan of Turkey was expected to restore Hagia Sophia's status as a mosque. Upon his decision to restore the site's status as a mosque open to worship, Erdogan personally inspected the site and the preparations to have it ready for the Friday prayer on July 24, 2020. The government quickly named 3 imāms, one a professor of religious studies, for Hagia Sophia. On July 24, 2020, Erdogan, accompanied by top government officials and politicians, participated in the first Friday prayer at the site after

a 86-year hiatus where he recited passages from the Qur'ān. 350,000 people are estimated to have been in attendance.
Following is an English translation of the entirety of the Council of State's Court Decision No: 2020/2595 in the above summarized Matter No: 2016/16015.

Translation

Plaintiff: [Redacted]

Counsel: [Redacted]

Respondent: [Redacted]

Counsel: [Redacted]

Matter: The Plaintiff asks that the Cabinet Decision—dated 11/24/1934 and numbered 2/1589— concerning the conversion of the Hagia Sophia Mosque into a museum be annulled, on which the decision of the 1st Regional Directorate of the Prime Ministry's Directorate General of Foundations— dated 10/19/2016 and numbered 27882—to deny plaintiff's request to the Prime Ministry that Hagia Sophia be reopened to worship—dated 08/31/2016—is based. Plaintiff's Contention: Plaintiff requests that the Cabinet Decision of 1934 be annulled, and asserts accordingly that the signatures under the Cabinet Decision of 1934 be submitted to a graphology test; that the Decision was not published in the Official Gazette and submitted to the Council of State for inspection, in contravention to Article 52 of the Turkish Constitution of 1924; that some of the ministers whose signatures appear under the Decision are proven by parliamentary minutes to have been outside of Ankara at the time of the Decision; that Hagia Sophia's deed mentions the word "mosque" and not "museum" and that it is not described as a museum on UNESCO's official website; that Hagia Sophia, as a *waqf* property, needs to be used in accordance with its foundation charter [*waqf*iyyah; tr. vakfiye]; that the will of the endower is being disregarded; and that there is no decision taken to assign Hagia Sophia to the Ministry of Culture and Tourism.

Respondent Government Agency's (no longer active) Defense: Respondent requests that the case be dismissed on the grounds that there can be no litigation years later against a Cabinet Decision put into effect in 1934; that the timing of the suit is late; that the Plaintiff, from time to time, applies to the Prime Ministry and other agencies regarding Hagia Sophia and that the application here is identical to their previous one; that there were various cases against the Cabinet Decision in question and that a previous case by the Plaintiff was dismissed and that decision had become final; that there exists a final judgment on the matter; that the Hagia Sophia Mosque is registered under the *waqf* charter of Mehmed II son of Murad II dated 1470, in lot no. 7, block no. 57, section no. 57, as "The Honorable Mosque of Grand Hagia Sophia inclusive of a tomb, properties rented out, a clock-house, and a madrasa" and that said *waqf* is a registered *waqf* with its own legal personality governed and represented by the Directorate General of Foundations; that the Cabinet is the highest administrative decision-making body of government to make general administrative decisions; that the Cabinet is authorized to make any administrative decision as long as it is based on a law and does not contravene the Constitution and laws; that altering Hagia Sophia's status and manner of use falls under the executive's discretion; that the Cabinet may make a decision to that end at any time pursuant to national and international circumstances and our domestic legal framework; that the allegation that the signatures under the Cabinet Decision are forged is false.

Council of State Investigating Judge's Opinion: Is of the opinion that the Cabinet Decision in question be annulled. Council of State Prosecutor's Opinion: Plaintiff asks that the Ataturk signature under the Cabinet Decision dated 11/24/1934 and numbered 2/1589 concerning the conversion of the Hagia Sophia Mosque into a museum be examined at a criminology laboratory and annulled.

It has come to our attention that, before the instant case, a prior case by the Plaintiff with the same request was rejected by the Tenth Chamber of the Council of State in its decision

dated 03/31/2008 and numbered E:2005/125, K:2008/1858; and that said decision was upheld, with a different reasoning, by the Council of Chambers of Administrative Matters in its decision dated 12/10/2012 and numbered E:2008/1775 and numbered K:2012/2639; and that Plaintiff's request for revision of decision was denied by the decision dated 04/06/2015 and numbered E:2013/3803, K:2015/1193.

Thus, it must be accepted that Plaintiff must have been notified of the Cabinet Decision dated 11/24/1934 and numbered 2/1589, at the latest, by the time the aforementioned case was commenced, and since there have not arisen any novel legal circumstances that would give rise to a right to commence a late legal action, there is no possibility to proceed with the case due to the statute of limitations.

As for the substance of the matter:

After examining the case file, it is understood that the immovable consisting of 2 hectares and 6644 m2 in the City of Istanbul, District of Eminonu, Cankurtaran Neighborhood, Bab-i Humayun Street, in lot no. 7, block no. 57, section no. 57, which includes the Hagia Sophia Mosque, was registered in the name of the Fatih Sultan Mehmet Waqf on 11/19/1936; that the Ministry of Education had requested, through its letter dated 11/04/1934 and numbered 94041, that the Hagia Sophia Mosque, a unique architectural and aesthetic monument, be converted into a museum, the shops belonging to the *waqf* be demolished, the rest be expropriated and refurbished and that the Directorate allot a certain amount that year and the following year for its reparation and permanent protection; that the Directorate General of Foundations appraised the monetary situation of the *waqf* in its letter dated 11/07/1934 and numbered 153197/107; that the Cabinet Decision dated 11/24/1934 and numbered 2/1589 decided that the buildings belonging to the *waqf* surrounding the Hagia Sophia Mosque be demolished by the Directorate General of Foundations and that the Hagia Sophia Mosque be converted into a museum by expropriating and demolishing other buildings and repairing and preserving others, to be compensated by

the Ministry of Education.

On 16 November 1972, The UNESCO General Conference has adopted the Convention Concerning the Protection of the World Cultural and Natural Heritage in order to identify and introduce cultural and natural sites with universal values accepted as humanity's shared heritage; to raise society's consciousness on preserving this universal heritage; and to ensure the necessary cooperation to preserve cultural and natural sites that are damaged and destroyed for various reasons. This Convention, to whose accession we have provided assent through the Law dated 04/14/1982 and numbered 2658, was adopted by the Cabinet Decision dated 05/23/1982 and numbered 8/4788 and published in the Official Gazette dated 02/14/1983 and numbered 17959.

In its Preamble, the Convention emphasizes that it was adopted noting that "the cultural heritage and the natural heritage are increasingly threatened with destruction not only by the traditional causes of decay, but also by changing social and economic conditions which aggravate the situation with even more formidable phenomena of damage or destruction"; that "deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world"; "protection of this heritage at the national level often remains incomplete because of the scale of the resources which it requires and of the insufficient economic, scientific, and technological resources of the country where the property to be protected is situated"; that "the Constitution of the Organization provides that it will maintain, increase, and diffuse knowledge, by assuring the conservation and protection of the world's heritage, and recommending to the nations concerned the necessary international conventions"; that "the existing international conventions, recommendations and resolutions concerning cultural and natural property demonstrate the importance, for all the peoples of the world, of safeguarding this unique and irreplaceable property, to whatever people it may belong"; that "parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole"; that "in view of

the magnitude and gravity of the new dangers threatening them, it is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage of outstanding universal value, by the granting of collective assistance which, although not taking the place of action by the State concerned, will serve as an efficient complement thereto"; that "it is essential for this purpose to adopt new provisions in the form of a convention establishing an effective system of collective protection of the cultural and natural heritage of outstanding universal value, organized on a permanent basis and in accordance with modern scientific methods."

The World Heritage List, created in accordance with Convention articles, shows natural and cultural sites identified by UNESCO's World Heritage Committee and whose protection is guaranteed by the country in which they are located. The purpose of creating such a list is to enable international cooperation to preserve sites that are the heritage of humanity. The lists, which is regularly updated, has 851 sites from 141 countries as of 2008. 660 of these are cultural, 166 are natural, and 25 are both cultural and natural sites. Istanbul's historic sites were added to the World Heritage List as cultural sites on 12/06/1985.

The use of Hagia Sophia, which is among the most important parts of Istanbul's historic sites and has universal values accepted as common heritage, as a museum falls under the government's discretion and as such there is no illegality in the Cabinet Decision under question.

Plaintiff requests that the Ataturk signature under the Cabinet Decision concerning the conversion of the Hagia Sophia Mosque into a museum dated 11/24/1934 and numbered 2/1589 be submitted to a criminology laboratory for inspection. This request should be denied as, from examining the case file, it becomes clear that the Decision was prepared by the Cabinet pursuant to the Letter from the Directorate of Decisions of the Prime Ministry of the Republic of Turkey dated 11/14/1934 and numbered 94041, and that the President had signed the Decision, and that the Museum had begun operations on 02/01/1935.

For the foregoing reasons, it is opined that the case ought to be dismissed.

ON BEHALF OF THE TURKISH NATION

The Tenth Chamber of the Council of State, the adjudicating body of the dispute, began proceedings on 07/02/2020, the date of which parties were notified in advance, after taking notice of the presence of [Redacted] representing the Plaintiff Association and Plaintiff's Counsel [Redacted], Legal Consultant [Redacted] representing [Redacted], the Council of State Prosecutor; both parties were allowed to present their contentions and responses; the Council of State Prosecutor's opinion and parties' reaction thereto were heard; the hearing was then terminated.

Regarding Plaintiff's allegations that the signatures under the Cabinet Decision are forged, that some of the Ministers whose signatures appear under the Decision have been proven to have been outside of Ankara at the time of the Decision, as evidenced by parliamentary minutes, that the signatures need to be submitted for graphological evaluation: it has been decided that there is no need to have the signatures under the Decision be examined for their veracity, since the decision has been reached that there are insufficient indications in the case file that would necessitate such examination.

Regarding Respondent's contention that the statute of limitations applies:

Article 7, paragraph 1 of the Administrative Procedure Law numbered 2577 provides that the right to commence an action, save separate timelines provided by special laws, is 60 days before the Council of State and administrative courts and 30 days before tax courts; paragraph 4 provides that, for administrative decisions requiring publication, the timeline begins the day after publication, but if the decision requires execution, interested parties can commence an action against either the decision or the executive action or both; Article 10 of the same Law provides

that interested parties may apply before administrative authorities to have a decision executed or an action taken that can constitute the subject matter of an administrative suit, that if there is no response within 60 days the application will be considered to have been denied, and that interested parties may sue before the Council of State, administrative or tax courts, depending on the subject matter, after said 60 days [for the authority to respond to plaintiff's request] expire and within the statute of limitations.

In the present dispute, the Plaintiff Association has requested that the Hagia Sophia Mosque be opened to worship in accordance with their rights, the law, and the *waqf* charter, via their petition dated 08/31/2016 registered in the Prime Ministry's general documents registry: "that it is impossible for the Hagia Sophia Mosque to be a museum both legally and from a *waqf* perspective; that the Law on the Assignment of Historic and Architecturally Valuable Old Waqf Artifacts to the Directorate General of Foundations takes precedence over the Cabinet Decision; that the rule of law is ensured by the Turkish Constitution." The petition was responded to and denied by the letter of the 1st Regional Directorate of the Prime Ministry's Directorate General of Foundations dated 10/19/2016 and numbered 27882: "that, although the ownership of the Hagia Sophia Mosque belongs to the Directorate General of Foundations, in accordance with the Cabinet Decision in dispute dated 11/24/1934 and numbered 2/1589, it has been converted into a museum under the responsibility of the Ministry of Culture and Tourism."

The application made by the Plaintiff Association to the Prime Ministry is one under the scope of Article 10 of the Administrative Procedure Law numbered 2577 and concerns the allegation that Hagia Sophia's status as a museum is contrary to law and the *waqf* charter and requests that it be opened as a mosque. The Plaintiff Association was notified of the denial of their application, according to the certified letter of notice in the annex of the case file, on 10/24/2016 and the present action has been commenced within the 60-day statutory limit on 12/20/2016. While the case before our Chamber numbered E:2018/3786 concerning the annulment of the Cabinet Deci-

sion has been dismissed on 09/13/2018 with decision number K:2018/2588, since it was commenced without first applying to the sued government agency and without an individual administrative decision on the matter, the present case has been processed without dismissal because it rests on an individual decision [of denial by administrative authorities].

The decision of denial concerning Plaintiff Association's application rests upon the disputed Cabinet Decision. Therefore, following the individual decision [of denial], which is an administratively actionable matter, plaintiff may file a case against either this decision or the decision on which the individual decision [of denial] rests [i.e., Cabinet Decision], or both, and in the present dispute, plaintiff has timely filed suit against the Cabinet Decision upon receipt of the individual decision [of denial]. For this reason, the statute of limitations objection by the sued government agency is without merit.

As for Respondent's contention that there is already a final judgment issued by our Chamber on the same matter and concerning the same parties:

The final judgment contention concerns the decision of the Council of Chambers of Administrative Matters dated 12/10/2012 and numbered E:2008/1775 and numbered K:2012/2639 that upheld, with a different reasoning, the decision of dismissal of the Tenth Chamber of the Council of State dated 03/31/2008 and numbered E:2005/125, K:2008/1858.

In said decision, the decision to dismiss was upheld for the following reason: "… It is clear that the government of the Republic of Turkey, in accordance with Convention provisions, will have to protect and preserve Hagia Sophia, included in the World Heritage List and accepted as humanity's shared heritage. There is nothing in the Convention that prohibits a determination on the use of Hagia Sophia in accordance with our domestic law, as long as that determination accords with the principle of protection and preservation.

Respondent government agency has stated that it is necessary to evaluate Hagia Sophia differently than other mosques given its historical, architectural, and cultural qualities and for its protection; that its manner of use has been determined by the Decision under question as a museum in light of these necessities and under the national and international exigencies of 1934.

It also falls under the government's discretion to discontinue Hagia Sophia's use as a museum and to assign it a different purpose, in light of changes in national and international circumstances, and in accordance with the purpose to protect and preserve Hagia Sophia's historical, architectural, and cultural qualities. …"

In said decision, after mentioning that there is no provision in the Convention Concerning the Protection of the World Cultural and Natural Heritage prohibiting a determination on how to use Hagia Sophia pursuant to our domestic law, it has been decided that assigning Hagia Sophia a different status other than a museum is within the government's discretion. However, the substance of that case did not involve any allegations, substantive evaluations, reasonings or decisions concerning Hagia Sophia's ownership, its *waqf* status, and whether it is against the law to use it for a purpose other than the one delineated in its charter.

Thus, it is necessary to substantively evaluate the new and different application made by Plaintiff pursuant to Article 10 of the Law numbered 2577, which concern contentions not adjudicated beforehand and on which there exist no prior judgments or decisions; thus, it is not possible to state that there is a final judgment on the matter already; thus the procedural objection by Respondent government agency is without merit, and after hearing from the Investigating Judge, [we have] proceeded to the substance of the matter:

FACTS AND PROCEDURAL POSTURE:

Plaintiff's representative applied to the (now defunct) Prime Ministry with a petition dated 08/31/2016 to have Hagia Sophia, registered under the *waqf* charter of Mehmed II son of Murad II dated 1470 as a "**mosque**," and according to the deed dated 11/19/1936, located in the City of Istanbul, District of Eminonu, Cankurtaran Neighborhood, Bab-i Humayun Street, in lot no. 7, block no. 57, section no. 57, as "**The Honorable Mosque of Grand Hagia Sophia inclusive of a tomb, properties rented out, a clock-house, and a madrasa**" under the name of "Ebulfetih Sultan Mehmet Waqf," opened to worship.

The 1st Regional Directorate of the Prime Ministry's Directorate General of Foundations responded to said petition with a letter dated 10/19/2016 and numbered 27882 that the Hagia Sophia Mosque continues to operate as a museum, and this letter was delivered to Plaintiff on 10/24/2016, and then the present case was commenced through a petition registered on 12/20/2016.

EVALUATION AND REASONING:

a) Applicable Law:

Article 1 of the repealed Law on the Application and Enforcement of the Civil Code numbered 864 provides: "Events that preceded the entry into force of the civil code shall be governed by law applicable at the time of occurrence of said events. Thus, regarding events that have occurred before 4 October 1926, even after said date, the law applicable at the time of occurrence of sad events shall govern." Article 8 provides: "A separate enforcement law shall be passed concerning *waqfs* established before the entry into force of the civil code."

Similarly, Article 1 of the Law on the Application and Enforcement of the Turkish Civil Code dated 12/03/2001 and

numbered 4722, which repealed Law numbered 864, provides: "The law applicable at the time shall be applied to the legal consequences of events that have preceded the entry into force of the Turkish Civil Code. Whether events that have taken place before the entry into force of the Turkish Civil Code are legally binding in their consequences shall be governed, even after the passage of this law, in accordance with the law applicable at the time of occurrence of said events."

Article 10 of the Waqf Law dated 06/05/1935 and numbered 2762 provides: "Those *waqfs* whose use for their established purposes contravenes law or public policy or have become useless can be assigned to other establishments or can be traded with money or tangible property upon the offer of the *waqf* board of directors and decision of the cabinet. Works of architectural or historical value cannot be sold."

Article 15 of the Waqf Law dated 02/20/2008 and numbered 5737, which is still in force, provides: "The immovables of *waqfs* cannot be confiscated or pledged and no statute of limitations shall apply to institute proprietary interests thereon. Those *waqfs* that belong to the Directorate

General and that have lost their ability to be used in accordance with their establishment purpose or those whose use contravenes public policy or whose use completely or partially as a *waqf* has become impossible can be transformed into another *waqf*, be assigned to another *waqf*, or converted into money upon the request of the *waqf*'s board of directors and decision of the *waqf*'s general assembly. If converted into money, that money shall be assigned to a different *waqf*. For transfers within the same *waqf*, no fee of transfer shall be paid." Article 16 provides: "The Directorate General shall first assign a purpose to the *waqf*s, in line with their establishment purpose. Those *waqfs* that cannot be put to use by the Directorate General can be rented until they are used in accordance with their principal purpose. These *waqfs* can be assigned to public institutions or public associations with a similar purpose to be used in line with the *waqf* charter and be restored and repaired by the assignees under the supervision of

the Directorate General."

b) The Institution of *Waqf*

Waqfs, whose roots go back to Islamic law, essentially mean the assignment, by the will of the endower, of property from private possession to public use by prohibiting proprietary interests over said property so that the benefits accruing therefrom can be put to social and cultural use, as emphasized in the decision of the Constitutional Court dated 12/04/1969 and numbered E:1969/35, K:1969/70 and its decision dated 12/26/2013 and numbered E:2013/70, K:2013/166.

Article 101 of the Turkish Civil Code dated 11/22/2001 and numbered 4721 defines *waqfs* as "congregation of property with legal personality that result from the assignment by real or legal persons of sufficient property or rights for a defined and indefinite purpose."

While it is possible to establish *waqfs* today, under the provisions of the Turkish Civil Code numbered 4721, regarding *waqfs* that have been established prior to the entry into force of said law, and taking into account their historical qualities, the reasons for their establishment and the purposes and conditions delineated in their charters and to maintain their continuity; the governance, activities, control, registry of movable and immovable property in and outside of the country, protection, reparation, and preservation and maintenance of their goods for economic purposes of *mazbut waqf*s, *mulhak waqf*s, new *waqf*s, congregational *waqfs* and *esnaf waqfs* shall be governed by the Waqf Law dated 02/20/2008 and numbered 5737.

Movable and immovable property that is necessary to provide for the maintenance of the *waqf* so that the activities and the purposes of the *waqfs* are realized are called "akar" and property and services provided by *waqfs* directly to the public for free are called "hayrat."

c) The Law Applicable to Old Waqfs

The Turkish Civil Code dated 02/17/1926 and numbered 743 has been published in the Official Gazette dated 04/04/1926 and numbered 339, and in accordance with its Article 936 on its entry into force, entered into force six months later on 10/04/1926.

Article 1 of the repealed Law on the Application and Enforcement of the Civil Code numbered 864, titled "General provisions, the law's retroactivity," provides: "Events that preceded the entry into force of the civil code shall be governed by law applicable at the time of occurrence of said events. Thus, regarding events that have occurred before 4 October 1926, even after said date, the law applicable at the time of occurrence of sad events shall govern." Article 8, titled "Waqfs and establishments preceding the Civil Code," provides: "A separate enforcement law shall be passed concerning *waqfs* established before the entry into force of the civil code. Establishments whose establishment comes after the entry into force of the Civil Code shall be governed by provisions of the Civil Code." Because it was deemed inappropriate for a *waqf* established before the entry into force of the Civil Code numbered 743 on 4 October 1926 to be governed by the provisions of the new law, it was stated in Article 8 of the Law numbered 864 that separate legislation would be passed on *waqfs* established before the entry into force of the Turkish Civil Code and accordingly the Waqf Law dated 06/05/1935 and numbered 2762 was put into force.

Similarly, with the entry into force of the Turkish Civil Code numbered 4721 on 1 January 2002, it was stated in Article 8 of the Law on the Application and Enforcement of the Turkish Civil Code dated 12/03/2001 and numbered 4722, which repealed the Law numbered 864, that without prejudice to *waqf* laws existing before the entry into force of the Turkish Civil Code numbered 4721, the status of *waqfs* established before 4 October 1926 would be protected.

Thus, the lawmaker has demonstrated utmost respect for

the will and freedom of contract of the endowers of old *waqf*s, has made no change, when regulating old *waqf*s, with respect to the institution of the *waqf* and the legal status of its relations and the notion that its property is private property, and has preserved the legal status of *waqfs* established before the entry into force of the Turkish Civil Code dated 10/04/1926 and numbered 743 via the provisions of the Waqf Law numbered 2762 (still preserved as Waqf Law numbered 5737).

ç) The Assessment by the Assembly of Civil Chambers of the Court of Cassation on Old *Waqfs*

The general assessment by the Assembly of Civil Chambers of the Court of Cassation on *waqfs* in its decision dated 05/30/2007 and numbered E:2007/18-293, K:2007/310 is as follows:

"The *waqf* in question is from the Ottoman period. It is therefore necessary to review the case in light of Ottoman *waqf* law. In Ottoman practice, *waqf* means to take away a property from possession and dedicate its benefits to charity indefinitely under certain conditions. There is no doubt that *waqf* is a legal institution, regardless of whether it is private or public. Yet, legal transactions are classified based on whether there exists a unilateral declaration of intent or reciprocal declarations of intent behind them. According to which of these are *waqfs* established? According to Ottoman jurists, regardless of their public or private status, and regardless of whether there are immediate beneficiaries or not, establishing a *waqf* requires a unilateral declaration of intent. It is established by the offer (declaration of intent) of the endower [tr. vâkif]. For the offer to become binding, upon adjudication of the matter, the judge must decide that the *waqf* is necessary [lāzim]. In Ottoman practice, this is called tescil [registration/tasjīl]. For the transaction establishing a *waqf* to be valid and necessary [Ṣaḥīḥ wa lāzim] tescil is required. Through tescil, all provisions of the act of establishing a *waqf* become binding on all parties and legal persons. No longer can

anyone file a suit alleging proprietary claims against the *waqf* property. … To whom does the *waqf* property belong after being dedicated to the *waqf*? Ottoman jurists clearly state that these properties have been transferred to a legal person by invoking the maxim "…in principle, as though Allāh's property…". The legal consequence of the *waqf* is that the endowed property is locked in and its benefit become the property of all subjects of Allāh. (Ebu-Ula Mardin, Ahkam-i Evkaf [Provisions of Waqfs], Ömer Hilmi Karinabadizade, Ahkamül Evkaf [Waqfs' Provisions].) Through the *waqf* transaction, the endowed property acquires a certain type of moral inviolability. There can no longer be legal transactions over that property like over ordinary property subject to ownership. … In light of the explanations above, in Ottoman practice, *waqf* is a legal institution established by a unilateral declaration of intent, whose necessity is decided upon adjudication, whose legal status is expressed through tescil, and whose subject matter consists of a known, determinate, and durable property whose ownership is alienated from the endower and managed by its trustees in accordance with its purpose and to the benefit of real and legal persons.

Whether an Ottoman *waqf* was established in accordance with the principles above can only be determined upon examination of the *waqf* charter (vakfiye)."

d) The Decision of the Assembly of Administrative Chambers of the Council of State Concerning the Kariye Mosque

In the case before our Chamber concerning the annulment of the Cabinet Decision dated 08/29/1945 and numbered 3/3054 on assigning the Kariye Mosque, located in the City of Istanbul, District of Fatih, established before the entry into force of the Turkish Civil Code numbered 743 on 10/04/1926, with mazbut *waqf* charity status, to the Ministry of Education for use as museum and museum storage, in our decision dated 03/12/2014 and numbered E:2010/14612, K:2014/1474, we have

dismissed the suit for the following reason: "… that the United Nations Educational, Scientific and Cultural Organization's General Conference has adopted the Convention Concerning the Protection of the World Cultural and Natural Heritage; that this Convention, to which we have assented through the Law dated 04/14/1982 and numbered 2658, adopted by the Cabinet Decision dated 05/23/1982 and numbered 8/4788 has been published in the Official Gazette dated 02/14/1983 and numbered 17959; … that the World Heritage List, prepared as a result of Convention provisions, shows the natural and cultural sites determined by UNESCO's World Heritage Committee and whose protection has been guaranteed by the states in which they are located; that the aim of preparing such a list is to ensure international cooperation to protect the shared heritage of humanity; that there were 851 sites from 141 countries on the constantly updated list as of 2008; that 660, 166 and 25 of these were cultural, natural, and cultural and natural, respectively; that Istanbul's historical sites have been added to the World Heritage List on 12/06/1985 as cultural heritage sites; that the Kariye Museum, which is part of Istanbul's important historical sites and accepted as shared heritage and of universal value, has witnessed history since centuries before until today; that it reflects the important interaction between humanistic values at a certain time period or at a cultural site concerning the development of architecture, technology or architectural art, city planning, and landscape creation; that it presents a valuable example of the architecture or technology or landscape symbolizing one or more important eras of human history; that it is a symbol representing one or more cultures; and therefore that there is no illegality in its use as a museum to properly fulfil its function of being introduced to the word …"

Upon appeal of our Chamber's said decision, the Council of Chambers of Administrative Matters, in its decision dated 04/26/2017 and numbered E:2014/4645, K:2017/1860, has found the appealed decision consistent with law and procedure and has decided to uphold it; however, Plaintiff, alleging the illegality of the disputed Cabinet Decision, has requested that the decision to uphold dated 04/26/2017 be reviewed, and the ar-

guments in Plaintiff's petition for review, found consistent with Article 54 of the Law numbered 2577, have been accepted by the Council of Chambers of Administrative Matters, which removed the appeal decision by the Council of Chambers of Administrative Matters dated 04/26/2017 and numbered E:2014/4645, K:2017/1860, and reconvened and decided in its decision dated 06/19/2019 and numbered E:2018/142, K:2019/3130 to remand our Chamber's decision dated 03/12/2014 and numbered E:2010/14612, K:2014/1474 for the following reasons:

"The Honorable Kariye Mosque is an immovable charity endowed in the Ottoman period pursuant to private law provisions to the mazbut Fatih Sultan Mehmet Waqf. Immovable charities [tr. hayrat] are immovables of *waqfs* which have been established to provide direct services for the public good such as places of worship, hospitals, and kitchens, and these immovables are regarded as public property according to the provisions of both the repealed Waqf Law numbered 2762 and the in-force Waqf Law numbered 5737. Therefore, in essence, private ownership laws are inapplicable to them. Immovable charities cannot be sold, pledged, confiscated, and no statute of limitations granting proprietary interests thereon can be instituted. For these properties are not under the private ownership of anyone, they are assigned to public use and benefit. Immovable charities cannot be assigned a purpose other than the one determined by the *waqf*, except for the provisions in Article 10 of the repealed Waqf Law numbered 2762 and Articles 15 and 16 of the Waqf Law numbered 5737.

Thus, the disputed Cabinet Decision, taken without the rise of a situation foreseen in Article 10 of the repealed Waqf Law numbered 2762, which disregards the intent and assignment of the endower that the immovable be used as a mosque perpetually, is in violation of Article 1 of Law numbered 864, quoted above, which provides that the law at the time of the issuing of the *waqf* charter shall be applicable law. Before the disputed Cabinet Decision was taken, in an opinion letter sent from the Minister of Finance to the Prime Ministry, perhaps in anticipation of this legal violation, it was stated that "Therefore,

the enactment of the draft bill being prepared by the Ministry of Education is awaited," and the Cabinet Decision was taken with reference to a law that had not yet been enacted. When the Respondent government agency was asked of the legal framework governing the dispute, through an interim decision dated 04/21/2010 by the Chamber as the case was before the Sixth Chamber of the Council of State, it had been unable to point to any laws.

The foundational quality of a *waqf*'s immovable charities is that they are protected from out-of-purpose use against third persons as well as the state itself. That these *waqfs* are under the protection of the state does not mean that the state may dispose of *waqf* properties whenever and as it pleases. The state is merely an entity to whom *waqf* property is entrusted to ensure that the property is used only in line with its purpose. The assignment of immovable charities for another purpose, even if through an administrative decision, would be unlawful.

Further, when the Cabinet Decision was being made, the stipulations of the Waqf Law numbered 2762 in force at the time were disregarded. Even in the absence of the provisions of the aforementioned repealed Law numbered 864, as the Cabinet Decision was being taken, the stipulations of the legal framework in force at the time of the decision and Article 10 of the Waqf Law enacted on 06/05/1935 and numbered 2762 providing: 'Those *waqfs* whose use for their established purposes contravenes law or public policy or have become useless can be assigned to other establishments or can be traded with money or tangible property upon the offer of the *waqf* board of directors and decision of the cabinet,' were disregarded. The same provision is still reiterated in Articles 15 and 16 of the Waqf Law in force numbered 5737.

Yet the disputed Cabinet Decision has been taken without satisfying any of the conditions set out by the Law and neither have procedural requirements been followed. For there is no illegality or contravention to public order in Kariye Mosque's use as a mosque, and there is no decision by the Board of Directors of the Directorate General of Foundations upon which the

Cabinet Decision could have been based. Moreover, the assignment concerns the use of a place of worship as a museum and a museum storage site, which, even if all other conditions were satisfied, renders the disputed Decision manifestly unlawful because of its purpose.

For the foregoing reasons, the disputed Cabinet Decision is unlawful from the standpoints of its [lack of] authorization, form, reasoning, and purpose."

In accordance with said decision of remand, the Cabinet Decision's sections pertaining to the Kariye Mosque have been annulled by our Chamber's decision dated 11/11/2019 and numbered E:2019/11776, K:2019/7680.

e) The Status of *Waqf* Property

According to the Constitutional Court's decision dated 01/30/1969 and numbered E:1967/47, K:1969/9, the property of a *waqf* never belongs to the state but to the *waqf* itself: "it is a requirement of Islamic law and the Waqf Law that preserves parts of that law that the immovable property of *waqfs* established in accordance with Islamic law and whose presence is recognized by the Waqf Law dated 06/05/1935 and numbered 2762 be under the ownership of their *waqf*s. Thus, *waqf* property never belongs to the state but to the *waqfs* themselves."

According to the jurisprudence of the Court of Cassation, too, *waqf* properties are not owned by the state. In accordance with the Law on the Application and Enforcement of the Civil Code numbered 864, in its decision dated 05/26/1935 and numbered E:1935/78, K:1935/6, the Council on the Unification of Civil Law Precedents has decided that for *waqfs* established before the entry into force of the Turkish Civil Code numbered 74, previous law shall be applicable and that *waqf* properties are not state property: "that old principles shall be applicable to *waqfs* like this that have been established prior to the entry into force of the Civil Code," "that *waqf* property is accepted not to

be among state properties."

f) The General Assessment of Waqfs Established Before 10/04/1926

In light of the foregoing laws and Constitutional Court, Court of Cassation, and Council of State precedents, concerning *waqfs* established prior to the entry into force, before 10/04/1926, of the Turkish Civil Code numbered 743, the following conclusions have been reached:

(i) That the *vakfiye* or the *waqf* charter is the founding document of the *waqf*, and that these documents contain regulations concerning the subject matter, purpose, and organs of the *waqf*, as reflective of the endower's intention,

(ii) That the provisions of the *vakfiye* or the *waqf* charter have the binding force and value of the law; that, once the establishment of the *waqf* has been completed, these provisions bind the endower, the trustees, the beneficiaries, third parties as well as the state and therefore that no one may change the *vakfiye* or the *waqf* charter that reflects the intention of the endower,

(iii) That it is obligatory that *waqf* properties be used in accordance with the intention of the endower.

After the intent to establish a *waqf*, which is a private law transaction, has been declared pursuant to law, there is no doubt that the congregation of property that now acquires legal personality has the constitutionally guaranteed right to ownership over its properties and rights as well as the right to association with respect to the continuance of its legal personality. Therefore, it is necessary that regulations concerning the private law legal personality of *waqfs* be consistent with this essential quality of the institution of the *waqf*, and that decisions taken with regard to *waqfs* be in accordance with the intent of the endower as well as the right to ownership and association of the Constitution.

Otherwise, in the event that the intent of the endower

when establishing the *waqf* is disregarded and the purpose of the endower is transgressed or the purpose or properties of the *waqf* are altered, there would be no possibility to characterize the *waqf* as a private law legal personality, and this would contravene the principle of legal certainty as a necessary extension of the rule of law, enshrined in Article 2 of the Constitution, and rules in Articles 33 and 35 of the Constitution on the right to association and ownership.

Thus, in line with the principles summarized above, the lawmaker has provided in the provisional Article 7 of the Waqf Law numbered 5737 that, concerning the immovables of *waqfs* established before 10/04/1926, those registered in the 1936 Declarations with immovables under nom de guerre or fictitious names, and those bought by congregational endowments after the 1936 Declarations or those that have been bequeathed or donated to congregational *waqfs* but have been registered under the names of the Treasury, the Directorate General of Foundations, bequeathers or donors, on account of ineligibility to acquire possession, it is possible for *waqfs* to acquire these properties by application, within 18 months after the passage of the Waqf Law numbered 5737 with all rights and responsibilities in the deeds, to deed registries, upon the recommendation of the Foundation Council Members.

Similarly, through provisional Article 11 added to the Waqf Law numbered 5737 by the Decree dated 08/22/2011 and numbered 651, congregational *waqfs* can have immovables without any registered owners, immovables registered under the Treasury, the Directorate General of Foundations, municipalities, special provincial administrations—save those expropriated, sold or traded with them—, and graveyards and fountains registered under government agencies, registered back under their names by registry of deeds, if they apply within 12 months after the passage of said article with all rights and responsibilities attached to the deed; those immovables that have been bought by or bequeathed or donated to congregational *waqfs* but have nonetheless been registered under the Treasury or the Directorate General of Foundations on account of ineligibility to

acquire possession and are now registered under third persons shall be paid [to congregational *waqf*s] by the Treasury of the Directorate General of Foundations based on the market value determined by the Ministry of Finance.

Finally, provisional Article 13 added to the Law numbered 5737, through Article 78 of the Law dated 03/21/2017 and numbered 7103, provides that the immovables located in the city of Mardin, the District of Nusaybin that are listed in the article shall be registered by the relevant registries under *waqfs* among Assyrian *waqfs* determined by the Foundation Council.

g) The European Court of Human Rights' (ECHR) Perspective on the Institution of the *Waqf*

While the right to establish foundations is not explicitly enshrined in the European Convention on Human Rights, and while Article 11 of the Convention only mentions "the freedom of association," ECHR interprets this article broadly to encompass the right to establish foundations (Sidiropoulos and others v. Greece, no. 26695/95, 07/10/1998, § 40; Mihr Vakfi v. Turkey, no. 10815/07, 05/07/2019, § 40) and finds a close connection between the right to establish foundations and the freedom of conscience and religion in Article 9 and freedom of expression in Article 10 of the Convention (Young, James and Webster v. UK, no. 7601/76; 7806/77, § 57, 08/13/1981).

In some individual application cases brought before it by some *waqf*s, ECHR considers alleged violations of the right to ownership according to Article 1 of Additional Protocol no. 1 and rules that the *waqfs* be compensated monetarily or property and rights be registered under their name and returned to them. In application made by one of these *waqf*s, the Waqf of Samatya Surp Kevork Armenian Church, School and Graveyard, founded by a Sultan's decree in the Ottoman period in 1832, ECHR, taking into account the *waqf* status and the fact that the immovables under question had been registered under the *waqf*'s name for a long time, ruled that the immovables be re-registered un-

der the *waqf*'s name, and that failing, the *waqf* be compensated monetarily (Board of Directors of the Waqf of Samatya Surp Kevork Armenian Church, School and Graveyard v. Turkey, no. 1480/03, 12/16/2008).

It is therefore apparent that the ECHR, too, as a result of the protected status of *waqf*s, guarantees *waqf*s' immovables and rights as part of the right to ownership, including those *waqfs* founded during the Ottoman period.

As it is clear that the right ownership extends to using and benefitting the property in question, the intent of the endower with respect to the endowed property and rights must be preserved and regarded with respect to the use of *waqf* assets. As a necessary consequence, the alteration of the status of a *waqf* immovable, contrary to the endower's intent, or its use contrary to the intended purpose will contravene ECHR caselaw.

ğ) The Examination of the Disputed Cabinet Decision

1) Content

The Cabinet Decision dated 11/24/1934 and numbered 2/1589 put into force based on the letter of the Directorate General of Foundations dated 11/07/1934 and numbered 15319/107, based on the letter of the Ministry of Education dated 11/04/1934 and numbered 94041, which summarizes said letters by the Ministry of Education and the Directorate General of Foundations, converted the Hagia Sophia into a mosque by providing: "The matter has been discussed by the Cabinet on 11/24/1934 and it has been approved and decided that the *waqf* buildings surrounding the mosque be demolished and cleaned by the Directorate General of Foundations and that the other buildings be expropriated and the Hagia Sophia Mosque be converted into a museum with the cost of demolishing, reparation and preservation being paid by the Ministry of Education."

2) The Waqf Charter

It has been emphatically stated in the *waqf* charter of Mehmed II son of Murad II's *waqf* dated 1470 that among the charities of the *waqf* is the Hagia Sophia Mosque, previously a church, and that the condition is irrevocable that "*waqf* properties shall in no way be transferred or acquired."

3) The Deed

Hagia Sophia, after the Cabinet Decision in question was put into place, in accordance with the deed dated 11/19/1936, was registered under the name of the "Ebulfetih Sultan Mehmet Waqf" (today Fatih Sultan Mehmet Han Waqf) as located in the City of Istanbul, District of Eminonu, Cankurtaran Neighborhood, Bab-i Humayun Street, in lot no. 7, block no. 57, section no. 57, as "The Honorable Mosque of Grand Hagia Sophia inclusive of a tomb, properties rented out, a clockhouse, and a madrasa." The Hagia Sophia Mosque is an immovable charity, endowed according to the private law regulations of the Ottoman State, that belongs to the *waqf* of Mehmed II son of Murad II.

4) The Convention Concerning the Protection of the World Cultural and Natural Heritage

In accordance with the rules of the Convention Concerning the Protection of the World Cultural and Natural Heritage, to whose accession we have provided assent through the Law dated 04/14/1982 and numbered 2658, adopted by the Cabinet Decision dated 05/23/1982 and numbered 8/4788 and published in the Official Gazette dated 02/14/1983 and numbered 17959, without any specification as to its use, Hagia Sophia was included in the World Heritage List on 12/06/1985 under the title "Istanbul's Historic Sites," together with other historic sites

on the historical peninsula, including the Topkapi Palace, the Suleymaniye Mosque, the Blue Mosque, the Sehzade Mehmet Mosque, Zeyrek Mosque, and others. The World Heritage List, prepared in line with said Convention's provisions, reflects the natural and cultural sites determined by UNESCO's World Heritage Committee and whose protection is guaranteed by the states in which they are located.

Article 6 of said Convention provides: "Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property right provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate."

5) Assessment

(1) Concerning International Law

It is obvious that, in light of Article 6 of the Convention Concerning the Protection of the World Cultural and Natural Heritage, State parties to the Convention accept that Hagia Sophia's cultural and natural heritage should be protected through international cooperation without any prejudice to the sovereignty of the Republic of Turkey where it is located and to the ownership rights granted by Turkey's domestic laws.

Thus, there is nothing in the Convention prohibiting a determination, based on our domestic laws, on how to use Hagia Sophia, which has been included in the World Heritage List without any specification as to its use. On the contrary, it is a necessity of "respecting the sovereignty of States" and "without prejudice to property right provided by national legislation" provisions of Article 6 of the Convention that the use of Hagia Sophia be determined according to our domestic law on founda-

tions.

While the Convention's essential purpose is to protect the natural and cultural sites included in the World Heritage List, cultural sites' field of use is to be determined by the domestic law of the country in which the cultural site is located. Indeed, there are many heritage sites within "Istanbul's Historic Sites," among which is Hagia Sophia, and other heritage sites which have sites still being used as mosques, including the Selimiye Mosque, Divrigi Ulu Mosque, the Suleymaniye Mosque the Blue Mosque, the Sehzade Mehmet Mosque, and Zeyrek Mosque.

(ii) Concerning Domestic Law

Immovable charities [tr. *hayrat*] are *waqf* immovables that are established for direct public use such as places of worship, hospitals, and kitchens. According to both the repealed Waqf Law numbered 2762 and the in-force Waqf Law numbered 5737, these immovables have been reserved for "public use."

Therefore, in essence, private ownership law does not apply to these immovables; immovable charities cannot be sold, pledged, confiscated, nor can any statute of limitations granting proprietary interests thereon can be instituted.

For these properties fall under no one's private ownership but are assigned to public use and benefit. Except for situations provided in Article 10 of the repealed Waqf Law numbered 2762 and Articles 15 and 16 provided in the Waqf Law 5737, immovable charities cannot be assigned a different purpose other than the one determined by the *waqf*. Even under said exceptions, immovable charities must be assigned to other charities with a similar purpose, to the extent possible.

The foundational quality of a *waqf*'s immovable charities is that they are protected from out-of-purpose use against third persons as well as the state itself. That these *waqfs* are under the protection of the state does not mean that the state may dispose of *waqf* properties whenever and as it pleases. The state

is merely an entity to whom *waqf* property is entrusted to ensure that the property is used only in line with its purpose.

Assigning a *waqf*'s immovable charities a different purpose via a regulatory administrative measure will offend both domestic law and universal legal principles.

Article 1 of the repealed Law on the Application and Enforcement of the Civil Code numbered 864, which governs the applicable law to *waqfs* established before the entry into force of the Turkish Civil Code, clearly provides: "Events that preceded the entry into force of the civil code shall be governed by law applicable at the time of occurrence of said events." Article 8 clearly provides: "A separate enforcement law shall be passed concerning *waqfs* established before the entry into force of the civil code." Although these provisions explicitly protect "old *waqf* status," –which can be said to be formulated as follows:

(i) That the provisions of the founding document vakfiye, upon the establishment of the *waqf* has been completed, binds the endower, the trustees, the beneficiaries, third parties as well as the state,

(ii) That the matters regulated by the vakfiye can in no way be changed,

(iii) That it is obligatory that *waqf* properties be used in accordance with the intention of the endower—when the disputed Cabinet Decision is examined, it becomes clear that the immovable charity Hagia Sophia Mosque, which, according to its vakfiye, ought to have been used as a mosque, and which, according to the deed, belongs to the "Ebulfetih Sultan Mehmet Waqf" (today Fatih Sultan Mehmet Han Waqf), has been converted into a museum.

The old *waqf* status of the Hagia Sophia Mosque and *waqfs* established prior to the entry into force of the Turkish Civil Code on 4 October 1926, which was protected by Articles 1 and 8 of the Law numbered 864, has been preserved continually based on the same principles by the repealed Waqf Law dated 06/05/1935 and numbered 2762, the Law on the Application

and Enforcement of the Turkish Civil Code dated 12/03/2001 and numbered 4722, and the Waqf Law dated 02/20/2008 and numbered 5737, all of which have come into force after the disputed Cabinet Decision. Thus, the Cabinet Decision in question is clearly inconsistent with Article 1 of the Law numbered 864 quoted above, which provides that the law at the time of the writing of the *waqf* charter shall be applicable law.

When the Cabinet Decision in question is examined in light of the aforementioned legal framework and the decisions of the Constitutional Court, the Court of Cassation, the Council of State, and the ECHR, it is undisputed that;

Hagia Sophia, whose status is preserved and guaranteed by our legal order, is under the ownership of the mazbut *waqf* Fatih Sultan Mehmet Han Waqf with its own private law legal personality,

Hagia Sophia has been assigned to public use as a mosque in accordance with its endower's intention, that it is an immovable charity reserved for the benefit of the public free of charge, and that it is also registered in its deed as a mosque,

The *waqf* charter has the force and value of law, that the quality and intended use of the endowed immovable stated in the *waqf* charter cannot be altered and that this binds all real and legal persons, including Respondent,

The state has a positive obligation to ensure that *waqf* assets are used in accordance with the intent of the endower and a negative obligation not to interfere with *waqf* property and rights that would do away with the intent of the endower.

In this case, because it is concluded that the Waqf's—which has been preserved and protected by the Turkish legal system since ancient times—immovables and rights cannot be prohibited from being left to public use in line with its charter and that it is legally impossible for it to be put to a different use, as it has been perpetually assigned per the *waqf* charter to be used as a mosque, there is no legality in the disputed Cabinet Decision that, disregarding all of this, has ended Hagia Sophia's

use as a mosque and converted it into a museum.

DECISION:

For the foregoing reasons, with the possibility of appeal to the Council of Chambers of Administrative Matters within 30 days of receipt of this decision, it has been decided unanimously on 07/02/2020 that;

1. The disputed Cabinet Decision be **ANULLED**,

2. The litigation expenses, whose details are provided below, totaling [Redacted] be paid by Respondent to Plaintiff,

3. [Redacted] Turkish Lira attorney fees according to the Attorney Minimum Fee Guidelines applicable at the time of the decision be paid by Respondent to Plaintiff,

4. The remainder of the postal fee down payment be returned to Plaintiff after the decision becomes final.

A Precedent for the Unprecedented: Historical Reflections on Plague, Quarantine, and Islamic Law in Morocco

Ari Schriber (Harvard Law School)

By now, the effects of the COVID-19 virus have touched all domains of public life across the world. Public alarm and government interventions abruptly upended life to the extent that economic, political, and social norms are wholly unrecognizable for billions of people. One domain that has received less attention is that of religion, especially the impact of quarantines and curfews for congregational activities. In a country like Morocco, where the state claims authority over the domain of religion, such policies take on even greater significance. Beyond its military-imposed 6 AM to 6 PM curfew, the Moroccan Supreme Council of 'Ulama—a state religious body within the Ministry of Islamic Affairs—ordered the temporary closure of all mosques and implored worshippers to perform prayers from home. The policy's religious implications sparked pockets of backlash: protesters in Fez and Tangier thronged to demand the reopening of mosques, and state security officials arrested the Salafi preacher Abu Naeem for a YouTube *fatwā* rejecting the state's religious justification for the closures.

On one level, none of this is unique to the Moroccan or Muslim context: religious organizations across the world have differed in their approaches to religious gatherings, from complete disregard to innovative solutions. In the Moroccan context, the tensions between political, scientific, and religious considerations for policy-making likewise is not a new phenomenon. Beyond its close regulation of religious law and political expression, the Moroccan government routinely works to balance a strong commitment to upholding Islamic institutions while projecting a distinctly "moderate" and "tolerant" version of Islam. The recent decision to close mosques, far be it from a widespread controversy, nonetheless offers a moment to reflect deeper on how public voices invoke certain touchstones of knowledge to arrive at decisions so implicated in religious discourse. In Mo-

rocco, as elsewhere, the simultaneous public appeal to scientific, religious, and indeed historical knowledge conjures a dizzying array of assumptions serving as the basis for action in crisis.

The historical trajectories of such actions and ensuing public debates are also less 'unprecedented'—perhaps the foremost buzzword of the COVID-19 experience—than they may appear. With due deference to the immediacy of current public health research, I propose that some historical anchoring in the discourse of past debates—indeed beyond the actions and policies themselves—are instructive to present debates. That is, the way in which political and intellectual figures past balanced the exigencies of mortal danger with their complex of worldly and spiritual anxieties can shed light on the doubts and unknowns that characterize this experience. In Morocco, the social and religious contentions concerning the very concept of plague and quarantine from well over a century ago provides striking insights for this purpose.

Aḥmad al-Nāṣirī and *Kitāb al-Istiqṣā*

In 1895, the Moroccan scholar and historian Aḥmad al-Nāṣirī published a magisterial work of history entitled *Kitāb al-istiqṣā li-akhbār duwal al-Maghrib al-aqṣā* ("The Book of Inquiry into Moroccan Empires," hereinafter *Kitāb al-Istiqṣā*). The work itself embraces the enormous pretention of recounting the entire history of Morocco, from the pre-Arab and pre-Muslim Berber era to his contemporary society under Sultan Hassan I (r. 1873-1894). In doing so, the text reifies the notion of an "independent political[1]" Moroccan state at a moment when the inevitability of colonial rule became increasingly apparent. Throughout its constituent volumes, al-Nāṣirī evinces a keen interest in the broader world around him and its increasingly pan-national intellectual trends.[2] This spirit, one that Eric Calderwood

1 Eric Calderwood, "The Beginning (or End) of Moroccan History: Historiography, Translations, and Modernity in Ahmad b. Kahlid al-Nasiri and Clemente Cerdeira," *International Journal of Middle East Studies* 44, no. 3 (2012): 399.

2 "Al-Nasiri's admiration for European science, his interest in European

forcefully argues as a distinct figment of "modernity,"[3] frames al-Nāṣirī's telling of his country's own history and how it reflects on his present. It is amidst the epic retelling of this history that al-Nāṣirī arrives with a deeply vested interest in the political and religious dimensions of plague.

Plague and Quarantine: The Anxieties of Sultan Aḥmad al-Manṣūr (r. 1578-1603)

In the fifth of *Kitab al-Istiqṣā*'s nine volumes, al-Nāṣirī takes up the Saʿdian Dynasty, whose sultans ruled Morocco from 1549 to 1659. Based in Marrakesh, the most well-known Saʿdī *sulṭān*, Aḥmad al-Manṣūr, ruled over a territory spanning contemporary Morocco, Mauritania, and Mali. It is within his extended and florid biographical narratives of al-Manṣūr that al-Nāṣirī first broaches the topic of disease and its containment. The specific chapter, entitled "The Uprising of Crown Prince Muhammad Shaykh Maʾmūn against his Father al-Manṣūr and Its Causes," begins as a searing indictment of al-Manṣūr's son al-Maʾmūn's moral depravity, a problem that apparently weighed heavily on the Sulṭān.[4] Al-Nāṣirī recounts that al-Manṣūr had been living in Fez, yet upon preparing to return to Marrakesh, he received an alarming letter from Abū Fāris, his other son and representative (*khalīfa*) in Marrakesh. In the letter, Abū Fāris reported the outbreak of plague (*wabāʾ*)[5] in the southern Sūs

languages, and his participation in Pan-Arab journalism … also align his *Kitab al-Istiqsa* with important trends in 19th-century Arabic historiography." Calderwood, "The Beginning (or End)," 401.

3 Calderwood, "The Beginning (or End)," 402.

4 Sulṭān al-Manṣūr's advisers reportedly went to Meknes to visit Maʾmūn, only to return confirming the unabashed immoral behavior that the latter exhibits. Al- Manṣūr ignores advice to kill his son, instead ordering him confined. Abū al-ʿAbbās Aḥmad b. Khālid al-Nāṣirī, *Kitāb al-istiqṣā li-akhbār duwal al-Maghrib al-aqṣā*, Vol. 5 (Casablanca: Dār al-Kitāb, 1997), 169. Citations to this source hereafter made in-text.

5 The term *wabāʾ* is used in modern Arabic to mean "pandemic," including in current media coverage of COVID-19. Due to the contemporary technical meaning conveyed by "pandemic," I translate it in al-Nāṣirī"s text as "plague." This is distinct from the Arabic term *ṭāʿūn*, meaning "plague" with the connotation of divine punishment.

(Sousse) region and in Marrakesh itself. Al-Nāṣirī proceeds to quote the entirety of Sultan al-Manṣūr's decisive letter of response.

From the outset, al-Manṣūr's letter succinctly addresses his son's warning: he instructs Abū Fāris to leave Marrakesh "if any signs of the plague appear, even the smallest bit, even on one person" (179). In that case, Abū Fāris should make his way to the coastal city of Salé, where apparently an antidote (*tiryāq*) awaits for his consumption.[6] More crucially, al-Manṣūr then prescribes two additional measures for Abū Fāris to protect himself and the city entrusted to his guardianship. First, al-Manṣūr orders that no piece of his mail originating in the disease-afflicted region (Sūs) be taken into his home—rather, Abū Fāris should have his scribe open it elsewhere, read it independently, and then come to inform him of its contents. Secondly, al-Manṣūr continues, "I recommend to you that if the plague appears, you close off the area and leave safely and soundly" (182). In other words, in a severe outbreak, Abū Fāris should seal entry to and exit from Marrakesh, ostensibly to avoid risk of further spread, and leave while he still can. Like the previous point, this recommendation appears based on nothing more or less than the pragmatic association of human movement with the spread of disease. At no point in the letter, as quoted by al-Nāṣirī, does al-Manṣūr express anxiety about the social or political implications of these measures. After addressing a few other ancillary matters, al-Manṣūr implores his son to keep him apprised of the situation and concludes his missive.

The Historian's Ambivalence: Al-Nāṣirī's Digression on Quarantine and *Sharīʿa*

Following the letter, al-Nāṣirī resumes his historian's voice to ask the reader to pay attention to two matters: first is the fact that al-Manṣūr permitted his son Abū Fāris to leave

6 Though he does not specify the nature of the antidote, al-Manṣūr adds that there is a separate "beneficial drink" antidote for Abū Fāris's young son to use instead as much as needed (179).

Marrakesh upon any sign of the plague, even though, according to al-Nāṣirī, "this matter is impermissible (*maḥẓūr*) in shariʿa" (183). Second is the fact that al-Manṣūr ordered Abū Fāris not to touch any of the mail coming to him from the infected region of Sūs. According to al-Nāṣirī, this second point clearly evokes "the actions of Europeans (*al-Faranj*), and those who go their way, to preserve themselves from plague: [actions] called quarantine (*al-kurantīna*)."

Al-Nāṣirī's narrative then turns personal, explaining that the issue of plague and quarantine has been on his mind since he traveled from his hometown of Salé in March 1879 (late Rabīʿa I 1296 AH). That being the "year of the plague," the topic of how to address such calamities arose in conversation one day when al-Nāṣirī met a group of jurists (*fuqahāʾ*) in the coastal city of El Jadida. Al-Nāṣirī recalls that the men began discussing what the Christians (*al-Naṣārā*) have done in such situations, namely this concept of quarantine: confining the population, forbidding interregional travel, and prohibiting the accompaniment of other people. Al-Nāṣirī recalls being enthralled by this discussion, adding that he later came across competing legal opinions on the matter within the famed travel report of Egyptian diplomat Rifāʿa al-Ṭahṭāwī.[7] Most famous for his musings on Parisian culture and government, al-Ṭahṭāwī recounts disembarking at the port of Marseille and immediately being forced into quarantine due to his foreign provenance.[8] Al-Ṭahṭāwī uses that occasion in his own narrative to consider how Maghribī religious scholars have addressed quarantine, comparing the opposing opinions of a Tunisian Mālikī scholar with a Tunisian Ḥanafī scholar.[9] Al-Ṭahṭāwī reports that the Mālikī's opinion forbade quarantine on the basis that its measures are considered "fleeing [God's] justice" (*al-firār min al-qadāʾ*).[10] By contrast, the

7 T*akhlīṣ al-Ibrīz fī Talkhīṣ Bārīz* (lit., "Extracting Gold in the Synopsis of Paris").

8 Rifāʿa Rāfiʿ al-Ṭahṭāwī, *Takhlīs al-Ibrīz fī Talkhīṣ Bārīz* (Cairo: Hindāwī, 2012), 57.

9 The Mālikī is Shaykh Muḥammad al-Manāʿī (d. 1250/1834), a teacher at al-Zaytūna mosque. The Ḥanafī is *muftī* Shaykh Muḥammad al-Bayram (d. 1889).

10 More precisely, this refers to removing oneself from the domain of

Ḥanafī scholar's opinion permitted quarantine measures based on (unspecified) proof texts from the Qurʿān and Sunna.[11] Upon encountering these conflicting opinions, al-Nāṣirī reports his growing desire to revisit the matter and establish the valid Islamic legal ruling (*ḥukm sharʿī*) for instituting quarantine.

Al-Nāṣirī asserts that the best way to approach the legal ruling for quarantine is to weigh the benefit (*maṣlaḥa*)against the harm (*mafsada*) that it incurs. To do this, al-Nāṣirī appeals explicitly to the Mālikī methodological principle (*aṣl al-fiqh*) of *maṣlaḥa mursala*, by which jurists may establish rulings in the absence of scriptural evidence.[12] The qualified jurist relies on individual reason to determine whether an action conforms to the underlying purposes of *sharīʿa* (*maqāṣid al-sharīʿa*) by weighing its benefits and harms. The jurist then may determine the preponderance (*rujḥān*) of either benefit or harm in the practice, thereby conferring its Islamic legal status as licit or illicit.

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sharīʿa rule. This may intend to evoke certain *ḥadīth* in which the Prophet Muhammad addresses whether it is permissible to flee lands that have been stricken with plague (*ṭāʿūn*). E.g., from the collection of *Saḥīḥ Muslim*, Usāma b. Zayd reported that Prophet Muḥammad said: "This ailment [*wajaʿ*] or illness [*saqm*] was a divine punishment by which some nations before you were punished. Then it remained on earth afterward, and it goes away sometimes and comes back another time. So whoever hears of in a land should not go to it, and whoever is in a land with [the illness] should not to flee from it" Muslim b. al-Ḥajjāj al-Qushayrī, *Al-Musnad al-ṣaḥīḥ al-mukhtaṣar min al-sunan bi-naql al-'adl 'an al-'adl 'an rasūl Allāh ṣallā Allāhu 'alayhi wa-sallam*, Vol. 4 (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, 2010), 737; and in the *Muwaṭṭaʾ*, Mālik reports that Usāma b. Zayd heard the Prophet Muḥammad say: "The plague [*ṭāʿūn*] is an affliction [*rajz*] that was sent down on a group of Israelites or some other group before them. If you hear of it striking a land, do not go there. If it strikes a land where you are already present, however, stay and do not flee." Mālik b. Anas, *Al-Muwaṭṭaʾ: the recension of Yaḥyā b. Yaḥyā al-Laythī (d. 234/848)*, eds. and trans. Mohammad Fadel and Connell Monette (Cambridge, Massachusetts: Program in Islamic Law, 2019), 736-37.

11 These scriptural citations are not provided by al-Ṭahṭāwī or al-Nāṣirī. Al-Ṭahṭāwī likewise notes that al-Manāʿī and al-Bayram debated whether the earth is round or flat, with al-Bayram holding the former opinion and al-Manāʿī the latter. al-Ṭahṭāwī, *Takhlīs al-Ibrīz*, 58.

12 For classical legal opinions on *maṣlaḥa mursala*, see Felicitas Opwis, *Maṣlaḥa and the Purpose of the Law: Islamic Discourse on Legal Change from the 4th/10th to 8th/14th Century* (Leiden: Brill, 2010), 3; 165-69. For the distinct Mālikī treatment of *maslaha mursala* as a principle of jurisprudence (*aṣl al-fiqh*), see ʿUmar al-Jīdī, *al-Tashrīʿ al-Islāmī: Uṣūluhu wa-maqāṣiduhu* (Rabat: Manshūrāt ʿUkāẓ, 1987), 111-12.

Al-Nāṣirī enthusiastically takes on this task and proceeds to outline the normative attributes that one may expect from imposing a quarantine.

Starting with the benefits, al-Nāṣirī recognizes that quarantine is supposed to ensure the safety (*al-salāma*) of a nation from the plague. Yet he immediately hedges on this presumption: "[But] this benefit, as you see, is neither determinate nor probable, because safety is not related to [quarantine] as they claim." Al-Nāṣirī reasons that rulers invoke it while exaggerating the danger, and worse yet, that people under quarantine fall ill anyhow from the disease that they intended to flee. Compelled by the ambiguity of quarantine's efficacy, al-Nāṣirī brusquely concludes that "the benefit of quarantine is doubtful or lacking. If it is as such, then shariʿa would not take it into consideration" (184).

Having so briefly assessed quarantine's principle benefit by doubting its veracity, al-Nāṣirī then turns to its harms. He states that these detriments may be categorized as both worldly (*dunyāwī*) and religious (*dīnī*)—a two-fold categorization that he did not afford to its benefits. As for the worldly detriment, al-Nāṣirī articulates an anxiety with striking contemporary resonance: that quarantine measures cause irrefutable harm to commerce by confining people, forbidding their movement, and impinging on their markets. The author does not elaborate the point further, allowing the succinct base appeal to human livelihood to speak for itself.

Al-Nāṣirī then takes up the question of religious harms stemming from quarantine, especially its impact on the faith of common believers (*al-ʿāmma*). The essence of this harm is that imposing quarantine could distort the beliefs (*ʿaqāʾid*) of commoners by rankling their trust (*tawakkul*) in God's capacity for protection: "for commoners—due to their lack of understanding—these phenomena give rise to delusions, they believe them, and they fall into the trap of weak faith (*ḍiʿf al-īmān*)" (184). Al-Nāṣirī's logic thus implies that the faith of common believers is easily shakable, especially if they are forced by fear into a

practice with unclear benefits.[13] On top of this, Al-Nāṣirī situates these dire religious consequences within a well-trodden religious and political trope of his time: the justifiability of emulating of foreigners (*iqtadāʾ al-aʿjām*). This question in fact pervades many of the other parts of *Kitab al-Istiqṣā*, along with, among others, the work of al-Ṭaḥṭāwī that he cited previously.[14] For al-Nāṣirī, the embrace of quarantine fits unfortunately well within this dubious history: as whenever "foolish" (*ḥamqāʾ*) commoners aggrandize foreign ways, such imitation will lead to the much-loathed state of social rebellion (*fitna*), "and what harm is worse than that?" (185).

He concludes the assessment of quarantine's harms by citing two other jurists who expressed similar opinions. One jurist, Egyptian scholar Shihāb al-Dīn al-Qasṭallānī (d. 923/1517), addressed the topic in an exegesis (*tafsīr*) of Qurʿān 4:102 (Sūrat al-Nisāʾ).[15] Al-Qasṭallānī interprets the verse as an appeal to humanity to be on guard against disease and even their obligation to use available medicines to treat them.[16] Here, al-Nāṣirī agrees with al-Qasṭallānī that any means necessary should be taken against plague, such as avoiding infected areas and taking medicines approved by doctors. However, al-Nāṣirī adds

13 Al-Nāṣirī denies that his admonition denigrates commoners, stating that his concern arises from "fear for them and taking precaution for them so we do not leave them ignorant to do whatever they want or [that we] do with them what harms their religion and world" (184).

14 See also, e.g., Khayr al-Dīn al-Tūnisī (d. 1890), *Aqwam al-masālik fī maʿrifat aḥwāl al-mamālik*; Mahdī al-Wazzānī (d.1923), *Al-Nawāzil al-jadīda al-kubrā fīmā li-ahl Fās wa-ghayrihim min al-badū wal-qurā al-musammāʾa bi'l-Miʿyār al-Jadīd al-jāmiʿ al-muʿrib ʿan fatāwā al-mutaʾakhirīn ʿulamāʾ al-maghrib*; and Shakīb Arslān, (d. 1946), *Limādhā taʾakhkhara al-Muslimīn? Limādhā taqaddama ghayrhim?*.

15 Qurʿān 4:102 (Sūrat al-Nisā'), in its part cited by al-Nāṣirī: "There is no fault in you, if rain molests you, or you are sick, to lay aside your weapon; but take your precautions. God has prepared for the unbelievers a humbling chastisement." AJ Arberry, *The Koran Interpreted* (New York: Touchstone, 1996), 116.

16 "[The verse] indicates the necessity of being on guard against (*ḥadhar*) all presumable harms (*maḍārr maẓnūna*), and thus it is known that treatment by medicine, being on guard against the plague, and being wary of sitting under a leaning wall is obligatory (*wājib*)." (185). For the full exegesis of the verse, see Abū ʿAbbās Shihāb al-Dīn Aḥmad b. Muḥammad b. Abī Bakr b. ʿAbd a-Malik al-Qasṭallānī al-Qutaybī al-Miṣrī, *Irshād al-sārī li-sharḥ Ṣaḥīḥ al-Bukhārī*, Vol. 7 (Cairo: al-Maṭbaʿa al-Kubrā al-Amīriyya, 1905/6 [1323 AH]), 96.

that this obligation clearly excludes any means that would result in a legal harm (*mafsada shar'iyya*) "like this quarantine" (185). Al-Nāṣirī likewise cites his contemporary al-Hāshimī b. Khaḍrā', then Qāḍī of Marrakesh, who agreed that skepticism is well warranted: "as for the ruling on quarantine, it is prohibited (*min al-ḥaẓr*) as you mentioned," Bin Khaḍrā' wrote in a letter to al-Nāṣirī. For Bin Khaḍrā', this is namely due to its association with "fleeing from [God's] justice" (cited previously in al-Ṭahṭāwī), the harm of which outweighs quarantine's benefits.[17] Al-Nāṣirī reports that Bin Khadrā' then cited numerous texts that he (al-Nāṣirī) excluded for length, relying on the clarity of the ruling without them. Bolstered by these two voices, al-Nāṣirī concludes his personal digression and returns to the history of Sultan al-Manṣūr's own death from the very plague that so worried him (186).

Analysis: Reason, Jurisprudence, and the Uses of History

This brief excursus that al-Nāṣirī presents as historical commentary contains a rich and diverse array of historical insights for both his own period and the contemporary moment. Perhaps most relevantly, it demonstrates how a public intellectual voice concerned with pandemic articulated its dangers within concurrent and sometimes competing political, social, and economic anxieties. Despite his negative assessment, al-Nāṣirī does not deny the danger of plague or the logic that human proximity contributes to its spread. He endeavors instead to weigh quarantine's broader consequences within the rubric of *maṣlaḥa mursala*, a Mālikī legal methodology that 1) presupposes no textual evidence for the issue, and 2) presupposes the Islamic jurisprudential qualification for its undertaker.[18] Al-Nāṣirī therefore ap-

17 According to al-Nāṣirī, Bin Khaḍrā' surmises that, "this ruling is violated only by arrogant followers of caprice" (186).

18 Islamic legal scholars disagreed on whether the jurisconsult undertaking *maṣlaḥa mursala* necessarily should have attained the rank of *mujtahid*, a scholar qualified to perform independent legal reasoning (*ijtihād*). Opwis, *Maṣlaḥa and the Purpose of Law*, 171 (Footnote 141).

peals to his own judgment, arguing that the supposed benefits of quarantine cannot outweigh its potential consequences on human faith and livelihood. In the end, he gives credence to these ostensible harms to argue that quarantine is forbidden in *sharīʿa*.

The normative benefit of quarantine and indeed al-Nāṣirī's own historical narrative of Sultan al-Manṣūr offer paradigms in favor of quarantine, yet al-Nāṣirī ultimately subordinates these to anxieties that clearly speak louder to him. Such rationale has been all too clear in the current moment, as governments and politicians, thrill-seekers, and conspiracy theorists alike shroud scientific data in conspiracy and doubt. Here, I propose that the lesson is not so much one to look back and deride al-Nāṣirī's lack of knowledge and/or ambivalence about public health in his assessment—it is indeed too simple of a conclusion and somewhat ahistorical. Beyond accounting for the limited biological knowledge at his disposal, it is difficult to reject wholly the validity of concerns that he articulates. The worldly detriment that he mentions—the impact of quarantine on economic livelihood—has loomed large in the United States and elsewhere as social interaction has come to a sudden halt. At the same time, al-Nāṣirī logically equates the skepticism of Western practices with a dire fear for the faith of his countrymen. In an era when narrative of Islamic "decline" and European supremacy pervaded Muslim intellectual discourses, this argument should not come as a surprise. Indeed, the fact that al-Nāṣirī so readily and quickly adopts tropes like Western imitation and *fitna* demonstrates how underlying social anxieties—then like now—pervade and indeed shape our responses to these questions.

Al-Nāṣirī's exploration of quarantine through the lens of Islamic normativity likewise sheds light on Islamic legal reasoning as it existed in this context and persists today. The contemporary Moroccan state has adopted the jurisprudential concept of *maṣlaḥa mursala* as a pseudo national creed that embodies the ideal of Moroccan Islam's flexibility. The ensuing rulings based on *maṣlaḥa mursala* are thus highly circumstantial, meaning that a scholar could declare the same action licit or illicit depending

on the context (or the scholars could disagree). As al-Nāṣirī's own writing suggests, the sources of knowledge for doing so may be as varied as political norms, scientific knowledge, and/or spiritual preservation. This means that a jurist then or now could invoke *maṣlaḥa mursala* to come to a starkly opposite view of quarantine: that the benefit of saving lives outweighs the harm that quarantine inflicts. This points, on the one hand, to Islamic jurisprudential reasoning's potential flexibility for addressing novel issues of time and place. On the other hand, however, jurists naturally cannot embark on such discretionary endeavors free of the political and social exigencies of their own times and places. This becomes even more pronounced when evaluating the normativity of a question with such unknown dangers and consequences. Notwithstanding the Islamic ideal of independent jurisprudential reasoning, al-Nāṣirī's intellectual undertaking thereby shows the simultaneous efficacy yet ephemerality of such legal methodologies.

Finally, this section of *Kitāb al-Istiqṣā* tells us as much about the enterprise of telling history as it does about the content of that history itself. That is to say, the anecdote on al-Manṣūr recounts a snippet of a 1000-plus year history, one that involves the Sultan al-Manṣūr and his movements amidst impending pestilence. However, Al-Nāṣirī diverges from that historical narrative itself to digress into his own thoughts about quarantine based on al-Manṣūr's words. The ensuing excursus, however, scarcely mentions al-Manṣūr's decisions: instead, they recount al-Nāṣirī's own personal narrative—his life in "the year of the plague"—and grappling with the permissibility of quarantine. This, of course, results in an exhibition of his own legal-intellectual approach by which he concludes that *sharīʿa* rejects it. In this way, al-Nāṣirī's excursus on nineteenth-century quarantine emerges as the main substance of the text, while the historical narrative of al-Manṣūr itself is merely pretext. Regarded as such, a historical work like *Kitāb al-Istiqṣā* holds as much, if not more, historical value for al-Nāṣirī's own time than that which he recounts. Whether al-Manṣūr sustained a similar crisis of conscience three centuries prior, he becomes for al-Nāṣirī's

history a crucial case study in the tension of expediency and legality. Consciously or not, al-Nāṣirī writes himself into that narrative as the final arbiter of this timeless political and moral dilemma.

It remains to be seen, of course, what future historians and public voices will conclude about the social and economic casualties of pandemic. Without doubt, the anxieties underlying political control, economic capacity, and social standing will continue to frame these reactions alongside, or in spite of, scientific assessments. In contemporary Morocco, this has included state led religious and scientific justifications for quarantine—as well as coercive measures to enforce them. At the same time, we who see ourselves enduring an unprecedented challenge will not stop trying to look to the past for answers. Doing so will involve not merely invoking comparable incidents past, but inevitably reading them through the lens of our present challenges. At the intersection of moral and legal reasoning, scientific knowledge, and effective policy making, our historical narratives themselves loom large over the choices available for the path forward. Indeed, what we write today about this history—no less, a musing on quarantine in nineteenth-century Morocco—will provide a potent source for future assessments of our actions in this uncertain moment.

China – Xinjiang Uyghur Autonomous Region Regulation on De-Radicalization: On 新疆维吾尔自治区去极端化条例, promulgated by the Standing Comm. People's Cong. of the Xinjiang Uighur Autonomous Region, China, Mar. 29, 2017, effective Apr. 1, 2017.

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Regulation Summary

In March 2017, Xinjiang, a territory in northwest China, enacted the Xinjiang Uyghur Autonomous Region Regulation on De-Radicalization ("2017 Regulation"), which designated fifteen types of statements and actions as "primary expressions of radicalization" and authorized punishment for nonconformity, including criminal penalties and forced participation in "individual and collective" education programs. Many of these designated statements and actions are not only common practices in Muslim communities but also mandated by traditional Islamic law. The 2017 Regulation, through restricting religious expression, has the effect of further stigmatizing the Islamic faith and dismantling the social infrastructure of Muslim communities in Xinjiang.

Analysis

Background

Xinjiang, officially the Xinjiang Uyghur Autonomous Region, is a region in Central Asia and home to several ethnic groups, including the Uyghur, Kazakhs, Tajiks, Kyrgyz, in addition to a large Han Chinese population. Uighurs have lived in the region for more than 1,000 years since adopting Islam after contact with Muslim traders.[1] Muslim ethnic groups make up more

1 *See* Bethany Allen-Ebrahimian, *Exposed: China's Operating Manuals for Mass Internment and Arrest by Algorithm*, Int'l Consortium of Investigative Journalists (Nov. 24, 2019), https://www.icij.org/investigations/china-cables/exposed-chi-

than half the region's population of 25 million.[2] Even though Uyghurs living in Xinjiang are nominally entitled to rights of autonomy and self-governance under the Chinese constitutional regime,[3] they have long faced economic marginalization and political discrimination as an ethnic minority.[4]

In recent years, the conflict between Uyghurs and the Beijing government has intensified due to the government's policies of mass surveillance, increased arrests, and a system of "re-education camps," which reportedly held more than a million members of Muslim ethnic groups.[5] The 2017 Regulation was introduced to provide legal justifications for the government's mass detention policies on anti-terrorism grounds. It was enacted on March 29, 2017 by the Standing Committee of the People's Congress of the Xinjiang Uighur Autonomous Region, the region's legislature.[6] Article 14 of the 2017 Regulation authorized the government to effectuate "education and transformation" through "individual and collective" education programs.[7] Article 48 further authorized criminal penalties for violation.[8]

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2 *See* Austin Ramzy & Chris Buckley, *'Absolutely No Mercy': Leaked Files Expose How China Organized Mass Detentions of Muslims*, N.Y. Times (Nov. 16, 2019), https://www.nytimes.com/interactive/2019/11/16/world/asia/china-xinjiang-documents.html.

3 *See* P.R.C. Constitution（中华人民共和国宪法）art. 4 (2018) (China). For a discussion on China's lack of robust judicial review, see *Recording & Review: An Introduction to Constitutional Review with Chinese Characteristics*, Nat'l People's Cong. Observer, https://npcobserver.com/2018/01/19/recording-review-an-introduction-to-constitutional-review-with-chinese-characteristics/ (last visited Nov. 29, 2019).

4 *See* Allen-Ebrahimian, *supra* note 1.

5 *See* Ramzy & Buckley, *supra* note 2.

6 *See* Xinjiang Uyghur Autonomous Region Regulation on De-Radicalization（新疆维吾尔自治区去极端化条例）(promulgated by the Standing Comm. People's Cong. of the Xinjiang Uighur Autonomous Region, Mar. 29, 2017, effective Apr. 1, 2017) (China), http://www.xjdrc.gov.cn/info/10465/1396.htm [hereinafter 2017 Regulation]. Chinese national and regional legislatures largely play a rubber-stamping role and act at the direction of the Chinese Community Party. *See generally The NPC and Its Standing Committee*, Nat'l People's Cong. Observer, https://npcobserver.com/about-the-npc-and-the-blog/ (last visited Nov. 29, 2019).

7 *See id.*, art. 14.

8 *See id.*, art. 48.

Discussion

Article 9 of the 2017 Regulation listed fifteen types of prohibited speeches and actions, which are labeled as "primary expressions of radicalization."[9] This essay focuses on discussing the prohibitions concerning marriage and divorce as well as personal appearance.

1. Marriage and Divorce

Article 9 subparagraph (6) prohibited "marriage and divorce through religious methods without legal procedures."[10] To contextualize this prohibition and the meaning of "legal procedures," it may be helpful to examine the Xinjiang Uyghur Autonomous Region Additional Regulations on Implementing the Marriage Law ("1980 Regulation"), which was enacted by Xinjiang's legislature in 1980 as a key piece of legislation on marriage in the region. The 1980 Regulation provides additional guidance on implementing the national marriage law and outlawed several foundational institutions of the marriage and divorce under traditional Islamic law.[11]

First, the 1980 Regulation prohibited "religious ceremony as a substitute for marriage registration."[12] Second, the law prohibited "purchase or sales of marriage" and "conditioning marriage on money or property."[13] This rule effectively banned the pledge and payment of dower (*mahr*), a key element of the Islamic marriage contract. Under traditional Islamic law, the dower provides the wife with financial security within the mar-

9 *See id.*, art. 9.

10 *See id.*, art. 9(6).

11 *See* Xinjiang Uyghur Autonomous Region Additional Regulation on Implementing the P.R.C. Marriage Law (新疆维吾尔自治区执行中华人民共和国婚姻法的补充规定) (promulgated by the Standing Comm. People's Cong. of the Xinjiang Uighur Autonomous Region, Dec. 14, 1980, effective Jan. 1, 1981) (China) https://www.chinacourt.org/law/detail/1988/10/id/76513.shtml [hereinafter 1980 Regulation].

12 *See id.*, art. 7.

13 *See id.*, art. 5.

riage,[14] whereas the drafters seemed to have regarded such monetization of marriage as undesirable. Third, the law prohibited "unilateral divorce through verbal or written notice."[15] This rule has the effect of banning *ṭalāq* as a mechanism for divorce.

The violation of the 1980 Regulation or the national marriage law would normally lead to only civil consequences, such as nullification of the marriage.[16] However, in the context of the 2017 Regulation, failure to follow the legal requirements for marriage or divorce may fall under subparagraph (6)'s prohibition of "marriage and divorce through religious methods without legal procedures," and be characterized as an "expression of radicalization," leading to much severe consequences such as criminal penalties.[17]

Additionally, Article 9 subparagraph (3) prohibits one's "interference with other people's weddings, funerals, or inheritance."[18] Such broad language has led some commentators to interpret "other people" to include even family members.[19] If that is the case, the prohibition will whittle away the role of a guardian (*walī*) in the marriage because the guardian's activities clearly "interfere with" women's marriage. Under Islamic law, having a guardian, who ordinarily is the woman's father, is required for there to be a valid marriage. The guardian often represents the women's family interest and is responsible for selecting and approving the potential husband.[20]

In sum, the two provisions in Article 9 of the 2017 Regulation prohibited a number of key institutions in a traditional

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14 *See* Asifa Quraishi & Frank E. Vogel, The Islamic Marriage Contract 88 (2008).

15 *See* 1980 Regulation, *supra* note 11, art. 6.

16 *See* P.R.C. Marriage Law (中华人民共和国婚姻法) arts. 43–49 (promulgated by the Standing Comm. Nat'l People's Cong., effective Jan. 1, 1981) (China), http://www.gov.cn/banshi/2005-05/25/content_847.htm.

17 *See* 2017 Regulation, *supra* note 6, art. 48.

18 *See id.*, art. 9(3).

19 *See* Nectar Gan & Mimi Lau, *China Changes Law to Recognise 'Re-Education Camps' in Xinjiang*, S. China Morning Post (Oct. 10, 2018), https://www.scmp.com/news/china/politics/article/2167893/china-legalises-use-re-education-camps-religious-extremists.

20 *See* Wael B. Hallaq, Sharī'a: Theory, Practice, Transformations 274–75 (2009).

Islamic marriage. By designating these practices as "expressions of radicalization" in conjunction with heavy penalties for nonconformity, the 2017 Regulation further stigmatizes the Islamic faith and dismantles the social infrastructure of the Muslim communities in Xinjiang.

2. Personal Appearance

Article 9 of the 2017 Regulation also sets out two provisions regulating personal appearance. Subparagraph (7) prohibits "wearing, or compelling others to wear burqas with face coverings or symbols of radicalization."[21] Subparagraph (8) prohibits "spreading religious fanaticism through growing abnormal beards or name selection."[22]

First, the 2017 Regulation is not the first law in the region to ban burqas. In December 2014, Xinjiang's capital, the City of Urumqi, enacted a ban on "burqas with face coverings" in all "public spaces."[23] In contrast, the 2017 Regulation has an even broader scope by expanding the ban beyond public spaces;[24] wearing a burqa in one's private home thus is a violation of the 2017 Regulation. Such a restriction can hardly be justified on public safety grounds and can be reasonably characterized only as a deterrent to religious expression. Although covering a woman's face is not explicitly mandated by the Qur'ān, Muslim jurists who believe women are required to cover their face often rely on Qur'ānic verses of 24:30–31, which instruct women not to display their beauty to people other than their husband and close family members; the Qur'ān also directs the men and women to dress and interact in a modest manner.[25] In the modern

21 *See id.*, art. 9(7).

22 *See id.*, art. 9(8).

23 *See* Urumqi Municipal Regulation on Banning Burqa with Face Covering in Public Spaces (乌鲁木齐市公共场所禁止穿戴蒙面罩袍的规定) (promulgated by the Standing Comm. People Cong. of the Xinjiang Uighur Autonomous Region, Jan. 10, 2015, effective Feb. 1, 2015) (China), http://xj.people.com.cn/n/2015/0116/c188514-23571698.html.

24 *See* 2017 Regulation, *supra* note 6, art. 9(7).

25 Qur'ān, 24:30–31, Quran.com, https://quran.com/24/30–31 (last vis-

context, a woman may choose to wear burqa for various reasons. In addition to demonstrating piety or modesty, donning a burqa may reflect a woman's desire for privacy in a male-dominated environment or her participation in political movements.[26] The 2017 Regulation utterly disregarded a Muslim woman's self-expressive interests in choosing to wear a burqa even in her private home.

Second, the ban on "growing an abnormal beard" seems more ambiguous because the meaning of "abnormal" depends on the context.[27] However, in light of the overall purpose of the law to suppress religious expressions, "growing an abnormal beard" may refer to the common practice of non-shaving among Muslim men. Although not explicitly mentioned in the Qur'ān, some jurists believe that growing one's beard is encouraged or mandatory under Islamic law relying on authoritative statements from *ḥadīth* stating that "[C]ut the moustaches short and leave the beard (as it is)."[28] The beard has also been seen as a "symbolic physical identit[y]" and "an indication of religious piety" because it is one way for male Muslims to distinguish themselves from non-Muslims.[29] Notably, in 2015 the United States Supreme Court unanimously struck down a state prison policy that prohibited a Muslim prisoner from growing a beard on religious freedom grounds.[30] Similar to the ban on burqa, the ban on "growing an abnormal beard" could be viewed purely as a restriction on religious expression.

Conclusion

In conclusion, the Xinjiang Uyghur Autonomous Region

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ited Nov. 29, 2019); *see also* Juan Eduardo Campo, Encyclopedia of Islam 119, 702 (2009).

26 *See id.* at 119.

27 *See* 2017 Regulation, *supra* note 6, art. 9(8).

28 *See* Sahih Al-Bukhari ¶ 5893, Sunnah.com, https://sunnah.com/bukhari/77/110 (last visited Nov. 29, 2019).

29 *See* Ahmad Bunyan Wahib, *Being Pious Among Indonesian Salafis*, 55 Al-Jami'ah: J. Islamic Stud. 1, 14 (2017).

30 *See* Holt v. Hobbs, 574 U.S. 352 (2015).

Regulation on De-Radicalization, through designating as "primary expressions of radicalization" a number of statements and actions mandated by Islamic law, severely restricted the right to religious freedom of the Muslim community living in the region. The law has the effect of further stigmatizing the Islamic faith and dismantling the social infrastructure of the Muslim communities in Xinjiang.

Roundtable on Islamic Law & Legal History [Selections]

Edited by Intisar A. Rabb (Harvard Law School) and
Mariam Sheibani (University of Toronto-Scarborough)*

Abstract

In December 2020, we launched our Roundtable on Islamic Legal History and Historiography, which brought together leading and emerging scholars of Islamic law and history to weigh in on diverse approaches to questions of method and meaning in Islamic law and legal history. After publishing twenty one essays throughout December, January, and February, the Roundtable culminated on Friday, 5 March 2021 in a live webinar over Zoom. During the live Roundtable webinar, contributing scholars reflected on the larger themes, questions, debates, and conclusions that came out of the online Roundtable. For the first time, these Roundtables—both written and live—put a wide array of legal, intellectual, and social historians in conversation with one another, connected by the sources and insights about Islamic law that have animated the field over the last half century of scholarship on Islamic law. We are pleased to present these thought-provoking essays, and invite you to join us and contributing scholars in continuing conversations that sparked by this historic discussion about the state of the field of Islamic legal history.

* As conveners of this Roundtable on Islamic Legal History and Historiography, we gratefully acknowledge the comments from Professors Abigail Balbale of New York University, Najam Haider of Barnard College, and Adnan Zulfiqar of Rutgers Law School; and the editorial assistance and contributions of two stellar student editors: Cem Tecimer, a SJD candidate at Harvard Law School, and Omar Abdel-Ghaffar, a PhD student in the Department of History at Harvard University.

Methods and Meaning in Islamic Law: Introduction

Intisar A. Rabb*
Harvard Law School

How should we think about the most pressing questions of Islamic law and legal history today? We asked leading scholars of Islamic law and history to weigh in on the methods and meaning they notice or favor, at a time when much has changed in the field and the world since Islamic law emerged as a major field of studies in the global academy over the last century, and at a time when access to new sources, historiographical advances, and data science tools promise that more changes are yet to come.

Myriad engagements with Islamic law and its historical moorings motivate a slew of sometimes existential questions: Is Islamic law a lived tradition with varied socio-historical manifestations, or is it a set of doctrines and rules contained in normative texts that many label "orthodox"? Is Islamic law an expression of values that any modern adherent could interpret to order lives and oppose injustice, or is it the province of experts to show what Muslim jurists said and did, historically, in an unbroken chain of textual sources that reach back to the Prophet Muḥammad and Islam's founding era? What is Islamic law and history *about*? How do we know? And to what end?

Consider this: When Malcolm X squared off against

* with contributions by Mariam Sheibani and Najam Haider

Joseph Schacht in a 1962 New York court room, ostensibly over whether inmates at Attica claiming to be Muslim were entitled to religious accommodations, the two were arguing about methods and meaning in Islamic law and history.[1] Years earlier, when Joseph Schacht accepted Harvard Law School Dean Erwin Griswold's invitation to deliver the first major lecture on Islamic law at an American law school in 1947, the two were engaged in a conversation about method and meaning in Islamic law and history in the academy and in the courts.[2] And years later, when the late Columbia professor Jeanette Wakin wrote a tribute to her colleague Joseph Schacht (d. 1969) in this Program in Islamic Law's predecessor publication, she, too was meditating on methods and meaning in Islamic law and history.[3] All asked questions about the origins, methods, and contours of Islamic law, which took off in the 1950s and 60s.[4] Throughout Schacht loomed large as he marched his way into the center of these

1 SaMarion v. McGinnis, 253 F. Supp. 738 (W.D.N.Y. 1966); see also Bryant v. McGinnis, 463 F. Supp. 373 (W.D.N.Y. 1978). For discussion, see Garrett Felber, *Those Who Don't Know Say: The Nation of Islam, the Black Freedom Movement, and the Carceral State*(University of North Carolina Press, 2020).

2 Dean Griswold would go on to become Solicitor General of the United States, and took a position in the 1969 conscientious objector case against Muhammad Ali that—as with former Dean Roscoe Pound—seems to have drawn closely on Schacht's Weberian notions of Islamic law as an arbitrary form of justice to oppose religious accommodations for the athlete, as Schacht had opposed religious accommodations for prisoners years before. See Marty Lederman, "Muhammad Ali, Conscientious Objection, and the Supreme Court's struggle to understand 'jihād' and 'holy war': The Story of *Cassius Clay v. United States*," *SCOTUSblog*, June 8, 2016; see also Intisar A. Rabb, "Against Kadijustiz: On the Negative Citation of Foreign Law," *Suffolk University Law Review* 48, no. 343 (2015): 349 n.41, 357.

3 Jeanette Wakin, *Remembering Joseph Schacht (19021969)*, Occasional Publication no. 4 (Cambridge, MA: Harvard Law School: Islamic Legal Studies Program, 2003). For a discussion of Schacht's focus on "Islamic law in practice" and law reform in the Muslim world, and for a full list of his related and other works, see Wakin, *Remembering Schacht*, 17–20, 32–40 (selected bibliography).

4 Schacht's most significant salvo came in 1950, *The Origins of Muhammadan Jurisprudence,* which was heavily influenced by the nineteenth-century writings of Ignaz Goldziher, by the early twentieth-century teachings of his first professor of Islamic studies, Gotthelf Bergsträsser, and by those of the Dutch scholar who would come to be Schacht's teacher, Christiaan Snouck Hurgronje. Along with his 1950 *Origins*, his 1964 *Introduction to Islamic Law* dispatched almost equal parts history and meaning on the one hand, and method and historiography on the other. See Wakin, *Remembering Joseph Schacht*, 13–19.

debates by virtue of his first-in-time activities related to Islamic law *as law*, on the page and in the world.[5] But then we moved beyond Schacht.

Now consider this: By the early 1990s, scholarship about Islamic law had grown exponentially, as dozens of well-known scholars pursued ever more sophisticated questions about its methods and meanings. It was during this time that 'Islamic law' emerged and gained recognition as a discrete field of academic inquiry. This period saw entire cohorts of PhD graduates receive training by leading scholars of Islamic law and history who had joined the faculties at Harvard, Princeton, the University of Pennsylvania, and elsewhere.[6] They, their students, and scholars from around the country engaged in sustained debates tackling major historical controversies in the study of Islamic law and history.[7] Some of those debates unfolded in the pages of the *Journal of Islamic Law and Society*, which emerged then

5 Joseph Schacht is like a ubiquitous Energizer Bunny of Islamic law: He marched across the European Continent (born a German citizen in present-day Poland, and becoming the youngest faculty member at any German university when he received a faculty appointment at the University of Freiburg im Breisgau and later accepted a chair of Oriental Studies at Königsberg); marched across the Muslim world (having accepted a visiting professorship at the University of Cairo and conducted manuscript research in Istanbul before World War II, and much later having returned to the region as a visiting professor of law at University of Algiers' Faculty of Law that he later followed with trips to Nigeria and parts of East Africa); renounced both German citizenship and the German language after World War II as he went on to the United Kingdom (where he was to take up a faculty appointment at Oxford University and complete a second doctoral degree); went back to the Continent to teach at the University of Leiden; and then finally migrated to the United States—where he accepted a faculty appointment at Columbia University; weighed in on U.S. court cases involving Islamic law and Muslims; and accepted requests to lecture, receive awards, and do faculty visits at Harvard, Yale, and UCLA until his untimely death in 1969. Even afterward, Schacht's papers traveled, first to Europe and to the Muslim world: his widow Dorothy sold his papers to the publisher E.J. Brill, for which the University of Leiden sued and won, after which his papers went to rest, finally, at the libraries of a new buyer, the International Islamic University of Kuala Lumpur. See Wakin, *Remembering Joseph Schacht*, 2–11.

6 The scholars of Islamic law and history who had joined these schools in the 1970s and 1980s—think, for example, of Michael Cook, George Makdisi, Hossein Modarressi, and Roy Mottahedeh, to name a few—went on to train the trainers who, as their former students, now teach at leading and far-flung universities.

7 For illustrative works that emerged roughly in the 1990s with increasingly more diverse and sophisticated treatments of the field, see below under Further Reading: Islamic Legal History and Historiography.

too, in 1994.[8] And this same decade saw the establishment of the Islamic Legal Studies Program at Harvard Law School, to which the Program in Islamic Law is heir.[9] It was against that backdrop that Stephen Humphreys published the first handbook on Islamic history in 1991 and that Bernard Weiss published an edited volume that functioned as a handbook on Islamic law a decade later in 2001.[10]

Since, with the coming of the twenty-first century, the fields of Islamic law and legal history have seen unprecedented advances in scholarly meditations on meaning and method, and in the expansion of publications of primary and secondary sources of Islamic law and history.[11] One especially notable phenomenon is the recent trend of studied reflections on Islamic legal history and historiography alongside these works, resulting in the publication of no fewer than *five* handbooks on Islamic law in just *five* years.[12]

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8 *The Journal of Islamic Law and Society* is on volume 27 in 2020, having operated continuously since its inaugural issue.

9 Harvard Law School established the Islamic Legal Studies Program in 1991, when Dean Robert Clark worked with then-Assistant Professor Frank Vogel to structure and find funding for the Program as the world's leading institution for the academic study of Islamic law. HLS met its initial funding goals in 1993 and 1998. The endowment funds—all designated for teaching and fellowships, library books and research, and programming and scholarship in Islamic legal studies under a faculty director for the Program (then: a Center)—came from individuals and governments from within the Muslim world as well as from large corporations, such as the Boeing Company and the McDonnell Douglas corporation, that operated in the Middle East and larger Muslim world. See Harvard University Archives for Islamic Legal Studies Program, Box 9 (1991–2008); Intisar Rabb, "The Past, Present, and Future of Islamic Law at Harvard and Beyond," on the "God on Mass Ave Panel at HLS | 200: The Harvard Law School Bicentennial" (unpublished remarks based on archival ILSP documents, Cambridge, MA October 27, 2017).

10 Stephen Humphreys, *Islamic History: A Framework for Inquiry* (Princeton: Princeton University Press, 1991). See also the edited volume by the late Bernard Weiss, ed., *Studies in Islamic Legal Theory* (Leiden: Brill, 2001). The universities training legal historians typically assigned chapters from one or another of these works in their methods courses throughout the 2000s: it was what was available.

11 For illustrative works that emerged much earlier in the field more generally, see below under Further Reading: General Islamic History and Historiography.

12 Namely: Peri Bearman and Rudolph Peters, eds., *The Ashgate Research Companion to Islamic Law* (Farnham: Routledge, 2014); Anver M. Emon and Rumee Ahmed, eds., *The Oxford Handbook of Islamic Law* (Oxford: Oxford University Press, 2018); Khaled Abou El Fadl, Ahmad Atif Ahmad, and Said Fares Hassan, eds., *Routledge Handbook of Islamic Law* (Florence: Routledge, 2019); and

In light of these developments, we convened a Roundtable at the Islamic Law Blog to take stock of the state of the field. We invited leading and emerging scholars of Islamic law and history to weigh in on their approach to varied questions of method and meaning in Islamic legal history:

What have been the most significant methodological and historical developments in the field of Islamic law over the past two decades?

How have mainstream approaches from related fields in the humanities and social sciences, ranging from European, American, or Chinese legal history, for example, to law-and-economics, anthropology, and sociology, informed the study of Islamic law?

How have critical approaches from other fields in the humanities and social sciences, ranging from gender and feminist studies to critical race theory, informed the study of Islamic law?

How have data science, the use of quantitative methods, and digital technologies impacted the field, or promised to shape the future of the field?

What is your chosen approach to the historical study of Islamic law, and why?

Our Roundtable put a wide array of legal, social, and intellectual historians in conversation with one another on questions of meaning and method in Islamic law. Through it, we found insight into the once and future status of the field of Islamic legal history and historiography.

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the edited volumes A. Kevin Reinhart and Robert Gleave, eds., *Islamic Law in Theory: Studies on Jurisprudence in Honor of Bernard Weiss* (Leiden: Brill, 2014) and Sohaira Z. M. Siddiqui, ed., *Locating the Sharīʿa: Legal Fluidity in Theory, History and Practice* (Leiden: Brill, 2019).

Why and What Did Legal Scholars Write in Medieval Islamic Societies?

Maribel Fierro
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Abstract

Maribel Fierro's motivating question is "[w]hy books dealing with specific subjects were written at specific times and in specific contexts." Relying on a dataset compiled by Historia de los Autores y Transmisores de al-Andalus (HATA), a project she directs that aims to map the intellectual production of al-Andalus, the author observes that the majority of scholarship produced by Andalusi scholars were fiqh and poetry texts. The former, she argues, is likely explained by the professional opportunities enabled by engaging in the study of fiqh at the time compared to other genres. What makes such research possible is the breadth of the dataset, in no small way thanks to the collegial sense of some of the scholars during the Andalusi era, exemplified by the case of Ibn al-Ṭallāʿ (d. 497/1104) whose Kitāb aqḍiyat rasūl Allāh lists thirty-four of the sources he relied on.

The Cordoban Mālikī scholar Ibn al-Ṭallāʿ (d. 497/1104) authored a number of legal books dealing with contracts (*wathāʾiq*), patronate (*walāʾ*), and other subjects. He also decided to write a book on the judgments or sentences issued by the Prophet Muḥammad, the *Kitāb aqḍiyat rasūl Allāh*, when he realized that the subject had been largely overlooked: he found only one book, by Abū Bakr b. Abī Shayba (d. 235/849), which he described as being "small."[13] That 'small book' (*kitāb ṣaghīr*) is in fact included in Ibn Abī Shayba's *Muṣannaf*; to my knowledge, sections devoted to *aqḍiyat rasūl Allāh* or *aḥkām al-nabī* are not found in other *ḥadīṯh* compilations, although the *ḥadīths* quoted by Ibn Abī Shayba can be found in them under other headings. Ḥajjī Khalīfa (d. 1067/1657), in his *Kashf al-ẓunūn*, mentions Ibn al-Ṭallāʿ's work, of which he must have seen a copy, since he quotes its opening passage. He also mentions another work on the topic, the *Kitāb aqḍiyat rasūl Allāh* written by the Ḥanafī scholar Ẓāhir al-dīn ʿAlī b. ʿAbd al-ʿAzīz b. ʿAbd al-Razzāq al-Marghinānī (d. 506/1112).[14] Later, in his supplement to Ḥajjī Khalīfa's bibliographical compilation, the *Hadiyyat al-ʿārifīn*, Ismāʿīl Bāshā al-Baghdādī mentions another early author, the Egyptian Mālikī scholar Muḥammad b. Aṣbagh b. al-Faraj (d. 275/888), who wrote a book on *Aqḍiyat al-rasūl* that Ibn al-Ṭallāʿ does not seem to have had knowledge of, and which now seems to be lost.[15] While Ḥajjī Khalīfa asserts that al-Marghinānī's work gave rise to commentaries,[16] such was not the case with Ibn al-Ṭallāʿ's work. It did, however, circulate widely, with at least eight manuscripts preserved, mostly in Turkish libraries but also in India, and with more than six modern editions from

13 ʿAbd Allāh Muḥammad ibn Faraj al-Mālikī al-Qurṭubī Ibn al-Ṭallāʿ, *Aqḍiyat Rasūl Allāh* (Miṣr: ʿĪsá al-Bābī al-Ḥalabī, 1927), 125–26.

14 Ḥājjī Khalīfa, *Kashf al-ẓunūn*, ed. G. Flügel, 4 vols (Leipzig, 1835-58,) I, 379–80.

15 Ismāʿīl Bāshā al-Baghdādī, *Hadiyyat al-ʿārifīn, asmā' al-mu'allifīn wa-āthār al-muṣannifīn*, 2 vols. (Istanbul 1951), who also records two later works on the same subject, one by Abū l-Ṭayyib Muḥammad Ṣadīq Khān al-Hindī (d. 1307/1889) and another by the Shīʿī scholar Asad Allāh Ibn al-Ḥājj Ismāʿīl al-Kāẓimī (d. 1220/1805).

16 This work is not included in Carl Brockelmann, *Geschichte der Arabischen Litteratur*, *2 vols. + 3 vols.: Supplementenbänden*, 2nd ed. (Leiden: E. J. Brill, 1943–49). I do not know if it has been preserved.

1927 to 2003, as well as a translation into Urdu.[17]

Ibn al-Ṭallāʿ was careful to explain the state of the art (although he omits Ibn al-Aṣbaghʾs work) and lists the thirty-four works that he used as sources.[18] By doing so, we may recognize in him a 'colleague,' a scholar who did things the way they ought to be done. Making the effort to fill a gap in the extant literature on a subject seems to us a commendable undertaking in the scholarly world today, and one that by itself could explain why Ibn al-Ṭallāʿ wrote his book. Should we look further into the matter? One may think that interest in the sentences of the Prophet would have been widespread among the Shāfiʿīs and the Ḥanbalīs. Why then did a Mālikī like Ibn al-Ṭallāʿ think that the subject deserved more attention than that offered by Abū Bakr b. Abī Shayba? Did it have to do with the fact that those sentences were issued while the Prophet was living in Medina and therefore would have influenced the judicial practice there, a matter of importance for the Mālikīs given the relevance they accorded to Medinese ʿ*amal*? But then why was it that a Ḥanafī who was a contemporary of Ibn al-Ṭallāʿ also became interested in the same subject at around the same time in another region of the Islamic world? Is this another one of those synchronicities that are not uncommon in the global Islamic world of knowledge, and that point to specific needs or trends in the scholarly milieu or even in society at large?

Why books dealing with specific subjects were written at specific times and in specific contexts is an issue that has interested me since the time I started doing research back in the 1980s. Spanish Arabism had as one of its missions to translate into Spanish the works written in al-Andalus in order to make them available to other scholars – mostly Medievalists – who did not have competence in Arabic, as these works were believed to offer relevant materials for writing the 'history of Spain.' My

17 This information is taken from *Historia de los Autores y Transmisores de al-Andalus (HATA)*, directed by M. Fierro, http://kohepocu.cchs.csic.es/ and https://www.eea.csic.es/red/hata/

18 On which see Maribel Fierro, "La *Fahrasa* de Ibn al-Ṭallāʿ," in *Estudios Onomástico-Biográficos de al-Andalus. II*, ed. María Luisa Avila (Granada: CSIC, 1989), 277–97.

initial interest was in those Muslims and Islamic beliefs and practices that were subject to accusations of innovation, deviation and heresy in al-Andalus. I translated two books by Andalusi authors—Ibn Waḍḍāḥ al-Qurṭubī (d. 287/900) and al-Ṭurṭūshī (d. 520/1126)—dealing with innovations mostly in rituals (*bidaʿ*, sing. *bidʿa*), and in both cases it took me a long time to reach a satisfactory understanding—at least in my view.[19] I was greatly helped in eventually reaching this understanding by the fact of directing a project that had the aim of mapping the intellectual production of al-Andalus, Historia de los Autores y Transmisores de al-Andalus.[20] In *HATA*, the materials are organized in chronological order by author and discipline, one of which is Islamic law (*fiqh*).[21]

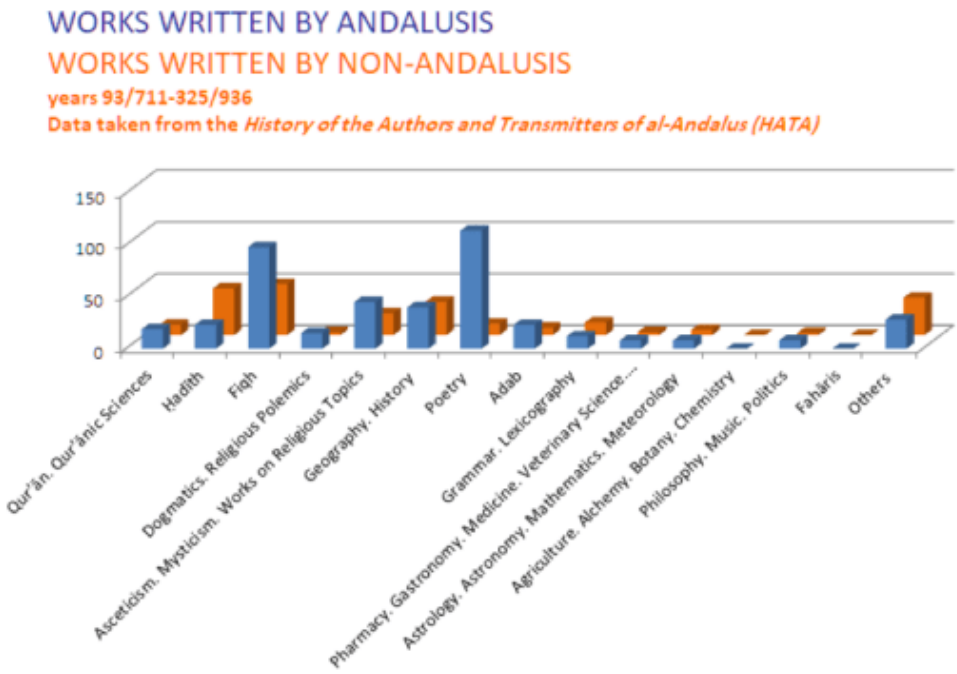
Fiqh was undoubtedly the discipline most cultivated by Andalusi scholars, as reflected in Table 1, which covers the period between 93/711 and 325/936. Just a note regarding the case of poetry: what the Table reflects by 'Poetry' are not works such as poetic *dīwān*-s, but verses—in some cases just a few of them—mentioned in the sources from which the materials of *HATA* have been extracted. Poetry in fact had a pervasive presence in Andalusi society, as it formed part of the daily life of the cultivated elites.

19 M. Fierro, "Al-Ṭurṭūshī and the Fatimids," in Farhad Daftary and Shainool Jiwa, eds., *The Fatimid caliphate: Diversity of traditions* (London-New York: IB Tauris and the Institute of Ismaili Studies, 2017), 118–62.

20 See note 5.

21 The 'disciplinary' division required us to make decisions that were often difficult and not always completely satisfactory in much the same way that everyone who has used the reference work that inspired the structure of *HATA* – Fuat Sezgin, *Geschichte des Arabischen Schrifttums*, 15 volumes (Leiden: Brill, 1967-2010) – has probably discovered.

TABLE 1[22]



The prevalence of *fiqh* over other disciplines, as revealed in TABLE 1, is in principle unsurprising: after all, *fiqh* offered more professional opportunities than other fields of study. What is more noteworthy is how rapidly early Andalusi legal scholars began to shape, through works of their own, the reception of what they had learned during their travels to the East. The dynamics of the pedagogical process were undoubtedly relevant

22 Tables 1 and 2 are taken from Maribel Fierro, "Knowledge transfer and production in early al-Andalus: Travel, scholars and book circulation," to appear in a book edited by Nikolas Jaspert (Heidelberg). I wish to thank him for giving permission to reproduce the Tables here.

in this respect. The data found in *HATA* also reveal trends that could otherwise have been missed, for example how the effort to compile *fatāwā* and the type of resulting compilation—devoted to just one author or paying attention to specific regions and thus including legal opinions from many scholars—can be related to specific political situations in the Islamic West.[23]

Of special interest is how *fiqh* was related to other disciplines and how such relations changed through time. Dominique Urvoy was a pioneer in highlighting the different ways in which knowledge was structured according to different historical periods through the exploitation of the data found in the biographical dictionaries of scholars.[24] It is now possible to broaden and complement Urvoy's findings thanks to new resources including not only *HATA*, but also the *Prosopography of the ʿUlamāʾ of al-Andalus*[25] and the *Biblioteca de al-Andalus*.[26]

The number of available primary texts has also hugely increased since I started my academic career. Back then, when working on Ibn Waḍḍāḥ's *Kitāb al-bida'*, very few works written in the 3rd/9th century that would have helped me in contextualizing his work were accessible even if preserved, and most were considered to have been lost. Now the situation has radically changed in general with respect to source materials from the Islamic world at that time, and in particular for al-Andalus, as shown in Table 2. *HATA* lists 147 legal works that circulated in al-Andalus between 93/711-325/936; of them, 49 were written

23 Maribel Fierro, "Compiling *fatāwā* in the Islamic West (third/ninth-ninth/fifteenth centuries)," *Jerusalem Studies in Arabic and Islam* 49, forthcoming. In this article I develop a finding that I first pointed out in "La religión," in *El retroceso territorial de al-Andalus. Almorávides y almohades. Siglos XI al XIII*), vol. VIII/2 *Historia de España R. Menéndez Pidal*, ed. M. J. Viguera (Madrid: Espasa Calpe, 1997), 435–546, chapter 2, note 25.

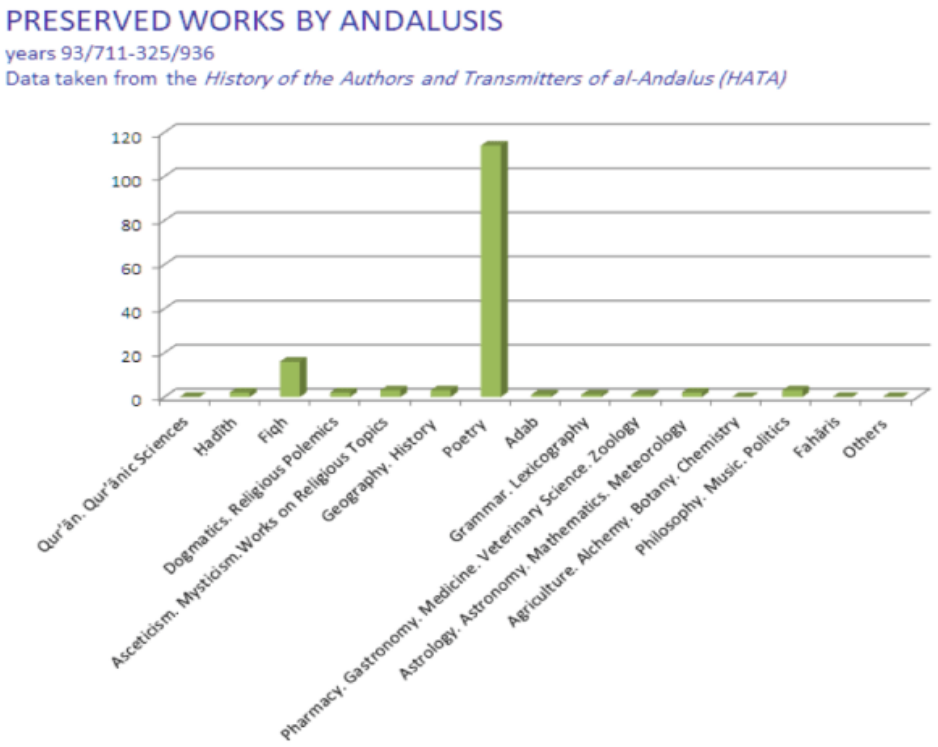
24 Dominique Urvoy, *Le monde des ulémas andalous du V/XIe au VII/XIIIe siècle* (Genève: Librairie Droz, 1978).

25 *Prosopografía de los ulemas de al-Andalus (PUA)*, directed by María Luisa Ávila, online access at https://www.eea.csic.es/pua/

26 Jorge Lirola Delgado and José Miguel Puerta Vílchez, eds., *Biblioteca de al-Andalus*, 7 vols. (Almería: Fundación Ibn Tufayl de Estudios Árabes, 2004-2012); Jorge Lirola Delgado, ed., Apéndice (Almería: Fundación Ibn Tufayl de Estudios Árabes, 2013); *La producción intelectual andalusí: balance de resultados e índices* (Almería: Fundación Ibn Tufayl de Estudios Árabes, 2013).

by non-Andalusi authors and 98 by Andalusi authors. Of these 98, 60 have been preserved, a figure I find quite striking given that these data refer to such an early period.

Table 2



To sum up, for the case of legal writings in al-Andalus, we are now in the best possible circumstances for analyzing a variety of issues, such as:

– the rate of survival of works written between the 2nd/8th-9th/15th centuries and how, where and why they have been preserved;

– historical developments regarding the appearance of specific genres and how they relate to specific political situations;

– which works were the object of commentaries and how the writing of such commentaries influenced the transmission of the

original works;[27]
– the popularity of certain works, how long their popularity lasted, and why;
– the identification of certain 'canons' in legal literature, especially in association with teaching, and how they evolved through time.

In order to make full sense of the data for al-Andalus collected in *HATA* – data obtained from biographical dictionaries, *fahāris*, historical works, quotations in other works, catalogues of manuscripts and many other sources – they should be compared with those of other regions, and in order to do so, similar data will need to be made available, something that will hopefully become a reality in the future. These kinds of resources will be of great help to fully grasp what motivated, for example, Ibn al-Ṭallāʿ and al-Marghinānī to tackle the Prophet's rulings simultaneously in disparate contexts.

27 The *Mustakhraja min al-asmiʾa mimmā laysa fī l-Mudawwana* by al-ʿUtbī (d. 255/869) seems to have stopped circulating as an independent work after Ibn Rushd al-Jadd (d. 520/1126) wrote his commentary *Kitāb al-bayān waʾl-taḥṣīl waʾl-sharḥ waʾl-tawjīh wa-taʾlīl li-masāʾil al-ʾUtbiyya* as noted by Ana Fernández Félix, *Cuestiones legales del islam temprano. La 'Utbiyya y el proceso de formación de la sociedad islámica andalusí* (Madrid: CSIC, 2003).

New Approaches to Islamic Law and the Documentary Record before 1500

Marina Rustow
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Abstract

Marina Rustow notes how prevalent scholarly attention is to long-form texts of Islamic law—attention that she argues, comes at the expense of studying Islamic legal documents in a sufficient manner. Study of the documents is an indispensable enterprise if we are to fully understand "how law worked in practice." In view of what we know to have been "heaps" of documents produced by Muslim judges and notaries, Rustow underscores how particularly noticeable a disjuncture there is between those documents and the long-form texts. Moreover, scholars often skip over and thus fail to avail themselves of the utility of documents in adding texture to social and legal history. She cautions social historians against "pseudo-knowledge," that is, the temptation to overlook complex factors, usually embedded in legal documents, that render our otherwise tame scholarly perception of the past truer but more "unruly." In the end, her invitation to join her in the study of documents and thereby improve the state of Islamic legal history is terse and timely: "Please go find yourself some documents."

Although thousands of Arabic and Persian legal documents survived from the medieval Islamicate world, they still appear only rarely in discussions of Islamic law. That's starting to change, but if we want a well-rounded picture of how law worked in practice, it needs to change faster. Those of us who specialize in documents aren't interested in hiding them from others. There are too many texts in need of editing, and we're only too happy to help others locate and decipher them. But, as the joke about shrinks and lightbulbs goes, first specialists in long-form legal works have to be convinced of the value and potential of documents as a source for legal history.

A division of scholarly labor

I don't work on Arabic legal documents. I study other documents: trade letters, accounts, personal letters and legal and administrative documents in Hebrew script from the Cairo Geniza, sometimes from elsewhere, and Arabic state documents, a category that includes decrees and rescripts from caliphs, sultans and viziers, bureaucratic reports, archival registers, fiscal accounts and receipts, and petitions. The project has led me into thorny questions about the relationship of documents to institutions. They're not the same questions the legal documents raise, but when I read scholarship on law and documents, I recognize my own problems.

Islamic studies has established traditions of specializing in long-form texts, whereas I worry that if people like me don't study documents and teach others how to do so, no one will bother. It's a peculiarity of medieval Middle East studies that even the historians among us focus disproportionately on books rather than documents. Just as the medieval Islamicate world attached social prestige to literacy, books and textual transmission, so, too, does our field attach intellectual prestige to the consumption of long-form texts. We've internalized the values of those we study, but there have been only sporadic attempts to

explain them.[1]

The long-form/documentary division of labor is as old as university-based Islamic studies. There's nothing inherently wrong with it: Islamic legal writings cover more than a thousand years and a huge swath of the globe. Islamic law is a complex and ramified subject, including positive law, scholastic debate among the schools, sources of law and jurisprudence, theological underpinnings of law, polemics, and the roles of *qāḍī*s, *muftī*s and other legal experts.

The documentary side also requires specialists. The surviving legal documents include contracts of sale, lease, loan, guarantee (*ḍamān*), and marriage, receipts and quittances, deeds of property endowment and manumission of slaves, powers of attorney, court records (*maḥāḍir*), court registers and piles of as yet unmapped and undefined document types. To understand them, it helps to read as many documents as possible. But the number of published legal documents, while it is increasing, is not enormous. Studying documents therefore inevitably means contact with manuscripts and competence at documentary paleography.

Then there's the problem of where to find documents. The caches we know about have disparate and sometimes vague origins, and some are dispersed across multiple libraries. But many if not all of them contain Arabic notarial documents and Islamic court records. From Egypt, there are the *genizot* of the Ben Ezra and Dār Simḥa synagogues in Cairo,[2] the archive of the Jewish community of Cairo,[3] and possibly other archives

1 E.g., Michael Chamberlain, *Knowledge and Social Practice in Medieval Damascus, 1190–1350*(Cambridge: Cambridge University Press, 1994); Elias Muhanna, *The World in a Book: Al-Nuwayri and the Islamic Encyclopedic Tradition* (Princeton: Princeton University Press, 2017); Luke Yarbrough, *Friends of the Emir: Non-Muslim State Officials in Premodern Islamic Thought*(Cambridge: Cambridge University Press, 2019); and Beatrice Gruendler, *The Rise of the Arabic Book* (Cambridge, MA: Harvard University Press, 2020).

2 For a new, practical guide to the documentary geniza, its historiography and its potential, see Jessica Goldberg and Eve Krakowski, eds., "Documentary Geniza Research in the Twentieth Century," a triple issue of *Jewish History* 32, 2–4 (2019).

3 D. S. Richards, "Arabic Documents from the Karaite Community in Cairo," *Journal of the Economic and Social History of the Orient* 15 (1972): 105–62,

as well.[4] There are tens of thousands of Arabic papyri from myriad archeological caches,[5] the largest collection of them in Vienna and currently being catalogued and digitized.[6] There are digitized collections at the University of Utah (the collection of A. S. Atiya),[7] the University of Cambridge,[8] and Princeton University[9] (the latter two both from the collection of George Anastas Michaelides). From Syria, there is a cache of more than two hundred thousand texts from the Umayyad mosque in Damascus, now in Istanbul.[10] In Jerusalem, there is a substantial cache of legal documents from the al-Aqṣā mosque,[11] and Arabic

and on their current location, Rustow, *Lost Archive: Traces of a Caliphate in a Cairo Synagogue* (Princeton: Princeton University Press, 2020)*,* 495–96 nn. 7–8.

4 The Coptic Patriarchate Archive in Cairo and the Greek Orthodox Patriarchate Archive of Alexandria are likely to be relevant to Islamic legal studies; I don't know whether they hold pre-Ottoman material. Both are mentioned in Tamer el-Leithy, "Living Documents, Dying Archives: Towards a Historical Anthropology of Medieval Arabic Archives," *al-Qanṭara* 32 (2011): 389–434.

5 For papyrus documents, see Petra M. Sijpesteijn, "Arabic Papyri and Islamic Egypt," in *The Oxford Handbook of Papyrology,* ed. Roger S. Bagnall (Oxford: Oxford University Press, 2009), 452–72. For Arabic documents more broadly, see The (Cumulative) Arabic Papyrology Bibliography of Editions and Research (henceforth APB), especially the landmark publications of legal documents by Grohmann, Khan, and Diem, and the Arabic Papyrology Database. For the Mamluk period, see Frédéric Bauden, "Mamluk Era Documentary Studies: The State of the Art," *Mamlūk Studies Review* 9 (2005): 15–60. For a recently unearthed and published personal archive from the Fatimid period, see Christian Gaubert and Jean-Michel Mouton, *Hommes et villages du Fayyoum dans la documentation papyrologique arabe (Xe-Xie siècles)* (Geneva: Droz, 2014).

6 There are images of 1,124 Arabic papyri on the website of the Austrian National Library.

7 https://collections.lib.utah.edu/search?&facet_setname_s=uum_appp.

8 https://cudl.lib.cam.ac.uk/collections/michaelides/1.

9 https://dpul.princeton.edu/islamicmss/catalog/hm50tr79b.

10 At the Turkish and Islamic Arts Museum. See most recently Arianna D'Ottone Rambach, Konrad Hirschler and Ronny Vollandt, eds., *The Damascus Fragments: Towards a History of the Qubbat al-khazna Corpus of Manuscripts and Documents* (Beirut: Ergon Verlag, 2020), https://doi.org/10.5771/9783956507564.

11 Linda S. Northrup and Amal A. Abul-Hajj, "A Collection of Medieval Arabic Documents in the Islamic Museum at the Ḥaram al-Šarīf," *Arabica* 25 (1978): 282–91; Donald P. Little, *A Catalogue of the Islamic Documents from al-Haram aš-Šarīf in Jerusalem* (Beirut-Wiesbaden: Franz Steiner Verlag, 1984); Huda Lutfi, *Al-Quds al Mamlūkiyya: A History of Mamluk Jerusalem Based on the Haram Documents* (Berlin: Klaus Schwarz Verlag, 1985); Christian Müller, *Der Kadi und seine Zeugen: Studie der mamlukischen Ḥaram-Dokumente aus Jerusalem* (Wiesbaden: Harrassowitz, 2013), and see below.

papyri have been excavated elsewhere in Palestine,[12] as well as in Iraq.[13] There are also scattered caches from Central Asia; among those that have surfaced in Afghanistan since the 1990s there are many legal documents.[14] Some caches are available online as high-resolution digital images; others are long overdue for digitization; still others have been the objects of extensive digital database projects.[15]

The Cairo Geniza is worth singling out in this context as a source of Arabic-script legal documents, because Islamic legal scholarship has rarely acknowledged its bounties, with the important exceptions of Geoffrey Khan's landmark publication of Arabic geniza documents and some promising work-in-progress.[16] The myth nonetheless staggers on that the geniza pre-

12 For the Arabic papyri from Nessana and Khirbet el-Mird, see the APB.

13 Five texts from the third/ninth century were excavated at Samarra in the 1920s. See Ernst Herzfeld, *Geschichte der Stadt Samarra* (Hamburg: Verlag von Eckardt and Messtorff, 1948).

14 Geoffrey Khan, *Arabic Documents from Early Islamic Khurasan* (London: The Nour Foundation, 2007); Ofir Haim, "An Early Judeo-Persian Letter Sent from Ghazna to Bāmiyān," *Bulletin of the Asia Institute*, n.s., 26 (2012): 103–19; Ofir Haim, "Legal Documents and Personal Letters in Early Judaeo-Persian and Early New Persian from Islamic Khurāsān (5th/11th Cent.)" (M.A. thesis, Hebrew University of Jerusalem, 2014); Ofir Haim, "Acknowledgment Deeds (*iqrār*s) in Early New Persian from the Area of Bāmiyān (395–430 AH/1005–1039 CE)," *Journal of the Royal Asiatic Society* 29 (2019); and Ofir Haim, "What is the 'Afghan Genizah'? A Short Guide to the Collection of the Afghan Manuscripts in the National Library of Israel, with the Edition of Two Documents," *Afghanistan* 2 (2019). The only collection of so-called "Afghan Genizah" texts that is now publicly available is owned by the National Library of Israel; all have been digitized. The Invisible East project at Oxford is now developing a database of these documents and others from Central Asia. For a much earlier publication of a Persian legal document from Bamiyan, see Gianroberto Scarcia, "An Edition of the Persian Legal Document from Bāmiyān," *East and West* 16 (1966): 290–95.

15 The oldest of these, to the best of my knowledge, is the Princeton Geniza Project (PGP), founded in 1985 by Mark R. Cohen and A. L. Udovitch. (I became its director in 2015.) The Arabic Papyrology Database is indispensable. A more recent database is Islamic Law Materialized, directed by Christian Müller, but only a small part of it is open access. (I'm acutely aware of the temptation to restrict access to a database for fear that the some of the data it contains is messy, raw, misleading or too important to risk releasing like drops into a vast ocean. But given the dearth of editions available and how scattered they are, the temptation should be resisted.)

16 Geoffrey Khan, *Arabic Legal and Administrative Documents from the Cambridge Genizah Collections* (Cambridge, 1993; henceforth ALAD) contains roughly sixty-nine of legal documents (doc. 53 may be a state document; doc. 95 is a legal document). Wissem Gueddich of the EPHE is currently writing a dissertation on

served only Hebrew-script texts. Even those who know Khan's corpus may mistakenly believe that he finished the job and there are no legal documents left to publish, but the opposite is true: Khan published a selection only from the Cambridge University Library, which houses half the geniza; the other half is dispersed across at least five dozen collections; and there are still scores of unpublished legal documents in Cambridge.[17]

Now that you've found some documents to work on, be warned that they can be challenging to decipher. It's admittedly easier to read the formulaic texts of legal deeds than the free text of letters. But coaxing meaning from formulaic texts requires its own strategies, starting with unpeeling their rigid-looking exterior. The fungible parts of the text — which historians usually consume first — are like the creamy center of the sandwich cookie: you're cheating if you eat it first and leave the rest on the kitchen counter for your parents to clean up. Formulae, too, tell stories: they have histories that reach back in time, often across languages and scribal traditions; they index contact across empires, religions and regions. The institutional settings in which scribes worked are often not visible to us, but sometimes we can reconstruct them from of documents' script styles, layout and wording.[18] But when you reach the fungible text, you will face a different problem of compression: in a very small space, you'll find legal dramas, family conflicts, financial dilemmas, elaborate negotiations, creative solutions and a panoply of human stratagem and manipulation. It takes creativity to reimagine the real-time, cinematic version of events (as I often press my students to do); it's nearly always worth the effort.

bills of sale for real estate and slaves; and Craig Perry draws on some Arabic-script legal documents in his book-in-progress on medieval slavery.

17 My team at Princeton has identified some of these, and they will appear in the PGP over the next few years. For a practical guide to the documentary Geniza, see Oded Zinger, "Finding a Fragment in a Pile of Geniza: A Practical Guide to Collections, Editions, and Resources," in *Documentary Geniza Research in the Twentieth Century,* ed. Goldberg and Krakowski, *Jewish History* 32 (2019): 279–309.

18 Eve Krakowski and Marina Rustow, "Formula as Content: Medieval Jewish Institutions, the Cairo Geniza, and the New Diplomatics," *Jewish Social Studies* 20 (2014): 111–46.

Given the differing technical challenges of long-form and documentary texts, it's perhaps understandable that we've divided the labor. But it's also time to make the shop floor open-plan. Doing so is all the more pressing if we want to understand how substantive law on the books related to the documents drawn up in courts, the documents being how most people encountered the legal system.

Documents in Islamic law, documents in Islamic legal studies

How law books and real-world documents relate is, I would imagine, a complicated question in many legal systems. But it's complicated in Islamic law in ways particular to it, because in addition to the question of what documents have to tell us *about* law, there is also the question of the status of documents *in* law. One might be forgiven for thinking that we have to understand the function of documents in Islamic legal proceedings before we can learn about legal practice by using documents as historical sources. But logical though it may seem to any historian to ask how an archive came into being before mining it for information, asking jurists to tell us about the status of documents is not going to get us very far unless we're also asking the documents themselves what their function and status was.

The problem begins with the jurists themselves, who granted certain types of documents probative value under defined conditions, as when corroborated by witnesses or authenticated in other ways.[19] Someone who doesn't study Islamic law might

19 The literature on this subject is by now extensive. Landmarks include Emile Tyan, *Le notariat et le régime de la preuve par écrit dans la pratique du droit musulman* (Harissa: Faculté de droit de Beyrouth, 1959); Jeanette Wakin, *The Function of Documents in Islamic Law: The Chapters on Sales from Ṭaḥāwī's Kitāb al-Shurūṭ al-Kabīr* (Albany: SUNY Press, 1972); Monika Gronke, "La rédaction des actes privés dans le monde musulman médiéval: Théorie et pratique," *Studia Islamica* 59 (1984): 159–74; Baber Johansen, "Formes de langage et fonctions publiques: Stéréotypes, témoins et offices dans la preuve par l'écrit en droit musulman," *Arabica* 44 (1997): 333–76; Brinkley M. Messick, *The Calligraphic State: Textual Domination and History in a Muslim Society (*Berkeley: University of California Press, 1993);

regard this point as merely technical or procedural. But behind it lurk epistemological and historical problems to do with oral and written transmission, and these problems extend well beyond law to all the other Islamicate branches of knowledge.

Every branch of knowledge held information to be authentic, at least in theory, when transmitted by an unbroken chain of transmitters who were reliable in technically defined ways. This was the tradition's way of guaranteeing quality control, just as people do in our line of work with peer review and reputable publishing houses. Michael Cook notes that by the third/ninth century, the oral transmission of *ḥadīth*"operated in a context permeated by the use of writing."[20] Hossein Modarressi explains more concretely that the early transmitters of *ḥadīth* kept notebooks, called by technical Arabic terms including *juzʾ* (quire), *nuskha* (exemplar), *aṣl* (source), *ṣaḥīfa*(which I would venture to translate in this context as daybook or register), and *kitāb*(written document); these terms "conveyed the sense of a personal notebook or material received through oral transmission, perhaps originally simply a jotter," and by the third Islamic century, there were hundreds of them.[21] Gregor Schoeler has explained the system as a holdover of the Hellenistic habit of transmitting official texts orally and using writing

Messick, "Evidence: From Memory to Archive," *Islamic Law and Society* 9 (2002): 231–70; and Christian Müller, whose work is discussed below. For recent overviews, as well as important early modern and modern examples of written documentation constituting legal proof, see Guy Burak, "Documents," in *The [Oxford] Encyclopedia of Islam and Law* <http://www.oxfordislamicstudies.com/article/opr/t349/e0121>; and Jessica Marglin, "Written and Oral in Islamic Law: Documentary Evidence and Non- Muslims in Moroccan Shariʿa Courts," *Comparative Studies in Society and History* 59 (2017): 884–911 (885–92, with a focus on the *madhāhib*'s approach to documents and the hitherto neglected Mālikī school); and Messick, *Sharīʿa Scripts: A Historical Anthropology* (New York: Columbia University Press, 2018). Intisar Rabb points out that in fact documents could have probative value without the testimony of two witnesses: Intisar A. Rabb, "The Curious Case of Bughaybigha, 661–883: Land and Leadership in Early Islamic Societies," in *Justice and Leadership in Early Islamic Courts*, eds. Intisar A. Rabb and Abigail Krasner Balbale (Cambridge, MA: Harvard University Press, 2017), 23–36.

20 Michael Cook, "The Opponents of the Writing of Tradition in Early Islam," *Arabica* 44 (1997): 437–530.

21 Hossein Modarressi, *Tradition and Survival: A Bibliographical Survey of early Shīʿite Literature*(Oxford: Oneworld, 2003), xiv, with earlier scholarship and important methodological points on xv.

only as a mnemonic or as private notes,[22] like some traditions of musical notation today.[23]

As to how the distinction between oral and written transmission of information — and, in practice, their intertwinement — played out in Islamic law and the scholarship on it, Émile Tyan, Joseph Schacht and Jeanette Wakin each wrote about what he or she saw as the contradiction between early Muslim jurists' "refusal to recognize written documents," as Wakin categorically put it in her edition of part of al-Ṭaḥawī's *Great Compendium of Formulae* (*al-Jāmiʿ al-kabīr fī al-shurūṭ*), and the fact that judges and notaries nonetheless produced heaps of them.[24] Although "documents were not accepted as proof in the technical sense," Wakin explained, they were "vital … to the functioning of law in practice" because they "acted as a firm record and even proof of the transaction."[25] Eventually, these scholars argued, the jurists paid attention to the tension between theory and practice, merging them in two distinct ways: by requiring the use of witnesses to authenticate the contents of documents orally, and by developing a repertoire of standard document texts via a new genre of legal literature, *ʿilm al-shurūṭ*, literally, the science of documents, but in practice, formularies. At the intersection between theory and practice were notaries — the scribes who

22 Gregor Schoeler, *Écrire et transmettre dans les débuts de l'islam* (Paris: PUF, 2002).

23 For parallels in late antique and medieval rabbinic Jewish practice, see Judith Olszowy-Schlanger, "Cheap Books in Medieval Egypt: Rotuli from the Cairo Geniza," in *Intellectual History of the Islamicate World* 4 (2016): 82–101; Olszowy-Schlanger, "Reading in the Provinces: A Midrash on Rotulus from Damira, Its Materiality, Scribe, and Date," in *Continuous Page: Scrolls and Scrolling from Papyrus to Hypertext,* ed. Jack Hartnell (London: Courtauld Books, 2019); Anna Busa, "The Rotuli Corpus of the Medieval Midrash Pirqa de-Rabbenu ha-Qadosh," *Fragment of the Month*, Genizah Research Unit, Cambridge University Library (July 2017); David Stern, *The Jewish Bible: A Material History* (Seattle: University of Washington Press, 2017), 70–78; and Rustow, *Lost Archive,* chap. 14.

24 Émile Tyan, *Le notariat et le régime de la preuve par écrit* (Beirut, 1948); Wakin, *Function of Documents,* 8; cf. Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1964), 9: "The use of written documents is well attested for the pre-Islamic period and for the time of Muhammad, and it continued without interruption into Islamic law, although its theory took no notice of it."

25 Wakin, *Function of Documents,* 27, 41.

wrote the documents.

Schacht, Wakin's doctoral advisor, had also edited chapters of the same work of al-Ṭaḥāwī, one on loans and deposits, the other on preemption (co-owners' right of first refusal to buy out their partners' shares).[26] Schacht held that formularies were "one of the most important sources of legal practice in Islam."[27] By this he meant not that formularies were historical sources for reconstructing legal practice — formularies, after all, are prescriptive works, not evidence of practice — but rather that formularies served as models for notarial practice. Many after Schacht have understood him as saying that what the jurists said had nothing to do with what happened in courts of law. But he didn't consistently take such an extreme view; Schacht's own writings on the topic are more equivocal.[28]

Nonetheless, Schacht's emphasis on *shurūṭ* models is, from my point of view, odd: if he wanted to reconstruct legal practice, he could just as easily have cited original documents, as Wakin later would. Why didn't he? Did he shy away from documents? In his 1948 review of Tyan's study of Muslim judicial procedure, Schacht commented on the "professional illegibility"

26 Joseph Schacht, *Kitāb adhkār al-ḥuqūq wa l-ruḥūn min al-Djāmiʿ al-kabīr fi l-shurūṭ*(Heidelberg, 1927) and Joseph Schacht, *Kitāb al-shufʿa min al-Djāmiʿ al-kabīr fi l-shurūṭ* (Heidelberg, 1930).

27 Schacht in his review of Tyan, *Notariat, Orientalia* 17 (1948): 519–22, esp. 521.

28 From the same side of the fourth/tenth century watershed but with a stack of *fiqh* books to hand, Baber Johansen argued that the jurists had never been as categorical about the primacy of oral testimony as Schacht had supposed (or as Johansen thinks Schacht had supposed; what Schacht himself thought is not as clear). Johansen's revision to Schacht and Wakin consisted in his moving beyond the early period. Like them, he mustered Ḥanafī discussions of the problem, but unlike them, he discussed the period after al-Ṭaḥawī. Baber Johansen, "Formes de langage et functions publiques: stéréotypes, témoins, et offices dans la preuve par l'écrit en droit musulman," *Arabica* 44 (1997): 333–76. The passage he cites from Schacht on p. 333 (from *Introduction to Islamic Law*, 193) doesn't quite say what Johansen says it does. For a recent, forceful refutation of the "orientalist" view that the jurists ignored reality, see Mohammed Fadel, "State and Sharia," in *The Ashgate Research Companion to Islamic Law,* ed. Rudolph Peters and Peri Bearman (Routledge, 2014), 93–107; for a helpful review of the positions in the debate, see Marion Katz, "Age of Development and Continuity, 12th–15th Centuries CE," *The Oxford Handbook of Islamic Law,* eds. Anver M. Emon and Rumee Ahmed (Oxford: Oxford University Press, 2018), 450–51.

of the notaries, which "strikes the eye when looking at the extensive collection of documents on paper in the Egyptian Library in Cairo," where he had lived between 1935 and 1939. Schacht characterized the paper documents as "a collection which, incidentally, deserves no less careful a study than the papyri" (that they're on paper dates them post-290/900).[29] But, unless I've missed it, Schacht never incorporated them into his scholarship: Schacht didn't use documents as a reality-check in the face of the jurists' theoretical law, but rather used *shurūṭ* books as evidence of how their jurist authors "sought to make their formularies safe from the possible effects of differences of doctrine."[30] Schacht was, in other words, interested in documents not for their own sake, but as an index of the jurists' influence on court practice. He believed that there was a continuum between the jurists and the courts; but he ignored the evidence of real documents — which, it turns out, would have supported his argument.

It was Wakin who took up that challenge, at least partly. Before I explain how, I feel compelled to say that Wakin was the inspiring teacher who introduced me to Islamic law in the three years before her untimely death in 1998. It was only a decade later that I fell in love with Arabic-script documents and diplomatics, and I never discusssed them with her. It has, then, amazed me to reread Wakin over the course of writing this piece, knowing what I now know. She put the few published papyri at her disposal to good use — not just those in Arabic, but in Aramaic, Demotic and Coptic, with glances at Latin diplomatics — and they helped her to resolve the problem, or rather, non-problem, of the relationship between legal theory and practice.[31] For Wakin, real documents fueled the jurists' quest to

29 Jeanette Wakin, "Remembering Joseph Schacht (1902–1969)," *Occasional Papers of the Islamic Legal Studies Program [at Harvard University]* 4 (2003), 4–5.

30 Schacht, review of Tyan, *Notariat,* 522. The desire to avoid legal dispute was also behind the notaries' development of a new genre of document in the fourth/tenth century, the *iqrār*(acknowledgment of debt), to replace the *dhikr ḥaqq*, which was legally less watertight. All known *adhkār ḥuqūq* are written on papyrus, while to the best of my knowledge all known *iqrārāt*are on paper and parchment, suggesting that the latter had indeed definitively replaced the former by around 940.

31 Wakin, *Function of Documents,* 2 nn. 1–3, 25–26, 45–50, and passim

produce ever more watertight formulations and, conversely, real notaries came to rely on the formulations in the *shurūṭ* books; as she put it, "documents in judicial practice were appropriated from model documents, and these in turn were drawn from the world of practice."[32] Documents also fed Wakin's sharp analysis of the structure of sales contracts, which is more than worthy of the corpus of philological scholarship on medieval semitic-language documents, though it preceded it by decades.

I find it all the more striking, then, that Wakin didn't edit any papyri herself. To the contrary, she described papyri as "inaccessible," "scattered … all over the world," and "extremely difficult to read" and she seemed to find it entirely normal that "only a relatively small proportion has been published," or at least to be resigned to the situation.[33] Were the philologists who published papyrus and paper documents in the 1960s — Adolf Grohmann, Samuel Miklos Stern, Nabia Abbott — such exalted beings that even excellent Arabists didn't try to join them in their quest to fill the world with more editions?[34]

But when a larger proportion of papyri finally was published, they reinforced some of Wakin's conclusions. In 1993, Geoffrey Khan published a spate of new editions of documents on papyrus and paper.[35] On Khan's view, the documents demonstrated the force of al-Ṭaḥawī's impact on notarial practice in Egypt: bills of sale from Fatimid-era Fusṭāṭ read as though the notaries had adopted them from the pages of al-Ṭaḥāwī, sometimes expanding them to render their formulations legally more secure.[36] Khan's editions were followed in 1996 and 2006 by Michael Thung's corpus of loan documents, *adhkār huqūq* for

(I stopped hunting for references to papyri after fifty pages).

32 This and the previous quoted phrase are from Wakin's *Encyclopaedia of Islam* article s.v. "*sharṭ*."

33 Wakin, *Function of Documents*, 2.

34 Some papyrologists also played a role in perpetuating this myth; see Rustow, *Lost Archive,* 447–48 and 527 n. 102.

35 Geoffrey Khan, *Bills, Letters, and Deeds: Arabic Papyri of the 7th-11th Centuries* (Khalili Collections 1993); Khan, *Arabic Legal and Administrative Documents.*

36 Khan, *Bills, Letters, Deeds,* 175; cf. Khan, *Arabic Legal and Administrative,* 52–55.

the second and third centuries and *iqrārāt* for the fourth.[37] The jurists had deemed the *dhikr ḥaqq* vulnerable to contestation; that the *iqrār* had replaced it was yet more demonstration of their impact on notarial practice.

Documents did not, then, occupy a different universe from the jurists' prescriptions, at least in Egypt in the middle period.

That doesn't mean we're out of the woods, however. Challenges remain. Christian Müller, for instance, has demonstrated that the corpus of nine hundred legal documents from Jerusalem in the 1390s evinces a wider variety of types and formulaic structures than one finds in the *shurūṭ* literature of the period.[38] It shouldn't be surprising that notarial practice is more unruly — and creative — than the handbooks let on, or can correct for. The same difficulty pervades administration, bureaucratic practice and fiscality: practice is more unruly than theory.[39] (In medieval Jewish law, too, the relationship between the *shurūṭ* books and the *shurūṭ* themselves is disconcertingly indirect, but here, part of the problem seems to be that the surviving *shurūṭ* manuals come from Iraq and the documents from Egypt.)

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37 Michael H. Thung, "Written Obligations from the 2nd/8th to the 4th/10th Century," *Islamic Law and Society* 3 (1996): 1–12; and Thung, *Arabische juristische Urkunden aus der Papyrussammlung der Österreichischen Nationalbibliothek* (Corpus Papyrorum Raineri 26) (Munich, 2006).

38 Christian Müller, *Der Kadi und seine Zeugen*. Cf. Müller, "Écrire pour établir la preuve orale en Islam: La pratique d'un tribunal à Jérusalem au XIVe siècle," in *Les outils de la pensée. Étude historique et comparative des textes*, eds. Akira Saito et Yusuke Nakamura (Paris : Maison des Sciences de l'Homme, 2010), 63–97, at paragraph 6. I'm not convinced that in the domain Müller is discussing, documents in legal proceedings, an "antagonisme entre théorie et pratique … a dominé trop longtemps notre vision du droit musulman prémoderne," and I also don't think that's what Schacht means by "the contrast between theory and practice" in the passage Müller cites (*Introduction to Islamic Law*, 199). Schacht appears to be referring to the difference between what ordinary Muslims do and what they are supposed to be doing according to Islamic law (abstaining from pork and wine, to use Schacht's examples) — not to the difference between how courts functioned and how jurists wanted them to function. The "contrast between theory and practice" Schacht intends here is constitutive of *all* legal systems by definition: there wouldn't be laws against exceeding the speed limit were humans unwilling and cars unable to do so.

39 The aporia of S. M. Stern "Three Petitions of the Fāṭimid Period," *Oriens* 15 (1962): 172–209, is another instance of this.

We should, then, neither lament the disjunction between long-form texts and documents nor pretend that it doesn't exist. Instead, we should attempt to explain it.[40]

Procedural pseudo-knowledge

I'm a social historian. I write history from the ground up. I believe that physical contexts, material objects and human relationships are indispensable to our understanding of the past. For historians like me, personnel, procedures and social power are an integral part of understanding how law and judicial systems functioned in real time.

But even the most anthropologically oriented social historians can delude themselves into thinking they have a clearer picture of how things worked than they really do. I've recently come to understand, thanks to a project I undertook with the historian and Jewish law scholar Eve Krakowski, that geniza specialists have unknowingly absorbed and purveyed what she calls "pseudo-knowledge" about how Jewish courts functioned in tenth to thirteenth-century Egypt and Syria. This is a variant of a phenomenon Mark Cohen has dubbed the "optical illusion" created by Goitein's *Mediterranean Society* — the illusion being that his five-volume work is coterminous with the contents of the Cairo Geniza. It isn't.

Goitein depicts the Jewish judicial system in deceptively concrete terms. Judges sit "on the bench." There are "chief judges" in Fusṭāṭ and "puisne judges" outside Fusṭāṭ (puisne is his translation of *nāʾib*). You can almost picture the black robes and powdery white wigs. He writes that judges "normally" doubled as notaries, suggesting that geniza evidence presents us with norms, not a congeries of potentially contradictory tidbits

40 A successful attempt to do this is Mark R. Cohen, *Maimonides and the Merchants: Jewish Law and Society in the Medieval Islamic World* (Philadelphia: University of Pennsylvania Press, 2017). Where Maimonides's code of Jewish law veers off the course set by the *geʾonim*, particularly in commercial law, Cohen musters geniza documents demonstrating that he was bringing Jewish law into line with what was the practice in his day.

and semi-anonymous scribes.[41] He paints a clear hierarchy of officials. He makes things seem more stable and real than they may have been. On closer inspection of the documents, some of those descriptions dissolve — not into total nothingness, but into skeletal outlines shot throuogh with large gaps.

With these cautions in mind from the Jewish court and notarial documents, I pose the following problems about the Islamic ones.

First: who wrote *qāḍī*-court documents? For Tyan, Schacht, Wakin and Khan, notaries evolved from the class of professional witnesses. Tyan and Wakin cite Ibn Khaldūn's claim that in each city, notaries have shops where they both "function as witnesses and register (testimony) in writing."[42] Wakin and Khan find ample corroboration for that claim in the documents, since many are written in the same hand as one of the witnesses' signatures, demonstrating that notaries served as witnesses, or vice-versa.

I am prepared to believe that a certified witness who hung around the courts could also learn to draw up documents. But we still don't know how such a transformation happened historically. Literacy was limited in preindustrial cultures, and the technicalities of writing had to be learned — not just imitating script, which is complex enough, but cooking ink, cutting reeds, and preparing or procuring writing supports. The layout and script of court documents are uniform enough to suggest they were learned in apprenticeship. The flexibility with which scribes handled formulary likewise suggests that they didn't slavishly follow models, that they were creative and knew what they were doing. Good scribes are like chefs: they don't mechanically reproduce recipes, but vary their output based on the occasion and the ingredients at their disposal.[43] The script

41 S. D. Goitein, *A Mediterranean Society: The Jewish Communities of the Arab World as Portrayed in the Documents of the Cairo Geniza*, 6 vols. (Berkeley: University of California Press, 1967–93), 2:53, 70, 125.

42 Ibn Khaldūn, *Muqaddima,* 1:462, quoted in Tyan, *Notariat,* 39, and Wakin, *Function of Documents,* 9.

43 Marina Rustow, "The Diplomatics of Leadership: Administrative Documents in Hebrew Script from the Geniza," in *Jews, Christians and Muslims in Medieval and Early Modern Times: A Festschrift in Honor of Mark R. Cohen,* eds.

styles of the legal documents are consistent (or consistently illegible, to echo Schacht's complaint), and also conspicuously different from other types of writing. In some Arabic-script legal documents from the geniza, *qāḍī*s are also described as official witnesses, judges may well have served as notaries; there was a flexibility of roles and a continuum of expertise.[44]

But if notaries witnessed the very documents that they themselves drew up, didn't this vitiate the purpose of certifying the document for its authenticity? Christian Müller has offered a possible solution based on the Jerusalem legal documents: he argued that witnesses affixed their signature to a document not to secure its probative function, or even to assert that the transaction recorded there had occurred, but instead to signal that they would testify about the transaction in person before the judge. So, if you walked into a court with a signed document, you were, in effect, telling the judge that you had witnesses at your disposal who were willing to testify that the legal act recorded in the document had taken place. The judge didn't have to accept the document; he only had to call on the witnesses who had signed it.[45] This solution is persuasive for the documents Müller discusses from the Ḥaram al-Sharīf, but it must be tested elsewhere. There is much else that we still don't understand about witnessing, including the role of professional witnesses — though for the early period, Mathieu Tillier's *L'invention du cadi,* to which I'll return below, has cut through the fog in part

Arnold Franklin, Roxani Margariti, Marina Rustow, and Uriel Simonsohn (Leiden: Brill, 2014), 306–51 (344).

44 T-S Misc. 29.24 (Khan, ALAD, doc. 23); T-S Misc. 29.8 (Khan, ALAD, doc. 41); T-S Ar. 40.126(edition in Ṣabīḥ ʿAodeh, "Eleventh Century Arabic Letters of Jewish Merchants from the Cairo Geniza" (Hebrew; PhD diss., Tel Aviv University, 1992), doc. 69; English translation in Goitein, *Letters of Medieval Jewish Traders* [Princeton, 1973], 270–71; see Khan, ALAD, 165 n. 6).

45 Christian Müller, "Écrire pour établir la preuve orale en Islam: La pratique d'un tribunal à Jérusalem au XIVe siècle," in *Les outils de la pensée: étude historique et comparative des textes,* eds. Akira Saito and Yusuke Nakamura (Paris: Maison des sciences de l'homme, 2010), 63–97; Müller, "The Power of the Pen: Cadis and Their Archives. From Writings to Registering Proof of a Previous Action Taken," 369. Schacht seems to be envisioning the same scenario in his review of Tyan, *Notariat*, 520: "the quality of *ʿadl* is not in itself indispensable in the person who drafts legal documents, it is only convenient insofar as he may later be called upon to act as one of the witnesses."

by ignoring the generalities of prescription, focusing instead on historically attested practices and distinguishing among the procedures of different regions and periods.[46]

Other details require equally careful parsing. Witnesses weren't always present either for the writing of a document they signed or the legal act it recorded. They might sign on different days, sometimes months apart. The chemical analysis of inks on rabbinical court documents from the geniza — a promising new area of study — suggests that witnesses signed in different inks, and if so, it would be reasonable to assume that they signed from the comfort of their own homes, but we don't know.[47] If we don't actually know where witnesses were when they signed, how can we say we understand the judicial system? Because as scholars we get paid to sound knowledgeable, we may wish to avoid the distressing sensation of ignorance and focus instead on what's more abundantly documented. But this is a case in which we should lean into our ignorance: instead of avoidance, we need new questions, creative solutions and, above all, more editions of texts.

There are other mysteries of legal setting. At what point (and where) do we find courts that are brick-and-mortar institutions, or that they met in mosques, or that they were merely informal aggregations around the authority of the judges, who heard cases at home? Were pre-Ottoman Islamic courts really "not bound to a given physical space but to the judge's person"?[48] If not, how does this affect our ideas about court procedure, or about court archives? Annotations on documents demonstrate that courts kept archives, and (pace the influential argument

46 Mathieu Tillier, *L'invention du cadi. La Justice des musulmans, des juifs et des chrétiens aux premiers siècles de l'Islam* (Paris : Publications de la Sorbonne, 2017). On written proof, see 348–54.

47 See Zina Cohen, Judith Olszowy-Schlanger, Oliver Hahn and Ira Rabin, "Composition Analysis of Writing Materials in Geniza Fragments," in *Jewish Manuscript Cultures: New Perspectives,* ed. Irina Wandrey (Berlin: De Gruyter Open Books, 2017): 323–38.

48 Khan, ALAD, 7, 100; Delfina Serrano Ruano, "Qadis and Muftis: Judicial Authority and the Social Practice of Islamic Law," in *Routledge Handbook of Islamic Law,* eds. Khaled Abou El Fadl, Ahmad Atif Ahmad, and Said Fares Hassan (London: Routledge, 2019), 156–71, esp. 160.

of Wael Hallaq), in many cases they long outlasted the judges; we also know that some mosques had both archives and other document repositories.[49]

There are other questions of acute concern to experts in Islamic law that simply don't appear in the documents, suggesting that they may have been less important in everyday legal proceedings. Documents are equivocal on scholastic differences. The notaries' goal was to make their deeds valid to judges of any persuasion. They therefore avoided using bits of formulary over which the legal schools differed, as a matter of legal precaution (*iḥtiyāṭ* or *taḥarruz*), as al-Ṭaḥāwī put it.[50] Nor can we assume a *qāḍī*'s affiliation from the outcome of a case: despite the reasonable expectation that *qāḍī*s would apply "the fully developed legal doctrine of a specific law school (*madhhab*)," three of the Sunnī schools held that the appointment of a *qāḍī* who had attained the status of *mujtahid* was invalid if made on condition that he would adhere to the doctrines of a school. Only the early Ḥanafīs allowed such a stipulation (and only then if the *madhhab* in question was the *qāḍī*'s own).[51]

These rules seem to be a straightforward means of ensuring the independence of the judiciary from political power. But did they? Mathieu Tillier's work on *maẓālim* in Abbasid Egypt paints a more complex picture.[52] Christian Müller, meanwhile, has cautioned that often judges rendered no decision at all, but

49 Wael B. Hallaq,"The *qāḍī*'s *dīwān* (*sijill*) before the Ottomans," *Bulletin of the School of Oriental and African Studies* 61 (1998): 415–36, with the argument contra in Rustow, *Lost Archive*, 67–73. There was a mosque repository for books and documents at the Umayyad mosque in Damascus; see D'Ottone Rambach, Hirschler and Vollandt, *The Damascus Fragments.*

50 Wakin, *Function of Documents,* 32; Khan, ALAD, 7, 100.

51 Muhammad Khalid Masud, Rudolph Peters and David S. Powers, "Qāḍīs and Their Courts: An Historical Survey," in *Dispensing Justice in Islam: Qadis and Their Judgments,* ed. Muhammad Khalid Masud, Rudolph Peters and David Powers (Leiden: Brill, 2006), 1–44, esp. 14.

52 Mathieu Tillier, "The Mazalim in Historiography," in *The Oxford Handbook of Islamic Law*, eds. Anver M. Emon and Rumee Ahmed (Oxford: Oxford University Press, 2019); Tillier, "Qāḍīs and the Political Use of the Maẓālim Jurisdiction under the ʿAbbāsids," in *Public Violence in Islamic Societies: Power, Discipline, and the Construction of the Public Sphere, 7th–18th Centuries CE*, eds. Christian Lange and Maribel Fierro (Edinburgh: Edinburgh University Press, 2009), 42–66.

rather presided over a process of arbitration,[53] and where this is true, it would compound the difficulty of understanding the relationship between law and documents. Documents also hide legal reasoning and argumentation since, as Chibli Mallat has put it, they "register a fact which has either never been disputed, or one the dispute over which has now been settled."[54]

The documents may likewise be hiding evidence of forum-shopping among the *madhhab*s. There is abundant evidence of it in other kinds of sources, so we might suspect that it was happening de facto. But even from Fatimid-era *qāḍī*-court documents, it's not possible to discern whether all the judges were Ismāʿīlī. The formulae continue general Egyptian notarial practice as consolidated after al-Ṭahāwī, as Khan notes; there is nothing Ismāʿīlī about them, though Ismāʿīlī judges and officials do appear in them.[55] Since Fatimid caliphs and viziers granted investitures to Jewish and Christian judges, it's not far-fetched to imagine them granting investitures to Sunnī judges. But if this is the case, then the judicial system had multiple levels that still

53 Christian Müller, "Settling Litigation without Judgment: The Importance of a Hukm in Qâdî cases of Mamlûk Jerusalem," in *Dispensing Justice in Islam: Qadis and their Judgements*, eds. Muhammad Khalid Masud, Rudolph Peters and David Powers (Leiden: Brill, 2006), 47–70.

54 Chibli Mallat, "From Islamic to Middle Eastern Law: A Restatement of the Field (Part II)," *The American Journal of Comparative Law* 52 (2004): 209–86, esp. 249–50. Cf. Brinkley Messick, "The Judge and the Mufti," in *The Ashgate Research Companion to Islamic Law*, eds. Rudolph Peters and Peri Bearman (Ashgate, 2014), 82.

55 See, e.g., the *ʿalāma* of an anonymous judge, "*allāh al-ʿu[m]da*," at the top left of a fifth/eleventh–century marriage contract, T-S Ar. 38.61 (Khan, ALAD, 34); the judge Abū ʿAlī al-Ḥasan b. ʿAlī b. Ḥassān in an iqrār from 534/1140, T-S 8J5.8 (Khan, ALAD, doc. 43; the name and *kunya* are ambiguous, since in this period even Jews could bear any of them); and the anonymous judge in a fifth/eleventh–century court record, T-S Ar. 38.71 (Khan, doc. 59), lines 3 and 11–12, 14, 18. The situation is, however, clear when Fatimid-era documents identify judges as *qāḍī al-quḍāt*, e.g., Abū al-Fatḥ ʿAbd al-Ḥākim b. Saʿīd b. Mālik b. Saʿīd, in a marriage contract of 419–27/1028–36, T-S 18J1.10, line 5 (Khan, ALAD, doc. 32). A more ambiguous case is the judge mentioned in a lease document for a government property from 509/1115, T-S Misc. 29.24, recto, lines 6–7 (Khan, ALAD, doc. 23), Abū l-Ḥasan Muḥammad b. Hibatallāh b. al-Ḥasan, who is described as a certified witness (*shāhid ʿadl*) and also as "head of the office of prosperous Friday and neighborhood mosques in Cairo al-Muʿizziyya, may she be guarded, and Fusṭāṭ, and of the office of intestate property (*mawārīth ḥashriyya*), and of the auspicious granaries." Since he ran the mosques in the capital, it's probably safe to assume he was Ismāʿīlī.

need to be parsed. As much as the documents obscure about the judges, they reveal about the calm imperviousness of everyday notarial practice to the kinds of issues we might have expected, based on the legal writings, to bother people. Was notarial practice its own sphere, then? If so, what about those judges who doubled as notaries?

In sum, documents show that there are dimensions to law that we haven't adequately explored.

Please go find yourself some documents

One could be forgiven for concluding that reconciling the documents with the writings of the jurists is too large a task for one person. I would suggest, in fact, that it's the job for a subfield. Let's found one.

Subfields solve the problem of a standing army, but an army still needs to define strategies when faced with complex problems — likewise researchers before recalcitrant evidence. We've tried our current division of labor, and we've had underwhelming results. I would suggest, then, that we train students to cross the divide between documents and long-form texts. As for how to tackle the problem of documents and judicial systems, rather than tackling it whole, let's break it into smaller, more conquerable pieces. Recent books have made an excellent start on this, and they've tended to break the problem up in one of two ways: by tracing the history of institutions over time, and by offering microhistories of a single system.

The institution-over-time approach drives Mathieu Tillier's magisterial *L'invention du cadi*. The book promises to trace the emergence of the office of *qāḍī* from among a wider array of legal arbiters in the Umayyad period. In fact, it does more: it tells a wider story of early Islamic judicial systems. The difference is important. French distinguishes rigorously, as Tillier notes in his introduction, between "legal" and "judicial," so there are "legal questions," *questions juridiques,* but "judicial systems," *systèmes judiciaires,* where English might use "legal"

for both.[56] The book is about the second entity.

One of the book's major interventions in Islamic legal history is how it frames its question. On Tillier's view, previous attempts to trace the history of Islamic law have either treated their subject in an institutional and social vacuum or else flattened regional differences. Instead, he takes a "horizontal," "polycentric" approach, examining the judicial systems run by pagarchs, governors, caliphs, and even rabbis and bishops. Rather than focusing on jurists, judges, or even the broader range of legal specialists, Tillier tries to reconstruct the many public institutions and officials that meted out justice, and then to ask how these eventually led to the establishment of judgeships. If you'll forgive the historical whiplash, Tillier's book does for Islamic legal institutions what Yuval Noah Harari's *Sapiens* does for the history of humankind: it offers a glimpse of the alternatives that died out or assimilated when the species *qāḍī* pulled away from the postdiluvian scrummage.

Tillier's book is far so rich with source material and rife with careful interpretation that I can't possibly do it justice here. (Among other things, I am particularly struck by Tillier's intellectual honesty in presenting hypotheses and counter-hypotheses and allowing his reader to choose among them.) In this context, I want to point to the extraordinary first chapter, in which Tillier sifts through the published papyri — still a small fraction of the extant papyri, though more than Wakin had at her disposal, and they're now searchable in a database — to identify in administrative and legal documents the range of options available to those seeking justice. There are petitions and other appeals for arbitration to pagarchs, amīrs, sub-governors and governors (including the perennial star of papyrology Qurra b. Sharīk, an Umayyad governor of Egypt); and there are rescripts and letters in response to appeals. Thirty-five of the documents in Tillier's corpus are from Egypt and three from Palestine; even within Egypt alone, there are levels of authority in the game, local, intermediate and regional. He concludes that there were no *qāḍī*s until the Abbasid period. Even then, Sapiens-like, they still

56 Tillier, *L'invention du cadi*, 19.

weren't the only option available to those seeking justice. And then, having combed through the documents, Tillier launches on four chapters on the long-form sources, well-positioned to discern where they're retrojecting *qāḍī*s onto a period before they existed.

Tillier's book demonstrates the wisdom of the rule that if you're having trouble solving a problem, reframe it. Tracing the history of a single official such as the *qāḍī* might have yielded sterile or tautological results. Widening the field of inquiry to include other officials who dispensed justice yields a different picture not just of a single office, nor just of Islamic law, but of something much broader: justice.

A second way to break the problem into bite-sized pieces is to write microhistory. This is a classic technique among social historians, and it should have great appeal to legal historians, too.[57] The microhistorical approach revolutionized historical writing in the 1970s by narrowing its scope and delving into tiny details of the everyday world. By building up texture, microhistories bring into the open the assumptions, unspoken knowledge and unconscious habits of thought that would be unrecoverable with more traditional methods and sources. Microhistory trucks in the humble and ordinary, and in elites only insofar as they encounter the humble; it trucks not the exception, but in a mass of evidence of the unremarkable. Unlike a mere case-study, a microhistory allows conclusions to emerge from patiently accumulated detail, not via an illustrative or part-for-whole logic.
Some recent works of legal history could be described as microhistories. Among them is Eve Krakowski's book on marriage patterns among Jewish women in Fusṭāṭ, *Coming of Age in Medieval Egypt,* a title that echoes Margaret Mead's ethnographic classic*Coming of Age in Samoa*; both are about adolescent girls, and recover an entire culture through them.[58] Krakowski's corpus

57 The classic of the genre is Carlo Ginzburg, *The Cheese and the Worms: The Cosmos of a Sixteenth-Century Miller,* trans. John and Anne C. Tedeschi (Baltimore: The Johns Hopkins University Press, 1980); see also Ginzburg, "Microhistory: Two or Three Things That I Know about It," *Critical Inquiry* 20 (1993): 10–35.

58 Eve Krakowski, *Coming of Age in Medieval Egypt: Female Adoles-*

of geniza sources is exceptionally unforgiving. They include betrothal, engagement and marriage contracts in Aramaic, Judaeo-Arabic and Hebrew, which are mostly formulary, while the fungible information they contain is drily demographic. But through the patient aggregation of detail, Krakowski arrives at some startling conclusions. The first is the divorce rate among Jews in Fatimid and Ayyubid Fusṭāṭ — which was as high as Yossef Rapoport found among Muslims in the Mamluk period.[59] The second is that relatively few children grew up in a single household with a stable set of adults, a significant finding given that not all the adults married within their own religion or school, and religious and scholastic traditions were learned mimetically at home, even among those who had access to books, which means that children had access to many schools of religious practice. The third is that the culture of patronage and reciprocity that Roy Mottahedeh documented in his much beloved *Loyalty and Leadership and an Early Islamic Society* was highly gendered. In fact, patronage and institutionalized reciprocity were resources for men, but they worked for women only insofar as those women had male patrons who were kin or, barring that, communal and state officials, which is so impersonal as almost not to count as patronage at all.[60]

Most intriguing, however, is the central claim of Krakowski's book. The social historical data she pulls from those marriage contracts reveal that Jewish marriage habits resembled those of medieval Muslims more than of late antique Jews. This isn't the surprising bit; what is is that while Jewish marriage wasn't socially distinctive, Jewish marriage *contracts* nonetheless carefully followed late antique rabbinic technical legal norms, and made a point of doing so. Jews were committed to contracting their marriages according to Jewish law even as they married like Muslims, and not just as a way of reinforcing

cence, Jewish Law, and Ordinary Culture (Princeton: Princeton University Press, 2018).

59 Yossef Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society* (Cambridge: Cambridge University Press, 2005).

60 Oded Zinger's book-in-progress draws analogous conclusions for female litigants in the Jewish courts.

Jewish distinctiveness; Jews also had a distinctively Islamicate (the suffix matters) idea of what it meant to have a legal tradition.

The book is an organic outgrowth and a departure from previous legal studies on the geniza, which tended to focus narrowly on the evolution of document types, or else on male social networks and communal administration. Krakowski's book reconstructs the institutions behind the documents and the user-end of the judicial system. It's microhistorical inasmuch as it begins from girls' age and status (legal and economic) at first marriage and ends with bold conclusions about a much bigger question: what it meant for Jews, Christians and Muslims in a remade Middle East to nurture legal (in the sense of *juridique*) institutions and judicial (in the sense of *judiciaire*) systems that they recognized as such.

Christian Müller's impressive study of the al-Aqṣā documents has also been called "microhistory."[61] Though his work comes from a different angle from Krakowski's, it shares her method of pulling history from legal documents not by discarding the fixed formulae (an act of deboning, as Tamer el-Leithy once memorably put it), but by fearlessly devouring them. No detail escapes Müller's curiosity, from the smallest (and most perplexing) marginal annotation to the layout and format of the page. No document type escapes his notice, either, from lists and inventories to otherwise unattested types of testimony and deed.

Like Tillier's book, Müller's is too complex to summarize in two paragraphs; given the state of my German (and the forbidding style of his), I'm sure I've overlooked key points. The book shows how the patient accumulation of documentary evidence can yield a whole that is greater than the sum of its parts — in his case, two wholes. The first is the shape of the Ḥaram corpus itself, which Müller reinterprets not as the archive of a*qāḍī* (as its cataloguer, Donald Little, had it), but as a massive dossier of evidence assembled to defend said *qāḍī* against allegations of corruption.[62] The second whole is a provincial

61 Müller, *Der Kadi und seine Zeugen*; Konrad Hirschler, review in *Islamic Law and Society* 25 (2018): 157–61, esp. 157, 159.

62 Christian Müller, "The Haram al-Sharīf Collection of Arabic Legal Documents in Jerusalem: A Mamlūk Court Archive?" *al-Qanṭara* 32 (2011): 435–59.

Mamluk legal culture with idiosyncratic (or at least unattested) norms of document production, its own systems of document storage and retrieval, and a complex relationship to the state on the one hand and the doctrines of the jurists on the other. Like Tillier — and also like Kristen Stilt's study of the *muḥtasib* in Mamluk Cairo[63] — Müller has situated his study at the intersection of the state and judicial institutions, a vantage point from which generalizations about Islamic law, even Islamic law in a given time and place, are bound to seem hollow.

Just how hollow we won't know until we have more documents to study. Documents complicate the picture; an abundance of documents complicates it exponentially. Thirty years after Khan's landmark corpora, many hundreds or thousands of unpublished legal documents still await their debut onto the stage of scholarship. From personal experience, I can assure you that with hard work, good bookkeeping, regular reading sessions and reliable comrades, even someone with no prior training in Arabic paleography can learn to make sense of legal documents — all the more so scholars who know how to read the long-form Islamic legal works. The road to documentary glory is paved in the usual way of manuscript journeys: find the texts, decipher them (the more of them the better, since illegible segments and lacunae in one document get filled by others), understand them, contextualize them and, in the spirit of Tillier and Müller, interpret them both closely and with an eye on larger wholes. There are discoveries to be made; I urge you to try.

63 Kristen Stilt, *Islamic Law in Action: Authority, Discretion, and Everyday Experiences in Mamluk Egypt* (Oxford: Oxford University Press, 2011).

Tracing the history of *Ibāḍī* law and jurisprudence

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Abstract

In this essay, Ersilia Francesca reviews scholarship on Ibāḍī law, an understudied and marginalized subfield of Islamic legal history. She argues that recent scholarship in Ibāḍī law has demonstrated that Schact was mistaken to dismiss Ibāḍī jurists as outliers who adopted Sunnī legal norms with only a few tweaks. To the contrary, studying Ibāḍī law as a view of Islam "from the edge," she contends, enables a fuller picture of the multi-faceted process of Islamic law's emergence. She further offers a periodization for the study of Ibāḍī jurisprudence in three chronological stages: a formative stage in Basra, an intermediate stage generated by Ibāḍī travels to Oman and the Magreb, ending in "a stage of maturity."

Ibadism still remains the most disacknowledged and misunderstood branch of Islam. In particular the Ibāḍī contribution to the field of law and jurisprudence is mainly underestimated within mainstream Islamic studies, which privileges Sunnī and Shīʿite sources. However, studies on Ibadism have advanced in the last decades, thanks to the sustained efforts of researchers, associations (such as *Ibadica* in Paris), and the Ministries of Awqaf and Religious Affairs and Culture and Heritage in Oman. Studies on Ibāḍī law were first carried out during the European colonial period in Africa and in the Middle East when French (A. Imbert, M. Morand, M. Mercier, E. Zeys) and German (E. Sachau) scholars began to examine the legal works of the Ibāḍī communities in Algeria, East Africa, and Zanzibar. Their studies aimed at making the legal texts of the religious minorities available to the colonial rulers.

An academic reconstruction of Ibāḍī law was first attempted by Joseph Schacht in *The Origins of Muhammadan Jurisprudence*,[1] a fundamental text for the study of Islamic law that has stirred up a great deal of controversy since its publication. Schacht starts with the assumption that the Sunnī schools do not differ from the Khārijite and the Shīʿite, any more than the latter two differ from each other. He affirms that the ancient sects, during the first centuries of Islam, were in contact with the orthodox community and merely adopted the Islamic law already developed in the Sunnī schools of law. In his account, they merely introduced marginal modifications intended to adapt it to their own political agendas and dogma.

Schacht's position on Khārijī/Ibāḍī law was challenged by several scholars. In his study on Ibāḍī ritual purity, based on *Kitāb al-waḍʿ fī 'l-furūʿ* by al-Jannāwunī (Jabal Nafūsa, first half of the twelfth century), R. Rubinacci contests Schacht's assumption that the Khārijites merely adopted the legal system of the orthodox schools.[2] On the contrary, he argues that the Khārijites played a significant role in developing Islamic law,

1 J. Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950), 260–61 (Chapter 8 on *Khārijī Law*).

2 R. Rubinacci, "La purità rituale secondo gli Ibāḍiti," in *Annali dell'Istituto Universitario Orientale* T1957, 1-41.

as they were driven by a particularly strict ethical code that was kindled by an intense, on occasion exaggerated, religiosity.

In 1971, ʿAmr Khalīfa Ennami (al-Nāmī) defended his Ph.D. thesis at Cambridge University entitled *Studies in Ibāḍism*, which can be considered a milestone in research on Ibāḍī dogma and law. In the chapter on jurisprudence, he confutes Schacht's theory on the late derivation of Ibāḍī law compared to the Sunnī schools by showing that the Ibāḍīs contributed to the process of the formation of Islamic law, developing their own legal system that was differentiated from the Sunnī system in many ways. Ennami's study is based on his own research on Ibāḍī manuscripts, which led him to study works scholars had not previously consulted from the first centuries that . Therefore, Ennami could demonstrate that the Ibāḍīs began to draw up their own legal treatises at the same time as the ancient schools of law, or even earlier.

Following Ennami's works, further studies carried out by J. Wilkinson, E. Francesca, A. al-Salimi, A. Gaiser, M. Muranyi, demonstrated that the Ibāḍīs set forth, from the beginning, an independent line from the Sunnī schools, with autonomous authorities and jurists. They developed a rich literary heritage stretching back to the formative period, which is of great potential importance. In particular, research focusing on Ibāḍī law in the first centuries of Islam can contribute to offering tentative solutions to the main problems concerning the formative period of Islamic law, such as questions concerning transmission, authorship, and content.

As far as the development of the Ibāḍī school is concerned, Wilkinson refers to a process of "normalization" or "hadithication" through which Ibāḍīs rationalized the development of their school. They identified Jābir b. Zayd (d. between 711-12 and 722-23) along with his Meccan connections as the founding figure and stressed the master-pupil connection among the first leaders of the Basran community (Jābir, Abū ʿUbayda, al-Rabīʿ) for the transmission of knowledge (*ḥamal* or *raf' al-'ilm*) in the same way as the "imamate" of the community passed along this

same line.[3]

In recent years, the critical editions of *rasāʾil*, *ʿaqīda*, *fiqh* books, and other Ibāḍī sources by Ennami, A. al-Salimi, W. Madelung, F. Jaʿbiri, among others, have made valuable material available to researchers.[4] Custer's catalogue of the Ibāḍī primary and secondary literature shows the richness of the Ibāḍī literary heritage, which has only been partially explored.[5] The annual series of International Conferences on Ibadism, which started in 2009 in Thessaloniki, have further expanded the field and attracted new scholars to Ibāḍī studies. Among the Conference proceedings published by OLMS in Germany, the volume on Ibāḍī jurisprudence provides a comprehensive framework for the study of Ibāḍī law.[6]

The development of Ibāḍī law and jurisprudence: A Periodization

In my research, I mainly focused on the early development of Ibāḍī law and jurisprudence. I suggest that looking at Islam from the edge can provide us with a better understanding of the entire formative process of Islamic law. The themes treated in early Ibāḍī sources reflect the legal debates taking place during the first centuries of Islam, reflecting two opposing trends which may be identified in the formative phase of Islamic law: the continuation of local legal traditions and the efforts of

3 The early development of the Ibāḍī school is summarized in J. C. Wilkinson, *Ibāḍism. Origins and Early Development in Oman* (New York: Oxford University Press, 2010), 122–210.

4 In the 70s Ennami edited the *Ajwibat Ibn Khalfūn* (Beirut, 1974) by the famous scholar Abū Yaʿqūb Yūsuf Ibn Khalfūn al-Mazzātīl-6th/12th century), providing impetus for the publication of Ibāḍī works. For the most recent editions of early Ibāḍī sources, see, e.g.,A. Al-Salimi, Early *Islamic Law in Basra in the 2nd/8th Century: Aqwal Qatada B. Diʿama Al-Sadusi (Lei*den: Brill, 2018); A. Al-Salimi and W. Madelung, Ibāḍī *Texts from the 2nd/8th Century (Lei*den: Brill, 2018); F. al-Jaʿbīrī, Rasāʾil *al-Imām Jābir b. Zayd (Oman*: Maktabat al-Ḍāmirī li-l-Nashr wa-'l-Tawzīʿ, 2013).

5 M. H. Custers, *Al-Ibāḍiyya: A Bibliography*, 2nd ed. (Hildesheim: Georg Olms Verlag, 2017).

6 B. Michalak-Pikulska and R. Eisener, eds., *Ibadi Jurisprudence: Origins, developments and cases* (Hildesheim: Georg Olms Verlag, 2015).

the first jurists to find solutions which conform to Islam.

As far as the dynamic between Islam and late antiquity is concerned, I scrutinize the interactions between different and concurring legal praxes, focusing on the consistency and plausibility of the ongoing narrative and *ikhtilāf* on *zinā* as an impediment to marriage in Ibāḍī law.[7] I argue that a plausible answer to the question of the relationship between Islamic law and other legal systems, as in the case of adultery and fornication, can be found in the common cultural and social background they shared, which refracted through the Jewish and Christian legal traditions down to the eve of the rise of Islam.

As Muslim legal actors gradually relied upon an increasing number of textual sources for legal opinions, they incrementally gained their own interpretive autonomy. Examining pre-classical and "non-orthodox" legal collections – such as early Ibāḍī texts – along with their relationship to non-Islamic sources, is a fruitful method for depicting the multi-faceted process of the early formation of Islamic law.

In my research, I outline three different stages in the development of Ibāḍī law and jurisprudence: a formative stage in Basra, an intermediate stage when the communities moved to Oman and the Maghreb, and a stage of maturity in both Maghreb and Oman.

In the formative stage (approximately mid first/seventh-third/ninth century), Ibāḍī jurists were in contact with the Sunnī community and they acknowledged the authority of Sunnī traditionists, such as Qatāda b. Diʿāma,[8] ʿAmr b. Harim, ʿAmr b. Dīnār, Tamīm b. Khuwayṣ, and ʿUmāra b. Ḥayyān. In this period, a number of doctrines, diverging from Sunnī law, emerged in Ibāḍī law. For example, the rejection of *masḥ ʻalā ʾl-khuffayn* (wiping shoes instead of washing feet as part of ablution), the injunction that the property of a client (*mawlā*) who has no

7 Jerusalem Studies in Arabic and Islam, 49, 2020 (forthcoming).

8 A collection of traditions and opinion attributed to Qatāda along with those of early Ibāḍī authorities has been recently edited by al-Salimi under the title *Early Islamic Law in Basra in the 2nd/8th Century: Aqwal Qatada B. Di'ama Al-Sadusi* (Leiden-Boston: Brill, 2018). This source is of crucial importance in understanding the relationship between Sunnīs and Ibāḍīs in early Islam.

relatives is to be inherited by his people and not by his patron, and the impediment to marriage between an unmarried man and an unmarried woman who have committed fornication, are all doctrines that differ between Ibāḍī and Sunnī law.

Some traditions transmitted by old Ibāḍī jurists support doctrines rejected in later legal works. Typical of this group of "unsuccessful" traditions are those assuming that exchanges of precious metals involve no usury unless there is a time lag in the transaction (absolute equality in quantity is not demanded) and those allowing the sale of an *umm al-walad* or *mudabbar* slave.

The development of early Basran Ibāḍism into a conventional *madhhab* was associated with an increasing consciousness of differentiated group identity. This is evidenced by the fact that the marriage between an Ibāḍī woman and a non-Ibāḍī man, although considered lawful, was nonetheless disapproved of. The validity of prayer performed behind a non-Ibāḍī *imām* was also discussed at length in early Ibāḍī sources. Jābir b. Zayd was said to have performed the Friday prayer under the guidance of the Umayyad governor al-Ḥajjāj, but later scholars seem to have held that praying behind a non-Ibāḍī *imām* was invalid and had to be offered again. This dispute emerged in the correspondence between Abū Sufyān Maḥbūb b. al-Raḥīl and Hārūn b. al-Yamān, during the imamate of al-Muhannā b. Jayfar (841-852), and gave rise to the question of the true 'tradition' of the Ibāḍī Basran community.

The development of Ibadism as a movement in general and as a school of law in particular was mainly in the hands of the *fuqahāʾ* and *ʿulamāʾ*. When the community was still based in Basra, the first Ibāḍī authorities were in close contact with Sunnī scholars, exchanging advice and opinions with them, thus contributing to the general development of Islamic law. When the community left Basra and settled mainly in Oman, Ḥaḍramawt, and the Maghreb, there was no rivalry between the main centers of Ibadism even though they developed chains of transmission (*isnād*) of their own comprising local authorities. There were transmitters who, having studied in one center, moved to another center and disseminated the learned material there ('bearers of

knowledge', *ḥamalat al-'ilm*), so the bulk of traditions going back to early Ibāḍī Basran authorities became the 'common property' of the whole Ibāḍī community.

The fourth/tenth century marked a new phase (which we can call the "intermediate phase") in the development of Ibāḍī law with the expansion of works of *uṣūl* and *furū'*. The development achieved by Ibāḍī jurisprudence is clearly visible in the work of the Omani jurist Muḥammad b. Sa'īd al-Kudamī (who lived between the end of the fourth/tenth and the beginning of the fifth/eleventh centuries) entitled *al-Mu'tabar*. According to al-Kudamī, the *sunna*'s main function (as well as that of the community's consensus, *ijmā'*) is interpreting God's Book. Judges and jurists have to rely on these three sources (Qur'ān, *sunna,* and *ijmā'*) in issuing their judgments or legal opinions.[9] Along with al-Kudamī's treatise, the *Kitāb al-jāmi'* by 'Abd Allāh b. Muḥammad b. Baraka al-Bahlawī (d. late fourth/tenth century) became a fundamental reference point for Omani-Ibāḍī jurisprudence.[10] This work made a notable contribution to Ibāḍī *fiqh* by affirming the centrality of prophetic traditions, which constitute the fundamentals (*qawā'id*) of both jurisprudence and hermeneutics (*uṣūl al-fiqh,* which he calls *uṣūl al-dīn al-shar'iyya*). He was familiar with Sunnī sources, which he studied to affirm the superiority of the Ibāḍī school against the "*mukhālifūn*," or opponents, and introduced into Ibadism some elements of Sunnī *ḥadīth* classification.[11]

Ibāḍīs find no problem with the traditions of other doctrines as long as their chains of transmission are trustworthy and there are no substantive reasons in the report not to accept them. Ibn Baraka said "we do not deny the traditions of others as long as they are not corrupt."[12] This communal *sunna* was absorbed

9 Al-Kudamī, Abū Sa'īd Muḥammad b. Sa'īd, *Kitāb al-Istiqāma*, 3 vols. (Muscat: Wizārat al-Turāth al-Qawmī wa-'l-Thaqāfa, 1985), Vol. 3, 6–7.

10 Wizārat al-Turāth al-Qawmī wa 'l-Thaqāfa, ed., 2 vols (Sulṭanat 'Umān, 1971, 1973).

11 Ibid. Vol. 1, 14–15 (*al-Jāmi'*; *bāb al-awal fī 'l-akhbār*). On *ḥadīth* classification see ibid. 16–21 (*bāb fī 'l-akhbār al-murawiyya 'an al-nabī*).

12 Quoted in Aḥmad Ibn Ḥammū Kurrūm, *Ishāmāt al-madrasa al-Ibāḍiyya fī khidma al-sunna al-nabawiyya* (El Hamiz (Algeria): Markaz al-manār, 1432/2011), 13–15.

into the Ibāḍī *madhhab* but only to emphasize certain desirable behaviors (*faḍīla*), never for determining dogma—for that Ibāḍī authority alone was valid.

The stage of maturity of the Ibāḍī law, along with the ongoing process of "hadithication," is evident in the works by the Omani encyclopedists at the end of the fifth/eleventh and the beginning of the sixth/twelfth centuries, in particular the *Kitāb al-ḍiyāʾ* by Salma b. Muslim al-ʿAwtabī (d. early 6th/12th cent.), the *Bayān al-sharʿ* by Muḥammad b. Ibrāhīm al-Kindī (d. 508/1115) and the *Muṣannaf* by Abū Bakr Aḥmad b. Mūsā al-Kindī (d. 557/1162). By the mid-twelfth century Muḥammad b. Ibrāhīm al-Kindī collected the *siyar*, epistles on different matters of theology and jurisprudence written by early Ibāḍī authorities, which played a crucial political and pedagogical role within the community. They constitute an instrument of legitimization of Ibāḍī political and religious ideology and a guarantee of the collective cohesion.

In North Africa, after the definitive collapse of the Rustamid imamate following the victory of the Fatimids in 358/868-69, the Ibāḍī community was forced to take refuge in the remote oases of the Algerian Mzab, on the island of Jerba, and in Jabal Nafūsa. There it managed to survive in secret (*kitmān*), led by a council of elders (*ʿazzāba*). After the political collapse of the movement and a period of stasis, there was a new period of efflorescence in jurisprudence, parallel to that found in Oman. The process of maturity/hadithication in the Maghribi-Ibāḍī sources culminated in the first half of the sixth/twelfth century when Yūsuf al-Warjlānī completed his arrangement (*tartīb*) of a collection of *ḥadīth* attributed to al-Rabīʿ b. Ḥabīb, in which traditions of the Prophet and the Companions were handed down through the *imāms* of the school, known as *Musnad al-Rabīʿ b. Ḥabīb* or *al-Jāmiʿ al-ṣaḥīḥ*. For the Ibāḍī *madhhab* the *Musnad* fulfills two important functions: providing an independent Ibāḍī collection of *ḥadīth* without having to refer to other schools, and affirming the pupil-*imām* transmission line from the founder of the *madhhab* Jābir b. Zayd, via his successor Abū ʿUbayda, via the successor of the latter, al-Rabīʿ.

Future Avenues in the Study of Islamic Law

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Abstract

In his essay, Najam Haider calls for "more cohesive and integrated scholarly engagement with the pre-modern Islamicate world." To that end, the author urges scholars to creatively engage and treat legal texts as valuable sources for understanding the social and political predicates of Islamic societies. For example, tracing the creation and migration of legal texts across regions can yield valuable insights into multiple ideas and ideologies across the pre-modern Islamic world, as a part of a larger intertextual world where scholars study all actors in Islamic history as interacting with, complementing, and arguing against one another.

I should begin by noting that I am not—strictly speaking—a scholar of Islamic law. Rather, I am a scholar of early Islam who routinely draws on Islamic law as a means for excavating elements of pre-modern social history. My first book project, for example, applied a data-driven statistical model to legal texts pertaining to ritual in order to test literary narratives about the formation of communal identity in early Islam.[1] This monograph built on the pioneering work of Harald Motzki and Gregor who demonstrated the value of analytic methods that focused on the structure of reports preserved in legal compilations.[2] Specifically, they showed the utility of legal sources as reservoirs of historical information (often) protected from the polemical reworking that could characterize historical or theological texts.

Over the last decade or so, there has been a real proliferation of studies that mine legal tracts and compilations for information pertinent to broader aspects of social history. In line with the premise of this workshop, I will limit my comments to particularly fertile and exciting developments that highlight the potential of legal texts to deepen our understanding of Islamicate society in general. That is not to say that Islamicate societies are reducible to the law (a point effectively made by Shahab Ahmed) but rather to argue that legal sources—when engaged creatively—tell us about much more than just the law.

One of the most exciting new directions in the study of Islamic law involves a renewed interest in geography. In the mid-twentieth century, Joseph Schacht put forward a timeline for the development of Islamic law that highlighted geographical schools of law.[3] Some decades later, Wael Hallaq reconfigured Schacht's conclusion while other scholars emphasized the importance of locations such as Kūfa, Medina, and Mecca in the evolution of Islamic law.[4] In more recent times, geography has

1 Najam Haider, *The Origins of the Shī'a* (Cambridge: Cambridge University Press, 2011).

2 See, for example, Gregor Schoeler, *The Biography of Muhammad*, trans. Ewe Vagelpohl (New York: Routledge, 2006) and Harald Motzki, *The Origins of Islamic Jurisprudence* (Boston: Brill, 2002).

3 Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1967).

4 Wael Hallaq, "From Regional to Personal Schools of Law?," *Islamic*

come to the fore as a primary unit of study. New studies have attempted to reconstruct local legal practices while others have placed jurists more concretely in their local contexts.[5] To offer one example, Behnam Sadeghi has proposed a test for evaluating the reliability of early legal traditions that involves the creation of local linguistic and legal corpora which could then be used to ascertain the likely geographical origins of all kinds of texts.[6] I recently peer reviewed an article that works in a similar vein for Twelver Shī'ī legal sources with a focus on texts produced in Egypt and Qumm. The truly exciting aspect of these kinds of studies is their potential to reach a stage where we could, in fact, have a clear sense of the vocabulary, syntax, stylistic elements, and argumentative preferences of specific regions/cities. This information might then, in turn, be applied to a broad variety of genres, ranging from historical chronicles and exegesis to theological missives and poetry.

Another important recent development in legal studies stems from a growing interest in the transmission of knowledge across time and space. Given the immense scope and volume of surviving legal material and new digitization efforts led by teams at AKU/SOAS (Sarah Savant and Maxim Romanov) and UCSD (Mairaj Syed), we are not so far removed from a future in which we could trace the travel history of a set of legal texts or arguments. There have been previous efforts to document the reception of certain traditions or ideas across region and period but these involved meticulous research that took years and offered only minimal conclusions. The development of software that can quickly mine thousands of sources for examples of reuse and quotation allows us to map the movement of ideas and texts from one source text to another. If we can place these sources in specific geographical locations (as I described above), then that map acquires a materiality that can highlight the main networks for the transmission of knowledge in the pre-modern

Law and Society, 8 (2001): 1–26.

5 Najam Haider, "The Geography of the *Isnād*," *Der Islam*, 90 (2013): 306–46.

6 Behnam Sadeghi, "The Traveling Tradition Test," *Der Islam*, 85 (2010): 203–42.

Muslim world. Such studies might finally allow us to test our assumptions about the close links between Medina and Egypt or Mecca and Basra. Perhaps we will find other pathways for transmission that are currently obscure. I, for one, have always been curious about the connection between early Shī'ī communities in Qumm (for which we have considerable information) and those in Aleppo and North Africa (for which we have very little information).

As is likely apparent to anyone reading this, my interest in the law derives from its potential as a source for other kinds of historical information. In my current research project, for example, I am drawing on a collection of Zaydī Shī'ī legal traditions located in Kūfa in the third/ninth and fourth/tenth centuries to excavate the social divisions that characterized the city's Zaydī community. I am fairly certain that there were at least two (if not more) communal divisions among the Zaydīs that might be correlated with the neighborhood and mosque layout of Kūfa (which we know quite well through the work of Djait and others).[7] The legal sources do not specify these divisions explicitly but the needed information is embedded within their very structure and composition. What is needed, then, is a kind of textual archaeology that treats the legal sources as material artifacts of early Kūfan society.

I want to end by recounting an email I received a few months ago from a senior colleague whose work focuses on *adab*. He reached out to thank me for an article I wrote—drawn from my dissertation—that looked at legal debates over the permissibility of intoxicating drinks. He mentioned that he had been struggling with some of the arguments in a particular text that he was translating but that my article helped him understand the nuances of the discussion at a granular level. This reinforced for him the need for a more holistic engagement with pre-modern Islamicate scholarly production. Many of the scholars in the pre-modern Muslim world wore multiple hats from poet to jurist to theologian to historian (and more!). Their audiences (mostly

7 Hichem Djait, *al-Kūfa: naissance de la ville islamique* (Paris: Editions G. P. Maisonneuve et Larose, 1986).

other scholars) were adept at deciphering scholarly allusions that cut across fields of study. It is imperative that we begin to read these sources as part of a larger intertextual world rather than isolated within a specific scholarly discipline. A growing awareness of this intertextuality is, for me, one of the most promising developments in Islamic legal studies. Intisar Rabb has recently published a study that demonstrates how historical chronicles allude to legal issues.[8] Matthew Keegan has discussed legal riddles that appear in works of which assume that the reader possesses a basic level of legal knowledge.[9] Going a step further, a junior colleague and friend is currently working on a project to excavate the theology of al-Jāḥiẓ through a close reading of his literary works. This is all truly exciting and groundbreaking work and bodes well for a more cohesive and integrated scholarly engagement with the pre-modern Islamicate world.

8 Intisar A. Rabb, "The Curious Case of Bughaybigha, 661–883: Land and Leadership in Early Islamic Societies," in *Justice and Leadership in Early Islamic Courts*, eds. Intisar A. Rabb and Abigail Krasner Balbale, (Cambridge, MA: PIL/Harvard University Press, 2017) 23–36.

9 Matthew Keegan, "Levity Makes the Law: Islamic Legal Riddles," *Islamic Law and Society*, 27 (2020): 214–239.

The Neglected History of *Furūʿ* and the Premodern/Modern Binary

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Abstract

Marion Katz reflects on major developments in Islamic legal studies since the 1990's, the decade that saw – as noted in the introduction to this Roundtable– expanded and diversified scholarly attention to Islamic legal studies. For her, it is puzzling then that outdated frameworks continue to percolate in the field, such as the crude "premodern / modern binary" and the continued neglect of what she calls fiqh studies. Katz urges scholars to pursue more nuanced approaches to deal with the sheer volume of the textual corpus and to fill in chasmic history of substantive law, namely: (1) the study of "core samples," that is, the diachronic investigation of individual concepts and doctrines to document inflection points, and (2) the study of "transverse slices," that is, the synchronic study of a wide range of material from a specific historical context that helps expose underlying and pervasive assumptions behind a broad area of law.

Without a doubt, the single greatest change in the field of Islamic legal studies since my days as a graduate student in the 1990s is its sheer magnitude. This includes an enormous diversification of its disciplinary methods, institutional locations, and chronological and geographic scope. I'll reflect here only on developments in my own area of study—roughly, pre-Ottoman *fiqh*—while acknowledging that it (rightly) occupies an increasingly modest fraction of a swiftly growing field. The expansion of what I'll call "*fiqh* studies"—the academic study of Islamic law as a normative system—applies both to primary-source materials (which have been made accessible on an unprecedented scale in the form of published editions, digitally imaged manuscripts, and searchable online databases) and to secondary studies, which now appear yearly in quantities defying the capacities of any individual scholar.

Like any other interpretive enterprise, Islamic legal history involves a hermeneutic circle in which scholars construct their accounts of long-term developments by aggregating scholarly findings about individual thinkers and texts, while their interpretations of individual thinkers and texts are in their turn informed by their understanding of long-term developments. The increased pace and volume of recent scholarly production has propelled this cycle ever faster. One need only think of a figure such as al-Māwardī (d. 450/1058) to realize how much deep readings of individual works have contributed to the revision of received master narratives, and vice versa. His work *al-Aḥkām al-sulṭānīya* is a basic building block in all accounts of the development of what may be termed "constitutional" *fiqh*, but scholars have offered sharply contrasting interpretations of that work based on their interpretations of the larger legal trajectory in which al-Māwardī was intervening.[1]

1 On al-Māwardī's *al-Aḥkām al-sulṭānīya* see, for instance, Frank E. Vogel, "Tracing Nuance in Māwardī's *al-Aḥkāmal-sulṭāniyyah*: Implicit Framing of Constitutional Authority," in *Islamic Law in Theory: Studies on Jurisprudence in Honor of Bernard Weiss*, eds. A. Kevin Reinhart and Robert Gleave (Leiden: Brill, 2014), 331–59; Ovamir Anjum,*Politics, Law and Community in Islamic Thought: The Taymiyyan Moment* (New York: Columbia University Press, 2012), 117–21; Patricia Crone, *God's Rule: Government and Islam* (New York: Columbia University Press,

Nevertheless, overgeneralized and outdated frameworks persist to some extent. As Sohaira Siddiqui has discussed in a recent contribution to this series, work in the field is still dominated (in some cases implicitly and structurally, in others overtly) by a dichotomy between "pre-modern/pre-colonial" and "modern/post-colonial" eras. While her focus is on the ways in which this dichotomy tends to elide the colonial period that intervenes between the two, I'd like to focus here on its implications for the study of "pre-modern" Islamic law. I should begin with the disclaimer that in some contexts, I too use this term as a shorthand acknowledging the comparative continuity of *fiqh* frameworks prior to the late nineteenth century. Nevertheless, problems arise when such convenient shorthands come to structure and inform our inquiry, providing our guideposts through the ever-expanding source base.

Recent years have seen a number of studies that both disaggregate different aspects and stages of legal change in modernity and identify major transformations occurring in earlier centuries (the work of Guy Burak[2] and Samy Ayoub[3] comes to mind). Perhaps unsurprisingly, the gradually emerging *longue durée* narrative of legal history has gained its clearest lineaments in the areas most closely linked to political history. For instance, a development like the Mamlūk institution of chief justices from the four schools of law is a datable event with clear implications for the operation of *madhhab*-based law in a specific geographical area. As scholars including Patricia Crone, Ovamir Anjum and Mona Hassan[4] have shown, developments in constitutional law can also be meaningfully linked to the course of political

2004), 232–34. Vogel's contention that Māwardī is not making deep concessions to necessity but asserting novel claims to scholarly authority over statecraft vividly illustrates how continuing debates over long-term developments can lead to contrasting readings of individual texts.

2 Guy Burak, *The Second Formation of Islamic Law: The Ḥanafī School in the Early Modern Ottoman Empire* (New York: Cambridge University Press, 2015).

3 Samy Ayoub, *Law, Empire, and the Sultan: Ottoman Imperial Authority and Late Ḥanafī Jurisprudence* (New York: Oxford University Press, 2020).

4 In addition to the works of Crone and Anjum in Footnote 1 above, see Mona Hassan, *Longing for the Lost Caliphate: A Transregional History* (Princeton: Princeton University Press, 2017).

events. However, this is much less true of developments in other areas of substantive law. Even the most excellent surveys of the field—Hallaq's magisterial Sharīʿa: Theory, Practice, Transformations (Cambridge: Cambridge University Press, 2009) would be one example—often situate their overviews of *fiqh*'s substantive content in a timeless "pre-modern" or "classical" space, to be followed by a discussion of the ruptures of modernity.

The occurrence of legal change is now universally acknowledged, but the focus is often on moments of rupture and conflict rather than on gradual and structural change. It is not without reason that scholars often focus on key crises and disputes. An episode like Ibn Taymīya's (d. 728/1328) insistence on the revocability of fourfold divorce in the shadow of incarceration is not only dramatic in itself, but illuminates far broader dynamics.[5] Arguably, however, there is a sense in which doctrines or conventions that prevailed broadly over a sustained period are more significant than the "creative" or disruptive arguments that made more waves. These broader patterns and more gradual shifts are discernible only through painstaking analysis of lengthy texts with little surface appeal. This may explain the relative paucity of studies focusing systematically on *furūʿ* works. Generally lacking the obvious intellectual appeal of *uṣūl* texts and the contextual color of their sexier cousin the fatwa collection, *furūʿ* compendia have been comparatively neglected in the secondary literature, more often treated as reference works than as objects of study in their own right. Based on their sheer voluminousness (and probably on the degree to which they were historically taught and consulted), *furūʿ* works proportionately constitute the most under-studied genre in the study of Islamic law. Of course, it is in large part this very voluminousness that deters their systematic study.

How can scholars chart a course through this sea of texts? It seems to me that the two most obvious options are what might be called the "core sample" and the "transverse slice." In

5 See Yossef Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society* (Cambridge: Cambridge University Press, 2005), ch 5 (pp. 89–110).

this metaphor, the "core sample" is like the columns, narrow in diameter but sometimes literally miles in depth, that scientists bore from the polar ice caps. Samples drawn from different points along the length of such a column can reveal environmental changes that took place over vast periods of time. A "core sample" of the *furūʿ* literature would be a study following a tightly focused legal issue diachronically over a lengthy period. Examples of this approach include Baber Johansen's work on land tax,[6] Khaled Abou El Fadl's *Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2001), Behnam Sadeghi's *The Logic of Law-Making in Islam: Women and Prayer in the Legal Tradition* (Cambridge: Cambridge University Press, 2012), and Nurit Tsafrir's *Collective Liability in Islam: The ʿĀqila and Blood Money Payments* (Cambridge: Cambridge University Press, 2019); I have also attempted this type of study in the first half of *Women in the Mosque* (New York: Columbia University Press, 2014). By tracing the course of a single doctrinal point meticulously over a long period of time, one can hope to craft a narrative in which the inflection points emerge from the specific evidence at hand, rather than being imported from a prior framework (such as dynastic history) that may or may not be illuminating. This approach is complicated by the fact that, unlike a core sample of polar ice, our textual corpus does not generally allow us to hold steady all variables other than time. Doctrinal diversity, geographical shifts in the foci of textual production, and the evolving relationships among various legal and law-adjacent genres all complicate any effort to craft a unitary long-term narrative of development, even on a single legal issue.

In contrast with the "core sample," the "transverse slice" would be a broad and systematic analysis of material from a specific historical context. A study of this kind would address the underlying logic and prevailing assumptions of a broad area of the law and/or of the substantive legal work of a specific author.

6 Baber Johansen, "Legal Literature and the Problem of Change: The Case of Land Rent," in *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim* Fiqh (Leiden: Brill, 1999), 446–64.

It is notable that much more work of this kind has been done in *uṣūl* than in *furūʿ*. In terms of studies of specific thinkers, to the best of my knowledge, there is no *furūʿ* counterpart of Bernard Weiss's work on al-Āmidī[7] or Sohaira Siddiqui's work on al-Juwaynī.[8] This may be because *furūʿ* works are assumed to be less expressive of an author's distinctive intellectual and religious perspective; however, works like al-Juwaynī's *Nihāyat al-maṭlab*, al-Sarakhsī's *Mabsūṭ*, or Kāsānī's *Badāʾiʿ al-ṣanāʾiʿ* could richly reward this kind of inquiry. Just as *uṣūl* works are now taken seriously as works of Islamic thought independently of their role as algorithms for the generation of legal doctrine, *furūʿ* works can similarly be seen as rich mines of social and religious reflection.

In terms of systematic readings of broad areas of the law, the works of Baber Johansen offer a deep exploration of several areas of Ḥanafī *fiqh* (with a particular focus on the work of al-Sarakhsī). His work has contributed to subsequent studies including Kecia Ali's *Marriage and Slavery in Early Islam* (Cambridge: Harvard University Press, 2010), a meticulous analysis of the logics informing several intersecting areas of *fiqh*. While Ali's book helped stimulate further scholarship on thematically adjacent topics (such as Hina Azam's *Sexual Violation in Islamic Law: Substance, Evidence, Procedure* [New York: Cambridge University Press, 2015], which deals with overlapping issues of bodily self-ownership) it is surprising how little her methodology has informed subsequent studies in other areas of *furūʿ*. This may bespeak the tendency for work dealing with women or gender to be relegated to its own niche, rather than regarded as integral to the wider field.

7 Bernard Weiss, *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Dīn al-Āmidī* (Salt Lake City: University of Utah Press, 1992).

8 Sohaira Siddiqui, *Law and Politics under the Abbasids: An Intellectual Portrait of al-Juwayni* (Cambridge: Cambridge University Press, 2019). Here I'm thinking primarily of works analyzing the substantive doctrinal content of a *furūʿ* work rather than its methodological approach; examples of the latter include Talal Al-Azem, *Rule-Formation and Binding Precedent in the Madhhab-Law Tradition: Ibn Quṭlūbughā's Commentary on the* Compendium *of Qudūrī* (Leiden: Brill, 2017) and Umar F. Abd-Allah Wymann-Landgraf, *Mālik and Medina: Islamic Legal Reasoning in the Formative Period* (Leiden: Brill, 2013).

It is by accumulating a larger repertory of diachronic "core samples" and synchronic "transverse slices" we can begin to fill in the history of substantive law. (Some works, like Azam's *Sexual Violation*, can also be hybrids of the two.) It is true that many people are already using variations of a rough periodization into "formative," "classical," and "pre-classical" periods, but we have few thorough accounts of the evolution through these periods for specific legal issues. Until we do, we may run the risk (or face the necessity) of falling back on the fiction of a timeless "premodern" *fiqh*. This phenomenon has been evident in the reception of Ali's book; itself rigorously based on sources of the formative period (roughly, the third/ninth century), it is sometimes taken to describe a synthesis disrupted only by the transformations of modernity. For instance, even an excellent study such as Kenneth Cuno's *Modernizing Marriage* draws in part on Ali's findings to inform his account of the "precolonial" conceptions of marriage that were displaced by Egyptian reforms of the late nineteenth and early twentieth century.[9]

In addition to over-generalization of findings on the formative period, there are also instances where the received wisdom on "pre-modern" *fiqh* is extrapolated back from analyses of modern developments. This can sometimes be seen in the broader reception of the work of Talal Asad, who has so meticulously reconstructed the discursive transitions of the colonial period. As Khaled Fahmy has recently observed, Asad's arguments about the "transmutation of shari'a" are based on close reading of "legal texts from the very last years of the late nineteenth and early twentieth century."[10] It is obvious that contrasts constructed on the basis of evidence from the nineteenth and twentieth century cannot be projected backward

9 Kenneth Cuno, *Modernizing Marriage: Family, Ideology, and Law in Nineteenth and Early Twentieth-Century Egypt* (Syracuse, NY: Syracuse University Press, 2015), 2, 87. Cuno does acknowledge the diversity of Islamic normative discourses on marriage and strives to be attentive to change over time.

10 Khaled Fahmy, *In Quest of Justice: Islamic Law and Forensic Medicine in Modern Egypt* (Berkeley: University of California Press, 2018), 24. Fahmy's own proposal is to turn away from Asad's focus on discourse, but this observation applies just as well to the study of discourses.

into the deep past, and this was certainly not Asad's intention. However, hypotheses about what is new and distinctive in modern developments are sometimes taken to imply a durable or even timeless *status quo ante*. For instance, to again quote Fahmy, Asad "traces transmutations of the concepts of the individual and the family and studies how these transmutations brought about a distinction between morality and law."[11] The implication could be drawn that prior to the modern period there was no such distinction. However, other evidence from the late nineteenth and early twentieth century has been taken to imply an opposite trajectory, towards an unprecedented modern synthesis of Islamic law and ethics. Examining the new roles of Deobandi *'ulamā'* in British-ruled India, Brannon Ingram argues that while "[f]atwas were traditionally solicited by kazis," in the late nineteenth and early twentieth centuries "[t]he fatwa became a tool of mass moral reform, 'a form of the care of the self,' linking 'selves to the broader practices, virtues, and aims' of Islamic tradition."[12] Did modernity bring an unprecedented rupture between "morality and law" (as suggested by Asad) or an unprecedented synthesis between the two (as suggested by Ingram)? Only a richer account of premodern developments, not extrapolation from developments in modern sources, can answer this question.

My own current research on the *fiqh* of wives' domestic labor is structured as a series of "transverse slices" focusing on how this issue fits into the broader legal logic of a series of jurists. Perhaps unsurprisingly, these snapshots suggest that there is a more complicated trajectory to be reconstructed between the model of the marriage contract Ali established for the formative period and the modern transitions documented by scholars like Cuno. Wives' domestic labor was also an issue where scholars

11 Ibid., 24.

12 Brannon D. Ingram, *Revival from Below: The Deoband Movement in Global Islam* (Oakland: University of California Press, 2018), 48. Here Ingraham is citing Hussein Ali Agrama, "Ethics, Tradition, Authority: Toward and Anthropology of the Fatwa," *American Ethnologist* 37 (2010): 4. However, Agrama's own position (like Asad's) seems to be that the contemporary Egyptian *fatwā*s perform this ethical function despite, not because of, their being products of modernity.

often explicitly perceived a divergence between the legal parameters of the marriage contract (which did not require wives to do housework) and the ethico-religious ideals of wifely conduct (which did). To the extent that there is an overall long-term arc, the evidence suggests that in the discussion of this specific issue the trajectory was towards an unprecedented synthesis between legal and ethical discourses in the modern period. However, the larger takeaway is that there is no valid binary between "premodern" and "modern," if only because the terrain of "premodern" opinion is so diverse and its progress so far from unidirectional.

Islamic Law from the Internal Point of View

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Abstract

Haider Hamoudi notes the different perspectives lawyers and historians employ in making sense of the law. Invoking H.L.A. Hart's famous distinction between "internal" and "external" points of view with respect to law and legal rules, Hamoudi describes lawyers as primarily adopting the former, and historians, the latter point of view. This is not to suggest that lawyers do not take history into consideration, but rather to mean that when they do, their focus is results oriented in that they use history to understand the ultimate endpoint, the contemporaneous meaning of a legal rule or institution. Hamoudi observes two consequences emanating from lawyers' adoption of the internal view that puts lawyers somewhat at odds with the demands of historical method and meaning. While deliberately omitting discussion on the normative desirability of either method, Hamoudi concludes by observing value in merely pointing out the differences between the internal and external viewpoints of law and history, respectively, to help expose "our own biases and assumptions."

I begin this short contribution with a confession—I am not an historian. I am not even a legal historian. I am a lawyer, devoting much of my professional life to understanding and analyzing the methods by which contemporary courts and other legal institutions use Islamic law in their decision making, and from time to time using those same methods to make arguments of my own before other courts and legal institutions. The methods thus used, and the arguments thus deployed, in my experience seem to strike many in the humanities and social sciences as acontextual, misconceived, and distorting. My submission is that this perception arises not because there is anything particularly wrong with the way in which modern courts use Islamic law in broad conception, but rather because the disciplines approach the study of the past differently.

The great legal positivist H.L.A. Hart points out that the way in which legal rules are understood within law is distinct from the manner in which they are understood in other disciplines. To quote Hart directly,

> [I]t is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as a guide to conduct. We may call these respectively the "external" and the "internal" points of view.[1]

Lawyers and judges almost without exception adopt this "internal point of view" when crafting arguments or making decisions. The foundational assumption underlying this perspective is that the law is capable of establishing its own normative rules, and policing its own boundaries and categories, on its own terms, without need of validation from other disciplines.

To be clear, lawyers and judges do make use of history, and other social sciences, when crafting legal argument. However, they use them as an instrument, rather than approaching the disciplines on their own terms and on the basis of their own founda-

1 H.L.A. Hart, *Concept of Law* (Oxford: Oxford University Press, 1961), 89.

tional assumptions. Ronald Dworkin—who famously took aim at Hart's theory of legal positivism[2]—largely agrees with Hart on the distinction between internal and external perspectives. Dworkin describes those adopting the law's internal perspective and their use of the social sciences (with particular reference to history), as follows:

> Their interest is not finally historical, though they may think history relevant; it is practical….They do not want predictions of the legal claims they will make but arguments about which of these claims is sound and why; they want theories not about how history and economics have shaped their consciousness but about the place of these disciplines in argument about what the law requires them to do or have.[3]

To illustrate in the context of Islamic law, it would be exceedingly rare for a lawyer making an argument in a modern court to be concerned with the progressive stabilization and institutionalization of the Sunnī *madhhabs* and parallel Shī'ī institutions from the twelfth through fifteenth centuries, to borrow from the themes of Professor Katz's scintillating article on that very subject.[4] Lawyers do not think they need to know much about the development of lawmaking institutions in particular epochs in the premodern world in order to know how to make arguments from the rules of Islamic law as promulgated by various jurists within the institutions themselves. Judges, similarly, do not find this sort of historical contextualization useful as they render decisions based on Islamic law.

Similarly, social science approaches to the law that seem to tear apart the entire foundation upon which an entire area of

2 Scott Shapiro, "The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed," in *Ronald Dworkin*, ed. Arthur Ripstein (New York: Cambridge University Press, 2007), 22–55.

3 Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), 13.

4 See Marion Katz, "The Age of Development and Continuity, 12th-15th Centuries CE," in *The Oxford Handbook of Islamic Law*, eds. Anver Emon and Rumee Ahmed (Oxford: Oxford University Press, 2018).

law operates are unlikely to gain very much purchase from those adopting the internal perspective. By way of example, Mariam Sheibani, Amir Toft, and Ahmed El Shamsy richly engage the reliability of the traditional Muslim account of the genesis of Islamic law in a recent, laudable article. They note as follows:

> This traditional account, in a nutshell, says that Islamic law originated in the rules and instructions propounded by Muhammad, and that after the exodus to Medina and the establishment of a Muslim polity these rules grew into an extensive body of laws rooted in the Qur'an. After Muhammad's death, his successors continued to implement the Qur'anic laws as well as others based on the Prophet's precedent. In addition, they solved issues that were not explicitly covered by the former two sources by employing individual reasoning (*ra'y*). Some of Muhammad's companions who were recognized for their legal acumen settled in the newly founded garrison towns, establishing regional traditions of legal learning in these locations. Between the second quarter of the second Islamic century and the middle of the third…, a handful of prominent jurists systematized earlier legal thought and laid the foundations for enduring legal schools with their own legal literatures. Within this traditional narrative, the aspects that have prompted extensive debate concern the following questions: whether the Qur'an actually served as a source for the early jurists; whether the Hadith reports contain authentic information regarding Muhammad's sayings and actions (and if they do not, when and how they became attributed to him); whether and how the regional legal traditions were transformed into legal schools centered around particular individuals; and how the nature of legal reasoning changed within this period.[5]

5 Mariam Sheibani, Amir Toft and Ahmed El Shamsy, "The Classical Period: Scripture, Origins, and Early Development," in *The Oxford Handbook of Islamic Law*, eds. Anver Emon and Rumee Ahmed (Oxford: Oxford University Press, 2018), 403–04.

The authors describe the validity of these truth claims as a "central" debate in the historical scholarship. This is noteworthy, because the debate is of diminished value to those adopting the law's "internal point of view." The governing assumption is that the traditional account is accurate. It could not be otherwise. To question the centrality of the Qur'ān to the content of the law or to suggest that almost none of the Sunna came from the Prophet Muhammad directly, would be to undermine the entire edifice upon which the court relies in defining the normative boundaries of Islamic law, and in defining and redefining its categories.

Of course, the work of the historian and the lawyer can overlap. For example, where the Pakistani Supreme Court claims that the proper punishment for *zinā'* is lashing, and not stoning, and casts doubt on *ḥadīth* that seem to suggest otherwise,[6] the plausibility of the legal argument in many ways overlaps with the historicity of the claim. Yet the disciplines, *each equally valuable in its own right,* are quite different, and in a way that can render the one baffling and well-nigh incomprehensible to the other.

In my experience, within the Islamic context, there are two consequences to the law's internal approach that render it particularly challenging to understand when adopting the external perspectives of the social sciences. The first of these is the law's tendency to decontextualize legal rules. The assumption that the law establishes its own normative boundaries and categories carries with it a consequent assumption that there is a certain stability to legal doctrine, a pith and pit to legal rules that carry across time and place, and that a judge or lawyer may access to advance a particular claim or make a particular decision. The precise historical context in which these rules were issued is, as a result, usually of limited worth.

To illustrate with an example from Islamic finance, consider Muftī Taqi Usmani's now famous article criticizing particular forms of *ṣukūk* as failing to meet minimum standards of *sharī'a* compliance. In this approximately twenty four page work, in order to fashion the legal arguments that he does,

6 *Hazoor Bakhsh v. Federation of Pakistan* (1981 PLD FSC 145).

Usmani makes voluminous references not only to Qur'ān and Sunna, but also to jurists as varied as the Ḥanbalī jurist Ibn Qudāma (d. 620/1223), the *ḥadīth* scholar Ibn Ḥajar al-ʿAsqalānī (d. 852/1449), the modern *fiqh* commentator Muṣṭafā al-Zarqā (1904-1999), and Mālik b. Anas (d. 179/795).[7] An historian friend of mine immediately dismissed this sort of patchwork argument stitched together across over 1500 years of jurisprudence, from *ḥadīth* scholar to Ḥanbalī jurist to the eponym of the Mālikī school and beyond, as patently ridiculous. This was, to her mind, yet another results-oriented attempt to find some way to bless modern Islamic finance transactions that were designed to mimic conventional ones in all but form. The irony was that in fact Usmani was doing something very nearly the opposite, in that he was seeking to limit the variations of *ṣukūk* that had proliferated and that he felt were pulling Islamic finance away from what he described as the "higher purposes of Islamic economics."[8]

The more salient point for these purposes is that Usmani's approach did not strike very many lawyers I know as being particularly unusual or problematic, whether those lawyers were well schooled in *fiqh* or not. Indeed, when I communicated the objection to a partner at my former law firm who was deeply engaged in Islamic finance transactions, he was kind enough to send back to me, without comment, a brief we had worked on together concerning whether or not our client, a software developer, was responsible to their contracting partner, a software distributor, for particular types of consequential damages that had arisen from an alleged bug in the software. The brief cited a mid-nineteenth century English case, the Uniform Commercial Code, commentaries to the Uniform Commercial Code written in the middle of the twentieth century, and cases from the respective jurisdictions of New York, New Jersey, California, and Florida over the past half century. I can certainly appreciate and see the value in an external disciplinary perspective that might

7 Muftī Muhammad Taqi Usmani, *Sukuk and their Contemporary Applications* (Al-Qalam, Al-Qalam Sharī'ah Scholar Panel, 2008), http://alqalam.org.uk/wp-content/uploads/2017/07/Sukuk.pdf

8 Ibid, 23.

ask precisely why a case decided when it was legal to purchase and sell human beings could shed light on damages for which a software developer might be liable. The concerns that animate an antebellum court respecting damages for contract breaches surely bear no resemblance to those that would motivate a twenty-first century court dealing with software.

For whatever it is worth, our own internal perspective would be that the common law has long established a principle that applies across time and space that a party is responsible for damages that arise from a breach of contract, and that principle is that the breaching party is only responsible for those damages which it knew, or should have known, were a probable result of the breach. The use of material across different jurisdictions and eras is in this context quite intentional—to show the depth and tenacity of the principle.

I have seen courts use this approach in Islamic law with some frequency. An Iraqi court denying recognition of a conversion out of Islam, and an Egyptian court seeking to demonstrate that Nasr Abu Zayd's writings are acts of unambiguous apostasy, both cited foundational text and jurists across *madhhabs* and eras to demonstrate the universality of their respective arguments.[9] (The Egyptian court even went so far as to cite Shī'ī jurists it would barely recognize in almost any other context.)

To be clear, the law's tendency to eschew historical contextualization is not universal. If contextualization will help construct a legal argument—by providing an avenue through which an authority might be distinguished or discarded, for example—then a court will adopt it. Faced with the inconvenient fact that Ḥanafī jurists never permitted a child to receive financial support from a father prior to the date of instituting a claim for such support, the Egyptian Supreme Constitutional Court turned, *inter alia*, to a historical contextualization. Specifically, the Court suggested that the juristic rule arose at a time when the filing of such suits was largely unnecessary and, in the rare

9 Case 318/2000 of the General Panel of the Court of Cassation (Iraq); Case No. 287 of Judicial Year 11, District 14, Personal Status Appeals Court of Cairo, decided June 14, 1995 (Egypt).

event that it proved necessary, the claims were easier to make.[10] I would note that the contextualization in such instances is not understood to undermine the stability of legal doctrine so much as demonstrate its continuous evolution within self-defined normative boundaries. Legal rules exist within the system to serve certain aims, and adapt to continue to serve those aims across place and time. In those instances where the underlying purposes are no longer served by the rules due to significant shifts in social conditions, they may be discarded.

This leads to the second consequence of the internal point of view that can be harder for outsiders to grasp, which is the fact that the better authority tends to be the more recent. In some ways, this seems counterintuitive—how can the best authority to demonstrate the validity of a particular issuance of *ṣukūk*, for example, be anything other than revelatory text? How could it be that a lawyer seeking to persuade a *sharī'a* review board of *sharī'a* compliance turns first to the Standards of the Accounting and Auditing Organization of Islamic Financial Institutions, rather than to Qur'ānic verse or Sunnaic pronouncement, or at least the interpretations of early jurists?

Again, the challenge is by no means unique to Islam—the same argument could be made vis-à-vis a constitutional court which turns to its precedent first, rather than to the text of the constitution it claims to be interpreting. In neither case, of course, is a court suggesting that the original texts are somehow unimportant—to the contrary, they are the foundation upon which the doctrine is built. For this reason, it would be exceedingly rare for a court interpreting Islamic law (or a constitutional court interpreting a constitutional provision) *not* to cite the relevant, original text.

Still, the *meaning* of that text, and *the manner of its application*, by necessity adapt over time to address broadly different facts and circumstances in disparate places at disparate times. And it is therefore the *evolution* of the doctrine, presumed to be stable, and presumed to proceed from the original meanings the

10 Decision 29 of Judicial Year 11, Supreme Constitutional Court of Egypt, decided March 29, 1994.

text offers, that is of more interest to the lawyer and the court, because the later authorities almost surely speak more closely and more directly to the matter with which the court grapples.

Pennsylvania has a series of rules, part of what is known as the Statute of Frauds, that requires that certain contracts be in writing in order to be enforceable. Many of these rules predate the founding of the United States. Indeed, for contracts for the sale of land, the rules specifically indicate they take effect only as to contracts entered into after April 10, 1772. It is written in language that is slightly archaic and challenging for many of my law students to decipher. I suspect the same might be true for quite a few lawyers admitted to the Pennsylvania bar.[11] This is of little moment. To paraphrase Frederic Maitland, lawyers only presume to understand what a centuries old statute meant in its time, and give little thought to it in the vast majority of cases. Instead, "it is the ultimate result of the interpretations of the statute by the judges of twenty generations" in which they are truly interested. Maitland continues:

> The more modern the decision the more valuable for [the lawyer's] purpose. That process by which old principles and old phrases are charged with a new content is from the lawyer's point of view an evolution of the true intent and meaning of the old law; from the historian's point of view, it is almost of necessity a process of perversion and misunderstanding.[12]

The same might readily be said of a Kuwaiti court grappling with the *sharī'a* compliance of a particular *ṣukūk* issuance, an Egyptian court deciding whether or not a husband's *nafaqa* obligation extends to a certain type of herbal medicine, or an Indonesian court considering how to apply a prohibition on *khulwa* to a couple on a motorcycle who stopped on the side of the road for a period of several minutes. The authorities with which the

11 33 PA CS 1-3.

12 Frederic Maitland, "Why the History of English Law is not written," in *The Collected Papers of Frederic William Maitland*, ed. H.A.L. Fisher (Cambridge: Cambridge University Press, 1911), 222.

court will engage most intently will be the most recent, because they speak most directly to the question that the court seeks to resolve.

The purpose of these brief remarks is not to make some sort of anti-intellectual claim respecting whose perspective is the better one. It suffices to note that each adds value in its own right. I have little patience for a lawyer or judge so incurious as to be unwilling even to consider external perspectives that challenge the stability of the doctrine, or provide contextualization to demonstrate, for example, that the doctrine arose to privilege certain groups over others. My only purpose was to offer my own views of how lawyers and judges understand Islamic law, from their own insider's perspective, in the hopes that it might enlighten those less familiar with our own biases and assumptions.

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 (*ʿulamāʾ*, *fuqahāʾ*), 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.[1] Khaled Abou El Fadl has referred to such materials as "juristic discourses."[2]

When did pious speculation by individual Muslims evolve into the formal, organized production of Islamic legal knowledge? Ibn al-Muqaffaʿ (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 *Muṣannaf*s of ʿAbd al-Razzāq al-Ṣanʿānī (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

1 There is much to study outside the literature of *fiqh*, *uṣūl al-fiqh*, and related genres, such as Ottoman court records, the *madhhab*s' 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.[3] 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.[4]

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-Muwaṭṭaʾ* and the works of al-Shaybānī (d. 198/804-5) and al-Shāfiʿī (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.[5] 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

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 Follower ʿAṭāʾ 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 *madhhab*s, 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.[6] The early judges' activities provide a window onto what Schacht famously labeled "Umaiyad administrative practice."[7] 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.[8] 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.[9] If Rabbinic law were not actually applied and enforced in Roman Palestine and Sasanian Babylonia in the

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: Aḫbār 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 argues 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).[10] 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

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 Islamicate 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.[11] He says this because he recognizes that, in regard to doctrine, Islamic law is multi-vocal (as Ibn al-Muqaffaʿ complained), but also because he *assumes* that 'law' must always be state law and therefore *uni*vocal. 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.[12] 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.[13] 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

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 form Judicial Rulings and the Administrative Acts of Judges and Rulers* (New Haven: Yale University Press, 2017).

a primary role.[14])

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.[15] 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.[16]

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, *Sharīʿa: 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 *khulʿ* 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, *Khulʿ 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-shakhṣiyya*) 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).

Quantitative Approaches to Ottoman *Fatwā* Collections

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Abstract

In their joint essay, Metin Coşgel and Boğaç Ergene make the case for "a pluralistic approach to the study of Islamic legal history," through the lens of law and economics and other types of quantitative analysis. Regression analysis, they suggest, provides especially useful approaches suited to interdisciplinary studies of historical events. To illustrate, the authors describe the findings of their previous scholarship on Ottoman court records, for which they coded data on court petitions and were able to arrive at generalizable conclusions about access to early modern courts. Noting the uptick in digitized primary sources in the field, they predict an increase in Islamic legal scholarship that integrates quantitative analysis.

In this essay we make a case for the benefits of a pluralistic approach to the study of Islamic legal history, with a special focus on the merits of blending traditional historical approaches with methods of economic and quantitative analysis. Many of the recent innovative developments in humanities and social sciences have come from pluralistic methodologies that combine the tools of multiple disciplines into a coherent framework. In the digital age, scholars of Islamic legal history are finding it ever more feasible to harvest data from archival sources and to analyze them with highly sophisticated techniques, often by combining traditional methods with new capabilities originally developed in other disciplines. Numerous new initiatives are currently underway, such as the digital humanities and data science initiatives of the Program in Islamic Law at Harvard University and the *İstanbul Kadı Sicilleri* project of the Center for Islamic Studies in Turkey aimed at digital publication of original and transliterated copies of the *qāḍī* registers of Istanbul courts.

We expect these initiatives to enhance Islamic legal historiography greatly by informing formal studies of the law with searchable historical manuscripts, jurisprudential opinions, and actual court documents. By providing digital open access to thousands of legal texts and archival documents, these initiatives not only facilitate first-time use by those who previously could not obtain them easily but also provide innovative opportunities for experienced users who can now analyze them with cutting edge computational methodologies (e.g., "distant-reading" of textual material). In general, we would expect the field of Islamic law and history to grow significantly in the near future as other scholars and organizations follow these leads to unveil new data and develop novel techniques for analysis.

Methodological pluralism is necessary to tackle the complexity and contextuality of numerous research topics in the study of Islamic law. Important questions in the field often intersect with other disciplines, as can be seen in intellectual debates surrounding the Islamic legal perspective on constitutionalism, religious diversity, socio-economic justice, business finance, comparative law, criminal codes, and gender roles and rights.

Researchers clearly need to be fluent in theoretical concepts and analytical tools from other disciplines to engage in these debates. Moreover, many contemporary research questions need to be supported by empirical evidence, often requiring the use of advanced quantitative methods.

Combining pluralistic methodologies with economic and quantitative analysis of the law may currently be more feasible and effective than ever in the study of Islamic law. The law and economics approach has already gained maturity and prestige in legal studies, and sophisticated quantitative methods have likewise become indispensable elements of recent economic analysis. In addition, thanks to numerous digital humanities and data science initiatives in progress, interested scholars can count on greater availability of archival records and numerical data for research.

Law and Economics

A key component of methodology is the theoretical perspective that guides inquiry. In our recent book titled *The Economics of Ottoman Justice: Settlement and Trial in the Sharia Courts* (Cambridge University Press, 2016), we examined legal practice in a provincial Ottoman town called Kastamonu in the late seventeenth and eighteenth centuries. For this analysis, we found it extremely useful to be guided by the tools and concepts of the law and economics literature. Developed in the last century in a collaborative effort by social scientists and legal scholars, this approach has grown into a mature and dominant area of specialization in legal scholarship, with vast applications for current and historical legal systems worldwide.

Despite its dominance, the law and economics approach has not gone without criticism. Early applications typically relied on standard neoclassical assumptions regarding human behavior and motivations, which has come under attack as being too simplistic and controversial. Critiques have also questioned efficiency as the criteria used in evaluating the optimality of outcomes and policies, charging it as being too narrow to con-

sider the plurality of desirable characteristics (e.g., fairness and justice) of a legal system.

In response to these criticisms, researchers in the law and economics movement have broadened perspective by adopting techniques and insights from other, even competing, traditions. Although some of the earlier applications relied on simple behavioral assumptions regarding self-interest and unbounded rationality, later studies have developed more sophisticated models that incorporate numerous cognitive and motivational variations among individuals and across cultures. In the same vein, whereas early works focused on the legal norms and institutions of contemporary western societies, more recently scholars have extended the analysis to other social and historical settings.

We believe that a pluralistic methodology that includes insights from the law and economics literature would be highly appropriate for various research projects in Islamic legal historiography. The main advantage of this approach would be to think systematically about the abilities of individuals to make legal decisions, availability of methods of dispute resolution, efficiency of court procedures and outcomes, economic effects of laws and *fatwā*s, and various other issues regarding legal behavior and institutions. Law and economics scholars would also benefit from this exchange by gaining insights into the workings of a historical non-western legal system.

Quantitative Analysis

Another key component of methodology is the type of technique used in the collection and analysis of data. In our analysis of Ottoman court records, we used a pluralistic approach that combined traditional historical research with quantitative methods. Building on the insights of the cultural turn and the strengths of historical scholarship, we developed rigorous techniques designed specifically for the unique legal, contextual, and linguistic characteristics of court records. For example, we introduced novel categories of analysis to classify court clients

into groups and used quantitative techniques to evaluate how differences in gender, religious affiliation, and socioeconomic status influenced legal interactions and outcomes. Such an approach allowed us to go beyond studying microhistories of selected (possibly unrepresentative) legal disputes and instead observe, with greater precision and confidence, broad patterns in behavior and outcomes among all court participants.

For systematic investigation of complicated empirical questions, such as why parties took their disputes to court (rather than settle without trial) and who won at trial, we used regression analysis, the most widely used tool of quantitative research. Regression analysis is an indispensable component of systematic pluralistic scholarship for various empirical questions in Islamic legal historiography. Given an empirical relationship of interest between two variables, such as legal rights and social outcomes, regression analysis would force the researcher to think carefully about the hypothesized direction of causality between these variables, consider other variables involved, and specify the functional form (e.g., logarithmic, quadratic) of their relationship. By using data to estimate the parameters of this relationship, with suitable controls for other variables, the researcher would simply refer to the signs, magnitudes, and standard errors of the coefficients of variables of interest to assess the direction, strength, and significance of their effects on the outcome.

Of course, a quantitative approach is not suitable for all types of research questions in Islamic legal historiography. To begin with, quantification may not be possible for various phenomena being studied. Likewise, measurement errors in the data may be too serious to make them appropriate for useful analysis. Although these concerns may apply to many research questions in the field, we nevertheless believe that quantitative methods are entirely appropriate for numerous other important research questions. Ultimately, the proof of the pudding will be in the eating for each quantitative application.

Legal Practice in Kastamonu Courts: An Illustration

For our study of legal practice in the sharia court of Ottoman Kastamonu, we identified the gender, honorific titles, religious markers, and family associations of individuals who came to court and relied heavily on quantitative techniques for analysis. Our results showed the importance of evidence use in litigation and uncovered significant differences in legal strategy and competency in the society. For example, a litigant could gain an advantage by assuming the burden of proof, a strategy used most successfully by religious title-holders. The likelihood of success was also higher for those who presented documents or *fatwā*s at trial. Overall, our results indicated that members of prominent families and individuals with religious and pilgrim titles had a significant advantage over other groups in legal competency.

Our investigation uncovered significant changes in the court's operations during the seventeenth and eighteenth centuries, such as a proportional increase in the court's involvement in contractual interactions among the local population but a decrease in court involvement in dispute resolution. Our analysis of trial-settlement decisions also showed interesting results, such as a greater tendency of title-holding elites to litigate their disputes in court rather than settle before trial. Our investigation of factors affecting the litigants' chances of success in an Ottoman court was the first systematic analysis of this question in the literature. Through this analysis, we were able to examine the importance of socioeconomic privilege and identify the circumstances under which men, Muslims, and members of upper classes had greater chances to dominate trials.

Going forward, we would expect scholars in the field of Islamic legal studies to have a greater ability to use quantitative analysis due to new archival records and numerical data being made available by various digital humanities and data science initiatives. Take the example of the digital publication of Ottoman era court records for Istanbul mentioned above. Initiated in 2008, the *İstanbul Kadı Sicilleri* project has

so far digitally published original and transliterated copies of 100 registers of various courts in Istanbul. Freely available to researchers and the general public, these records include not just court proceedings regarding legal disputes and settlements, but various other items registered in court, including inheritance inventories, sales transactions, records of marriage and divorce, trade regulations, and copies of imperial communication. These records will clearly enable numerous quantitative studies of Istanbul's legal history and the legal, social, and economic life of its inhabitants. Similar projects are underway in digitizing the court records of other towns, *fatwā*s of prominent jurists, and books of religious scholars. Surely, these initiatives will soon expand scholarship in Islamic legal historiography significantly through vast amounts of new data amenable to pluralistic methodologies and quantitative analysis.

A Note on the Quantitative Analysis of Ḥadith

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Abstract

Hiroyuki Yanagihashi observes how recent developments make the quantitative analysis of ḥadīths a "promising" endeavor. The question then becomes: why and how the text of certain ḥadīths, taken literally, appear to contradict established Sunnī legal doctrine? The logical presumption is that either traditionists transmitted the jurisprudence of ancient legal systems that were eventually replaced by later-derived fiqh rulings or they reformulated the ḥadīths in the process of transmission to develop the rulings underlying those later legal systems. By way of example, and to investigate these possibilities, Yanagihashi proposes quantitative analysis to trace variations within the texts of two prominent ḥadīths over the course of more than a century. His analysis yields conclusions that corroborate other work in ḥadīth-related studies from recent years (e.g., those of Behnam Sadeghi on a larger scale in his "Traveling Tradition Test," and Intisar Rabb with respect to a select ḥadīth in her evaluation of the doubt canon, and others): an increase in textual variation does not necessarily correspond to a change in legal doctrine; the number of variants can increase over time, even after the compilation of Sunnī Islam's six canonical ḥadīth collections. His methods represent and propose new directions for quantitative analysis at the intersection of ḥadīth and law in early Islamic history.

Nowadays, it is easy to deal with a large quantity of data on a personal computer, which makes a quantitative analysis of *ḥadīth* promising. In fact, it is not rare that an unexpected outcome is obtained from a quantitative analysis. In this essay, I apply this methodology to the question of whether traditionists retained or developed a legal system in parallel with the *fiqh* system represented by that of the four Sunnī schools of law, to show its utility and caveats.

We know that according to Sunnīs the Prophetic Sunna is the second source of Islamic law. However, many researchers of Islamic law must have felt from time to time that this is not always the case. There are many *ḥadīth*s which, at least taken literally, contradict positive solutions adopted by jurists. (Conversely, in many cases jurists invoke *ḥadīth*s that are not recorded in *ḥadīth* collections, as well.) Suffice it to cite an example. According to a *ḥadīth* (*ḥadīth* 1) recorded in al-Bukhārī's *Ṣaḥīḥ*, ʿAmr b. al-Sharīd, a Successor living in Taif, narrated:

Al-Miswar b. Makhrama came and put his hand on my shoulder. I went to see Saʿd [b. Abī Waqqāṣ] with him. Abū Rāfiʿ said to al-Miswar, "Don't you tell this man to buy from me my house which is in my yard?" Saʿd said, "I will not pay more than four hundred either in cash or in installments. Abū Rāfiʿ said, "I was offered five hundred in cash, but I refused. If I had not heard the Prophet saying, 'A neighbor is more entitled to his nearness,' I would not sell it to you."[1]

No less than fifty-three *ḥadīth*s referring to the same event are recorded in nineteen works including al-Bukhārī's *Ṣaḥīḥ* (two *ḥadīth*s to the same effect are recorded there) and the *Sunan*s of Abū Dāwūd, Ibn Mājah, and al-Nasāʾī. According to the opinion unanimously held by Sunnīs, if one of the co-owners of an undivided immovable property sold his share to a third party, the other co-owners can exercise the

1 Abū ʿAbd Allāh Muḥammad b. Ismāʿīl b. Ibrāhīm b. al-Mughīra al-Bukhārī, *al-Jāmiʿ al-musnad al-ṣaḥīḥ al-mukhtaṣar min umūr rasūl Allāh ṣallā Allāh ʿalay-hi wa-sallama wa-sunani-hi wa-ayyāmi-hi*, ed. Muḥammad Zuhayr b. Nāṣir al-Nāṣir, Cairo: Dār Ṭawq al-Najāt, 1422 A.H., 9:27, no. 6977.

right to pre-emption (*ḥaqq al-shufʿa*) to repurchase the share by paying the buyer the same amount that the latter spent, i.e., the price and any associated expenses. The right is established also in other circumstances according to some jurists, as suggested by this *ḥadīth*. The four Sunnī schools of law unanimously assert that the pre-emption right is established only after the object has been sold, and do not require the one who intends to sell an immovable property or his share to offer a sale to the pre-emptors or to inform him of his intention to sell his share. This is to say, their opinion contradicts this *ḥadīth*.[2]

This is not an isolated case. There are many legal *ḥadīth*s whose content contradicts the corresponding *fiqh* rule, as noted. The question then arises why traditionists recorded such *ḥadīth*s. Many researchers may be inclined to infer that traditionists made it a rule to transmit *ḥadīth*s to subsequent generations that they deemed to be authentic or at least that they did not deem to be inauthentic, even if those *ḥadīth*s were actually abandoned or disregarded by jurists. This inference implies that traditionists, or those among them who were versed in jurisprudence, retained and transmitted *ḥadīth*s inspired by ancient legal systems that were eventually overshadowed by the *fiqh* of the four Sunnī schools of law. However, we can conceive of another scenario, that is, traditionists did not only retain the ancient legal systems, but also developed their own legal systems.

To verify whether traditionists passed on *ḥadīth*s inspired by an ancient legal system or they developed their own legal system(s) up to a certain period, let us examine the changes over time in the number of variants of two groups of *ḥadīth*s recorded in fourteen works including the six canonical *ḥadīth* collections and Mālik's *Muwaṭṭaʾ*, i.e., those related to pre-emption and those related to several prohibited transactions such as *muzābana*, *muḥāqala*, etc.[3] (Let us call these Groups 1 and 2, respec-

2 Al-Shāfiʿī attempts to harmonize the opinion of the jurists with this hadith. Abū ʿAbd Allāh Muḥammad b. Idrīs al-Shāfiʿī, *Ikhtilāf al-ḥadīth*, ed. Muḥammad Aḥmad ʿAbd al-ʿAzīz, Beirut: Dār al-Kutub al-ʿIlmiyya, 1406/1986, 535—536.

3 *Muzābana* denotes buying something whose measure, weight, and number are unknown for something (of the same kind) whose measure, weight, or number is known, whether it is wheat, dates, or whatever food, or goods of wheat,

tively). Ninety-one *ḥadīth*s belonging to Group 1 are divided into seven sub-groups each of which comprises a number of *ḥadīth*s that seem to have derived from the same original *ḥadīth*, judging from their *isnād*s and *matn*s. In contrast, it is difficult to classify over three hundred *ḥadīth*s belonging to Group 2, for most of them are composite *ḥadīth*s, into which two or more *ḥadīth*s of different origins were incorporated.

The problem is determining the *matn* that a *ḥadīth* had during a particular period of time. One method is to identify it with the one contained in a *ḥadīth* whose *isnād* ends with a transmitter (i.e., the teacher who passed on this *ḥadīth* to the author of a text recording that *ḥadīth*) who died during that period. For example, according to a *ḥadīth* (*ḥadīth* 2) recorded in al-Shāfiʿī's *Umm*which has the *isnād* Sufyān b. ʿUyayna←al-Zuhrī←Sālim b. ʿAbd Allāh, Ibn ʿUmar narrated, "The Prophet forbade the sale of dates before they became mature."[4] It is not certain that this narration ascribed to Ibn ʿUmar was identical with the original *matn* of this *ḥadīth*, but it is almost certain that this was the *matn* (variant) that Sufyān b. ʿUyayna related to al-Shāfiʿī, although we cannot exclude the possibility that the latter changed what he heard from his teacher. Thus, the year 198/814, when Sufyān died, is the *terminus ante quem* of its generation, i.e., the date by which this *matn* must have been put into circulation. But let it be identified with the date on which this *matn* (variant) was put into circulation, for the sake of analysis.

This method poses a practical problem, that of defining

date kernels, herbs, safflower, cotton, flax, silk, etc. Mālik b. Anas b. Mālik b. Abī ʿĀmir b. ʿAmr b. al-Ḥārith, *Kitāb al-Muwaṭṭa', recension of Yaḥyā b. Yaḥyā al-Laythī*, ed. Bashshār ʿAwwād Maʿrūf (Beirut: Dār al-Gharb al-Islāmī, 1997), 2:150, no. 1831. *Muḥāqala* is variously defined. To mention two major opinions, according to one opinion, it is defined as a share-cropping contract, i.e., "giving land in exchange for a share of what is produced by the land, say a third or a fourth." Abū ʿUmar Yūsuf b. ʿAbd Allāh b. Muḥammad b. ʿAbd al-Barr al-Namarī al-Andalusī, *al-Tamhīd li-mā fī al-Muwaṭṭaʾ min al-maʿānī wa-al-asānīd*, eds. Muṣṭafā b. Aḥmad al-ʿAlawī and Muḥammad ʿAbd al-Kabīr al-Bakrī, 26 vols. (Rabat: al-Shuʾūn al-Islāmiyya, 1387-1412/1967-1992), 2:318-19. According to another, it is defined as "selling spikes of wheat for threshed wheat." Ibid., 2:313-14.

4 Abū ʿAbd Allāh Muḥammad b. Idrīs al-Shāfiʿī, *al-Umm*, ed. Muḥammad Zuhrī al-Najjār, 8 vols. (Beirut: Dār al-Maʿrifa, 1393/1973), 3:47.

a variant. Let us define it as a *matn* that contains a particular set of constitutive elements that are juristically meaningful. To take the example of the above-cited *ḥadīth* 1, the phrases contained in Abū Rāfiʿ's statement "my house which is in my yard" (as distinct "my house" without further qualification, as in many other similar *ḥadīth*s) and the statement of the Prophet that "A neighbor is more entitled to his nearness" are such elements, but not the phrase that "al-Miswar b. Makhrama came and put his hand on my shoulder," among others. As a suggestion, eight *ḥadīth*s including *ḥadīth* 1 are recorded in various works that share exactly the same set of elements, that is, this variant comprises eight *ḥadīth*s.

Figure 1 represents the changes over time in the number of variants of *ḥadīth*s belonging to Group 1 (N_v (1, *Y*)) and that of variants of *ḥadīth*s belonging to Group 2 (N_v (2, *Y*)) for the period from 150/767-768 to 260/874-875. (I start from 150, for few *ḥadīth*s have an *isnād* ending with a transmitter who died before 150, for the extant earliest sources that record a substantive number of *ḥadīth*s are the *Muwaṭṭaʾ* of Mālik (93-179/711-795) and the *Āthār* of Abū Yūsuf (b. 113/731-732; d. 182/798).) This figure indicates that N_v (1, *Y*) did not cease to slowly grow until 250 A.H., and that N_v (2, *Y*) constantly increased, the pace at which it grew being higher from 190 onwards than before. It follows, phenomenally, that traditionists continued to reformulate *ḥadīth*s at least during the period from 150 to 250.

Verifying whether this was actually the case is beyond the reach of this essay. Suffice it here to refer to two points. First, there are cases in which the earliest work that records a *ḥadīth* belonging to a particular variant was composed much later than the period in which the legal opinion underlying that variant was put forward. For example, according to a *ḥadīth* recorded in the *Sunan* of Ibn Mājah (d. 273/886), the Prophet stated, "The right of pre-emption is like loosening the knot (that restraints the camel)."[5] A longer variant of this *ḥadīth* recorded in the *Kāmil*

5 Abū ʿAbd Allāh Muḥammad ibn Yazīd b. Mājah al-Qazwīnī, *Sunan al-Ḥāfiẓ Abī ʿAbd Allāh Muḥammad ibn Yazīd al-Qazwīnī ibn Mājah*, ed. Muḥammad Fuʾād ʿAbd al-Bāqī, 2 vols. (Beirut: Dār al-Fikr, n.d.), 2:835, no. 2500.

fī ḍuʿafāʾ al-rijāl of Ibn ʿAdī (d. 365/975-976) reads that the Prophet said, "The right of pre-emption is established neither for an absentee nor for a minor nor if a co-owner exercises it before another co-owner. The right of pre-emption is akin to loosening the knot (that restraints the camel)."[6] The two *ḥadīth*s are inspired by the idea that it is necessary to restrain the exercise of pre-emption right, for it can be harmful to the buyer. This idea is attributed to Ibrāhīm al-Nakhaʿī (Kufa, d. 97/715-716) and ʿUthmān b. Sulaymān al-Battī (Basra, d. 143/760-761), but Ibn Mājah's *Sunan* is the first writing that records a *ḥadīth* inspired by this idea. Generally speaking, growth in the number of variants does not necessarily mean a corresponding legal development.

Secondly, the rapid growth in N_v (2, *Y*) is due primarily to a combination or an extraction of existing *matn*s. For example, *ḥadīth* no. 14294 recorded in Ibn Ḥanbal's *Musnad* reads that the Prophet forbade *muḥāqala*, *muzābana*, *mukhābara*, *muʿāwama*, and *thunyā*.[7] Ibn ʿUlayya (d. 193/808-9) is the first transmitter who related a variant that refers to the prohibition of all of these five transactions to an author (Ibn Ḥanbal in this case) who recorded this variant, while variants referring to two to four among these transactions are related by earlier transmitters. Apparently, this *ḥadīth* is a composite *ḥadīth* in which existing *ḥadīth*s were combined and was not generated by a change in legal doctrine. Conversely, Ibn Māja received *ḥadīth* no. 2455 (*isnād*: Muḥammad b. Yaḥyā←Muṭarrif b. ʿAbd Allāh←Mālik←Dāwūd b. al-Ḥusayn←Abū Sufyān), which reads that Abū Saʿīd al-Khudrī narrated, "The Messenger of God forbade *muḥāqala*. *Muḥāqala* is a lease of land."[8] This *matn* seems to have been extracted from a *ḥadīth* re-

6 Abū Aḥmad ʿAbd Allāh b. ʿAdī al-Jurjānī, *al-Kāmil fī ḍuʿafāʾ al-rijāl*, ed. Lajnat al-Mukhtaṣṣīn bi-Ishrād al-Nāshir, 7 vols. (Beirut: Dār al-Fikr, n.d.), 6:180, cf. Abū Bakr Aḥmad ibn al-Ḥusayn ibn ʿAlī al-Bayhaqī, *al-Sunan al-kubrā*, 10 vols. (Beirut: Dār al-fikr, n.d.), 6:108, nos. 11368-369.

7 Aḥmad b. Muḥammad b. Ḥanbal, *al-Musnad*, ed. Aḥmad b. Muḥammad Shākir, 20 vols. (Cairo: Dār al-Ḥadīth, 1416/1995), 11:425, no. 14294.

8 Ibn Mājah, *Sunan*, 3:517, no. 2455. *Mukhābara* is a kind of share-cropping contract. This name is often said to have derived from Khaybar, where a share cropping contract was concluded between the Prophet and the Jews who

corded in Mālik's *Muwaṭṭaʾ* (*isnād*: Mālik←Dāwūd b. al-Ḥuṣayn←Abū Sufyān), which reads that Abū Saʿīd narrated, "The Messenger of God forbade *muzābana* and *muḥāqala*. *Muzābana* is selling ripe dates for dried dates while they were still on the trees. *Muḥāqala* is lease of land in exchange for wheat."[9] Apparently, many variants referring to one or more of these prohibited transactions were generated by combining or extracting from existing *ḥadīth*s. This is why N_v (2, *Y*) grew rapidly.

Therefore, it is premature to draw some definite conclusion from this figure. It should be complemented by a close examination of individual *ḥadīth*s. It is not rare that an unexpected outcome is obtained from a quantitative analysis, as noted. I did not expect that the pace at which the number of variants of *ḥadīth*s belonging to Group 2 would increase during the period from 200 to 260, i.e., the lifetime of the authors of the six canonical *ḥadīth* collections, as shown by Figure 1. I expected that the pace would have slowed down, for the authors compiled *ḥadīth* collections because they believed that the *matn*s they received from their teachers were definite and should not be reformulated, that is to say, they compiled *ḥadīth* collections to fix the *matn*s. The quantitative approach is revealing in this sense, but the meaning of its outcome is not always immediately evident.

inhabited there. Ibn ʿAbd al-Barr, *Tamhīd*, 2:321; cf. William J. Donaldson, *Sharecropping in the Yemen* (Leiden, Boston, Köln: Brill, 2000), 36; Shihāb al-Dīn Abū al-Faḍl Aḥmad b. Ḥajar al-ʿAsqalānī, *Fatḥ al-bārī sharḥ Ṣaḥīḥ al-Bukhārī*, eds. ʿAbd al-ʿAzīz ibn ʿAbd Allāh ibn Bāz and Muḥammad Fuʾād ʿAbd al-Bāqī, 13 vols. (Beirut: Dār al-Maʿrifa, n.d.), 5:14. *Muʿāwama* denotes a sale of date palms for several years, i.e., for limited years. Muslim b. al-Ḥajjāj al-Qushayrī al-Naysābūrī, *Ṣaḥīḥ Muslim*, ed. Muḥammad Fuʾād ʿAbd al-Bāqī, 5 vols. (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, n.d.), 3:1175, no. 1536 (85). *Thunyā* in this *ḥadīth* seems to refer to a sale with a clause conferring on the seller the right to repurchase the object. Cf. Abū al-Walīd Muḥammad b. Aḥmad b. Rushd al-Jadd, *al-Muqaddamāt al-mumahhadāt*, eds. Muḥammad Ḥajjī and Saʿīd Aḥmad Aʿrāb, 3 vols. (Beirut: Dār al-Gharb al-Islāmī, 1408/1988), 2:64-65

9 Mālik b. Anas, *al-Muwaṭṭaʾ*, *recension of Yaḥyā b. Yaḥyā al-Laythī*, 2:149, no. 1828.

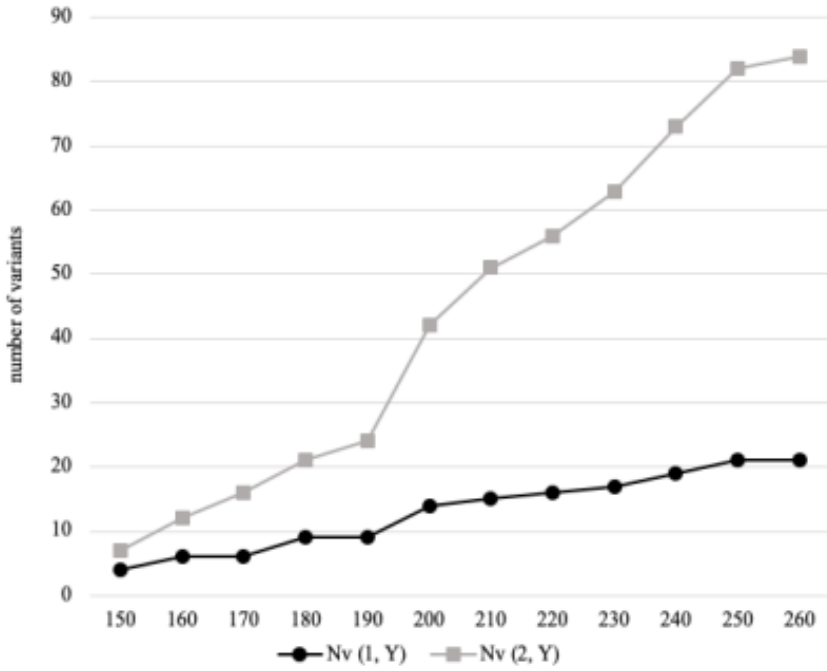

FIGURE 1. CHANGES IN THE NUMBER OF VARIANTS OVER TIME

Islamic Legal Canons as Memes

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Abstract

In her essay concluding the Roundtable, Intisar Rabb invites us to conduct a thought experiment— to think of legal canons as memes, that is, as cultural elements in circulation that, like genes, self-replicate and accrue to the benefit of human society. Just as memes spread, so do legal canons—principles that guide legal interpretation—from one scholar to another, from one written record to the other. Describing at length multiple angles from which legal canons can be categorized, Rabb shows that the many and varied types of canons illustrate how deeply embedded canons are in the social, cultural, and also legal culture that produces them. That, in turn, invites close collaboration between legal historians and data scientists to enable a mapping of a "meme pool" for legal canons, which she pursues through developing the Courts & Canons project at Harvard Law School: through digital tools, we will be able to trace the curious textual travels of legal canons (as memes), and through that, the transmission of cultures, practices, and ideas in through all manner of texts (their meme pool) recording the history and practice of law and society in the Muslim world.

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Introduction

We've all seen memes, and we've seen them in various guises in the internet's most recent forms. There are viral memes, like a down-home Bernie Sanders sitting on a folding chair in hand-made mittens at this year's Inauguration in Washington DC, or the wide-eyed "I'm not a cat" lawyer blooper from Texas. We've seen fleeting memes, like Gangnam style K-pop videos (with nearly 4b views today), and long-lasting memes, like rickrolling American-pop videos (ranked by Reddit as the longest standing meme today).

I'd like to propose a legal history thought experiment with a digital humanities edge: I suggest thinking of legal canons as memes, and propose that mining a textual "meme pool" with the help of data science tools can help uncover important insights in legal history in ways that canons are remarkably well situated to do. This idea applies to contexts of both American law and Islamic legal history. But, aside from some comparative framing, I will focus on Islamic legal history in tune with this Roundtable's focus and in line with my own work on Islamic legal canons (*qawāʿid fiqhiyya*) as sources for social and legal history. To proceed along these thought-experimental lines requires defining three concepts: (1) memes, (2) Islamic legal canons , and (3) meme pools in this context: sources for both Islamic interpretive-legal doctrine and social-legal history—to which I will turn after providing a little more background on the general idea.

Now to state up front: the legal canons-as-memes I'm interested in referring to a legal term of art—also known as "legal maxims," "canons of construction," or "principles of interpretation"—common to many legal systems where judges and jurists interpret law. Legal canons are notoriously difficult to define. But there is a core, often aided by work that jurists do in collecting them.[10] *Black's Law Dictionary* defines canon or maxim

10 For examples of collections, in American law, see those of Antonin Scalia and Bryan Garner in a treatise called *Reading Law* (St. Paul, MN: Thompson/West, 2012), 69–77 (collecting 57 "textualist canons" that ought to guide courts)

as "an established principle or proposition; a principle of law universally admitted, as being a correct statement of the law, or as agreeable to natural reason."[11] In American law, legal canons then are statements or guidelines for interpretation—sometimes incorporating the Latin from Roman law—like one version of the so-called rule of lenity: "*in dubio pro reo*: when in doubt, [decide] in favor of the defendant" or the ordinary meaning canon: "words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense."[12] Scholars of Islamic law typically define canons as interpretive principles that "used to apply general Islamic laws to particular cases."[13] But this is the oft-repeated medieval defi-

that and those of William N. Eskridge, Jr. in a response treatise called *Interpreting Law* (St. Paul, MN: Foundation Press, 2016) (collecting "dynamic canons" culled from Supreme Court cases from 1986 to 2016). Neither work ventures a short definition of legal canons. For the attendant difficulties that come with defining what counts as a canon, problems of "overcanonization," and challenges in distinguishing canons from mere doctrines or patterns of judicial-legal reasoning, see the thoughtful book review of *Interpreting Law* by Anita S. Krishnakumar and Victoria F. Nourse, "The Canon Wars," *Texas Law Review* 97, no. 1 (2018): 163–91.

11 Bryan A. Garner and Henry Campbell Black, *Black's Law Dictionary*, 11 ed. (St. Paul, MN: Thomson Reuters, 2019), s.v. "legal maxim." For newly available video definitions, see general definitions of legal maxims on Audiopedia (2016), and definitions of key maxims of criminal law by Dean Ralph Sarmiento (2019).

12 See Scalia and Garner, *Reading Law*, canon 6: 69–77 (ordinary-meaning canon); canon 49: 296–302 (rule of lenity); cf. Eskridge, *Interpreting Law*, 407 (ordinary meaning rule), 430 (rule of lenity). Of particular interest in my own work, the modern American rule of lenity is a statutory principle of strict construction specifying that, for ambiguous criminal law statutes, choose the narrower interpretation in favor of the defendant." See now Shon Hopwood, "Restoring the Historical Rule of Lenity as a Canon," *New York University Law Review* 95, no. 4 (2020): 918–51; Intisar A. Rabb, "The Appellate Rule of Lenity," *Harvard Law Review Forum* 179, no. 8 (2018): 179–215. For recent work assessing the "ordinary meaning" canon against empirically measured ordinary meaning, see Kevin Tobia, Brian G. Slocum, Victoria Nourse, "Statutory Interpretation from the Outside," *Columbia Law Review* (forthcoming).

13 For examples of contemporary treatments that reproduce common medieval definitions, see Yaʿqūb b. ʿAbd al-Wahhāb Bā Ḥusayn, *al-Qawāʿid, al-fiqhiyya: al-Mabādiʾ, al-muqawwimāt, al-maṣādir, al-dalīliyya, al-taṭawwur* (Riyadh: Maktabat al-Rushd, 1998), 22: *al-amr al-kullī yanṭabiq ʿalayhi juzʾiyyāt kathīra tufham aḥkāmuhā minhā* (quoting Tāj al-Dīn ibn al-Subkī); Wolfhart Heinrichs, "*Ḳawāid Fiḳhiyya,*" *EI*²-Supplement [Online] (defining qawāʿid fiqhiyya as "*madhhab*-internal legal guidelines that are applicable to a number of particular cases in various fields of the law, whereby the legal determinations (*aḥkām*) of these cases can be derived from these principles").

nition that does not provide an adequate definition to the range of ways canons are collected and used. In Islamic law, canons are comparable statements or guidelines of interpretation that sometimes coincide with Latin and U.S. canons, and they are sometimes unique. Examples are the analogous Islamic rule of lenity or "doubt canon," "*idraʾū al-ḥudūd biʾl-shubahāt*: avoid criminal punishments in cases of doubt," and the analogous ordinary meaning canon, establishing "*aṣālat al-ẓuhūr*: a presumption of ordinary meaning;" as well as the unique permissibility canon, "*al-aṣl fīʾl al-ashyāʾ al-ibāḥa*: the presumption for legal acts is permissibility."[14]

Moreover, legal canons have functions just as hard to capture. Legal canons are good pedagogical tools, and they are used as such. But their pithy form belies their expansive capture of whole areas of law, or the extent to which they are also used for much more: gap-fillers, tie-breakers, value-reinforcers, and other functions. Legal canons are good pedagogical tools, and used as such—their pithy form belies their expansive capture of whole areas of law; but they are also used for much more. Rather than settle on a definition or function in the abstract, and following the bottom-up approach of the modern American and medieval Muslim scholars collecting canons, I treat as a canon any principle that the scholars who collected legal canons identified from actual usage in legal and judicial contexts historically; and propose looking to see how they function inside and outside of those circles.[15]

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14 On the lenity rule and doubt canon in Islamic law, see my book on *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law* (Cambridge: Cambridge University Press, 2015). For various aspects of these principles see also my articles on "Reasonable Doubt" in Islamic Law." *Yale Journal of International Law* 40 (2015): 41-94, "The Islamic Rule of Lenity," *Vanderbilt Journal of Transnational Law* 44, no. 5 (2011): 1299–1351; and "Islamic Legal Maxims as Substantive Canons of Construction: Ḥudūd-Avoidance in Cases of Doubt," *Islamic Law and Society* 17 (2010): 63-125. On the ordinary meaning canon and permissibility presumption, see below, notes 25–33 and accompanying text.

15 I provide more detail about what this means in the second and third Parts of this essay. For examples of Islamic law collections of canons, in addition to the modern and medieval sources cited in Part Two, see, e.g., Shihāb al-Dīn al-Qarāfī (d. 684/1285), *Furūq*, ed. ʿUmar Qīyām and Qāsim b. ʿAbd Allāh Ibn al-Shāṭṭ (Beirut: Muʾassasat al-Risāla, 2003), Ibn Rajab al-Ḥanbalī (d. 795/1393), *al-Qawāʿid*

This thought experiment comes with three observations: First, the category of Islamic legal canons is the third of three major genres in Islamic law (following *furūʿ al-fiqh* and *uṣūl al-fiqh*), such that studying them bears promise for major research insights. But legal canons are understudied and, with some exceptions, we still don't have a cogent picture of their collective historical trajectory, institutional functions, or societal use. Exceptions include studies in this part of the world only since about the turn of the century.[16] Those studies add to encyclopedic studies and published editions of canons collections from the Muslim world over the past half century.[17] Second,

fī al-fiqh al-Islāmī, 2nd ed. (Mecca: n..p., 1999); al-Fāḍil al-Miqdād al-Suyūrī (d. 826/1423), *Naḍd al-qawāʿid al-fiqhiyya ʿalā madhhab al-imāmiyya*, ed. by ʿAbd al-Laṭīf al-Kūhkamarī Maḥmūd al-Marʿashī (Qum: Maktabat Āyat Allāh al-ʿUẓmā al-Marʿashī, 1403/1982-3); Jalāl al-Dīn al- Suyūṭī (d. 911/1505), *al-Ashbāh waʾl-naẓāʾir*, ed. Muḥammad al-Muʿtaṣim billāh al-Baghdādī (Beirut: Dār al-Kitāb al-ʿArabī, 1998); Ibn Nujaym (d. 970/1563), *Al-ashbāh waʾl-naẓāʾir*, ed. Muḥammad Muṭīʿ al-Ḥāfiẓ (Damascus: Dār al-Fikr, 1983).

16 In addition to my study of legal canons in Doubt in Islamic Law, which follows a representative canon throughout medieval Islamic history and provides a short history of legal canons, some recent studies include Mariam Sheibani, "Innovation, Influence, and Borrowing in Mamlūk-Era Legal Maxim Collections: The Case of Ibn ʿAbd al-Salām and al-Qarāfī," JAOS 140, no. 4 (2020): 907–53 (with a useful collection of 17 legal canons, or "maxims" discussed in the article at 946–51); Khadiga Musa, "Legal Maxims as a Genre of Islamic Law," *Islamic Law and Society* 21 (2014): 325–65; Mohammad Hashim Kamali, "Legal Maxims and Other Genres of Literature in Islamic Jurisprudence," *Arab Law Quarterly* 20, no. 1 (2006): 77–101; Wolfhart Heinrichs, "*Qawāʿid* as a Genre of Legal Literature," in *Studies in Islamic Legal Theory*, ed. Bernard Weiss (Leiden: Brill, 2002): 366–84. Necmettin Kızılkaya has a forthcoming book on *Legal Maxims in Islamic Law: Concept, History, and Applications of Axioms of Juristic Accumulation* (Leiden: Brill, forthcoming 2021), and prior works in Turkish and in English telegraphing his views: e.g., "Legal Maxims," in *The Encyclopedia of Islamic Bioethics*, ed. Ayman Shabana (Oxford Islamic Studies Online). Much earlier, the "ubiquitous" Joseph Schacht had roughhewn thoughts about Islamic legal maxims as well in chapter 6 of his *Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950), 180-89.

17 To take just a few, which would be good starting places for anyone interested in pursuing the study of one or more legal canons, see, e.g., Muḥammad Ṣidqī Būrnū, *Mawsūʿat al-qawāʿid al-fiqhiyya*, 3rd ed. (Beirut: Dār al-Risāla al-ʿĀlamiyya, 2015); Maḥmūd Muṣṭafā ʿAbbūd Harmūsh, *Muʿjam al-qawāʿid al-fiqhiyya al-Ibāḍiyya*, ed. Riḍwān al-Sayyid (Muscat: Wizārat al-Awqāf waʾl-Shuʾūn al-Islāmiyya, 2010); Muḥammad Muṣṭafā al-Zuḥaylī, *al-Qawāʿid al-fiqhiyya wa-taṭbīqatuhā fī al-madhāhib al-arbaʾa* (Damascus, 2006); Muḥammad Ḥasan al- Bujnūrdī, *al-Qawāʿid al-fiqhiyya*, ed. Mahdī al-Mihrīzī and Muḥammad Ḥusayn al-Dirāytī (Qum: Dalīl-i Mā 1424/2003-4); Muṣṭafā Muḥaqqiq Dāmād, *Qavāʿid-i fiqh* (Tehran: Markaz-i Nashr-i

as this Roundtable has reflected, with a problem common to any field of legal history, there are two sometimes opposing approaches based on the sources: studies drawing on self-conscious law/doctrinal sources for intellectual legal history, and studies drawing on historical/prosopographical writing on social legal history. Third, this approach offers a way to harness the power of new tools in digital humanities and data science to see in historical and legal sources what would be impossible for a human alone.

I. What Exactly is a Meme?

Merriam-Webster defines a meme as "an idea, behavior, style, or usage that spreads from person to person within a culture."[18] The term is relatively new—coined in 1978 and not to appear in the Oxford English Dictionary until 1989, as follows: "A cultural element or behavioural trait whose transmission and consequent persistence in a population, although occurring by non-genetic means (esp. imitation), is considered as analogous to the inheritance of a gene."[19] The concept "meme," as new as it is, and "like any good meme, caught on fairly quickly, spreading from person to person as it established itself in the language."[20] As it turns out, British scientist Richard Dawkins invented the term relatively recently in his 1976 book, *The Selfish Gene*, wherein he sought to portray the gene within each human being as a "survival machine."[21] Our survival comes partly through

ʿUlūm-i Islāmī, 1378/1999-2000); Yaʿqūb b. ʿAbd al-Wahhāb al-Bā Ḥusayn, a*l-Qawāʿid al-fiqhiyya: al-mabādiʾ, al-muqawwimāt, al-maṣādir al-dalīliyya, al-taṭawwur—Dirāsa naẓariyya taḥlīliyya taʾsīliyya taʾrīkhiyya* (Riyadh: Maktabat al-Rushd, 1998).

18 Merriam-Webster Dictionary [Online], s.v. meme. See also Richard Dawkins, *The Selfish Gene*, reprinted with corrections (New York: Oxford University Press, 1978), 206 ("'Mimeme' comes from a suitable Greek root, but I want a monosyllable that sounds a bit like 'gene.' I hope my classicist friends will forgive me if I abbreviate 'mimeme' to 'meme.'" (quoted above)).

19 See the University of Chicago, Theories of Media: Keywords Glossary (2004), s.v. "meme."

20 Merriam-Webster Dictionary, s.v. "meme."

21 Richard Dawkins, *The Selfish Gene*, Reprinted with corrections. ed. (New York: Oxford University Press, 1978), 203ff.

genes—which drives biological evolution and the requirements for material survival by choosing paths selfishly that will lead to its self-perpetuation. And survival comes partly through memes—which refer to *cultural* and *linguistic* evolution and the requirements for other aspects of survival. In fact, Dawkins calls memes an essential component of human evolution itself—over and above genes. They are essential because, like genes, they are replicating entities that evolve, and accrue to the benefit of human society.[22] Dawkins puts it this way: "Just as genes propagate themselves in the gene pool by leaping from body to body via sperm or eggs, so memes propagate themselves in the meme pool by leaping from brain to brain via a process which, in the broad sense, can be called imitation."[23] Perhaps anticipating the fleeting and permanent nature of the internet version of memes as well as the historical roots of religious-legal memes, Dawkins observed that: "some memes, like genes, achieve brilliant, short-term success in spreading rapidly, but do not last long in the meme pool. Others, such as Jewish religious laws, may continue to propagate themselves for thousands of years …."[24]

Here, I want to suggest three things: (a) I suggest that Islamic legal canons can function as memes, (b) I offer a typology for memes to offer a common grammar for identifying them, as they arose as an independent genre and took on a certain institutional role in the thirteenth century Islamic world, and (c) I suggest that legal canons-as-memes offer a means to bridge the typically divided social-historical from doctrinal-legal sources to offer new approaches to the study of Islamic legal history, and propose ways of doing so computationally.

To be sure, the analogy of legal canons to memes is not precise, and there are reasons to think it might be ill-advised if hewing too close to Dawkins' original notion of selfish genes.

22 Ibid., 205 (calling both replicators).

23 Ibid., 206.

24 Ibid., 209. I have omitted the second part of the sentence, "usually because of the great permanence of written records," because I disagree that memes (as, say, legal doctrines, constitutions, or canons) perpetuate *because* they are written. Often, they are not written, at least not for long stretches of time. It just so happens that we are able to take advantage of text-mining for canons as memes because they now are.

Memes for him are selfish; I don't presume Islamic legal canons are. Memes for him have a much broader scope—they could be a doctrine or idea or God himself; I mean the specific term of art of legal canons that we know of in American, Islamic, and Roman law – as a subset perhaps of his broader notion.[25] And then there is the question of human agency and legal, social, and moral values that extend from it. His theory has problems that arise when selfishness is contrasted with altruism; and while memes are self-perpetuating, it is not clear that memes are, in fact, selfish. In fact, as Dawkins himself alludes to in the last pages of his book, precisely the fact of human agency in the perpetuation of memes is instructive. I think it will be particularly instructive in *these* types of memes: Islamic legal canons. There is enough in the historical record to indicate that at least some are decidedly unselfish, and pair more often than not with decisions about morality, spirituality, and values in ways that genes may not. My hunch is that we will see in Islamic legal canons a meme-propagation that survives for some of the typical "selfish" reasons of, say, law-and-economics models of efficiency, wealth maximization, and power concentration. But my hunch is also that we'll see survival for more of the unselfish bases for law than the ones we are used to discussing in law schools where we strictly separate law from morality. It could be that the whole effort of examining legal canons as memes will be best suited to show whether and which values—beyond selfishness—account for their perpetuation and role in the history of Islamic law and society.

25 In Dawkins' broad view, "Examples of memes are tunes, ideas, catch phrases, clothes fashions, ways of making pots or building arches;" and claimed that even God is a meme: "How does it replicate itself? By the spoken and written word, aided by great music and art. … What is it about the idea of god that gives it its stability and penetrance in the cultural environment? The survival of the god meme in the meme pool results from its great psychological appeal. [In part] … it suggests that injustices in this world may be rectified in the next. … God exists, if only in the form of a meme with high survival value … in the environment provided by human culture." Dawkins, The Selfish Gene, 206.

II. What are Islamic Legal Canons?: A typology

Islamic legal canons are *interpretive principles that represent varied conceptions of Islamic law and its values*, as they developed over time and space.[26] Scholars of Islamic law – both medieval and modern – have typically defined these legal canons narrowly, as *text-basedprinciples used to apply general Islamic laws to particular cases*.[27] Having emerged at the start of Islam's history in the seventh century, Islamic legal canons have played a major role in the construction of Islamic law and society ever since.[28] The canons come from both the classical enumeration of four foundational *sources* (Qurʾān, Sunna, consensus, and legal reasoning) and from juristic and judicial *practices* addressing local disputes, responding to political authority and encapsulating social-cultural norms. Throughout Islam's history, judges and jurists have used legal canons not only to restate Islamic law, but to *construct* it. In the process, they deposited into the corpus of canons their ideas of valid interpretive and procedural principles, social-moral values, and the scope of their own power vis-à-vis other institutional actors.

Studying legal canons may well be essential to understanding Islamic law because the canons offer a wide-angled lens through which scholars can examine the history of Islamic law in terms of substance and procedure, textual and contextual bases for the law, and hidden values affecting legal institutions as well as elite or ordinary people. Moreover, a legal canons lens spotlights the tremendous degree of judicial discretion, interpretive diversity, and legal change permeating Islamic legal history. Enterprising jurists in the Muslim world have taken up

26 This section draws mainly from and offers a summarized portion of my chapter on *Interpreting Islamic Law through Legal Canons,* in Routledge Handbook of Islamic Law, ed. Khaled Abou El Faḍl et al. (Abington: Routledge, 2019).

27 See, as quoted above, note 4, Bā Ḥusayn, *al-Qawāʿid, al-fiqhiyya*, 22: *al-amr al-kullī yanṭabiq ʿalayhi juzʾiyyāt kathīra tufham aḥkāmuhā minhā* (quoting Tāj al-Dīn ibn al-Subkī).

28 For a history, see my *Doubt in Islamic Law*, 348–57.

the study of legal canons in recent decades, but they complain that attempts to define and classify these canons have not been precise or comprehensive.[29] A close look at legal canons will be instructive, and all the better with tools to facilitate that task.

* * *

Scholars of Islamic law, both medieval and modern, typically classify legal canons according to scope and general function for a jurist: INTERPRETIVE, SUBSTANTIVE, and UNIVERSAL. The first two categories follow the divisions between *uṣūl al-fiqh* (interpretive norms) and *furūʿ al-fiqh* (substantive laws); and the third category is a tenth-century addition by jurists to the substantive canons list meant to highlight the five agreed-upon ("universal") values derived deductively from Islamic law's aggregate rulings. Drawing on this basic rubric, but in attempt to offer a more streamlined typology of canons that follows juristic treatment of them (with updated insights from modern statutory interpretation theory), I collapse universal into substantive canons and add three additional categories that reflect the full spectrum of canons with respect to scope, function, and institutional role historically. The categories that I propose are these: SUBSTANTIVE, INTERPRETIVE, PROCEDURAL, GOVERNANCE, and STRUCTURAL. Without detracting from the basic accounts of the content or range of Islamic legal canons, this rubric allows us to classify and assess legal canons in ways that better account for their historical significance, broader range, and varied functions—that is, the ways in which canons have been deployed in Islamic law and society over time.[30]

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29 For instance, al-Sayyid Muḥammad Ḥasan Bujnūrdī, *al-Qawāʿid al-fiqhiyya* (Qum, Iran: al-Hādī, 1419/[1998]), 15.

30 For common classification schemes, see, for example, Abu ʿAbd Allāh al-Maqqarī, *Qawāʿid*, ed. Aḥmad b. ʿAbd Allāh b. Ḥamīd (Mecca, Saudi Arabia: Jāmiʿat Umm al-Qurā, 198-), 198–212; Suyūrī, *Naḍd al-qawāʿid al-fiqhiyya*, 90–114; Ibn Nujaym, *al-Ashbāh wal-naẓāʾir*, 1:17–19; Muḥammad al-Ḥusayn Āl Kāshif al-Ghiṭāʾ, *Taḥrīr al-Majalla*, ed. Muḥammad Mahdī al-Āṣifī and Muḥammad al-Sāʿidī (Qum, Iran: al-Majmaʿ al-ʿĀlamī lil-Taqrīb Bayna al-Madhāhib al-Islāmiyya, 1422/2001–2), 1:129–32, 139–42, 153–56. This section draws on and supplements those sources.

1. Substantive canons: universal, general, specific

Substantive canons elaborate basic substantive principles of law as concise restatements designed to provide guidance in the form of presumptions, tie-breakers, or clear statement rules to aid in interpretation and application of rulings in major areas of Islamic law. These canons often reflect value judgements about privacy, property, and questions of public norms. Whereas in U.S. legal canons come from the old common law or from American constitutional or statutory texts and judicial precedents,[31] Islamic law's substantive canons are drawn from both foundational texts and societal norms as understood by jurists and judges:

1.1 a small set of ***universal canons*** (*qawāʿid kulliyya*) said to apply to all of Islamic law, almost as policy preferences;

Harm is to be removed [or: no harm]: *al–ḍarar yuzāl* [*lā ḍarar wa-lā ḍirār*].

Custom is legally authoritative: *al-ʿāda muḥakkama*.

Hardship requires accommodation [of strict legal rules]: *al-mashaqqa tajlibu al-taysīr*.

Certainty is not superseded by doubt: *al-yaqīn lā yazūlu bi-l-shakk*.

Acts are to be evaluated according to their aims: *al-umūr bi-maqāṣidihā*.

1.2 thousands of ***general canons*** (*qawāʿid fiqhiyya ʿāmma*) that have wide application but that tolerate some exceptions; and

1.3 even more ***specific canons*** (*ḍawābiṭ*, *qawāʿid fiqhiyya juzʾiyya*) that apply to particular subject areas of law with more limited scope.

31 To compare the American law notion of substantive canons, see William N. Eskridge, Jr., "The New Textualism and Normative Canons," *Columbia Law Review* 113, no. 513 (2013): 537 ("Substantive canons are presumptions, clear statement rules, or even super-strong clear statement rules that reflect judicial value judgments drawn from the common law and from constitutional law (created by judges), as well as from statutes themselves (as understood and interpreted by judges)….").

2. Interpretive canons

Interpretive canons aim to guide judges and jurists on how to interpret foundational texts when devising new legal rulings or otherwise issuing opinions on novel legal issues:[32]

2.1 Textual canons (linguistic rules for how to interpret texts) instruct jurists and judges on how to interpret Islam's foundational texts to apply the "ordinary meaning,"[33] based on common-sense rules of grammar and style.[34] An example is the *ordinary meaning canon* instructing judges to adopt *the ordinary or apparent meaning unless there is some indication otherwise*.[35]

2.2 Source-preference canons specify how judges and jurists should choose among multiple and/or conflicting sources addressing the same legal issue. Examples are canons privileging *foundational texts over interpretive rules*,[36] *custom*

32 See Bujnūrdī, *al-Qawāʿid al-fiqhiyya*, 135 (i.e., interpretive canons are for the *mujtahid* rather than the *muqallid*).

33 On "ordinary meaning" and the related "objectified intent" in American law, in addition to Scalia and Garner, *Reading Law*, 69–77 and the sources in note 3 above, see John Manning, "Textualism and Legislative Intent," *Virginia Law Review* 91 (2005): 424 (defining "objectified intent" as the "import that a reasonable person conversant with applicable social and linguistic conventions would attach to the enacted words" that textualists typically apply); Ryan D. Doerfler, "Who Cares How Congress Really Works," *Duke Law Journal* 66 (2017): 983 (building on notions of objectified intent through analyses in linguistic philosophy with emphasis on *context* as salient information to both author and audience).

34 For English translations of *uṣūl al-fiqh* literature specifying grammatical rules of interpretation, see Bernard Weiss, *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Dīn al-Āmidī* (Salt Lake City: University of Utah, 1992) (a translation and exposition of Sayf al-Dīn al-Āmidī's *al-Iḥkām fī uṣūl al-aḥkām*); Roy Mottahedeh, *Lessons in Islamic Jurisprudence* (Oxford: Oneworld, 2003) (a translation and commentary on Muḥammad Bāqir al-Ṣadr's, *Durūs fī ʿilm al-uṣūl*).

35 For discussion, see, e.g., Taskhīrī et al., *Qawāʿid*, 1:41–42 (*aṣālat al-ẓuhūr*: presumption of apparent or *prima facie* meaning); 1:38–42 (*ʿalāmāt al-ḥaqīqa*: indications of ordinary meaning over figurative meeting). For canons on Islamic "legal meaning," by which a word assumes a technical meaning by conventional use in juristic discussions, see ibid., 1:28–31 (*thubūt al-ḥaqīqa al-sharʿiyya*: presumption of Islamic legal meaning).

36 See, e.g., Būrnū, *Mawsūʿa*, 39 (*lā ijtihād maʿa al-naṣṣ*); Maḥmaṣānī, *Falsafat al-tashrīʿ*, 225–26 (*lā masāgha li-l-ijtihād fī mawrid al-naṣṣ*); Taskhīrī et al., *Qawāʿid*, 1:425–75 (section on: *taqdīm al-naṣṣ ʿalā al-ẓāhir*; *taḥkīm*

over contract,[37] and *the first-in-time opinion over another equally valid opinion*.[38]

2.3 Extra-textual canons. *Extra-textual canons* refer to presumptions and other principles of interpretation in matters where the foundational texts yield absurd results or no result at all.[39] An example is the universal canon specifying that *custom has legal authority* and the related canon stipulating that *there is no bar on changes in legal rulings with changes in the times*.[40] Some *legal presumptions* in this category operate as default rules in cases of silence of the text. Sunnī law, for example, specifies a *presumption of permissibility* for transactions, and a *presumption of impermissibility* for devotional acts or in matters of sexual ethics.[41] Likewise, Shīʿī law includes a set of *procedural presumptions* designed to guide jurists to an outcome where texts are silent or ambiguous.[42]

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al-naṣṣ ʿalā al-ẓāhir); Kamali, "Legal Maxims," 81 ("[I]jtihād does not apply in the presence of *naṣṣ* [text].").

37 Many canons on custom relate to the universal canon regarding it: "custom has legal authority: *al-ʿāda muḥakkama*" (*Mecelle*, art. 36). For discussion of subsidiary canons, see Kamali, "Legal Maxims," 88–9: "what is determined by custom is tantamount to a contractual stipulation: *al-maʿrūf ʿurfan ka-l-mashrūṭ sharṭan*" (*Mecelle*, art. 43).

38 Būrnū, *Mawsūʿa*, 28 (*al-ijtihād lā yunqaḍ bi-mithlih*).

39 In Sunnī law, extra-textual canons mirror the equitable "sources" in the lexicon of Sunnī jurisprudence: *istiṣlāḥ*, *istiḥsān* and *istiṣḥāb*, as well as, *ʿurf*. In fact, one contemporary scholar has suggested that early accommodation for analogical reasoning and equitable principles facilitated the development of the field of legal canons in Sunni law much earlier than Shīʿī law. Bujnūrdī, *al-Qawāʿid al-fiqhiyya*, 9.

40 Maḥmaṣānī, *Falsafat al-tashrīʿ*, 235. See *Mecelle*, art. 36 (*al-ʿāda muḥakkama*), art. 39 (*lā yunkar taghayyur al-aḥkām bi-taghayyur al-azmān*).

41 See, e.g., Maḥmaṣānī, *Falsafat al-tashrīʿ*, 219–20 (citing Asnawī, *Sharḥ al-Manāhij*, 3:108: *al-aṣl fī al-manāfiʿ al-ibāḥa wa-fī al-mafāsid al-manʿ* (the principle in matters of benefit is permissibility and in harm prohibition)); Kamali, "Legal Maxims," 84.

42 For an introduction, see Ṣadr, *Durūs fī ʿilm al-uṣūl*, in Mottahedeh (trans.), *Lessons in Islamic Jurisprudence*, 119–33, 165–69. Like their Sunnī counterparts, Shīʿī jurists insist that these extra-textual canons were themselves derived from aggregated rulings. See, e.g., Makārim-Shīrāzī, *Qawāʿid*, 52. He also notes (p. 22) the differences between jurisprudential subjects and legal canons subjects – and that discussions of *ḥujjiyyat al-istiṣḥāb fī ʾl-shubahāt al-mawḍūʿiyya* or *al-barāʾa* or *waʾl-iḥtiyāṭ al-jāriyatān fīhā* are the latter because they yield individual rulings and obligations (*aḥkām and waẓaʾif shakhṣiyya*), not general principles for deriving them.

3. Procedural canons: evidence and judicial proceedings

Procedural canons are typically undifferentiated from the substantive canons in much of the existing legal literature on Islamic legal canons. But following medieval treatments of them in the broader historical literature, I treat them separately: jurists and judges used them to govern questions that arose with respect to evidence and court proceedings, rather than questions relating to specific questions of substantive law or jurisprudence:

3.1 Evidentiary canons help judges allocate burdens of proof for deciding cases, and they encapsulate evidentiary procedures common in judicial practice. The best known evidentiary canon is the principle placing the burden of proof on the petitioner: the burden of proof is on the claimant and the respondent may swear an oath of denial.[43]

3.2 Court procedure canons advise litigants on how to properly bring cases and judges on how to adjudicate them. Think: issues of standing, personal status, or sufficiency of evidence to entitle a person with a grievance to petition courts in the first place. Examples include rules that stipulate different outcomes based on identitarian norms, such as the canons governing non-Muslims in medieval Islamic lands: *Non-Muslim testimony is accepted for cases involving non-Muslims*;[44] or canons reflecting rulings stipulating *two women's testimony for that of one man*.[45]

3.3 Judicial conduct canons detail rules of conduct for judges—often without specific inclusion in legal canons collections—such as the need to consult expert jurists when uncertain about questions of law, issues of demeanor, and causes for removal. For instance, judges were to avoid deciding cases

43 Mecelle, art. 76 (*al-bayyina ʿalā al-muddaʿī wal-yamīn ʿalā man ankar*).

44 Ibid., 481 (contested canon).

45 For discussion of evidentiary disparities between men and women's court testimony, see Mohammad Fadel, "Two Women, One Man: Knowledge, Power and Gender in Medieval Sunni Legal Thought," *International Journal of Middle East Studies* 29 (1997): 185–204.

when angry and could be dismissed 'for cause'.[46]

4. Governance canons

Governance canons are principles that reflect and encapsulate varied theories of Islamic public law and political-legal authority (*siyāsa sharʿiyya*). They govern such matters as the authority to set and enforce rules of public law—criminal law, taxation, war, and the like. These canons also create avenues for the state or executive agent to issue equitable judgments beyond the four corners of the law. Examples (albeit contested) include:

canons allowing delegation of legal authority to the political ruler to resolve contested issues of law: *it is for the imām to determine the extent of discretionary penalties in proportion to the severity of the crime*,[47] or

canons imposing power constraints on the political ruler to violate individual rights: *the imām may not take anything from the possession of an individual unless there is a well-known entitlement to do so*,[48] and

canons directing executive officials to operate on the principle of the public interest (*maṣlaḥa)*: *[government] relations with the people should be based on the public interest*[49].

5. Structural canons

A final category is *structural canons*. In Islamic law, even more than in systems with constitutionally separated powers like that of the U.S., these canons must do work to apportion institutional responsibilities to the main actors in medieval Muslim

46 For general discussion of the phenomenon (albeit without explicit reference to legal canons), see, for instance, Mathieu Tillier, *Les Cadis d'iraq et l'etat abbasside (132/750–334/945)*(Damascus: Institut Français du Proche-Orient, 2009), 138–86. Such rules typically appear in judicial conduct literature (*adab al-qāḍī*) and in judicial biographies (*akhbār al-quḍāt*).

47 Maḥmaṣānī, *Falsafat al-tashrīʿ*, 255–56 (*jawāz al-tashrīʿ min qibal al-sulṭān*).

48 Būrnū, *Mawsūʿa*, 52–53; Maḥmaṣānī, *Falsafat al-tashrīʿ*, 255–56 (*jawāz al-tashrīʿ min qibal al-sulṭān*).

49 *Mecelle*, art. 58 (*al-taṣarruf ʿalā al-raʿiyya manūṭ bil-maṣlaḥa*).

societies: jurists, judges, and caliphs. That is, jurists use legal canons specifically and interpretation more broadly to allocate power.[50] Examples from Islamic history abound, and they reflect the unique features of Islamic law's system of legal pluralism and its diffused structures. One example will suffice: *a decision based on judicial interpretation cannot be reversed simply by a different interpretation*.[51] Medieval Muslim judges and jurists used this *judicial finality canon*, and others like it, to define the powers of the courts and other institutions.

A final question to consider on defining legal canons-as-memes, which will be essential to determining their most likely meme-pool in which to search for them is this: Where do these canons come from? The short answer: everywhere that you see texts of law and records of legal history (from both literary and documentary evidence), you are likely to see legal canons. From a jurist's perspective, canons come from three distinct sources, and accordingly they can be found in the doctrinal legal texts (*fiqh* treatises, canons collections, *fatāwā*): (1) textual-source canons: canons that restate foundational texts (textual-source canons); (2) canons that restate legal principles purportedly based on consensus or formal legal reasoning (interpretive-source canons); and (3) canons that restate legal principles derived by means of equitable principles such as *istiḥsān*, *iṣṭilāh*, and *istiṣḥāb* (what we can call equity canons).[52] But from a historian's bottom-up perspective, these same canons

50 In American law, judges use these canons to play a role in allocating institutional responsibilities substantively "in the ongoing elaboration of statutory schemes," and "courts play a more important role in assuming, assigning, or arbitrating institutional responsibilities." Eskridge, *Interpreting Law*, 12. Compare Jane Schacter, "The Changing Structure of Legitimacy in Statutory Interpretation," *Harvard Law Review* 108 (1995): 593–663.

51 Būrnū, *Mawsūʿa*, 28 (*al-ijtihād lā yunqaḍ bi-mithlih*), 39 (fa-*lā yumkin an tustaqarr al-aḥkām*); *Mecelle*, art. 16 (*al-ijtihād la yunqaḍ bi-mithlih*); see also Kamali, "Legal Maxims," 90.

52 See Būrnū, *Mawsūʿa*, 32–35, dividing legal canons along three different axes: (1) according to their degree of generality or specificity – into *al-qawāʿid al-kulliyya al-kubrā*, *al-qawāʿid al-fiqhiyya [al-aghlabiyya]*, *ḍawābiṭ* (pp. 32–35), (2) according to their relationship to the other two principal legal genres – into *qawāʿid uṣūliyya* and *qawāʿid fiqhiyya* (pp. 25–28); and (3) according to their known sources – i.e., textual sources (pp. 36–39), interpretive sources that rely on the foundational texts (pp. 39–40), and interpretive sources (pp. 40–41).

are not so neatly limited and appear regularly in historical chronicles, prosopographical sources, works of literature and more. This fact brings us to the third and final peg of the stool to support the idea of legal canons-as-memes: the legal canons meme pool, which—given the different perspectives of law and history—must include both legal-doctrinal and social-historical sources.

III. Islamic Law's Meme Pools: Legal & Historical Sources

Now how do legal canons-as-memes relate to sources for law and history? If canons historically represent the individual, perpetuating memes that jump from one jurist, or executive official, or administrator to another, then to evaluate them requires looking at the entire meme pool. If interested in tracing canons through the textual sources that comprise the legal-doctrinal and social-historical written record for this field, then the meme-pool comprises them all: works of *fiqh*, *uṣūl al-fiqh*, *qawāʿid fiqhiyya*, as well as *taʾrīkh* chronicles, *ṭabaqāt*, *adab* and more. If we could search all of those sources for the same pat phrases (and close variants) that make up legal-canons-as-memes, then we could begin to trace their origin, spread, function, values, and social phenomena that each reflect, over time, and place. We need not, and should not, divide the study of Islamic legal history into doctrinal-intellectual history and social history by virtue of needing to choose just one of those sets of sources. We are developing new modes of technology to do just that in a soon-to-launch project called Courts & Canons at Harvard Law School.

Take just one example that appears in several historical chronicles,[53] but never in the works of law that I argue respond

53 See, e.g., Ibn al-Furāt's detailed account in *Taʾrīkh duwal wal-mulūk*; Ibn ʿAbd al-Ẓāhir, al-Rawḍ al-zāhir, ed. ʿAbd al-ʿAzīz al-Khuwaytir (Riyadh, 1396/1976), 182; Ibn Kathīr, *Bidāya*, 13:234; Maqrīzī, *Sulūk*, 1:472. For discussion, see Yossef Rapoport, "Legal Diversity in the Age of Taqlīd: The Four Chief Qāḍīs under the Mamlūks," *Islamic Law and Society* 10, no. 2 (2003); Sherman A. Jackson, "The Primacy of Domestic Politics: Ibn Bint Al-A'azz and the Establishment

to them. We begin with the Mongol invasion to Baghdad that ended the Muslim caliphate in 1258. Two years later, in nearby Egypt, a slave soldier (*mamlūk*) by the name of al-Ẓāhir Baybars defeated the Mongols in 658/1260, and immediately seized the throne.[54] To solidify his hold on power and territory, he re-installed a pseudo-caliph whom he "represented." He spent the next few years fighting Crusaders, raising revenue, and setting up a military regime with slave-soldiers at the top: the Mamlūks. Five years in, once he had a hold on power, he turned to domestic affairs: namely questions of law and *religious* legitimacy. He had initiated some tentative reforms in 660/1262, but it was not until 663/1265 that he ordered a major judicial overhaul.

Each week, Sulṭān Baybars held court at the "Palace of Justice" that he had constructed just outside the Citadel in the new capital city of Cairo. He used to sit with his top military officials alongside the single chief judge of the realm, a Shāfiʿī judge by the name of Ibn Bint al-Aʿazz (d. 695/1296). On one occasion, in the year 663/1265, two litigants sought resolution of a matter that was ostensibly a private dispute about trusts and estates. But it turns out to have been about much more and precipitated a reform of the entire judiciary.

The facts of the case and the direct legal issue at hand were fairly straightforward. The daughters of the military officer [Amīr Nāṣir] were heirs to his estate. They claimed to have bought a large house from a judge. But when that judge

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of the Four Chief Judgeships in Mamluk Egypt," *Journal of the American Oriental Society* 115, no. 1 (1995); Jørgen S. Nielsen, "Sultan Al-Ẓāhir Baybars and the Appointment of Four Chief Qāḍīs, 663/1265," *Studia Islamica* 60 (1984): 167–78. This simplified account is drawn from these sources.

54 See further Amalia Levanoni, "The Mamlūks in Egypt and Syria: The Turkish Mamlūk Sultanate (648–784/1250–1382) and the Circassian Mamlūk Sultanate (784–923/1382–1517)," in *The New Cambridge History of Islam: Volume 2: The Western Islamic World, Eleventh to Eighteenth Centuries*, ed. Maribel Fierro (Cambridge: Cambridge University Press, 2010), 238–39; Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb Al-Dīn Al-Qarāfī*, Studies in Islamic Law and Society V. 1 (Leiden: E.J. Brill, 1996), 42–43, 48; Nasser O. Rabbat, *The Citadel of Cairo: A New Interpretation of Royal Mamluk Architecture* (Leiden: Brill, 1995), 54, 90–96, 98 and passim; Carl F. Petry, *The Civilian Elite of Cairo in the Later Middle Ages*, Princeton Legacy Library (Princeton: Princeton University Press, 1981), 15–36.

died, *his* heirs claimed that before he died he had converted the property into a charitable trust (*waqf*), and bequeathed it to his children. So the basic question was: who was entitled to the property or its proceeds: the heirs of the judge or the heirs of the military officer? A senior military officer present at the royal court raised objections to conferring property on the judge's heirs. The chief judge responded with a vague platitude: something to the effect that there are complicated factors in every case. And he advised giving the property to the judge's heirs, and reimbursing the heirs of the military officer for the alleged sale only if they could prove that a sale had occurred. This was a fine point of interpretation: *waqf over sale; possession over claims of ownership*. [These were two canons, arguably implied in the text.] These presumptions favored the heirs of the judge, and they could only be overcome by clear evidence in the form of two witnesses or a document of sale. Either way, the judges' heirs would win: They would keep the proceeds from trust and only reimburse a portion of it (i.e., the amount of the property sale) in the unlikely event that a military officer's heirs could provide evidence of a sale.

The point of this story is not what actually happened. Instead, it is the scope of judicial power and the chief judges' ability to use canons and interpretive tools to render a singular opinion that arrived at an outcome contrary to what the *sulṭān* wanted, with no recourse left to the *sulṭān*couched in the law. Mamlūk chroniclers of the time, and following them, legal historians of this period, point to this case as the acute incident that sparked Sulṭān Baybars' major judicial reform.[55]

Sulṭān Baybars reformed the judiciary in several ways, starting by weakening the power of the single chief judge—who belonged to the Shāfiʿī legal school—and distributing judicial responsibilities to the other three mainstream legal schools (which he designated as such for the first time to make four state-recognized Sunnī schools of law). He appointed one chief judge for every major approach to Islamic law at the time, that is, for every major school of law (*madhhab*); and made the

55 See sources cited above, note 37.

Shāfiʿī judge first among equals in coordinating between them. To put that in modern terms: Chief Judge Ibn Bint al-Aʿazz had become the John Roberts of his day, that is, if we too had a system of appointing one originalist, pragmatist, textualist, etc. – one judge for every major interpretive approach or 'school' of law. Finally, he required every school to convene separate court that *limited* judges' rulings to the existing rules and canons of each school—which jurists then accordingly had to document.

The aftermath was a rise of legal canons literature (among other things). That is, the judicial reform reported had effects on the legal literature and court practice, both of which are well-encapsulated in many of the legal canons collected in their wake. This episode in other words, inadvertently, sparked the rise of legal canons literature: collections of legal canons, by school, from the first five or so centuries of Islamic rule. Of course the initial set of collected legal canons arose out of disputes (common-law style) during Islam's founding period, long before jurists began to collect them by school, en masse, in the wake of Sulṭān Baybars's reform. Those founding-era legal canons spanned the gamut of legal questions, and they appeared in a wide range of sources for Islamic law and judicial practice: works of substantive law, legal theory, judicial procedure manuals, biographical dictionaries, historical chronicles, literary works, and more (though one question that remains unclear is from which sources the jurists collected them—one question a Courts & Canons tool can help answer).[56]

Conclusion

With the rise of legal canons collections, the question then becomes: how did these canons operate among judges and jurists and, how did the various actors who we know to have forum-shopped for desired outcomes know which court to go to

56 See Intisar A. Rabb and Bilal Orfali, "Islamic Law in Literature: Some Contributions from Qāḍī Tanūkhī," in *Arabic Literary Culture: Tradition, Reception, and Performance*, eds. Margaret Larkin and Jocelyn Sharlet (Wiesbaden: Harrassowitz, forthcoming 2019); see also my *Doubt in Islamic Law*.

for which issue? How did political, economic, and social change or upheaval affect the use, popularity, or expansion of legal canons and the public values they represented? On this point, I invite any scholar interested in the multivariate and rich history of legal canons (as memes) to join a growing effort to explore them through examining both legal and historical sources as the meme pool through which we can answer such questions, and more.

Given all the talk in Islamic law circles about legal history as social history vs. doctrinal history, those writing in the field have come to refer to doctrinal history from sources of law (*fiqh*, *ḥadīth,* etc.) as contrasted with textured history of what happens on the ground (*taʾrīkh, ṭabaqāt,* etc.). In fact, this contrast has emerged as a big theme of this Roundtable. Take just a few examples: Legal history appears with a focus on doctrinal sources as Robert Gleave points to critiques of overly law-focused studies of Islamic history, but implores scholars to include often sidelined sources for Shīʿī law; as Marion Katz points out that *furūʿ* works proportionally constitute the most under-studied genre in the study of Islamic law [I think canons might give *furūʿ* a run for their money on this bet], and outlines ways to remedy the situation; and Hiroyuki Yanagihashi explores the promise of quantitative methods on *ḥadīth* texts to match one of the purportedly raw sources of Islamic law with fiqh. Legal history appears with a focus on chronicles, documents, biographical and other sources from all the scholars calling themselves social historians or scholars of early Islam: Najam Haider models how he pairs legal texts for elements of social history with literary narratives to interrogate questions of identity in early Islam; Marina Rustow shines a light on non-legal documents that she used to "write history from the ground up" and to shed light on laws, societies, and institutions; and Elizabeth Urban argues for a multi-genre approach to law and history based on perspectives of vulnerable populations.

And of course most scholars taking part in this Roundtable [including those above] take a capacious view of law and legal history – seeing it as both social and doctrinal. Yossef Rapoport

explicitly notes that law is inseparable from society as he points to the use of historical sources for the social sphere; Maribel Fierro points out that *fiqh* was the most prevalent discipline in al-Andalus, but that it appeared alongside at least 12 other types of non-law sources—all yet to be analyzed together. I adopt this view. At the end of the day, all of us are asking timely questions about method and meaning in Islamic law and history in ways that I tried to outline in the introduction to this fantastically enriching exchange. Collectively scholars taking part in this Roundtable have wonderfully displayed multiple approaches to examining law in social-historical context (meaning) and the range of literary, documentary, and computational sources used to address them: which, how, and why (method).

Like other scholars interested in Islamic legal history, I'm interested in both method and meaning and propose using legal canons to explore them. Can we meaningfully explore both social-historical and legal-doctrinal sources, for how law [through meme-like legal canons] reflects society and how society reflects aspects of law? Can new collaboratively-built data science / digital humanities tools aid us in doing? Can we somehow harness the voluminous records and individual areas of expertise that tend to make many scholars focus study on only one area at a time, social-historical vs. legal-doctrinal? In my view, the answer is "yes" to all of these questions, when thinking of canons as memes. It turns out that canons are memes perfectly well-suited to quantitative analysis, supplemented by qualitative-historical analysis, and can offer means of gaining special insight into the social history of Islamic law, provided we can construct a meme pool that includes both historical and legal sources.

Here are three ways that I think this can work, and a few thoughts on to what end:

Legal canons, by definition and through frequent-repetition, are anonymized reports that take on a life of their own, replicate, and evolve in different incarnations – some viral, others contained; some fleeting, some long lasting. We hope to collect and assess canons in the new Courts & Canons platform at

Harvard Law School [access forthcoming], which now provides a data entry tool to capture and code the key features of canons, and at later stages will deploy AI tools to automatically search for and capture canons according to those very features.

As memes, legal canons can be tracked in a meme pool of historical *and* legal sources. Such a meme pool can offer a means of "memome mapping" through exploring individually owned corpora, library corpora, or the growing corpus at OpenITI through the KITAB project [up to 6000 texts with its recent release] (a joint effort of and Matthew Miller, Maxim Romanov, and Sarah Savant).

Thinking of legal canons as memes that transform through mutation, once we've collected a basic list of representative canons, we can do "fuzzy" semantic searches for variant legal canons to find both exact phrases and variants everywhere they appear in the meme pool of historical and legal texts. Mairaj Syed showed a sample of this last year with his NLP experimental analysis of the doubt canon and evidence canon on this Blog.

On the latter point, in addition to considering and categorizing canons individually, it is important to keep in mind that canons come with variants, hierarchies, and contests or "duels" that make them hard to define collectively in ways that mirror the definitional problems of legal canons elsewhere. That is, sometimes canons are variants of one another known differently to different schools of law. Sometimes they fall into a hierarchy or judge-imposed ordering, like debates that unfold in both American and Islamic law over lenity-first versus lenity-last: does the doubt canon or rule of lenity apply only after applying all other canons to clarify the meaning of the law, or before? And sometimes they are contested canons within and among various schools of law, or "dueling canons" where one canon is in direct contradiction with another and judges or jurists must choose which one prevails. Counting canons, assessing their variants, and charting the variants, ordering, and duels are all pressing research questions that we've so far undertaken laboriously in American law, less so in Islamic law, but that can be aided by a database of canons that allows for matching, ordering, and

contrasting variant or dueling canons.[57]

To what end? With these features in mind, we aim to build a COURTS & CANONS tool [+ database] that can demonstrate exactly how well suited legal canons are for identification, analysis, and geo-mapping as they copy, mutate, and spread. Legal canons as memes offer observable means of legal propagation and change in various ecosystems, from the seventh century onward; and were self-consciously so beginning in the mid-seventh/thirteenth century as Mamlūk-era jurists began to collect them to form an independent genre, and executives ordered judges to use them. These facts suggest that tracking legal canons-memes through the meme pool of both historical and legal sources with the use of data science can aid research and facilitate new insights that would be difficult or near-impossible with human eyes alone. At a basic level, such tools will allow for counting canons (how many were there, about what subject, to what frequency and why?); mapping canons (how did they spread across schools, geographies, and time, and why?); and interrogating canons by function (what role did they play in interpretation, in allocating institutional power, in the lives of ordinary subjects)? And at a broader level, such legal canons-meme-mapping through a broad meme-pool can reveal how juristic/judicial officials, executive officials, and other members of society either used or disregarded canons; it can

57 For some of the manual collections and definitional problems in American law, see above note 1. To take just one example of canons taken in combination: consider a recent example of dueling canons in *Lockhart v. United States*, 577 U.S. __ (2016), where the Supreme Court debated whether an adjective following a list applies only to the last item (according to the "rule of the last antecedent") or to all the items in the list (according to the "series qualifier canon"), and ultimately decided in favor of the former and against both the latter and the rule of lenity (and consequently against the defendant)—likely because of the sensitive values at play in a case where the defendant was a convicted sex-offender. Such dueling or qualified canons are precisely the subject of an entire sub-genre of Islamic legal canons, *furūq* literature, as exemplified in the writings of Qarāfī*, Furūq*—on which, see Sheibani, "Mamlūk-Era Legal Maxims Collections," esp. 934–41 (discussing contested canons). On *furūq* as distinctions more generally, see Elias G. Saba, *Harmonizing Similarities: A History of Distinctions Literature in Islamic Law*(Berlin: De Gruyter, 2019), esp. 16–42; Necmettin Kızılkaya, *İslâm Hukukunda Farklar: Furûk Literatürü Üzerine Bir İnceleme* (İstanbul: İz Yayıncılık, 2016); Yaʿqūb al-Bā Ḥusayn, *al-Furūq al-fiqhiyya waʾl-uṣūliyya* (Riyadh: Maktabat al-Rushd, 1419/1998).

show whether and how canons coincided with, affected, or were affected by the lives of ordinary people, institutions, and exogenous of events; and—as noted above—mapping canons can show whether and which values account for their perpetuation and role in the history of Islamic law and society. There is much to be done, and to see, here!

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