

Islam and the Rule of Justice

*Image and Reality in Muslim
Law and Culture*

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Approaching Islamic Law

Some years ago I co-chaired a meeting of French and American scholars of North Africa. To stimulate discussion I suggested that at our first, informal session we share stereotypes about one another's different approaches to the region. The advantage, I suggested, was that we would all know that they are just stereotypes—but (I quietly assumed) we would all, to some extent, really believe that they are true. Through stereotypes we could, however, express ourselves unreservedly and then hide behind the excuse that what we were saying was, we knew, just an exaggerated likeness.

The exercise worked wonderfully well: the French told us that Americans come into the area for a few years and then rush off to the next part of the world, while they devoted their entire careers to one place; and my American colleagues told the French that they were too wrapped up in structural schemes to see the ambiguities in which we colonials delight. No one took offense, we all felt better afterward, and we all appreciated that although stereotypes can be unfair, and even if they contain a grain of truth, they may do far more harm than good.

It is somewhat in this spirit that I begin by addressing a set of misperceptions of Islamic law. Although the central focus of this book is to analyze rather than debunk, it is desirable, at a time when the actions of the Taliban and ISIS would seem to validate Western fears and misunderstanding, to address some of the oversimplified views commonly held about Islamic law. A few precautionary notes are, however, worth highlighting.

The predominant focus of this book is on the Arab world, even though it represents only a fraction of the world's Muslim population. Moreover, when I speak of “the Arabs” it is necessarily in rather general terms, the phrase having to encompass a very wide range of local and historical instances. But if one approaches this diversity in the sense of embracing a



FIGURE 1.1. Anti-shari'a protest sign, Idaho (conservativeinfidel.com).

range of variations on shared themes, rather than as seeking some definitive essence, readers may wish to ask themselves two interrelated questions: In what sense does what is being described correspond to what has been learned about other parts of the Muslim world, such that one is stimulated to think more carefully about each of those situations? And in what ways do these variations affect one another and the non-Muslim world, since none of the countries or situations described exists in isolation? Taken in this spirit the specific situations to be presented here may help in formulating more precise questions raised by the practice of Islamic law.

That stereotypes of Islam, the Middle East, and Muslim law—favorable and unfavorable—are widespread is evident from even the most causal reading of the Western press. When the Archbishop of Canterbury (2008) suggested that Islamic law forums might be appropriate for handling certain family law matters of Muslims living in the United Kingdom he was roundly excoriated by those who acted as if he had proposed stoning adulterers or hacking off the hands of thieves, notwithstanding the frequent recourse to similar religious courts by Britons of other faiths. In March 2014, the Law Society of Great Britain offered instructions for drawing up a will in conformity with Muslim inheritance practices that grant one-half portions to women as opposed to men and no inheritance to children born out of wedlock, but the outcry was so great that eight months later

the Society withdrew its practice note.¹ In the United States 70% of Oklahoma voters favored passage of a referendum barring any use of Islamic law (characterized by the promoters as “a totalitarian socio-political doctrine”), only for a federal court to save them from utter embarrassment by ruling the law unconstitutional.² Similarly, former Speaker of the House of Representatives Newt Gingrich has said that shari‘a is “a mortal threat to the survival of freedom; the heart of the enemy movement from which the terrorists spring forth” and therefore “we should frankly test every person here who is of a Muslim background, and if they believe in sharia, they should be deported.”³ One town in Canada initially barred the use of Islamic law within its precincts even though there was not a single Muslim living there, while the province of Ontario forbade any religious court involvement in family law disputes, to the considerable consternation of Jews, Catholics, Jehovah’s Witnesses, and indigenous peoples who use such forums regularly.⁴ In short, one only has to keep up with the nightly news and op-ed commentary to witness images of Islamic law as brutality against women and punishments of Biblical intensity in order to realize how deeply these stereotypes influence the popular imagination.

Even scholarly literature is not entirely immune from misplaced emphases, especially as concerns a tendency to assume that Islamic law lives in the scholars’ texts much more than in the daily lives of the courts and ordinary citizens’ understanding of the law and its implementation. By contrast, the orientation throughout this book—as might be expected from one who is both an anthropologist and a common law lawyer—is toward Islamic law as a living system, one that is found as much in the marketplace and the home as in the textbooks, a law that is deeply subject to local custom, factual context, permissible interpretation, client choice, and judicial discretion. Just as Islam is what Muslims believe and do, Islamic law is where it is practiced and documented, influencing the decisions of daily life, underscoring the broad assumptions about human nature and human relationships, and supporting the sense of a world whose orderliness is highly contingent on and contextually embedded in those moral and commonsense propositions that suffuse the social lives of the community.

Some of the more prevalent misconceptions Westerners hold about Islamic law would, therefore, include the following:

ISLAMIC LAW INVARIABLY DISADVANTAGES WOMEN AND MINORITIES. Would it come as a surprise to learn that, based on the studies available, Muslim women win at least a significant part of their family law cases—anywhere

between 65% and 95% of the time? The image of Islamic law as invariably antagonistic to women's interests is both wrong as an absolute claim and far more complicated in its actuality. As we will see in chapter 4, women are certainly not treated the same as men in Muslim family law codes or traditional legal propositions, but the handling of their court cases is not simply one of gross gender discrimination. In such venues they commonly receive more nuanced attention for a wide range of reasons, not the least being that Muslim courts are, in their procedures and presumptions if not in all of the classical texts, significantly more accommodating than might seem to be the case.⁵ For many Muslims justice concerns equivalence rather than identical treatment, and it is against this background that some of the anomalies we will encounter may be comprehensible.

What is true for the results women achieve in court is also broadly applicable to other groups that have resided in predominantly Muslim countries. True, the testimony of a Jew or Christian was traditionally not counted equally to that of a Muslim, and contracts recognizable to the one confessional group might not be honored by the courts of the other. At the same time, contractual relations—including commercial partnerships and joint ownership of property—were not infrequent. Indeed, in a surprising number of instances Muslim courts did, in fact, recognize the documents drawn up by non-Muslim tribunals. Chapter 3 will, therefore, afford an opportunity to consider some of these relationships in detail and to speculate as to their utility in the current situation involving Israelis and Palestinians.

JIHAD IS AN INTEGRAL PART OF THE SHARI'AH. Jihad means "struggle," which for some Muslims continues to designate armed encounter with those who oppose Islam in whatever way. But its deeper meaning is that of struggling with the moral virtues that reason, if properly developed, can nurture against the temptations of passion and the many forms of ignorance that confront humans in a world of premonitory chaos. Indeed, jihad can also mean a kind of trust, even in the more technical sense of the trust a government exercises over common property, especially property that has been obtained in the course of solidifying the state. Thus in one sense Islamic law is not simply a justification for violent action against unbelievers but an informing sensibility, consonant with and integral to a range of other moral propositions, that challenges the law to live up to its role as a check on power and a vehicle that services the common good.

In this regard, it is true that, on its surface, Islamic law and custom hold that one may not displace a tyrant if further chaos ensues. Instances do,

however, exist of legal officials forcing the replacement of a tyrant, so the question arises as to whether there is a principled basis in Islamic law for balancing power and if so through what mechanisms. The answer lies less in institutions than in the personal responsibility of individuals and the allies they muster for support. Unlike many European countries, who used law as a vehicle for the centralization of the state, power was commonly more divisible in the Arab world, and, as we will see throughout this book, that fractionation of power has deep roots in the cultures of the region.

When, finally, we ask whether there is a comparable basis to the American Founders' emphasis on "virtue" that could help revivify constitutionalism in the Arab world it will be with the recognition that there are indeed cultural precepts, and not only political structures, upon which such reconstruction might be built. And since jihad also concerns the holding of property for the common good, as we shall see in chapter 4, it is a concept that could play a positive role in so fraught a conflict as that over the land of Israel-Palestine. Thus even jihad, a concept that for Westerners conjures up only a portion of its overall meaning, may be one of those cultural artifacts reminding us that when it comes to law and justice the whole story is not embodied in the formal structure of intensely politicized institutions alone.⁶

THE DISCRETION OF ISLAMIC LAW JUDGES IS VIRTUALLY UNBOUNDED. It was Max Weber who spoke of *kadijustiz* as a type of thinking in which judges have recourse to few if any generalizing precepts and standards. Although Weber himself realized that this model did not apply to actual Islamic law or the decision making of actual Muslim judges (in singular form, *qadi*) the image has stuck, and with it the idea that, as Justice Felix Frankfurter once said, the qadi sitting under a tree dispensing justice off the top of his head is hardly the model for rational adjudication.⁷

That every system of law incorporates judicial discretion is hardly an original insight. The question is not whether it exists everywhere but how it is constrained and articulated with other aspects of a society's overall legal, political, and moral system. In the case of Islamic law, as this book will suggest, Muslim judges are by no means simply left at large to decide as they please. On the contrary, legal procedures, cultural assumptions, analogic categorizing, development of new codes and constitutions, and the ethos of judges who endeavor to apply the law with a clear sense of social consequence all play a role in the distinctive styles of implementing discretion. More akin to common law than civil law, Islamic law stresses

procedure, with many forms of substantive law, as Sir Henry Maine said of the common law, being “secreted in the interstices.”⁸ Sometimes contrast is thrown into relief when a Muslim encounters the procedural differences of a foreign legal system, as I discuss in chapter 8 on the American trial of Zacarias Moussaoui, or when extra-legal customs are envisioned as part of the shari‘a, as will be seen in chapter 3. In each of these examples we have the opportunity to get beyond both ideal type and less than ideal stereotype to grasp more fully the structure and implications of judicial discretion as actually practiced by Muslim judges.

ISLAMIC LAW IS PREDOMINANTLY CHARACTERIZED BY BRUTAL PUNISHMENTS. The more extreme examples of Islamic criminal law gain much Western attention, even when they seem as ludicrous as they may be mean-spirited. Examples of the absurd can be found as recently as 2002 when the Egyptian jurist al-Qaradawi mused as to whether a condemned woman may be sent to her execution without a male chaperone. In other instances mullahs have suggested that allowing fornication to go unpunished is the cause of earthquakes, and have punished grocers for mixing tomatoes (feminine) and cucumbers (masculine) on the same vegetable stand.⁹ Most Muslim countries have established criminal codes that do not simply track the forms of Islamic law reputedly applied in the past. Extreme fundamentalists may seek to apply ancient rules, but even those states that profess to have embraced full Islamic law rarely apply its potential penalties. Thus the stoning of an adulterer was recorded only once in Ottoman history, and the Pakistani state did not formally apply its own rules during the restoration of strict Islamic law under the regime of Zia ul-Haq.¹⁰

In other instances, blaming a spirit (*jinn*) of the netherworld for a person’s misdeeds has sometimes been employed as a fiction for not holding an accused to the prescribed punishment.¹¹ In still other cases matters that in the West are regarded as within the purview of the state are regarded as private. Saudi Arabia permits hospital-based destruction of an eye-for-an-eye. Yet such a practice is very rare and the system of blood money as a substitute for draconian punishment may actually constitute a check on the power of the state by private action. A compensatory payment (*diya*) thus involves the decision of the victim’s kin as to whether a punishment should be applied, while the role of the state in pressing for forgiveness to the financial disadvantage of victims seeking blood money becomes an important part of the overall adjudicative process.¹² Conceptualizing an appropriate punishment is actually an inextricable part

of fact determination, and as we shall see the facts in Islamic law courts are deeply entwined with cultural assumptions that need to be carefully unpacked.

THE SHARI‘A EMPHASIZES RELIGIOUS DUTIES AND COLLECTIVE INTERESTS, NOT INDIVIDUAL RIGHTS. The shari‘a is more than a set of legal propositions: It concerns ritual duties, moral obligations, and social relationships. In the sense that it seeks to maintain the community of believers (*umma*) it is indeed oriented toward the collectivity. But the fact that it does not cast itself in terms of individual “rights”—in the sense in which, say, Western constitutions are cast—does not mean it is unconcerned with individuals. On the contrary, if, for example, the emphasis on contract is to place litigants back into a situation in which they may be able to continue their relationship and negotiate their own differences, then concern with the individual is by no means buried in the collective. Indeed, as my opening chapter’s discussion of a typical Muslim court will suggest, assessing the whole person is a vital aspect of the cultural style found throughout Arab cultures.

Moreover, the shari‘a is deeply entwined with local circumstance and as such with whatever shape the concept of the individual has acquired in a particular locale. So, for example, in the places of high Arab tradition the law may categorize the rights of individual women quite differently than is true for localized groups operating under traditional precepts or nations influenced by Western concepts of human rights. And individuals who have wider networks of alliance may be held to higher standards than those whose effects in the world of relationships are assessed as more limited. Whatever the range, the idea that the law completely subsumes the person within the group is as misleading as assuming that all cultures and religions conceive of the individual in precisely the same terms. As we shall see, to most Arabs the unity of the self—the idea of a person as a congeries of traits and ties all of which are present at any given time and cannot simply be divided into different and possibly incompatible roles—finds support in both the letter and the practice of the law.

ISLAMIC LAW IS CONCERNED WITH ENFORCEABLE RULES NOT PROCEDURAL JUSTICE. When we think of Islamic law we may be tempted to consider it as a set of rules, whether applied to behavior and decorum or the distribution of an estate to various categories of kin. But at least of equal importance—and arguably of even greater significance—are the procedures

and criteria applied in the assessment of cases and controversies. Courts, for example, make great use of local experts and those who qualify as “reliable witnesses.” Judges may assign priority for ending a dispute through an oath on the basis of who they assume is most likely to know the truth of a situation, and they commonly assess the extent and intensity with which parties are attached to their viewpoints as they consider the consequences for the social relationships that may flow from one or another judicial decision. Even written statements are commonly read as if the writer were being quizzed orally, so that questions may go less to the proper form of the document than to asking who this person is—to whom is he connected, to what implications must his attachments draw our attention. If we think of Islamic law as substantive rules alone we will miss out on understanding why the legal process is so integral to the law’s legitimacy and such a crucial vehicle for the articulation of social values at large. In the final section of the book we will also see that the rule of law is not simply about the rules of law, and that an authentic sense of orderliness and natural justice may need to be grounded on propositions that are not reducible to strict regulations.

ISLAMIC LAW IS STUCK IN THE PAST AND LACKS CREATIVITY. The static nature of Islamic law is often said to be proven by the classical proposition, current in the years after the Prophet’s death, that “the gates of independent reasoning” have been closed, that innovation and admixture of any sort are to be frowned upon, and that the orderliness of the community can only be retained if everyone adheres to the approaches codified by stories of the Prophet’s utterances and deeds and the redactions of the four main schools of Islamic law that developed in the years after his death. We now know, however, that if the gates were closed the key, as someone once said, was left rather conveniently under the mat. Independent reasoning not only continued through the ages but has always been entangled with the wisdom and attachments of its spokesmen, the needs of its adherents, and the changing economic and political necessities of the day.

We will see, for example, that some contemporary Muslim judges have independently developed a concept of the best interests of the child, even violating at times the codified requirement that custody go to a relative of established category. We will encounter judges who are prepared to accept illegal squatters’ agreements in order to bring them within the scope of the law, or courts that accept the testimony of someone from a minority

religion despite formal rules to the contrary. And we will uncover the use of new scientific evidence justified by citation to a Quranic story or acceptance of the judgment of one whose opinion is clearly in the minority. In each instance it will be evident that Islamic law has always been a living and changing law, that it is not an entity that remains rigidly attached to an age long since passed. It is, therefore, as true in the law as in life that, as the Arab saying goes, three things are certain—life, death, and change.

THOSE WHO APPLY ISLAMIC LAW ARE FULLY UNDER THE CONTROL OF THE STATE AND LACK ANY JUDICIAL INDEPENDENCE. An independent judiciary is the capstone of Western constitutionalism. By contrast, legal personnel in contemporary Arab regimes may seem to lack autonomy both structurally and operationally. Historically, though, Islamic judges often exercised significant independence from the regime in power.¹³ Structurally, virtually all contemporary Muslim countries have a ministry of justice that oversees the appointment and activities of the nation's courts, and judges are well aware that placement and advancement depend on how the ministry views them. But this is true for most European countries as well. The centralization of the judicial machinery is not necessarily coincident with its control by the regime, however much that might be the case in certain instances. Rather, if one looks at the full range of the courts' activities those of the Arab countries are not always and inevitably under the thumb of the regime. Lawyers have taken to the streets of Cairo to protest corruption, local communities have rejected centrally appointed personnel, and courts have employed equitable concepts to assuage the perceived unfairness of a given policy or written rule. Legal personnel often express a desire to practice their profession without having to be beholden to anyone or anything other than the canons of their own design. No one can doubt that the law courts are frequently misused by central governments in the Arab world.¹⁴ But it would be shortsighted, as we will see when I discuss the "Arab Spring" (chapters 5 and 6) and the nature of corruption, to imagine that judges and lawyers are invariably complicit in these acts and that they are not without their own ways of trying to assert their pride, independence, and commitment to their profession.

"THE CHAIR IS NOT ONLY MORE COMFORTABLE BUT MORE INFLUENTIAL THAN THE BENCH." This formulation by Noel Coulson (1964) is indicative of many textualists' approach to Islamic law. Undoubtedly the solicited opinions (sing. *fatwa*) and treatises of scholars and jurisconsults have

been—and in many instances continue to be—of great importance. They have set the tone as well as given direction and legitimacy to the entire system. But these jurists do not decide the cases that actually come to court. Indeed, they are usually recruited by parties on opposite sides of a case and are not necessarily the central figures involved in what has been called “bargaining in the shadow of the law.” Islamic law is not like the civil law systems of Europe that fill gaps in the codes by relying primarily on the writings of scholars. Instead, Islamic law works case by case, using the advice and consultation of non-court personnel but not simply depending on their treatises or their recommendations. However, unlike Anglo-American common law, historically the Islamic law judges did not produce case reports, did not look to appellate opinions for strict guidance, and (unlike civil law systems) did not use codes to find the right category under which to place a given case. But that does not make their system any less similar to common law approaches, for they partake of the two key ingredients of the type, namely they elicit facts primarily from the litigants and the court-affiliated experts (rather than their own investigation and interrogation), and they allow local circumstance to bubble up from below by attending carefully to the broader relationships among the parties and the practices of the local area.¹⁵ In the process, the state appears less central to the entire process than is the case in civil law systems.

Even the jurists—like judges, religious figures, and big men of whatever ambition—have had to build up personal followings in order to establish, by virtue of the repercussions of their own social networks, that they were men of consequence whose opinions others should adopt. The result has been a system not unlike that which characterizes other domains of social and political life—where, for example, leadership is not inherited but must be established and maintained personally—a form of legitimization that, because of its use of concepts and procedures that resonate in many other contexts of life, could largely garner popular legitimacy. The law, therefore, is not in the texts alone but in the culturally embedded style of judgment and the ways in which the law is drawn from and into everyday life.

CUSTOM IS NOT A SOURCE OF LAW IN ISLAM. The standard view of Islamic law, at least in most of the scholarly literature of the West, is that the sources of the law are the Quran, the Traditions of the Prophet, and the four main schools of law that developed in the early years of Islam. What is often not regarded as a source, however, is custom. For those Western

scholars who approach Islamic law from the perspective of European civil law systems this makes a certain sense, for that approach has classically regarded the two domains as completely separate, the inclusion of custom into a code rendering it no longer custom. But, as social scientist Matthew Erie summarizes the findings of more recent scholarship: “Actual practice, however, has shown that custom has had a much more expansive role than classical theory admitted.”¹⁶

Indeed, in Muslim countries, as in common law systems, custom is not segregated from law but is drawn upon in a wide variety of ways in fashioning legal approaches.¹⁷ In the United States that may happen, to take just one example, through the acceptance by courts of “custom and usage in the trade,” which may be decisive in certain commercial cases. In Islam local custom is the unmarked category, the source that does not need to be specified separately precisely because it is integral to the application of law in a great many cases. Custom may, therefore, serve as substantive guidance (as in accepting how contracts are formed differently by local groupings), as procedural supplement (as in the presumption as to what objects belong to husbands versus wives), or as factual assistance (as in the determination of who is most likely to know the truth of a matter and thus have the right to take a decisory oath first). Moreover, through all areas and periods one encounters some version of the saying that, short of it violating one of the few specifically law-like propositions in the Quran, custom and contractual provisions take precedence even over the shari‘a. Thus Muslims in Malaysia (who are descended from matrilineal peoples of Sumatra) will say that their inheritance rules, which do not always track those in the Quran, *are* Islamic, just as Berbers in North Africa resent being told that their customs are not Islamic when, from their viewpoint, those customs are not separate from Islam but are indeed their form of Islam.¹⁸ Seeing the role of custom from this perspective, then, both the legitimacy of Islamic law and its capacity for inclusiveness of widely diverse groups can be more readily appreciated.

* * *

Each of the forgoing images of Islamic law will be probed in the chapters that follow. When, for example, we consider the way in which squatters mimic the formal law in Morocco, we will see how alternative and pluralistic choices of law are incorporated into a constantly developing and creative approach to legal problems. When we look at Muslim-Jewish

partnerships and how they might be adapted to the current Palestinian-Israeli dispute, we will see how practicality has long ruled relationships mistakenly seen as completely segregated. And when we consider whether it is the middle class that will be responsible for the formation of a legal and constitutional structure that will end domestic chaos, we will analyze the connections linking economic roles and legal development. Similarly, we will see the implications for views of Islamic law when we consider what the concept of corruption entails, why the Arab Spring was only tangentially about implementing the shari‘a but centrally about establishing a rule of justice, and how, in conclusion, new constitutions might be grounded not only in structural constraints but in shared cultural orientations. Indeed, in what may seem an odd sort of way, looking carefully at the trial of accused terrorist Zacarias Moussaoui can cast light on how different the cultural styles of eliciting evidence and articulating one’s story in a legal context can be and how that difference can highlight the assumptions and misunderstandings about both law and justice made by both legal systems.

It was Samuel Butler who said that “there is a science of the aspect of things as well as of their nature,” and from the perspective of an anthropologist who is concerned with the often unforeseen connections among the multiple domains of life it is precisely an exploration of aspects rather than a taxonomy of essences that often has the greatest heuristic value. Turning a given feature of a culture to see its facets and linkages or assessing how the items arrayed add up to more than the sum of their parts is to avail oneself of the benefits of a synoptic view—an overview, a view of instances and manifestations—no less than an analytic one. This means seeing Islamic law as part of culture and not simply as a refined attribute of faith. Perceiving Islamic law through the lens of culture is to take seriously the connections its adherents suggest and demonstrate in their everyday lives, and hence to rejoin, at one extreme, the most recondite of legal precepts and, at the other, the most vital sources of the law’s legitimacy. Throughout, the common theme we see is that Islamic law is integral to that broader set of categories by which people grasp their world and create their own experience of it. And if it is true that nothing is so sad as the failure to understand another’s culture, then hopefully this narrative of Islamic law may, in its own way, encourage us to bridge that doleful gap.