

Boundaries of Religious Freedom:
Regulating Religion in Diverse Societies

Adam Possamai
James T. Richardson
Bryan S. Turner *Editors*

The Sociology of Shari'a

Case Studies from Around the World

Second Edition



Springer

Boundaries of Religious Freedom: Regulating Religion in Diverse Societies

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Processes of globalization have resulted in increasingly culturally and religiously diverse societies. In addition, religion is occupying a more prominent place in the public sphere at the turn of the 21st Century, despite predictions of religious decline. The rise in religious diversity, and in the salience of religious identity, is posing both challenges and opportunities pertaining to issues of governance. Indeed, a series of tensions have arisen between state and religious actors regarding a variety of matters including burial rites, religious education and gender equality. Many of these debates have focused on the need for, and limits of, religious freedom especially in situations where certain religious practices risk impinging upon the freedom of others. Moreover, different responses to religious pluralism are often informed by the relationship between religion and state in each society. Due to the changing nature of societies, most have needed to define, or redefine, the boundaries of religious freedom reflected in laws, policies and the design and use of public spaces. These boundaries, however, continue to be contested, debated and reviewed, at local, national and global levels of governance. All books published in this Series have been fully peer-reviewed before final acceptance.

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Bryan S. Turner
Editors

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Chapter 1

Introduction: Legal Pluralism and *Shari'a*



Bryan S. Turner , James T. Richardson, and Adam Possamai 

Abstract This introduction situates the book in the current field of research and aims to find some generalizations out of the diversity of legal pluralist practices from around the world.

1.1 Introduction: Legal Pluralism and *Shari'a*

Legal pluralism may be simply defined as the development of a number of different legal traditions within a given sovereign territory. Legal pluralism is often held to be a challenge to legal centralism, a legal doctrine claiming that the state has a monopoly over law making in its sovereign space. Opponents of state centralism based on state sovereignty and a legal monopoly often regard it as an ideology rather than a legal doctrine. The modern critique of legal centralism is associated with an influential article ('What is Legal Pluralism?') by John Griffith (1986) who proposed a simple definition as 'the presence in a social field of more than one legal order' (Griffith, 1986:1). By contrast 'legal centralism' is an ideology in which 'law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions' (Griffith, 1986:3). He argues that legal centralism is a myth on the grounds that any society will have many legal traditions or institutions. These can be the legal arrangements of corporations or

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churches or similar social organizations. Many of his examples are taken from anthropological research that examined ‘customary law’ in colonial and post-colonial settings. In many societies legal pluralism is now related to the recognition of indigenous traditional laws and, consequently, it is often referred to as ‘Unofficial Law.’ Studies of native traditions—such as Llewellyn and Hoebel’s *The Cheyenne Way* (1941)—have influenced recognition of the importance of custom in the normative foundation of law and thence the legal order of society. This period of research on the customary law of people under colonial administration has been called the ‘classic period’ of legal pluralism (Merry, 1988:872).

The ‘weak sense’ of legal pluralism occurs when the state commands or validates the ‘law’ of social groups whose identity is often based on religion, ethnicity or geographical location. Griffith dates the modern origin of weak legal pluralism in 1772 when a regulation was established by the East India Company when it recognized the *Qur’an* with respect to ‘Mohamodans’. In this sense, ‘legal pluralism in this sense seems to have been a fixture of the colonial experience’ (Griffith, 1986:6). Legal pluralism is so to speak tolerated by the state and its bureaucratic officials, but it is not regarded as desirable or necessarily permanent because the aim is to impose legal uniformity and coherence over the legal field. Many chapters in this second edition of *The Sociology of the Shari’a* are concerned with what Griffith would recognize as weak legal pluralism.

In the development of the sociology of law, an alternative to Weber’s position can be found in the work of the Austrian sociologist Eugene Ehrlich (1862–1922). Ehrlich was born in Czernowitz (in present day Ukraine), which was the capital of Bukowina on the edge of the decaying Austro-Habsburg Empire, and died prematurely of tuberculosis before completing his trilogy in the sociology of law. His work on customary law in part reflects the status of his birthplace in the power structure of Austria. While being subject to the centralized system of Austrian law, Bukowina also had a rich tradition of customary laws. Like most of the Austrian Empire, Bukowina was a multicultural society, and, in fact, Ehrlich regarded it as a ‘tribal society’ in which diverse groups (Germans, Gipsies, Jews, Hungarians, Romanians, Russians, and more) lived side by side under the political and legal umbrella of the Austrian imperial state. As a baptized Roman Catholic of Jewish descent, Ehrlich was only too aware of the cultural diversity that lay beneath the outer shell of Austrian imperial institutions.

In this context, he became interested in the gap between the actual practice of law ‘on the ground’ and the formal doctrines of law that were embraced and developed by the legal professionals in the universities and the formal courts. In response to this gap and the fictions of the formal law, in 1913, in *Fundamental Principles of the Sociology of Law* (Ehrlich, 2001), he coined the phrase ‘living law,’ to distinguish his approach from state-centred theories of law, which assume that law is created by the state to achieve a unified and coercive system of legal domination. Ehrlich argued that law is not exclusively produced by the state or the courts or by tribunals. He rejected the idea that is central to Weber, that law is a deductive system of legal propositions from general legal notions about contract, property, and sovereignty. He looked instead to how customary practices operated at the community level, as

the living law of the land. Hence, he took the view that law is basically about establishing a social order and it is to be found everywhere; law is concerned with “ordering and upholding every human association” (Ehrlich, 2001: 25). In the same passage he drew attention to the importance of sociology in the teaching of jurisprudence: “Since the law is a social phenomenon, every kind of legal science (*Jurisprudenz*) is a social science; but legal science in the proper sense of the term is a part of the theoretical science of society, of sociology” (Ehrlich, 2001: 25). In focusing on what lawyers do, rather than on what they are supposed to do, he developed a battery of concepts: living law, the inner order of association, rules of conduct, and rules of decision. It is perhaps unsurprising that Ehrlich’s ideas found a ready audience in the United States, where legal realism had turned its back on the formal jurisprudence of Europe. American pragmatism offered a fruitful context for his ideas on living law and his work was eventually supported by Roscoe Pound (1870–1964) at the Harvard Law School, who developed his own version of ‘sociological jurisprudence.’ Ehrlich’s ideas prepared the way for theories of legal pluralism, which reject the idea that law is only state law (Neklen, 1984).

In this framework, legal pluralism can be seen as a controversial sociological issue, because it can only exist in contrast to the notion that the state has a monopoly over the law. In other words, the idea of legal pluralism also functions as a critique of the state-centred or ‘official’ view of the law. We argue that, while this sociological interpretation of legal pluralism is important and plausible, there may be other arguments about the importance of a shared citizenship to guarantee equality (especially equality before the law) that must be taken into account. Ehrlich’s view of living law made sense in a society of multiple and distinct ethno-cultural communities with their own customs of normative ordering, but, in societies where the majority shares a common culture and a unified citizenship, can legal pluralism find a place?

Griffith is sympathetic to Eugen Ehrlich’s *Fundamental Principles of the Sociology of Law* that was published in 1913. Ehrlich distinguished between ‘rules of decision’ and ‘rules of conduct’. In a legal positivist tradition, law consists of an official of the state, such as a judge, deciding which legal disputes can be brought before him or her. A juristic science is concerned primarily therefore with the duties of a judge. By contrast a science of the law must be concerned with the rules of conduct. Ehrlich goes on to define law in a more comprehensive fashion as an ‘ordering’ of human conduct. This ordering can be composed of rules of law, but also religion, ethics, customs, decorum and etiquette. Law is only one small component of this normative ordering of human associations. Griffith believes that Ehrlich still remains too closely tied to state organizations and fails to give an adequate account of what he means by ‘associations’. Finally Griffiths turns to Sally Moore’s empirical study of two cases to illustrate her notion of legal pluralism involving a study of the New York City garment trade and to the Chagga people of Tanzania (Moore, 1978). Her point is that in modern societies we find a tangle of diverse and complex arrangements that rely on binding obligations to achieve their ends, here these obligations do not have overtly legal backing. The debate about legal pluralism is also closely associated with theories of multiculturalism and

cosmopolitanism (de Sousa Santos & Rodriguez-Garavito, 2005). These debates around pluralism raise a host of difficult conceptual issues, including the problem of defining law itself. Before turning to some of these vexed definitional issues, we should start with a brief consideration of the so-called 'legal centralism' position.

John Griffiths played a critical role in establishing the importance of legal pluralism in understanding how any society operates in situations from small tribal groups to large modern societies. He was for example instrumental in establishing the *Journal of Legal Pluralism and Unofficial Law* in 1981. While we accept much of the thrust of the position presented by Griffiths, there are interesting issues when we look closely at the *Shari'a*. We turn to an article by Sherman A. Jackson (2006) on legal pluralism, in which he examines Griffith's position from the perspective of Islam. For Jackson (2006:163) 'Islam is a religion in which not theology but law emerged as the manifestation of its genius'. Furthermore, the Prophet was credited with infallibility and hence protected from errors in his interpretations of scriptures. This protection passed not to an individual but to the interpretative community, and in practice this meant that only judgements that had been unanimously agreed by the community of jurists were binding on the community. Over time the jurists began to organize themselves into interpretive communities or schools of law (*mad-habs*) with exclusive legal authority. This process gave rise to the four main schools of law, namely the Hanafi, Maliki, Shafi'i and Hanbali schools. Legal authority sat with the schools and not with the state. The *Shari'a* existed before the creation of the Muslim state and is not state law. The state had a monopoly of power but not of legal authority. Modern Muslim state have struggled with this legacy and have sought to co-opt or suppress the vestiges of this historical legacy.

While these general observations apply to all Muslim societies, the Saudi Kingdom has some unique features. It came into existence with the breakdown of the Ottoman Empire. The new kingdom inherited laws from the Ottoman Empire that had been inspired by French law. From the beginning, the Wahhabiyya sought the establishment of a theocratic state in which the *Shari'a* would be strictly applied to both public and private life. In reality, statutory authority has been exercised by the royal family. A Civil Advisory Council was created in 1924. In 1962, a council of ministers was established to develop legislation in accord with the *Sharia*. In 1976, the various ministerial offices were instructed by the king to adapt existing laws to modern circumstances. Several bodies such as the Chamber of Complaints and the Commercial Court are not required to make decisions in accordance with the *Shari'a*. Various aspects of commercial law and criminal law have been pragmatically modernized without reference to the *Sharia*. In conclusion, 'The administrative regulations and orders of the king and other governmental authorities, steadily increasing in volume and theoretically designed to supplement the *Shari'a*, may to all intents and purposes be regarded as statutory legislation altering positive Islamic law (Layish, 1987:292). Oil revenues from the 1940s and even more so after the 1970s made difficult political and economic choices unnecessary. Reforms often involved 'committees' that issued regulations or edicts, thereby avoiding the terminology of 'laws' and 'courts'. The 'religious police' (The Body for Enjoining Virtue and Prohibiting Vice) is run by enthusiasts who are deputized by the ruler to impose

Islamic norms. As Saudi Arabia has grown in economic terms, many non-Muslims now work and live in the kingdom. This development often gives rise to situations that are not covered by traditional legal and religious practices. Often these issues are solved by quasi-judicial committees that issue monetary fines without recording all the relevant details of the status of the offenders or claimants. These ad hoc solutions are unlikely to survive indefinitely in a kingdom bent on economic reforms.

The Saudi Kingdom appeared to take a step in the direction of reform with the emergence of Crown Prince Mohammed bin Salman (MbS) in 2015. He is credited with the legal change to allow Saudi women to drive, but these expectations at reform were dashed by the brutal killing of Khashoggi the journalist who had been critical of Saudi policies, for example in the conflict with the Yemen. Critics of the contemporary royal establishment argue that MbS will be an authoritarian reformer who remains committed to the Wahhabi tradition (Choksy & Choksy, 2015).

The creation of the modern nation state typically involved an historical process establishing political sovereignty over territory and constructing political unity through the development of a unified legal system, a common framework of taxation, a national currency, the recognition of a national language and the development of a national army through male conscription. These processes lay at the core of the institution building that we now refer to as 'modernization.' These processes, both in Europe and in Asia, were typical of nineteenth century developmental strategies. In Asia, the construction of a centralized bureaucratic state was associated with the Meiji Restoration in Japan in 1868 that created a sound basis for state taxes, reformed the military and brought in legal changes based on western models. Similarly, in Turkey, the Early Republican Period (1923–1938) laid the foundation for secularism, cultural modernization and constitutional reform that followed aspects of French law and *laïcité*. Turkish republicanism involved the termination of the caliphate and the partial exclusion of the *Shari'a* from public life.

In sociology, the classical theorist of this conceptual assembly of nation, state and law was Max Weber, in his *Economy and Society* (1978). Weber starts his account of law by making a distinction between 'legal dogmatics'—the question of the contents and validity of law—and the sociology of law, which is concerned with how law actually functions as an institution. For Weber, the enforcement of formal legal norms requires a coercive apparatus, but not an apparatus that primarily requires the exercise of physical violence. His famous definition of these conditions is as follows. Whether law exists "depends on the availability of an organized coercive apparatus for the nonviolent exercise of legal coercion. This apparatus must also possess such power that there is in fact a significant probability that the norm will be respected because of the possibility of recourse to such coercion. Today legal coercion by violence is the monopoly of the state" (Weber, 1978 vol.1: 314). In short, in a modern society with a sovereign state, the law is enforced through the courts with the ultimate guarantee of state enforcement. Weber was, of course, interested in the historical development of the law and at various points in his sociology of law he referred to the development of sacred law through revelation, such as the *Shari'a*, and he acknowledged early developments of customary law which were based on communal consensus. For example, he noted that in the late Roman Empire

the jurists had to take note of the 'law of the land' in the case of the Common Law of the English provinces, and the distinction on the Continent between the Roman law and the 'indigenous bodies of law' (Weber, 1978 vol.2: 754). However the thrust of Weber's historical view was that, with legal 'rationalization' and the rise of the modern state, such customary laws disappeared under the impact of the monopolization of power by the bureaucratic state.

Can legal pluralism add more fuel to the bonfire of civil unrest, especially where a majority fears the impact of a minority? In modern societies, the revival of Islam and the demand for the *Shari'a* have become the principal testing ground for the operation of legal pluralism. Sub-Saharan Africa is an extreme illustration.

Legal pluralism can often be a spur to civil unrest rather than to social harmony. In November 2002, conflicts around the Miss World Competition plunged Nigeria into violent clashes between Christians and Muslims, thereby deepening the controversy surrounding the revival of the strict criminal code of the *Shari'a* in 12 of Nigeria's 36 administrative regions. In December, there were violent protests from Muslims in Abuja, where contestants awaited the opening of the pageant, and eventually Muslims attacked Christians in Kaduna, which is one of Nigeria's most volatile northern cities. The contemporary problem of Christian-Muslim relations is compounded by the fact that Nigeria is made up of 250 separate ethnic groups, with 400 linguistic groups. The struggle over the law is simply a manifestation of a deeper struggle over the unity of the sovereign state. While legal pluralism is an outcrop of a society that is already diverse and deeply divided, it becomes, in itself, a component of struggle and division, igniting further conflagration between social groups (Clarke, 2009).

The chapters that follow are specifically concerned with the nature and place of the *Shari'a* in a variety of societies and historical periods. The *Shari'a* is clearly not customary law or unofficial law. It is not the legal system of a tribal or indigenous community. It is a highly developed system of law that has a global reach across the Muslim community as a whole. It has been, as with other religions, significantly influenced by globalization, reform and modernization. However, before proceeding, we need to explore the complexity of the various definitions of the *Shari'a* that can be found around the world. There is a fundamental problem as to the very nature of the *Shari'a* as law. Understanding the *Shari'a* has been deeply affected by the legacy of Orientalism according to Wael B. Hallaq (2018). With respect to Islamic law, Hallaq claims the Orientalism paradigm in law was based on various false claims: the *Shari'a* was constructed a century after the death of the Prophet; the textual and practical sources of the *Shari'a* are to be found in the Fertile Crescent, not in Arabia; soon after its formation, further interpretation of the law was ruled out as 'the gates of *ijtihad* were closed' after which it stagnated. Hallaq argues by contrast that the creativity of *Shari'a* formation continued to flourish but the effects of colonialism were to transform the *Shari'a* from being the creation of the muftis into state law, which had the effect of secularizing the *Shari'a* (Powers, 2010).

This domain has become controversial because it is bound up, not just with the practice of law, but with the question of Muslim identity. It has also become associated with radical Muslim movements such as Boko Haram in Nigeria, where there

is a political movement to establish *Shari'a* as the exclusive jurisdiction over Islamic territory. Critics have also drawn attention to the *Hudud* laws which contain draconian provisions for any transgression of laws relating to alcohol consumption or illegal sexual intercourse. After 9/11, many security agencies came to see the *Shari'a* as a threat to democracy, and perceptions of the criminal law components in the *Shari'a* emphasized those measures that appeared to re-enforce gender inequality.

In some conservative states, Christian conservatives have responded to what they perceive as the spread of the *Shari'a* by arguing that the United States should develop its own Christian *Shari'a* in order to impose God's law on the country. One example of this response is the Kansas House of Representatives' introduction of a bill to permit individuals or businesses to refuse services to same sex couples, when the religious beliefs of these individuals or businesses are compromised. These developments are controversial because they are not consistent with the separation of church and state which is enshrined in the American constitution.

These negative views of the *Shari'a* are generally not accepted by scholars, who emphasize its internal variety and the fact that it is composed of law, a moral system, and a religious code. The *Shari'a* is thus a comprehensive system covering politics, economics, morality, and religious practices. In formal terms, the sources of the *Shari'a* are primarily the *Qur'an*—as the ultimate foundation of authority, being the divine revelation vouchsafed to the Prophet—and the *Sunnah* (or the ways of the Prophet). These formal sources have been, over time, supplemented by interpretations by judges [*qadis*], the consensus of legal scholars [*ulama*], and finally, legal reasoning. Given these diverse sources of authority, it is hardly surprising that Muslim law is diverse and that it evolves constantly over time (Hallaq, 2009a: 27). Hence Weber was mistaken in believing that a legal system based ultimately on revelation could not change to meet new circumstances and that the gap between tradition and actual circumstances could only be bridged by arbitrary legal decisions [*fatwas*].

It is useful to distinguish different levels of the *Shari'a*. First, there are universal values relating to justice and equality. Second, there are the regulations that apply specifically to Muslims' personal behavior, concerning aspects such as diet and modesty. Third, there is the *Shari'a* as practiced by the various law schools. Many of these legal rulings, for example, those regarding veiling and diet, are subject to dispute among legal authorities. This is hardly surprising since all legal decisions—whether religious or secular—are subject to interpretation (Hosen, 2007: 204).

Modern scholars, departing from Weber, see the *Shari'a* as a flexible and open system of law that can respond, and is responding, to modern circumstances. As is the case in secular legal systems, there are many versions of the *Shari'a* in terms of legal traditions and schools, and there are also differences between the forms of *Shari'a* practiced by *Sunni* and *Shi'ite* communities, respectively. However, one immediate problem in defining the *Shari'a* as 'law' is that this downplays, or even ignores, the role of the *Shari'a* as a comprehensive system of ethics. Access to the *Shari'a* has become increasingly important for Muslim minorities in western societies, where they are faced with new questions about how they should behave piously

in public spaces. If we are to think of *Shari'a* as law, we would be better advised to compare it with rabbinic law, because both these systems are devolved and local, dependent on the judgments of mullahs and rabbis regarding specific questions. In this sense *Shari'a* is not state law, but is closer, as Max Weber recognized, to common law. Like secular law, the *Shari'a* is constantly evolving and developing as Muslims face new challenges for which there are no definitive answers to be found in tradition.

Despite attempts by scholars to correct misunderstandings of the *Shari'a*, western critics (for example, in Republican dominated states in America) have been hostile towards its development (Turner & Richardson, 2012). In attempting to come to a balanced judgment about these debates, it is important to keep in mind the differences between the role of *Shari'a* in societies where Muslims are a minority and in those where they are a majority. Even in some societies or states that do have a Muslim majority the introduction of strict and comprehensive *Shari'a* law has been controversial. For example, in 2014 the sultanate of Brunei introduced a harsh version of the *Shari'a* criminal law tradition, including punishment by flogging and death by stoning. There has been international condemnation of this development from human rights groups. In 2012, President Morsi of Egypt attempted to enforce *Shari'a* more widely and more intensely in the country, and was subsequently ousted in 2013 by a military coup. In Afghanistan after the fall of government, the Taliban hard-line Islamic system is based on the nineteenth-century Deobandi movement that developed in British Colonial India. This form of Islam is an influential version among Islamists in contemporary Pakistan and Afghanistan. It is based on the teachings of the Sunni Hanafi tradition of jurisprudence. With respect to these controversial developments, for legal scholars, the merit of legal pluralism is that it can avoid civil conflict resulting from any attempt to impose a unified legal framework in a society which has distinctive minorities, each with their own cultural and legal traditions.

1.2 The Breakdown of Legal Centralism

It is widely held among social scientists, that the model of the unified sovereign state is breaking down under the impact of globalization, and one manifestation of this political transformation is the growing importance of legal pluralism. It is also argued by both sociologists and legal theorists, that, with globalization, there has been some erosion of state sovereignty and the emergence of porosity of state boundaries, requiring a revision of the traditional assumptions of national citizenship, such as 'flexible citizenship,' post-national national citizenship, and semi-citizenship. The corresponding growth of legal pluralism merely gives legal expression to these developments (Teubner, 1997). In addition, with economic and financial globalization, there has been further growth in commercial law, which is not specific to state boundaries and can constrain government policies over economic issues (Twining, 2000).

Legal pluralism is also associated with the role of law in regulating common resources such as access to sea routes for trade. Medieval trade was regulated by *lex mercatoria* and, in recent history, exploration rights for oil and gas, where state borders in coastal areas are contentious, often requires legal intervention. The United Nations Convention on the Law of the Sea (1982) would be one important illustration of this (Charney, 2002). Within the European community, the growth of legally binding relations can also be seen as an important instance of legal internationalism and pluralism. In 1951, the Treaty Establishing the European Coal and Steel Community made provision for an independent court, the Court of Justice, to interpret and enforce the treaty's provisions. In global terms, the extension of human rights provisions over states is further evidence of legal measures that impinge on state sovereignty. International legal relations have multiplied in recognition of the need to develop a set of universal norms to address global concerns relating to major issues, especially concerning threats to the environment. As a result, citizens can find themselves at the intersection of diverse laws (international, national, and customary) that regulate their lives at both the national and local levels.

There is an international legal system that constrains and regulates the behavior of nation states through consensual multilateral forums. These legal arrangements recognize a mutual interest in safeguarding the environment and they have important consequences for the autonomy of the nation state. There is an emerging recognition among legal experts regarding "the enormous destructive potential of some activities and the precarious condition of some objects of international concern make full autonomy undesirable, if not potentially catastrophic" (Charney, 1993: 530). Where there is some recognition that common resources are threatened, then there are compelling reasons for legally enforced co-operation between states. As a consequence, conventional legal boundaries between independent states become more porous. However, Jean Cohen (2012), in *Globalization and Sovereignty*, argues that there is no fundamental incompatibility between sovereignty and the participation of states in international legal agreements, and at the same time modifies what she defines as the 'monist' position of Hans Kelsen, in order to promote the idea of constitutional pluralism. In short, it is not the case that arguments about state porosity have won the day.

Anthropological research played a significant role in recognizing the continuing importance of customary law in the lives of indigenous peoples. As a result, the idea of legal pluralism became significant in the 1970s in response to the research of social anthropologists on the role of 'living law' in post-colonial societies. In these anthropological studies, the notion typically referred to the continuity of customary law alongside the state system. The growth of legal pluralism in post-colonial societies has often involved the recognition of customary law among aboriginal communities, as for example, in Australia. With the decline of authoritarian states in Latin America and the expansion of democratic institutions, there was greater social inclusion and recognition of the rights of indigenous peoples. The result was also an expansion of legal pluralism (Sieder, 2002).

The implications of the anthropology of law were subsequently recognized by legal theorists, often influenced by postmodernism, post-colonialism, and pragmatism, in describing the multiple legal systems of modern societies (Tamanaha, 1997). However, it turns out that the problem in defining legal pluralism is simply a consequence of the more problematic issue of defining law itself (Turner & Arslan, 2011). For Roscoe Pound (1966), who was in many respects sympathetic to Ehrlich, law can only exist where there are judges sitting in courts with the ultimate backing of the state. Pound (2009: lxvi), following the argument of Henry Maine that the judge precedes the law in historical evolution, held that the law is “a specialized form of social control through the systematic application of the force of the politically organized society that achieved paramountcy after the Reformation.” Similarly in the legacy of John Austin and Hans Kelsen, law is ultimately a command backed up by the authority of the state through judges sitting in courts (Hart, 1977). Without effective political and legitimate enforcement, how can any normative order function as law? In short, all forms of normative structure will require the ultimate sanction of a law court and finally of a state.

In some branches of contemporary jurisprudence, ‘law’ has come to be defined simply as any form of normative or regulatory pluralism (de Sousa Santos, 1995). Whenever ‘legal pluralism’ is invoked “it is almost invariably the case that the social arena at issue has multiple active sources of normative ordering” such as official legal systems, folkways, religious traditions, economic or commercial regulations, “functional normative systems,” and community or culturally normative systems (Tamanaha, 2008: 397). In summary, it is claimed that modern legal systems are becoming pluralistic, either through the recognition of customary law in post-colonial and post-imperial societies or through the impact of globalization, for example, through the spread of human rights. In this volume we are concerned with tracing the development of the *Shari’a* as an example of legal pluralism in societies where typically secular law is the dominant tradition. At the same time, the potential for civil conflict over competing legal systems requires the preservation of a secular public sphere and the implicit, and occasionally explicit, management of religion by the state. While legal pluralism might be deemed inevitable and compatible with multiculturalism and liberal tolerance, state law may be necessary as a last resort in societies where there is conflict between competing social groups with incommensurable demands about the law and general values.

1.3 *Shari’a* and Legal Pluralism

In contemporary legal theory, it is often the acceptance or otherwise of the Muslim legal tradition, or *Shari’a*, that has occupied the key position in debates about legal pluralism. In many post-colonial societies in Africa and Asia, English common law traditions exist alongside the *Shari’a*. For example, in Singapore, where Muslims are a minority, *Shari’a* operates in domestic disputes, marriages, and divorce

settlements under the general oversight of the Majlis Ugama Islam Singapura, or Muslim Council of Singapore (Kamaludeen et al., 2010). There is significant variation in the treatment of Islamic communities and *Shari'a* in Eastern Europe, Russia and parts of China, where 'legal pluralism' is an appropriate description for societies that combine customary law, secular constitutions and religious law (Kemper & Reinkowski, 2005). Greece represents a case where *Shari'a* is practised by a Muslim minority as a relic of past international agreements. As a legacy of the Ottoman *millet* system and based on the Lausanne Treaty of 24 July 1923, the Greek government recognizes *Shari'a* as the law regulating family and civic issues for Muslims who live in Western Thrace. While it is estimated that 95 per cent of the population in Greece is identified as Greek Orthodox, a section of the Muslim minority living in Western Thrace enjoys a minority status that is recognized by the Lausanne Treaty.

Many different cases of *Shari'a* and legal pluralism are compared in this volume. In the West, acceptance of the *Shari'a* has been deeply controversial. Public opposition to Muslim tribunals in Ontario Canada in the 1990s has had a significant impact on developments elsewhere (Boyd, 2004). Critics tend to believe that gender equality cannot be secured under the *Shari'a* and that there is little guarantee of transparency. The situation in the United States is somewhat different. The dominance of the Supreme Court in the Constitution in principle precludes the growth of legal pluralism, but even in the United States critics such as the Center for Security Policy have claimed that *Shari'a* has entered into state court decisions, reporting 50 appellate legal cases where there was a 'conflict of law.' The much disputed report (Turner & Richardson, 2012) also documented 15 Trial Court cases and 12 Appellate Court cases where the *Shari'a* was found to be applicable at bar (Center for Security Policy, 2011: 8). In anticipation of further evolution of the *Shari'a* in the United States, the American Public Policy Alliance has drafted the American Laws for American Courts Act to prevent any enforcement of foreign laws in American courts, and the Act has been passed in Tennessee, Louisiana, and Arizona. While right-wing elements in the Republican Party brought the debate about the *Shari'a* into the political debates around President Obama's second election, there was little public debate in 2013 about the spread of the *Shari'a*. Against these criticisms of the presence of the *Shari'a* in the United States, Christian Joppke and John Torpey, in *Legal Integration of Islam* (2013), argue that Muslims have become part of the mainstream of American life and that, unlike in France and Germany, the *Shari'a* has not proved to be so deeply controversial. Islamic practices including the *Shari'a* have become acceptable under the provisions of freedom of religion in the Constitution, despite much widespread Islamophobia amongst the general population.

Much of the sociological discussion of the *Shari'a* is based on a distinction between Muslim majority societies and Muslim minority societies. This contrast basically refers to the history of the *Shari'a* in the West and the East. Although there are important differences between Western societies in terms of the actual size of the Muslim community, the contrast between Muslim communities in West and East is a conventional distinction in the discussion of legal pluralism. In referring to

'Muslim majority societies', we must avoid obscuring the great diversity of these Muslim majority societies. Indonesia is an obvious example with its large Muslim, Christian and Hindu communities. Legal pluralism as a consequence is not restricted to western sovereign states. This East-West distinction has, especially in this century, been continuously revised by globalization. One aspect of this revision is of course the problem of authority. As Olivier Roy claims in *Globalised Islam*, (Roy, 2004:175) by the simple fact that 'Reconstruction of what it means to be a good Muslim in a non-Muslim society essentially rests on the individual'. The traditional hierarchies of family, age and gender, are no longer relevant because they no longer suffice as transmitters of traditional Islam.

It is important however not to treat this contrast in absolute terms. This revised volume is aware of the dangers of this simplification. However, one clear difference was the profound transformation of the practice of the *Shari'a* that was brought about by colonialism, especially French and British colonialism in Africa, the Middle East and Asia. Colonialism had the effect of translating the *Shari'a* into state law. We have very few anthropological studies of the actual practice of the *Shari'a* before colonialism. However, one important exception is the ethnographic study of highland Yemen on the edges of the Ottoman Empire and before colonialism by Brinkley Messick (1922) with the title *The Calligraphic State*. In pre-colonial Islam, the collection, codification and transmission of the *Quran* and the *Shari'a* depended on memory and handwritten textbooks. With colonialism, this personal world of sacred knowledge was transformed into the impersonal print. Modern Muslim societies are now being further transformed by mass education, rising literacy rates and the mass media.

Other profound changes have taken place in response to technology and modern science, especially reproductive technology. *Shari'a* courts are confronted by changes to marriage and reproduction that are occasioned by the advent of invitro fertilization for example. The other profound changes have been in terms of male-female relationships as more Muslim women move into the formal labour market and assume relationships of authority over men. In a modern bureaucracy such as a hospital, men may often find themselves in subservient positions that contradict the legacy of patriarchy. The traditional role of the *fatwa* (a personal decision of an individual *mufti*) has often been replaced with available on-line advice promoting a dynamic development of the *Shari'a* to accommodate new circumstances such as women in positions of authority (Anwar, 2005). However, western legal systems have also been forced to take notice of changes in medical science and in response to same sex-marriage and gender diversity. While Muslim religious traditions may struggle with changing forms of sexuality, similar dilemmas have been faced in Christianity where for instance growing acceptance of homosexuality promoted a crisis of Anglicanism (Sachs, 2009). The evolution of the *Shari'a* in response to issues that simply did not exist for previous generations, offers more evidence that the gate of legal interpretation (*ijtihad*) is never closed.

1.4 The Structure of This Volume

This book, through a number of specific cases studies—of Bangladesh, Malaysia, Iran, Philippines, Turkey, and so forth—explores these issues with a focus on the question of legal pluralism, state sovereignty, and social-religious divisions. Although the contributors of this volume are from various disciplines (such as law, anthropology, and sociology), the book has a strong sociological focus on the analysis of *Shari'a*.

This edited volume provides a comparative analysis of the application of *Shari'a* in countries with Muslim minorities (Part II) and in countries with Muslim majorities (Part I). It thus offers a global analysis of the phenomenon that goes beyond the usual dichotomy of the 'West versus the rest.' In addition, the case studies in Muslim minority countries are not located in the 'West' only, but include studies in South Africa, the Philippines and China.

However, before exploring specific case studies around the globe, the following chapter 'Sharī'a in the Qur'an: A Word Meaning "Law" or a Metaphor Evoking "Path"?' (Chap. 2) by T. Jeremy Gunn and Omar Sabil proposes first a detailed study of what the word *Shari'a* means in the Qur'an specifically and how it has subsequently been interpreted in different locations and time periods. While the word originally makes reference to a path, as found in many other religions, it has through the ages become recognized in reference to law. It has thus shifted from focusing on spiritual guidance to one on complying to legal rules. While *Shari'a* is not claimed by the authors to be a rudimentary form of law, it is also not a basis for running the government of a modern state. They argue that the vast majority of the Quranic text is not legal and that to have the modern state to have the authority to interpret, supplement or enforce the Qur'an is an innovation. This chapter provides a strong understanding on the social construction of *Shari'a* and especially how its meaning can be appropriated in certain social contexts.

The first part of this book, 'Case Studies from Muslim Majority Countries,' starts in Asia with a study of Malaysia. Shamsul, A. B., in his chapter 'One State, Three Legal Systems: Negotiating Justice in a Multi-ethnic and Multi-religious Malaysia,' (Chap. 3) first gives an historical analysis of how this country's legal system has dealt with religious diversity and legal pluralism over the last 600 years. He then assesses the social cohesion impact of this particular form of legal pluralism, which has been endorsed and accepted by the state's Federal Constitution. This legal process is closely linked to the long history of religious and ethnic diversity of this part of the world.

Habibul Haque Khondker's 'Modern Law, Traditional "*Shalish*" and Civil Society Activism in Bangladesh' (Chap. 4) explores the confrontation between the institutionalization of modern law and the practice of traditional arbitration, known as *shalish*. The author discusses the relation between state and civil society, and between civil society and the country's traditional rural society. Through an analysis of the activities of some civil society organizations, and of the traditional mediation process in place in rural Bangladesh, Khondker underlines practices of gender

inequality. To remedy discrimination against rural women, he proposes a balance between universal rights and local traditions through the implementation of a gender balanced *shalish* committee.

In 'Evolution of Unofficial Muslim Family Laws to Islamist Legal Pluralism in Erdogan's Turkey,' (Chap. 5) Ihsan Yilmaz focuses on the construction of unofficial Muslim family law and explores the results of various surveys with regards to its application. He finds differences at the grassroots level between the secular civil law of Turkey and the Muslim local law. Despite the efforts of the Kemalist hegemonic elite to secularize the Turkish society through a top-down use of law, he argues that Muslim law has continued to be unofficially influential in people's lives. Further, Yilmaz discusses new trends dealing with recent Syrian refugees, and observes a state-sponsored unofficial Islamist legal pluralism under the rule of the Islamist populist government of Erdogan.

Roman B. Lewis and Mehran Tamadonfar's 'The Clerics, Legal Schisms, and Pragmatism in the Islamic Republic of Iran' (Chap. 6) guide us through the history of Iran in the aftermath of its revolution in the late 1970s. It describes how the new government established the Twelver Shi'a Islamic as the official religion and attempted to Islamize the law of its country, but due to public resistance and schisms within the clerical leadership, it instituted the Expediency Council in the late 1980s to institutionalize legal pragmatism. Islamic legal principles could then be put aside in the interest of communal necessity as long as they did not conflict with *Shari'a*. This led to changes in the areas of law and modernized the penal code.

Chapter 7, with Amal Idrissi and Hassan Filali-Ansary's 'Equivocal Attitudes to Religion in Moroccan Law and Society' brings us to North Africa and more specifically to Morocco. It first describes the paradox under the French colonial rule that while the hexagon country adopted a separation of religion and state in 1905, it promoted the use of religion at the governmental level in its colony and even instrumentalized religion for political gain. This has left an impact on the post-colonial phase of this country as the state continues to control Islam. While *shari'a* remains absent in the Moroccan constitution, the authors explore how this country continues to adhere to Islamic traditional and ethical frames of reference while the monarchy has adapted itself to modernity.

The second part of the book moves to case studies from Muslim minority countries and starts with the Philippines. Isabelita Solamo-Antonio's 'The Philippine *Shari'a* Courts and the Code of Muslim Personal Laws' (Chap. 8) reviews, through the work of the PILIPINA Legal Resources Center, the issues that Muslim population has experienced when dealing with *Shari'a* in the south of the country. She also discusses how her NGO has been dealing with the legislative reform of the Code of Muslim Personal Laws.

Helen McCue and Ghena Kraven's '*Shari'a* and Muslim Women's Agency in a Multicultural Context: Recent Changes in Sports Culture' (Chap. 9) employs the theories of Will Kymlicka and Tariq Modood to assess multiculturalism in Australia. They use dress and sport as a case study to analyze how *Shari'a* is lived in a multicultural context. In this chapter, they demonstrate that Muslim women exercise agency, and challenge the dominant negative discourses about Islam.

Vito Breda's '*Shari'a* Law in Catholic Italy: A Non-agnostic Model of Accommodation' (Chap. 10) brings us to the home of the Roman Catholic faith and addresses the notion of positive secularism which, in the case of this country, is a distinctive pragmatic constitutional stance. Through the exploration of some court cases, which are grounded within this paradigm, Breda discovers an openness of the Italian judiciary towards *Shari'a* law.

Wolf D. Ahmed Aries, Cemil Şahinöz, and James T. Richardson explore, in 'Trial and Error in Affiliation: Muslims and *Shari'a* in the German Context,' (Chap. 11) the *Shari'a* controversies first introduced with the migration of Muslim workers to Western Europe soon after the second World War. They observe that some accommodation to *Shari'a* is now slowly happening in the areas of finance, family matters, and food preparation.

Moving to a supra-national level but still in Europe, in 'Islam in Europe: balancing between conflicting values and interests: The case of unanesthetized slaughter of animals' (Chap. 12), Marie-Claire Foblets and Hatem Elliesie study recent judgments in Europe on religiously motivated ritual slaughter. Through a few case studies, they describe some heated debates when it comes to balancing religious freedom and animal welfare. While taking animal welfare seriously, they argue that if European countries were to introduce a general ban on slaughter without stunning, the demand for halal meat would increase from non-European countries. Their claim to a way forward is by having a more consistent legal thinking.

Yuting Wang's 'Between the Sacred and Secular: Living Islam in China' (Chap. 13) brings us back to Asia, where she first briefly explores the history of Islam and then deals with the variations in acculturation and the practice of *Shari'a* among Chinese Muslim communities. Wang claims that despite some challenges that have their roots in a long history of tension between Islam and the state, the religious policy of this country is nevertheless maturing with time.

For the final chapter of this part, we move to another continent, with 'The Case of the Recognition of Muslim Personal Law in South Africa: Colonialism, Apartheid and Constitutional Democracy' (Chap. 14), written by Wesahl Domingo. Contrary to the case in other countries represented in the second part of this book, this country has a constitutional commitment by the state to provide recognition to customary and religious law. Domingo quotes Nelson Mandela, the first democratic president of South Africa, who said in a public address to Muslims: "We (ANC) regard it highly insensible and arrogant that the culture of other groups can be disregarded. The ANC has pledged itself to recognize Muslim Personal Law." In this chapter, she explores the pragmatic steps that are being taken to recognize Muslim personal law.

The third part of this book draws out from the case studies explored, and deals with, theoretical and comparative considerations.

James T. Richardson's 'Contradictions, Conflicts, Dilemmas, and Temporary Resolutions: A Sociology of Law Analysis of *Shari'a* in Selected Western Societies' (Chap. 15) applies the sociology of law theories of William Chambliss in order to understand the processes of conflict resolution with regards to *Shari'a* in the United States, Canada, and Australia. In these cases, Richardson unpacks the resolutions effected by the relevant political structures, which appear to be strongly symbolic.

Adam Possamai's '*Shari'a* and Multiple Modernities in Western Countries: Toward a Multi-faith Pragmatic Modern Approach Rather than a Legal Pluralist One?' (Chap. 16) uses Shmuel Eisenstadt's theory of multiple modernities to understand legal pluralism. The chapter offers an invitation to use this theory as a third way, in between the classical approach of 'universal' legalism and the more post-modern approach of legal pluralism.

The volume concludes with a discussion on the future of legal pluralism (Chap. 17) by Bryan S. Turner and James T. Richardson, which considers some of the tensions between the demand for equality in the evolution of citizenship and the demand for recognition of difference in multicultural societies that are exposed to legal pluralism. They consider three contexts in which legal pluralism is present. The first is legal pluralism in imperial systems before and during the consolidation of nation states. The second is the awareness of legal pluralism arising from the process of de-colonization and the slow and contested recognition of indigenous rights. The third situation is the recognition of different legal traditions in multicultural societies in which a majority agrees, possibly under considerable political and legal pressure, to recognize that a minority community has a claim to its own distinctive legal traditions, at least for the resolution of domestic conflicts. This third case is thought to be the consequence of the globalization of labor markets and the development of permanent diasporic communities.

1.5 Coda

One might imagine that the acceptance and growth of legal pluralism is simply an adjunct to the evolution of liberal values, particularly in western democracies. In this perspective, legal pluralism is simply the legal face of growing social and cultural diversity within the national community. Legal pluralism as a reflection of social pluralism looks like an appropriate democratic response to social change, especially to social diversity as a consequence of globalization. Such an optimistic interpretation neglects the politics of legal pluralism in which states may or may not respond to demands from citizens for their separate legal traditions to be accepted and implemented (Kyed, 2009). Politics inevitably emerges in any consideration of the role of *Shari'a*, because nation states are based on a system of national sovereignty that presupposes a single coherent legal system (Turner, 2014). While this assumption of legal uniformity may itself be a political myth in the face of customary legal norms and practices that lie outside the national legal system, the attachment to a legal monopoly is an important consideration for most states.

One might also imagine that societies based on a common law tradition would adjust to legal pluralism more readily than societies which support a uniform legal tradition. While colonial societies might allow the practice of tribal or customary law on aboriginal territories, there is an added complication with acceptance of the *Shari'a* against a background of widespread Islamophobia. In European societies, where there has been an influx of Muslims from former colonies, there has been a

general reluctance to recognize or accept Muslim practices such as veiling or female circumcision. Opposition to *Shari'a* can be seen in part as reflecting the growth of Islamophobia.

Britain is one obvious example where, despite a long history of common law and liberal institutions, there has been resistance to *Shari'a* 'courts'. If we take the case of recent British legal history, there has been considerable political opposition to any recognition of the *Shari'a*. The Archbishop of Canterbury's lecture in February 2008 to the Royal Courts of Justice in which he said that the spread of the *Shari'a* into the British legal system was almost 'inevitable' was greeted with shock and disbelief (Milbank, 2010). As various chapters in this volume are at pains to demonstrate, *Shari'a* is not law as it is known in the West. This basic misunderstanding in part explains political opposition to *Shari'a* especially in the United States.

Many of Britain's former colonies, such as Singapore, retained a common law framework, but also allowed customary and Islamic legal traditions to continue, within a limited framework, especially with respect to marriage and divorce. In many respects Britain is always a special case. It has no written constitution. Scotland has a separate legal tradition since the Acts of Union in 1707.¹ The House of Lords is an unelected second house based to extent on aristocratic privilege. *Shari'a* councils -perhaps mistakenly called *Shari'a* Courts – have functioned in the United Kingdom since the 1980s. The Islamic Council was established in Leyton East London in 1982. It was set up to address matrimonial issues by reference to Islamic family law. It is a registered charity and not a formal court of law. It exists to offer advice in all matters relating to the family. However, *Shari'a* councils have no official legal or constitutional role in the Britain. Their work consists primarily of adjudicating on religious divorces, usually at the request of women. In short, despite the British tradition of liberalism and democratic right, it leaves few openings for the growth of legal pluralism.

Opposition to Islam customary practices and to the *Shari'a* has been characteristic of France which has inherited a commitment to secularism as a legacy of the French Revolution. In both Britain and France, opposition to *Shari'a* is also a consequence of contemporary politics and a history of colonialism. The United States, where the special role of the Supreme Court is a critical issue, presents an even stronger example of legal and political opposition to 'creeping Sharia'. Several states, for example Texas and Arkansas, have legislated against the possibility of American courts referring the *Shari'a* in their deliberations (Hummel, 2020; Turner and Richardson, 2013). The movement against *Shari'a* has been driven by the American Freedom Law Center and Act for America, which has organized rallies against *Shari'a* across America. However, fear of the growth of *Shari'a* is misplaced for two important reasons. The first is that Sharia is strictly speaking not law, but rather a collection of guidelines for conduct. Secondly the American Constitution expressly denies the authority of any external foreign law. There are however some

¹ But even in the U.K. legal pluralism is demonstrated by the presence of a separate legal tradition in Scotland.

ambiguous areas such as the role of arbitration, especially in marital disputes between parties residing in America who were married outside the United States. While this issue is often debated with respect to *Shari'a*, there are additional legal complexities about the role of arbitration in relation to the work of the courts (Strauss, 2002). In order to make legal judgments during an arbitration process about issues in relation to inheritance, marriage and divorce between a Muslim couple outside the United States, an American judge would have to be familiar with provisions within Islamic tradition.

But have Muslim states shown any enthusiasm for legal pluralism? There is no simple answer to this question as this revised volume testifies. Again, Islamic legal practice in former European colonies has been profoundly influenced by colonial legacies. Wael Hallaq (2005, 2009b) has argued that the *Shari'a* was from its origin and early development the law of clerics, scholars and legal philosophers. It was never state law, but under colonialism the real and pristine meaning and nature of the *Shari'a* was changed and corrupted when it came under colonial jurisdiction and management, becoming part of the state apparatus to control and regulate Muslim societies. Authoritarian Muslim states that use *Shari'a* as an institution that expressed political power to a large extent continued the legal and political traditions of their former colonial masters. However, Muslim states have been subject to popular protests demanding constitutional and democratic reforms. The key example was Arab Spring that began in Tunisia in 2010 in protest against oppressive economic and political conditions. Youth unemployment was a key element as the basis of uprisings that spread to much of North Africa from Morocco to Egypt and eventually to Turkey and Syria. Constitutional reform took place in Morocco and Tunisia, but the general view is that in the long run the uprisings failed, because internal social and cultural divisions within the societies undermined any political unity, and as a result of external influence, especially in Syria where President Asad was supported by Russian military intervention, which saw an opportunity to expand its influence in the Middle East (Bayat, 2017). Although the protests may have failed to achieve democratic reforms, the consequences of the Arab Spring have been long lasting with for example, ongoing conflicts in the Yemen, the struggle in Syria and the multiple problems facing Lebanon. Tunisia remains the test case, where youthful demands for constitutional change and responsible government continue after President Kais Saied suspended parliament and declared a state of emergency. In Egypt Abdul Fattah al-Sisi overthrew a democratically elected President, declared the Muslim Brotherhood a terrorist organization, and imprisoned many thousand citizens suspected of religious extremism. While he supports religious reform and the *Shari'a*, he is opposed by the clerical establishment of Al-Azhar University - the supreme fountain of religious authority in Egypt. The irony of these contemporary conflicts over *Shari'a* is that medieval Egypt in the time of the Fatimid caliphate and Ayyubid dynasty enjoyed some degree of legal pluralism, because the courts of the *dimmi*s – communities living and practicing in Egypt - were protected by the *Shari'a*. As a result, there was considerable co-operation between Jewish and Muslim courts when attempting to settle matrimonial disputes (Ackerman-Lieberman, 2014). In British Egypt, many Egyptian legal arrangements were

modernized, except family and divorce laws which would have been sites of opposition. More recently, Egyptian feminists have been able to exploit some of this legal ambiguity to advance their cause (Sezgin, 2013).

In this volume we have not considered the many Islamic states primarily of central Asia. Islam was clearly incompatible with the dominant ideology of secular communism that was imposed, after much resistance, across the Soviet Union. The Soviet State over time has supported the Russian Orthodox Church as the distinctive religion of the Soviet Union, whereas Muslim Mosques were often seen as locations where anti-Soviet sentiments could be nurtured. To illustrate the fraught relationship between the secular Soviet State, we take one example. Chechnya became an Islamic society in the fourteenth century. Chechnya is made up of three communities. The dominant Chechen community is Islamic. There also are two small communities: Russians and the Ingush a mountain people resisting incorporation into a wider community for centuries. There were several conflicts between Chechens and Russians in the nineteenth century. Under the Communism system, Chechnya went through a process of sovietization, but when the Soviet Union broke up in 1991 Chechnya declared independence and installed the *Shari'a* as the only legal system, following Wahhabism. The two Chechnyan Wars inflicted devastating consequences in the country, including the devastating siege of Grozny. The Russian military adopted a strategy of bombing civilian areas to demoralize both the military and civilian population. After the end of second Chechnyan War, a Jihad was declared and an insurgency was directed by the charismatic Shamil Abu-Idris, who carried out numerous terrorist campaigns inside Russia.

At present neither Russia nor China is prepared to recognize the religious or cultural claims of its various religio-ethnic communities. The conflict between the Uyghurs of Xinjiang province and Chinese states has lasted for centuries. Originally part of the Russian Empire, Uyghurs are a Turkic people and predominantly Sunni Muslims. From the eleventh century, they were members of the Naqshbandi Sufi lodges. They were ruled by their own caliphs. Relations between China and the various ethnic communities of the region cannot be understood in any simple terms such as majority/minority, center/periphery, or primitive/modern mentality. The so-called 'peripheral minorities' have in fact played an important role in influencing contemporary Chinese society and identity. We can only understand these cultural conflicts as political conflicts (Gladney, 2004).

Contemporary conflict with China began in the 1990s when large numbers of Han Chinese began to migrate to Xinjiang province where they came to represent almost half the population. A violent conflict between Uyghurs and Han settlers provided President Xi with the excuse to suppress Uyghur cultural independence by establishing "re-education" centres. This process has been widely condemned as cultural genocide. Obviously, this situation allows for no presence of *Shari'a* in modern day China (Dillon, 2018). However, not all Chinese Muslim minorities have been forcefully suppressed. The Hui are the largest Muslim community which is widely dispersed across China. They have had a degree of religious freedom but short of openly enforcing *Shari'a*. The Hui have not taken up aggressive acts against the state. They have enjoyed some degree of freedom to follow their own customary

practices relation to ritual and everyday life. Matthew Erie (2016) in *China and Islam. The Prophet, The Party and the Law* on the basis of extensive field work argues that ‘customary law’ (minjian) is indeed tolerated by the state. Whether this free space can survive China’s sinicization process remains to be seen. A recent demand by Hui for halal food regulations be enforced has met with resistance. The issue then is, where there is evidence of ‘splittism’ (any movement to leave or divide China) to undermine the national secular culture of the state, there will be repressive actions from the Communist Party hierarchy. Scientific socialism is the only ideology that receives state endorsement. As a result, there is, at least officially, state centralized law throughout central Asia. These examples from Russia and China provide support for the argument that supporting or opposing legal pluralism is always political and not just an evolutionary legal process.

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Chapter 2

Shari'a in the Qur'an: A Word Meaning "Law" or a Metaphor Evoking "Path"?



T. Jeremy Gunn and Omar Sabil

Abstract The meanings of the term “sharī’a” have changed significantly over time. Although the connotations of sharī’a have shifted, there is a tendency, even by scholars, to invoke the term anachronistically. The shifting meanings of sharī’a have contributed in no small part to an increasingly politicized and rhetorically provocative debate, both within and outside of the Muslim world, regarding the contending roles of the modern state, positive law, political Islam, human rights, and Islamic religious values. Sharī’a (as a noun meaning “path”) appears only once in the Quran, where the Prophet Muhammad is instructed to follow God’s path. The word appears only a dozen times in the hadith (statements recounting the words and the actions of the Prophet), and it always is used to signify a path, and particularly a path to water. (The original meaning of “sharī’a” is thus analogous to “tao” in Taoism.) Within 200 years of the Prophet’s death, however, the metaphor of a path was converted into God’s perfect law, albeit knowable only to God. Human beings’ fallible attempts to understand God’s perfect law was known as “fiqh” (i.e., “jurisprudence”). Human beings struggle with fiqh; God alone knows sharī’a. This distinction between God’s sharī’a and human fiqh began to break down in the nineteenth century in large part resulting from the interventions by Europeans who brought their notions of written positive state law and codification into Muslim lands.

Although Muslim regimes did have positive laws (such as for crimes and contracts), they largely did not have positive laws governing religious matters. Under European pressure, the Ottoman Empire began a series of reforms during the second half of the nineteenth century that included the creation of “sharī’a courts.” In British India and Egypt (including the Sudan), the colonial power began to codify and apply “Muslim law”. The French colonial empire in Algeria, Tunisia, Morocco, Senegal, and Mauritania similarly worked to “civilize” and codify the *droit*

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