

CIVIL LAW

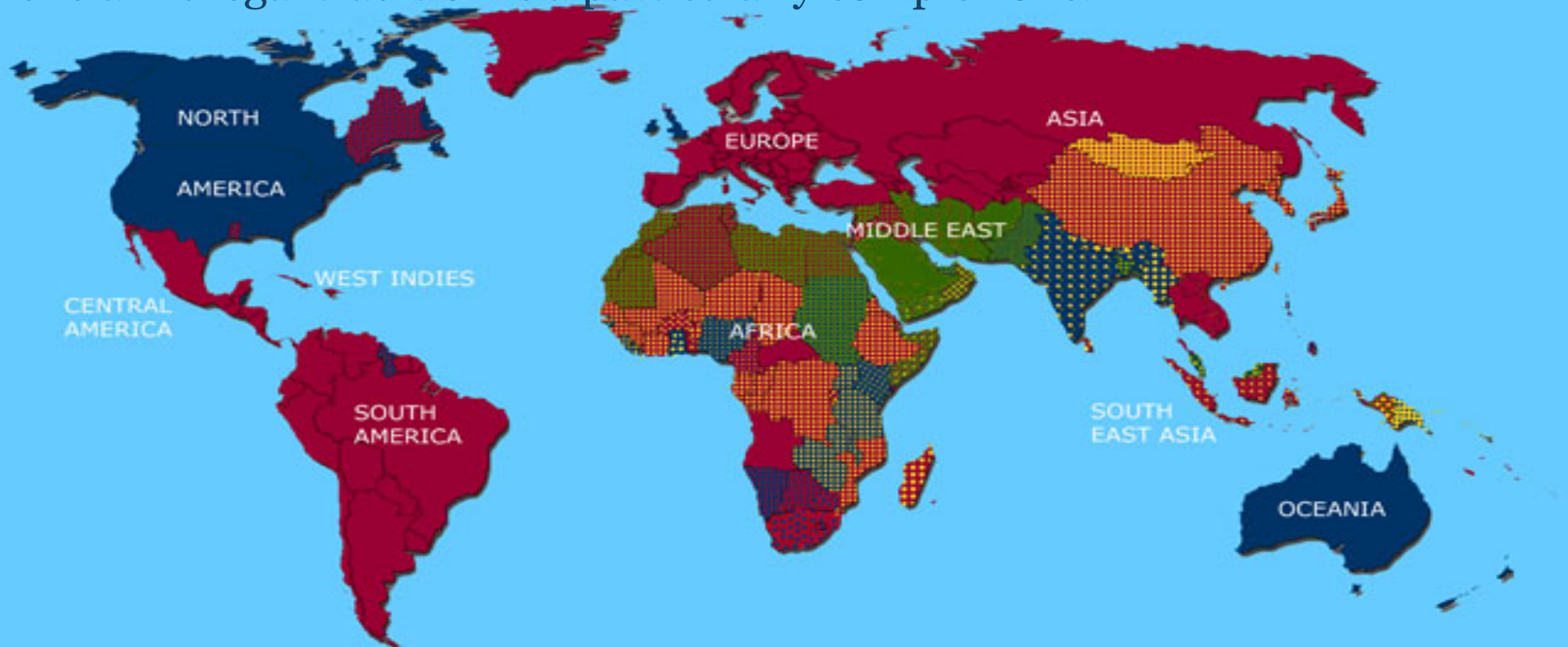
COMMON LAW

MUSLIM LAW

CUSTOMARY LAW

MIXED SYSTEM

The Islamic legal tradition is a particularly complex one.



Part II – Comparative Law Across Legal Traditions

CIVIL LAW

COMMON LAW

CUSTOMARY LAW

MIXED SYSTEM

MUSLIM LAW
MONOSYSTEMS
(Afghanistan,
Saudi Arabia,
Maldives)

MIXED SYSTEMS
OF MUSLIM LAW
AND COMMON LAW
(Singapore, Sudan)

MIXED SYSTEMS
OF MUSLIM LAW
AND CIVIL LAW
(Algeria, Egypt, Iran)

MIXED SYSTEMS
OF CIVIL LAW,
COMMON LAW,
JEWISH LAW, AND
MUSLIM LAW
(Israel)

MIXED SYSTEMS
OF MUSLIM LAW AND
CUSTOMARY LAW
(U.A.E.)

MIXED SYSTEMS
OF MUSLIM LAW,
COMMON LAW
AND CUSTOMARY
LAW
(India, Nigeria)

MIXED SYSTEMS
OF MUSLIM LAW,
CIVIL LAW AND
CUSTOMARY LAW
(Eritrea, Jordan)

MIXED SYSTEMS
OF MUSLIM LAW,
COMMON LAW,
CIVIL LAW AND
CUSTOMARY LAW
(Qatar, Somalia)

8. The Islamic Legal Tradition

What is Shari'a ?

- ▶ Shari'a is historically the 'law of water', "the way of God and the pathway of goodness" **[El Fadl 299]**. It then became an all-encompassing concept embracing the entirety of legal disciplines as developed from within the Islamic tradition.
- ▶ "Shari'a comprises the [...] foundational normative values of [...] the Islamic legal system. For instance, the notion that the divine will cannot be represented by a single system of fiqh; [...] the idea that the Islamic legal tradition protects five fundamental values: (1) life; (2) intellect; (3) reputation or dignity; (4) lineage or family; (5) property". **[El Fadl 302]**.
- ▶ "Claiming that a positive legal commandment is not a by-product of fiqh but is essentially part of Shari'a effectively endowed such a commandment with immunity and immutability". **[El Fadl 303]**

8. The Islamic Legal Tradition

What is Shari'a ?

Two written sources: the Qur'an and the Sunnah (compilation of hadith)

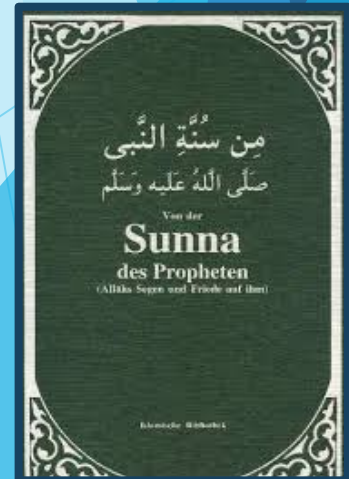
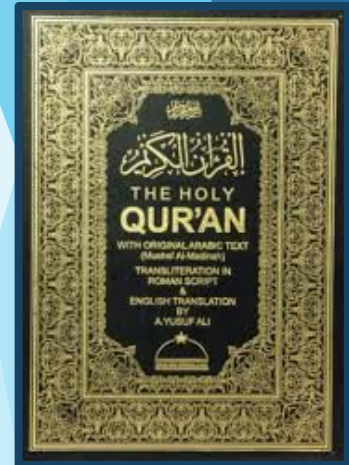
Qur'an: 80-500 verses on law

Family law: polygamy, repudiation as a prerogative for husbands only, men as 'protectors' of wives and families

Succession law: default and testamentary succession

Criminal law: lex talionis and hudud crimes, "the category of divinely ordained punishments that apply to violations committed against a class of mixed rights which are shared by God and human beings" [El Fadl 208]

Sunnah: sayings (hadith), actions, and silence of the Prophet. No official version: Sunnis and Shi'is refer to different texts (e.g. mut'a)

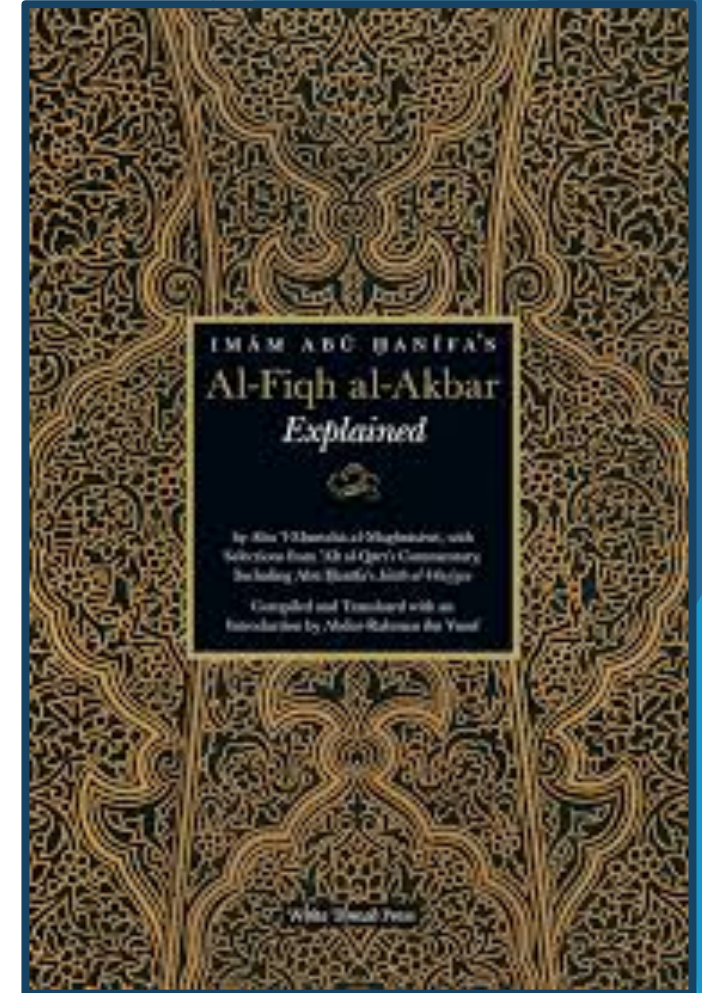


8. The Islamic Legal Tradition

What is Shari'a ?

Interpretive sources: the fiqh

“Legal schools that dominated the practice of law for more than three centuries after the death of the Prophet. [...] The founders of the schools of fiqh, and the early jurists in general, did not intend to generate binding legal precepts. Rather, acting more like law professors and legal scholars, they produced legal opinions and analysis, which became part of the available common law to be adopted by state-appointed judges in the light of regional customary practices”. **[El Fadl 303]**



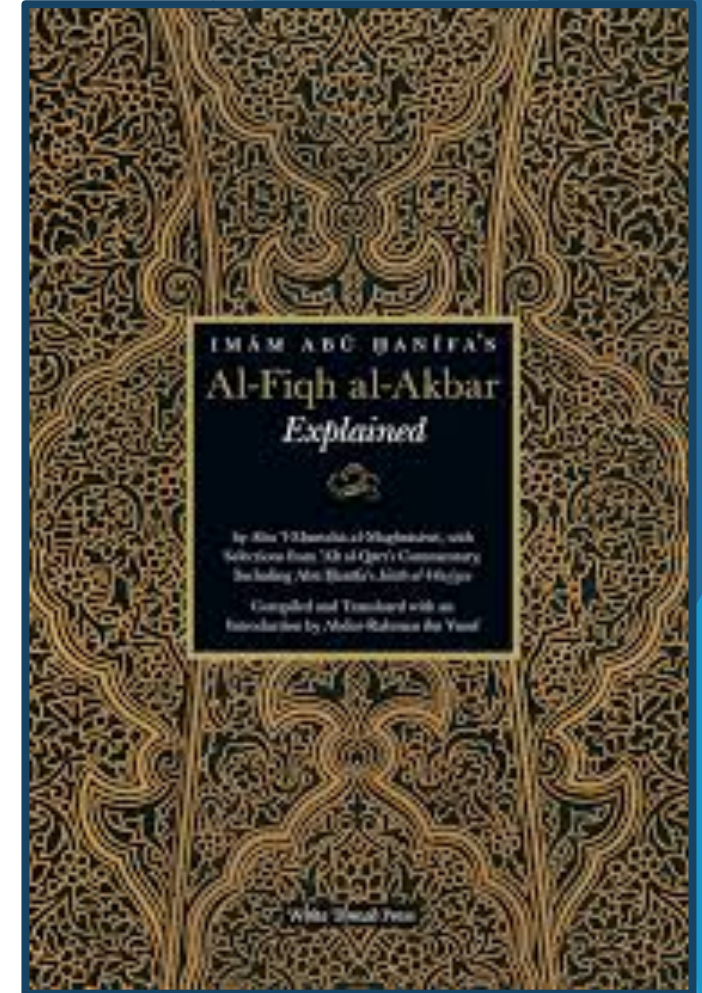
8. The Islamic Legal Tradition

What is Shari'a ?

Interpretive sources: the fiqh

“One of the most entrenched myths about Islamic law is that the legal system ceased to develop or change from the 10th or 11th centuries CE because, fearing diversity and fragmentation, the so-called ‘doors of ijtihad’ were declared forever closed. [...] This myth seems to have emerged in the 19th century as a simplistic explanation of the purported stagnation of the Islamic legal system and as justification for the legal reforms of the time, which in reality amounted to little more than the importation of European legal systems”. **[El Fadl 304]**

Part II – Comparative Law Across Legal Traditions



8. The Islamic Legal Tradition

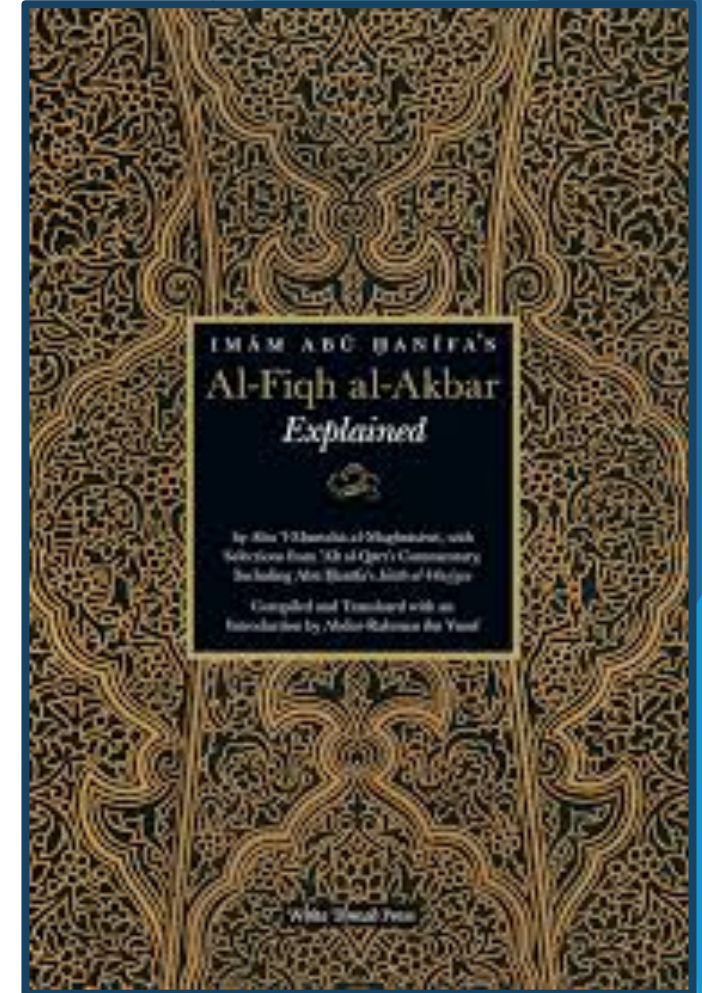
What is Shari'a ?

Interpretive sources: the fiqh

“The jurist method and the linguistic practices of cumulative communities of legal interpretation became not only the mechanism for legitimacy and authority, but also the actual source of law.

As a community of guilded specialists with an elaborate system of insignia and rituals, in most cases structured around a system resembling the Inns of Court in England, the jurists played a critical role in upholding the rule of law and in mediating between the masses and rulers”. **[El Fadl 305]**

Part II – Comparative Law Across Legal Traditions

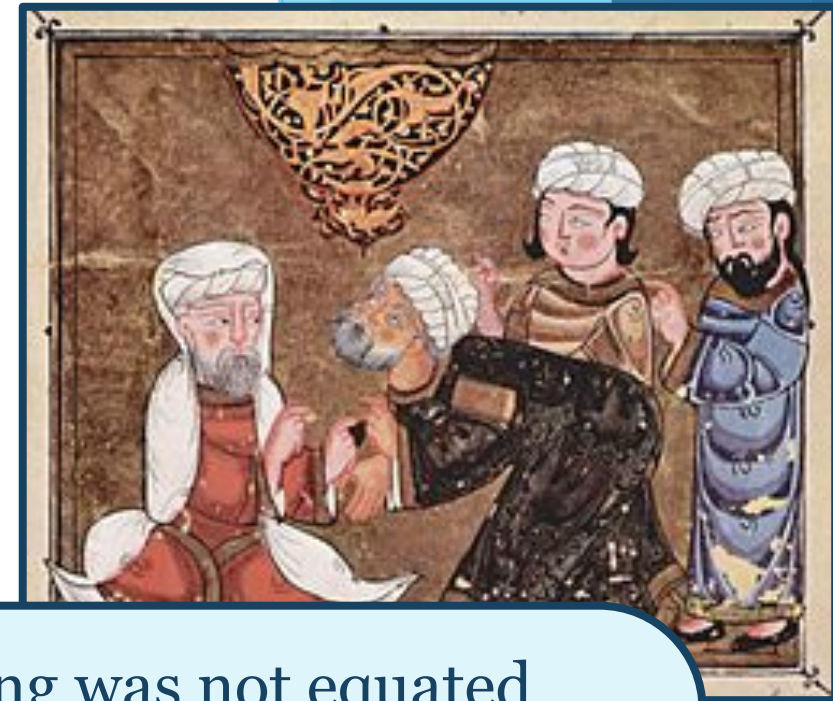


8. The Islamic Legal Tradition

What is Shari'a ?

Interpretive sources: the qadi

A judge ruling in accordance with Islamic religious law, appointed by the ruler of a Muslim country.



“In Islamic jurisprudence a court’s judgment or finding was not equated with or considered the same as God’s judgment. At a normative level, a court’s judgment could not right a wrong or make wrong a right and it could not negate or replace the duties and responsibilities imposed by an individual’s conscience. Jurists argued that individuals do have an obligation to obey court decisions as a matter of law and order, but judicial determinations do not reflect or mirror God’s judgment”. [El Fadl 307]

8. The Islamic Legal Tradition

What are the main features of the Islamic legal tradition ?

- ▶ Islamic legal cultures are essentially interpretive.
- ▶ The gaps, obscurity and indeterminacy of many prescriptions have traditionally allowed interpreters to flexibly read the rules in light of the demands of time and place.
- ▶ The distinction between Shari'a and fiqh has legitimated the practice of legal pluralism in Islamic history.
- ▶ Against this framework, State law (siyasa) has a role in law making and enforcement, but this role is a relatively minor one – the essentially point is the law of God, not the law of the State.

There were “competing schools of thought of fiqh”. [El Fadl 307]

8. The Islamic Legal Tradition

What are the main features of the Islamic legal tradition ?

Classical Islamic law – far from being rigid and monolithic – is flexible and pluralistic.

Many myths about Islamic law were simply created by the encounter between the Islamic legal culture and the Western world in the 19th century.

hudud crimes
and penalties

In classical Islamic law hudud penalties were rarely applied
Hudud crimes are to be judged by God, not by humans
'Any doubt must serve to suspend the application of the hudud'
'Forgiveness is better than punishment'

talion law

Qur'an, Bible and Hammurabi Code (18th century BCE)

8. The Islamic Legal Tradition

Is Islamic law compatible with (Western) democracy ?

‘Shura’ (electoral process) and ‘bay'a’ (consultative process) are mentioned in classical texts, yet do not seem to reach the threshold of democratic theory.

Shamseddin al-Sarakhsi (1090 CE)

“Is the granting by the Emir of Khurasan to an individual of a right of irrigation from the waters of a great river valid, when the right was not established before, or if the individual had irrigation established and the Emir increased this measure and granted him that right over a land which may or may not be on the land of a third party?”

8. The Islamic Legal Tradition

Is Islamic law compatible with (Western) democracy ?

Shamseddin al-Sarakhsi (1090 CE)

“If this decision of the Emir harms the public, it is prohibited, and it is permissible if it doesn't [...] So in case there is no such harm, the grant is valid for the grantee, but if harm occurs, the grant would be harmful to the public and the sultan is not allowed to carry it out. In the case of harm to the public, each individual can ask for the order's rescission, for the ruler would be impairing the individual's right. The ruler has only authority to collect his rights of the public and not the authority to impair them, and that only in a way which does not harm the public”. In the case at hand, “the grant should not have taken place [...] and it is not permissible for the Emir to empty a man's right of irrigation over his land to the benefit of another, and the right must be given back to the original beneficiary and to his heirs”.

8. The Islamic Legal Tradition

Is Islamic law compatible with (Western) rules on adoption ?

Qur'an 33:4: "Allah has not made for a man two hearts in his interior. And He has not made your wives whom you declare unlawful your mothers. And he has not made your adopted sons your [true] sons"

Kafalah can be defined as 'the commitment to voluntarily take care of the financial support, of the education and of the protection of a minor, in the same way a parent would for a child'. It is implemented through the appointment – judicial or by notarial deed – of a guardian, the *kafil*, with a view to providing assistance to a minor, the *makful*, who however never becomes the son of the *kafil*.

8. The Islamic Legal Tradition

Is Islamic law compatible with (Western) rules on adoption ?

Muslim countries refuse (both national and international) adoptions.

At the same times, Western countries have difficulties in qualifying the *kafalah* and its status in transnational settings. For instance, should a Moroccan orphan, put by a Moroccan court under the *kafalah* of an Italian couple living in Morocco, be allowed to apply for a visa of family reunion when the Italian couple moves back to Italy?

Italian Court of Cassation, Plenary, 16 September 2013, no 21108: the *kafalah* system cannot be equated to adoption. However, Italian rules on 'relatives' entitled to apply for family reunion should be interpreted extensively, and should include children under *kafalah*, if this is in their best interest.