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Title

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Journal

Berkeley Journal of Middle Eastern & Islamic Law, 2(1)

Author

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Publication Date

2009-04-01

DOI

10.15779/Z38KW2K

Peer reviewed

Techniques and Limits of Legal Reasoning in Shari'a Today

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The history of Islamic law is often presented as a narrative of development and discontinuity.¹ The developmental phase arose after the death of Prophet Muhammad in 632, when his companions and later generations struggled with how to authentically and authoritatively

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1. For examples of this narrative, see generally KHALED ABOU EL FADL, *SPEAKING IN GOD'S NAME: ISLAMIC LAW, AUTHORITY AND WOMEN* (2001) and Wael Hallaq, *Can the Shari'a Be Restored?*, in *ISLAMIC LAW AND THE CHALLENGES OF MODERNITY* 21-54 (Yvonne Haddad & Barbara Stowasser eds., 2004).

determine norms of human conduct that uphold the eschatological desire for paradise as opposed to demise in hell. The eschatological consequences of human social action were, theoretically, incentives to develop a normative tradition to guide human beings in their search for God's approval. In other words, Islamic law would offer a way for the Muslim believer to "get good with God." In the premodern period, the existence of legal professionals, licensing procedures, curricula, and training centers made possible an Islamic rule of law system that ensured transparency, accountability, and expertise.² From this earlier period, we find various sources that illustrate an awareness, among jurists at least, of a difference between the juristic class and the laity, and an appreciation of what is required to advance from the latter to the former.³

That difference has arguably diminished and narrowed, due in large part to a discontinuity in the *shari'a* as a rule of law system, as witnessed by the instances in which the *shari'a* has been removed and replaced by other legal traditions. Examples include the Ottoman Tanzimat, when the Sultan relied on European-inspired codes to reform the legal system, and the colonial era, when imperial powers imposed their own laws on the region or attempted conciliation between their own system and the limited Islamic doctrine still enforced. In the process of reforming and supplanting old legal systems, the nature of legal education and the legal profession shifted, emphasizing secular legal education and skills.⁴ While a premodern *madrassa* student would have delved deeply into the

2. While there are ongoing debates about the meaning of "rule of law," I use the term here to suggest how law is more than simple abstract doctrines; it incorporates institutions of learning, adjudication, enforcement, and so on—all of which embed law in the social, economic, and political fabric of a society. This is not to suggest that "rule of law" only adds an institutional dimension to the doctrinal rules. Rather it is meant to suggest that the contrast between Islamic law as "rule of law" and as "a system of rules" captures an important difference about how law is experienced and made manifest in the world of every day experience. For studies on "rule of law," see BRIAN TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004); Randy Peerenboom, *The Future of Rule of Law: Challenges and Prospects for the Field*, 1 HAGUE J. ON THE RULE OF L. 5, 5-9 (2009) (writing about the need for ongoing research about what might constitute an Islamic rule of law system).

3. See, e.g., Ibn Rushd al-Hafid, *The Definitive Statement: Determining the Relationship Between Divine Law and Human Wisdom*, in TWO ANDALUSIAN PHILOSOPHERS: ABU BAKR MUHAMMAD IBN TUFAYL & ABU'L WALID MUHAMMAD IBN RUSHD 75-110, 81 (Jim Colville trans., 1999).

4. See Lama Abu-Odeh, *The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia*, 52 AM. J. COMP. L. 789, 824 (2004).

study of the Qur'an, prophetic traditions, and related fields,⁵ the modern law student in the Muslim world works with codes of various sorts, many of which are drawn largely from European inspiration.⁶

The independence of new Muslim states perpetuated, developed, and enhanced the existing legal system put in place during the colonial period. This is not to say that there was no effort to create an Islamic milieu in such legal systems. When 'Abd al-Razzaq al-Sanhuri drafted the Egyptian Civil Code of 1949, he relied heavily on the French Civil Code, but was mindful of the potential contribution of Islamic law to the Egyptian legal order. Defining *shari'a* by reference to the premodern rules of law (or *fiqh*) could fill in any lacuna in the Code or customary law, so long as no *fiqh* ruling contravened a general principle of the Code.⁷ Indeed, in the modern legal curriculum of law schools in the region, such as Jordan for instance, students must take two or three courses on Islamic law during a full course of legal study.⁸ But it is important to note that while Islamic law is certainly present, it is subsumed within a contemporary system of law, is often defined as a body of premodern rules, and is significantly circumscribed in its application in modern legal systems.

Importantly, today both state and non-state actors invoke Islamic legal arguments to serve their own respective ends. Those ends may be to claim political legitimacy, to oppose a ruling regime by attacking their authority, or to fashion community identity in opposition to a threat, whether real or perceived. For Islamic law to serve such a political function, it must be understood as a fairly determinate system of legal rules. Indeed, as I have suggested elsewhere, *shari'a* is more often than

5. GEORGE MAKDISI, *THE RISE OF COLLEGES: INSTITUTIONS OF LEARNING IN ISLAM AND THE WEST* 80 (1981).

6. Lama Abu-Odeh, *Commentary on John Makdisi's "Survey of AALS Law Schools Teaching Islamic Law,"* 55 J. LEGAL EDUC. 589, 589-91 (2005); see Abu-Odeh, *supra* note 4, at 790-91 (emphasizing the role of European transplants in displacing the jurisdiction of a historically defined Islamic law in the Muslim world).

7. I 'ABD AL-RAZZAQ AL-SANHURI, *AL-WASIT FI SHARH AL-QANUN AL-MADANI AL-JADID* 44-50 (Ahmad Al-Maraghi ed., 2007).

8. Abu-Odeh tells of her own legal education in Jordan, where she took only three courses on Islamic law (marriage and divorce, inheritance and wills, and Islamic jurisprudence) over a four year legal curriculum. See Abu-Odeh, *supra* note 4, at 791.

not understood as a system of rules, rather than a rule of law system.⁹ This rarified conception of *shari'a* is politically significant because the resulting determinacy allows the legal doctrine to become a basis on which claims of identity, legitimacy, and opposition can rest. Consequently, attempts to shift that conception, or even to reform the prevailing rules themselves, will destabilize their efficacy as instruments of certain political agendas, and thereby invite opposition.

This article will illustrate the political role *shari'a* plays, and how that role is in part made possible by a reductive view of *shari'a*, which has and will continue to hinder those seeking reform or change. The article proceeds in three parts. In the first part, I illustrate how the politics of identity and community will limit the scope and extent of innovative *shari'a* reasoning and analysis through a case study of Mindanao in the Philippines. This is distinct from asking whether the history of Islamic legal analysis offers an analytic model for complex reasoning that can take into account the multitude of interests at stake in any given legal controversy. In Part II, I address a particular analytic model in premodern Islamic legal sources that offers a site for deliberative legal reasoning. To show how this model could be used to think creatively about *shari'a* in the modern state, I devote Part III to a discussion of polygyny. Reviewing premodern debates on polygyny, I show that a premodern legal heuristic on “rights” and “duties” can offer contemporary jurists an entry point into past and present *shari'a* debates about the social values, interests, and rights that help to characterize the modern nation state. But while this approach may illustrate a way to think about the premodern tradition within the modern state, it also threatens to disturb the determinacy of the law, and thus likely will remain on the periphery of contemporary Islamic legal debates.

I. *SHARI'A* AND COMMUNITY IN MINDANAO

The Muslims of Mindanao are a particularly fascinating case study of how Islam in general, and *shari'a* discourses in particular, have contributed to contemporary debates about identity, regional autonomy, and competing assertions of sovereignty and self-determination. The

9. See generally Anver M. Emon, *Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation*, 87 CAN. BAR REV. 391, 391-425 (2009); see also Anver M. Emon, *Conceiving Islamic Law in a Pluralist Society: History, Politics and Multicultural Jurisprudence*, SINGAPORE J. OF LEGAL STUD. 331, 331-55 (2006).

history of Islam in this region is not fully recorded or understood. Yet the brief account narrated below offers an entry point for better understanding the significance of Islam and *shari'a*.

Conflict has plagued the Southern Philippines since 1566, when newly-arrived Spaniards encountered Muslims in their colony, only after having expelled Muslims from Spain in 1492. For the three centuries of colonial rule, “both missionary and economic interests – the need to colonize both territory and minds – drove the Spanish” in their attempt to bring the region under their sway.¹⁰ Despite these efforts, however, most of Muslim Mindanao remained insulated from Spanish influence. The Spanish colonial power failed to subjugate its Muslim subjects in the region—but its angst towards the Muslims of the south passed to Catholic Filipinos.¹¹ Indeed, the dichotomies of identity that exist in the region today—Christian and Muslim, Western and Eastern, and even civilized and uncivilized—are part of the Spanish legacy in the region that has lingered, “radically dichotomizing Philippine cultures in ways that continue to mar Philippine society to this day.”¹²

The United States took control of the Philippines from Spain pursuant to the Treaty of Paris (1898), which marked the end of the Spanish-American War.¹³ That same year, the Philippines declared independence, although its claim was not initially recognized by either Spain or the United States, the latter formally doing so nearly a half century later in 1946.¹⁴ Although United States forces dominated Muslim rulers in the south, they nonetheless governed Mindanao as a unit separate from the rest of the Philippines, a trend that would continue

10. Jeffrey Ayala Milligan, *Teaching between the Cross and the Crescent Moon: Islamic Identity, Postcoloniality, and Public Education in the Southern Philippines*, 47 COMP. EDUC. REV. 468, 470 (2003).

11. Michael O. Mastura, *Administrative Policies Towards the Muslims in the Philippines: A Study in Historical Continuity and Trends*, in MUSLIM FILIPINO EXPERIENCE: A COLLECTION OF ESSAYS 64, 64-66 (1984).

12. Milligan, *supra* note 10, at 470.

13. The Treaty required Spain to cede control of the Philippines in exchange for a \$20-million-dollar payment by the United States. For general information about the Spanish-American War, see Library of Congress, Hispanic Division, “Spanish American War Introduction,” <http://www.loc.gov/rr/hispanic/1898/intro.html> (last visited March 16, 2009).

14. For a general overview of Philippine history, see generally RONALD E. DOLAN, PHILIPPINES: A COUNTRY STUDY (1991), available at <http://countrystudies.us/philippines>.

under the Philippine government.¹⁵ Attempts to gain a foothold over the region included officially-sponsored migration of settlers into Mindanao, resulting in a significant decline in the number of Muslims there. While Muslims comprised three-quarters of the population in the early twentieth century, that percentage dropped to one-third by 1939, and dropped further to one-fifth by 1990 as migration gained pace after World War II.¹⁶

The Philippines's newly-acquired sovereignty and independence did little to integrate the Muslims of Mindanao who took an increasingly hostile stance against the government. Tensions between the Philippine government and Mindanao continued to mount when Ferdinand Marcos came to power in 1965.¹⁷ Spurred by poverty, political marginalization, and government-sponsored migration of Christians into Muslim regions,¹⁸ Muslims heightened their attack against the Marcos regime when he declared martial law in 1972 (thereby effectively retaining power and sidestepping constitutional term limits).¹⁹ Marcos also faced pressure from Muslim governments and the Organization of the Islamic Conference (OIC) concerning the conflict in Mindanao and the claims of the Moro²⁰ National Liberation Front (MNLF) against the Philippine government.

Importantly, in this period, Islam became a galvanizing force around which Muslims of Mindanao organized themselves, defined their identity, and determined their collective interests. Agitated by what they perceived to be their marginalized existence and their ongoing fears about their future in the country, Muslims experienced

15. See Steven Rogers, *Beyond the Abu Sayyaf: The Lessons of Failure in the Philippines*, FOREIGN AFF., Jan.-Feb. 2004, at 15, 16 (providing a short narrative of the conflict in Mindanao).

16. Paul Dimond, *The Philippines: Fragile Democracy or Strong Republic?*, 37 ASIAN AFF. 210, 214 (July-Aug. 2006). On the issue of migration and land settlement, see Daniel Joseph Ringuet, *The Continuation of Civil Unrest and Poverty in Mindanao*, 24 CONTEMP. SE. ASIA 33, 36-37 (Apr. 2002).

17. Ringuet, *supra* note 16, at 39.

18. Dimond, *supra* note 16, at 213-14; Eliza Griswold, *Waging Peace in the Philippines*, SMITHSONIAN, Dec. 2006, at 82; Milligan, *supra* note 10, at 473.

19. Dimond, *supra* note 16, at 213-14.

20. The term "moro" was used by the Spanish as they were fighting the Muslims in the Iberian peninsula and North Africa during the Reconquista. The term "moor" came from "moro." For a short description of how "moro" came to be applied to Muslim Filipinos, see Mastura, *supra* note 11, at 64-65.

fear of being alienated from their religion; fear of being displaced from their ancestral home; fear of having no future in [the Philippines] because they really do not participate in its government nor share fully in its economy; and the fear of losing cherished values, customs and traditions.²¹

Islam had become a symbol of identity that allowed the Muslims of Mindanao to transcend regional, ethnic, and linguistic affiliations, situating them politically and socially in contraposition to the majority Catholic populace. “[Islam was], to an extent, an acknowledgement of one’s marginalization from that mainstream.”²² Indeed, groups like the MNLF and Moro Islamic Liberation Front relied (and continue to rely) on Islam to varying degrees as an important index of their organizational and national identity,²³ as such groups “engage[d] in community-level organization, enjoy[ed] mass membership bases, [had] genuine political agendas, and (with exceptions) generally limit[ed] their violence to military targets.”²⁴ In other words, their reliance on Islam and Islamic law as inherent to Muslim identity was both an end itself and tied to their demand for autonomy or secession.²⁵

With the cooperation of the OIC and MNLF, Marcos agreed that if the MNLF terminated its hostilities against the Manila government, the government would recognize the autonomy of thirteen Muslim-dominated provinces in Mindanao. With the support of Libya’s Colonel Qaddafi, both sides signed the Tripoli Agreement in 1976, which Marcos

21. U.N. Development Programme [UNDP], *Institutional Strengthening of the Shari’a Justice System (Phase I) Final Report (June 2004)*, § 2 ¶ 4.3.1 (p. 53), SC UNDP PHI/01/001 (prepared by the Center for Public Resource Management Consultant), available at [http://apjr.judiciary.gov.ph/pubreports/Shari’a Final Report.pdf](http://apjr.judiciary.gov.ph/pubreports/Shari’a%20Final%20Report.pdf) [hereinafter “Institutional Strengthening”]; see also Milligan, *supra* note 10, at 471.

22. Milligan, *supra* note 10, at 475. See also *id.* at 473 (“Beginning in the 1950s, as government-sponsored migration of Christian Filipinos...to Mindanao put increasing pressure on Muslims’ landownership, and accelerating in the 1970s as the resulting tensions erupted into armed conflict, Islamic identity has risen as a profoundly important factor in Philippine society, politics, and education.”).

23. This is not an unusual phenomenon in various parts of the Muslim world, where anti-colonial groups relied on Islamic ideals to galvanize popular support against occupying forces.

24. John Gershman, *Is Southeast Asia the Second Front?*, FOREIGN AFF., July-Aug. 2002, at 60, 67. On the other hand, the Abu Sayyaf Group is considered a terrorist organization with links to al-Qa’ida, and blurs “the edges between criminal gangs and militias.” *Id.* It is currently fighting the Manila government in the southern Philippines, but its agenda is not entirely clear. See also Griswold, *supra* note 18, at 82; James Hookway, *A Dangerous New Alliance*, FAR E. ECON. REV., May 6, 2004, at 12, 12.

25. See Gershman, *supra* note 24, at 60, 67.

thereafter put into effect through a series of legislative and executive decrees.²⁶ The Code of Muslim Personal Law (CMPL) was one such decree.

Also known as Presidential Decree 1083, the CMPL granted Muslims the ability to order their family and personal affairs pursuant to a codified version of Islamic law. In doing so, Marcos sought to enhance harmony by recognizing diversity, as the Decree's preamble suggests:

WHEREAS, pursuant to the spirit of the provision of the Constitution of the Philippines that, in order to promote the advancement and effective participation of the National Cultural Communities in the building of the New Society, the State shall consider their customs, traditions, beliefs and interests in the formulation and implementation of its policies;

...

WHEREAS, it is the intense desire of the New Society to strengthen all ethno-linguistic communities in the Philippines within the context of their respective ways of life in order to bring about a cumulative result satisfying the requirement of national solidarity and social justice.²⁷

Indeed, the CMPL marked a departure from a Philippine family law undeniably influenced by the Catholic majority. Under the Family Code of the Philippines, issued in 1987 by President Corazon Aquino, a married couple cannot divorce, but rather can only seek an annulment or legal separation.²⁸ In contrast, Muslims can marry and divorce under the CMPL. The two legislative enactments offered different methods of marital dissolution, codifying different legal regimes, and, as I argue here, competing sites for debates on identity— religious, political,

26. See Rogers, *supra* note 14, at 16 (providing a brief political narrative of the tensions between Mindanao and Manila).

27. A Decree to Ordain and Promulgate a Code Recognizing the System of Filipino Muslim Laws, Codifying Muslim Personal Laws, and Providing for its Administration and for Other Purposes, Pres. Dec. No. 1083, Preamble, Paras. 1, 4. (Phil.) [hereinafter Code of Muslim Personal Law], available at http://www.uniset.ca/phil/phil_musl_civ_code.pdf.

28. See The Family Code of the Philippines, Exec. Ord. No. 209, Arts. 45, 55, 56, 63(1) (July 6, 1987) (Phil.), available at <http://www.chanrobles.com/executiveorderno209.htm>. Article 45 of The Family Code of the Philippines provides various grounds upon which a party can seek to annul his or her marriage. Article 55 likewise lists numerous grounds upon which a couple can seek legal separation, including physical abuse, sexual infidelity, or where one party is addicted to drugs or identifies as gay or lesbian. Notably, under Article 56, a decree of legal separation will be denied if there is evidence of collusion between the parties to seek legal separation, or if both parties provide independent grounds for legal separation. A decree of legal separation is significant because while it allows both parties to live apart, "the marriage bonds shall not be severed." *Id.* Art. 63(1). I wish to thank Philippine Justice Jainal Rasul (retired) for bringing this fact to my attention.

economic, and social. Whatever its original context, the CMPL did more than supply legal regulations for managing the personal relations between Muslims; it provided determinate Islamic content to ongoing debates about Muslim religious and political identity, both inside and outside Mindanao.²⁹

The CMPL relies on a concept of *shari'a* as a system of rules as opposed to a rule-of-law system. Article 15, for instance, requires giving a *mahr* or dowry to the bride in order for the marriage contract to be valid.³⁰ Article 27 allows Muslim men to marry up to four wives, as long as they treat their co-wives equally.³¹ Finally, Article 29 allows a woman to remarry upon divorce after observing a three-month *'idda* or waiting period.³² In laying out the CMPL, the CMPL drafters took a cue from the *Luwaran*—a well-known manual of Shafi'i *fiqh* that was developed during Muslim rule in the region and used by Muslim judges in the adjudication of disputes.³³ Although the CMPL's provisions are limited to personal status or family law, it parallels *fiqh* rules found in premodern Islamic legal treatises like the *Luwaran*.³⁴ By pressing for

29. This is not to suggest that all contests about *shari'a* are reducible to the political, since the political is made possible by the various modes of religious experience. Indeed, for many Muslim Filipinos, their religious identity can be defined in opposition to the CMPL. Even then, however, the CMPL nonetheless figures into the calculus of Muslim identity in Mindanao and elsewhere in the region. The CMPL, for our purposes, offers a focal point for addressing the varying meanings of *shari'a*, irrespective of how Muslims relate to their religious identity.

30. Code of Muslim Personal Law, *supra* note 27, Art. 15.

31. *Id.*

32. *Id.*

33. The *Luwaran* includes selected Shafi'i legal doctrine in the vernacular, a list of penalties and injuries with a schedule of compensatory amounts, marginal notes from Arabic sources on Islamic law, and matters pertaining to dowry for marriage purposes. This is according to Michael Mastura, one of the CMPL drafters, and, as of this writing, the president of the Sultan Kudarat Islamic Academy, Cotabato City, Mindanao. I had the pleasure of meeting Mr. Mastura in Cotabato at the Academy on July 1, 2007, during which we discussed many of the issues addressed in this Article about the CMPL. I want to thank him and The Asia Foundation for making that meeting possible. See MICHAEL O. MASTURA, *The Maguindanao Sultanate and Polity: Relevance to the Emergent Philippine State*, in MUSLIM FILIPINO EXPERIENCE: A COLLECTION OF ESSAYS 29, 40 (1984). Moreover, the text contains eighty-five articles concerning such subjects as property, contracts, debts, oaths and testimony, marriage, divorce, and inheritance. *Institutional Strengthening*, *supra* note 21, at § 2 ¶ 4.2.10 (p. 53).

34. The CMPL is in no way a comprehensive code of Islamic law, but rather contains selected provisions on marriage, divorce, inheritance and custody. It does not include customary traditions (i.e. *'adat*) that have influenced the normative framework of Muslims in Mindanao.

this statute and imposing it as a decree, the Marcos government institutionalized how Islamic law would take shape and be understood for generations of Muslims living in the region (for whom, as I argue above, the CMPL is an index of identity).³⁵ Thus, even as Muslims called for improvements to the *shari'a* justice system, their conceptual understanding of *shari'a* was framed by the CMPL, limiting the scope of ongoing legal analysis that can occur.

Reflecting concerns about the quality of and access to justice—including the training of *shari'a* judges and lawyers, the physical existence of courts, and the efficacy of the *shari'a* court in comparison with other courts of first instance—such calls for improvement led to a research project sponsored by the Supreme Court of the Philippines and the United Nations Development Programme (UNDP) entitled “Strengthening the *Shari'a* Justice System (Phase I)” to study the history, content and structure of *shari'a* justice in Mindanao.³⁶ The report recommended the “integration of Muslims into the mainstream Philippine Society” through reform of *shari'a* courts in order to “facilitate the development and realization of a Philippine Islamic society that respects the rule of law.”³⁷ Such reform would be governed by the principle of integrating *shari'a* without conflicting with national laws, “equal protection and gender equality,” and “human rights.”³⁸ In seeking to reform the *shari'a* court system in accordance with this rule-of-law principle, however, the report called for changes not only to institutional design and capacity, but also to the substantive doctrine of the CMPL.

This imperative to integrate Islamic law with the national legal system, and its effect on defining the content of *shari'a*, troubled *shari'a*

35. Importantly, the Autonomous Region of Muslim Mindanao is not limited to the CMPL as the sole and exclusive expression of Islamic law. Rather it has the ability to pass criminal legislation in accordance with Islamic law. *Institutional Strengthening*, *supra* note 21, at § 3.4 ¶ 2.1.6 (p. 89).

36. *See generally id.* The report’s key findings show that the *shari'a* courts have a low case-load, are not easily accessible to parties, and compete with other forms of dispute resolution, both formal and informal. *Id.* at § 1 ¶¶ 2.2.1-2.2.2 (pp. 11-12). Moreover, the study shows that despite low caseloads, the courts are slow to dispose of cases. *Id.* at § 1 ¶ 2.2.6 (p. 14). Finally, the report raises concerns about the attitude and industry of *shari'a* judges, and the quality of their training and performance, thus raising serious worries about their contribution to enhancing respect and commitment to the rule of law. *See id.* at § 1 ¶¶ 3.1.1-3.1.9 (pp. 17-19)

37. *Id.* at § 5 ¶ 3.2 (p. 133).

38. *Id.* at § 5 ¶ 4.1.1 (p. 133).

court judges who raised a distinction between accommodation and integration, noting that although the CMPL “clearly recognizes the need for accommodation” it does not necessitate “integration or reconciliation between Islamic and Philippine laws.”³⁹ In other words, accommodation is preferable in the eyes of these *shari’a* court judges because it would allow both systems of law to co-exist, whereas integration required changes that merge the substance of both systems—changes which disrespect the fact that Islamic rules, “[b]eing of divine origin[,] are essentially immutable, unrepealable, complete, perfect and final.”⁴⁰ The *shari’a* court judges’ definition of *shari’a* presumed a system of rules that cannot be changed, leaving no room to negotiate over the terms of the CMPL. Consequently, although imposed by Marcos to quell Muslim fears and gain political leverage, the CMPL has taken on a new role in the lives of Muslims in the Philippines and their relationship to the state as citizens with multiple identities.⁴¹

While conceding that more should be done to increase judicial competence legitimacy, and aware of the CMPL’s limitations and bias against it by the *ulema*, the *shari’a* court judges nonetheless felt these objections should be overcome in the interest of increased *shari’a* justice in the region.⁴² This suggests that the CMPL does more than regulate family law matters among Muslims, but constitutes a site of ongoing debate among Muslims and between Muslims and the larger Philippine society about the history and future of Muslims in the country. To repeal the CMPL in the interest of greater integration with Philippine law or to introduce greater indeterminacy in the prevailing conception of *shari’a* would threaten the constitutive power that a rule-based approach to *shari’a* could have for a community seeking to find a political voice.

The case of Mindanao more generally demonstrates how a rule-based concept of *shari’a* may serve certain political purposes that can challenge efforts to reframe *shari’a* as anything less determinate than a code-like system of rules. The debates about the CMPL in the Philippines are embedded in a post-colonial context of power, dominance, identity and definition of the Muslim community in

39. *Id.* at vii-viii.

40. *Id.* at viii.

41. This is despite a bias among the *ulema* (Muslim scholars) against the codification of *shari’a* rules, as well as a “marked condescension” toward *shari’a*-court appointments of judges who have had the benefit of only 45-day training courses and a few lectures, which “barely suffice for gaining judiciary expertise.” *Id.* at ii.

42. *Id.* at i-ii.

Philippine society. Yet the rule-like content of *shari'a* reflects a rather narrow and conceptually-thin approach to *shari'a* as compared to the premodern debates discussed below.

II. TECHNIQUES OF LEGAL REASONING IN PREMODERN ISLAMIC LAW

Islamic history shows that jurists developed techniques of legal reasoning that defy easy generalizations about the concept of *shari'a*. I have written elsewhere in greater technical detail about the premodern legal heuristics of the *huquq Allah* and *huquq al-'ibad*, or what are often translated as “the rights of God” and the “rights of individuals.”⁴³ The two phrases play a special role in premodern Islamic legal debates, and thereby offer important insights into the ways we can imagine the nature, dynamism, and potential of legal reasoning in *shari'a*.

Both phrases, “rights of God” and “rights of individuals,” have an Arabic term in common—*huquq*—which is the plural form of *haqq*. *Haqq* has many meanings, depending on the context in which it is used. But in the context of the debates addressed below, it refers to “something incumbent upon one to do.”⁴⁴ The term signifies duty. But duty does not exist in a vacuum, and the definition begs the question: duty to whom?

This is where the phrases “rights of God” and “rights of individuals” provide answers. The rights of God capture those interests that serve the public well-being (e.g. order, security). They are not to be understood literally as God’s rights, but rather as interests benefiting the polity at large, interests meant to rid the world of evil (*ikhla' al-'alam 'an al-fasad*).⁴⁵ It is a technical phrase that conveys the idea that a large-scale, socially-significant interest is at stake. A “right of God” represents a public interest upheld by the ruling authority’s *imperium* and imposes duties upon individuals and governing authorities. The “rights of individuals,” or private interests, refer to individual expectation interests that must be satisfied under the law. These expectations may include the

43. Anver M. Emon, *Huquq Allah and Huquq al-'Ibad: A Legal Heuristic for a Natural Rights Regime*, 13 ISLAMIC L. & SOC'Y, 325, 325 (2006) (exploring how the legal debates on the theft, slander of illicit sexual activity, and highway banditry were in part framed by juristic recourse to the *huquq Allah* and *huquq al-'ibad* legal heuristic).

44. 10 IBN MANZUR, LISAN AL-'ARAB 51 (Dar al-Sadr 6th ed., 1997) (n.d.); 13 ZABIDI, TAJ AL-'ARUS MIN JAWAHIR AL-QAMUS 81 ('Ali Shiri ed., 1994) (n.d.); 1 E.W. LANE, ARABIC-ENGLISH LEXICON 605 (1984).

45. Emon, *supra* note 43, at 339.

desire to exclusively possess property, to be free from physical injury, or to receive a benefit under a charitable endowment.

In deciding whether a particular injury affects a public or private interest, jurists developed various substantive and procedural rules designed to uphold, redress, and vindicate the injured interest. For instance, the more a particular injury constitutes damage to the community at large, the more we might find a willingness by jurists to expand standing to a larger group of people, or permit the ruling authority to prosecute a wrongdoer *sua sponte*, and so on. By contrast, the more a particular injury damages a private interest, the more we will find jurists requiring the victim to petition the ruling authority for redress, limiting standing to bring suit, and empowering the victim to withdraw his or her petition (for any reason whatsoever).

The phrases “rights of God” and “rights of individuals” constitute a legal heuristic to frame legal reasoning in terms of the interests at stake. The heuristic reflects a juristic acceptance of, and engagement with, the complexities of lived experience, as well as the need to resolve conflict in a deliberative manner. To emphasize the heuristic, as opposed to the rules derived from it, is to call attention to a conception of *shari’a* as rationally and contextually deliberative, as opposed to a view of *shari’a* as a system of rules. To shed light on the significance of this heuristic to legal reasoning, we will explore premodern debates on theft (*sariqa*). In particular, we will examine the strategies jurists have used to construct a substantive right to restitution through compensation.

Suppose Thief steals Plaintiff’s car. Qur’an 5:38 states: “Regarding the male and female thieves, cut their hands as punishment for what they did as a warning from God.” For Muslim jurists, Thief’s action disturbs the public weal by undermining security and the institution of property. As such, the ruling authority has a specific interest in punishing Thief in the interest of maintaining social order, well-being, and trust in the governing authority. The amputation of Thief’s right hand is understood by jurists to accomplish this society-wide goal, and hence is considered redress for a violation of a right of God.

To support this position, jurists referred to an incident involving a companion of Muhammad, Safwan b. Umayya, who brought an allegation against someone for stealing his cloak.⁴⁶ The man confessed

46. For this story, see 8 AL-SUYUTI, SHARH SUNAN AL-NASA’I 68-72 (Dar al-Kitab al-‘Arabi, n.d.); 12 IBN HAZM, MUHALLA 55 (n.d.); 16 IBN RUSHD AL-JADD, BAYAN 228 (n.d.).

to the crime, and Muhammad sentenced him to have his hand amputated. At that moment, Safwan stated he did not want the thief to suffer punishment and instead wished to let him have the garment. Muhammad replied, "If only you had decided this before you brought him to me."⁴⁷ The thief's hand was then amputated. This example illustrates how interests classified as "rights of God" have a weight and social significance that can prevail over the varying and even unpredictable attitudes of individuals, who might otherwise hesitate to bring a charge involving corporal consequences.

Although jurists seemed content to classify the corporal punishment as a "right of God," they were concerned that the Qur'anic punishment offers no redress to the individual victim of theft. While the amputation is meant to rectify the public's collective injury and deter future crime, the punishment does nothing to redress Plaintiff's actual loss. Consequently, premodern jurists asked whether Plaintiff is entitled to compensatory damages. Jurists generally agreed that if Thief retains possession of the stolen goods, he must return the stolen property to its owner.⁴⁸ The property remaining in Thief's possession was never considered to transmute into his own property, and thus returning it is not a hardship to Thief's financial interests. Jurists disagreed, however, over whether Thief owes compensation to Plaintiff if the property no longer exists.

Suppose after Thief steals Plaintiff's car, he later wrecks it in an accident. In such cases, is Thief liable to both amputation and compensation, or must Plaintiff choose one liability over the other? The Qur'an only stipulates amputation as punishment, and makes no mention of compensatory liability at all. In this case, jurists had to reason to an outcome that involves accounting for the various interests at play. Defining those interests, however, were not easy. For some jurists, the interests at stake are only those of the public and the Plaintiff. For

47. See 8 AL-SUYUTI, *supra* note 46, at 68-72.

48. For Shafi'i jurists holding this view, see 4 RAZI, AL-TAFSIR AL-KABIR 355 (n.d.); 7 BAGHAWI, TAHDHIB 386-87 (n.d.); 5 MUHAMMAD AL-SHIRBINI, MUGHNI AL-MUHTAJ 494 ('Ali Mu'awwad and 'Adil 'Abd al-Mawjud eds., 2000) (n.d.). For Hanbali sources, see 9 ABU ISHAQ IBN MUFLIH, MUBDI' 143 (n.d.); 8 IBN QUDAMA, MUGHNI 270-71 (Mohammed Faris ed., Dar Al-Kutub Al-almiah, 1994); 4 IBN QUDAMA, KAFI 84 (n.d.). For Maliki sources, see 2 IBN AL-JALLAB AL-BASRI, TAFRI' 230 (Hassain Al-Dahmani ed., Dar Al-gharb Al-Islami, 1987); 3 IBN RUSHD AL-JADD, MUQADDIMAT 224 (n.d.); 8 KHURASHI, HASHIYA 331-2 (n.d.). For Hanafi sources, see 1 MARGHINANI, HIDAYA 419 (Z. Bainter ed., Darul Ishaat, 2005); 9 KASANI, BADA'I' 340 (n.d.); 9 SARAKHSI, MABSUT 156 (n.d.); 7 'AYNI, BINAYA 70 (n.d.).

others, Thief also has interests that must be protected. While Thief should be held liable for his crime, too much liability may impose an injustice on him.

The Shafi'is and the Hanbalis agreed that Thief, once found guilty, is subject to both amputation and compensation if the property in question has been consumed or otherwise destroyed. Their argument rests on the fact that two interests are at stake in the crime of theft—the public's and Plaintiff's—and both must be vindicated. The punishment of amputation redresses the violation of the right of God. Compensation, on the other hand, redresses Plaintiff's private right arising from the damage to his property interests. Redressing one interest does not preclude redressing the other.⁴⁹ As the Hanbali jurist Ibn Qudama stated: "Amputation and compensation constitute two rights that are required for the two right holders (*li-mustahaqqayn*) [i.e. God and Plaintiff], so it is permissible to unite both of them."⁵⁰ To negate one

49. 7 BAGHAWI, *supra* note 48, at 387. For other Shafi'i jurists holding the general Shafi'i position that both rights must be satisfied, see 4 GHAZALI, WASIT 145 (n.d.), who held that if the thief cannot return the property, he owes compensation (*daman*); 13 MAWARDI, HAWI 342 (n.d.), asserted that the corporal punishment for theft does not negate the individual right to compensation; 4 RAZI, *supra* note 48, at 355, indicated that the *hadd* of God does not negate or restrain one from satisfying private rights; 3 SHIRAZI, MUHADHDHAB 365 (Mohammed Al-Zahibi ed., 1992), held that if the thief destroys the property, he must pay compensation in fulfillment of the private rights; 8 QAFFAL, HILYA 77 (n.d.), said that if the property is destroyed, the defendant is subject to both amputation and compensation; 5 SHIRBINI, *supra* note 48, at 494, wrote that amputation is in fulfillment of the right of God, while compensation satisfies the private individual right, and one does not negate the other. For jurists of other schools who represented this position as the Shafi'i view, see 3 IBN AL-'ARABI, KITAB AL-QABAS 1027 (Mohammed Abdullah ed., 1992); 7 'AYNI, *supra* note 48, at 70; 2 IBN RUSHD AL-HAFID, BIDAYA 662-3 (n.d.); 9 KASANI, *supra* note 48, at 340; 1 MARGHINANI, *supra* note 48, at 419; 6 QURTUBI, JAMI' 108 (n.d.); 9 SARAKHSHI, *supra* note 48, at 156.

50. 8 IBN QUDAMA, MUGHNI, *supra* note 48, at 271. See also 4 IBN QUDAMA, KAFI, *supra* note 48, at 84, who said that compensation fulfills the private right and the Qur'anic punishment for the *hadd* satisfies the right of God. For other Hanbali jurists who held the same view, see 9 ABU ISHAQ IBN MUFLIH, *supra* note 48, at 143, who wrote that amputation and compensation are united under the cause of action for theft. Both reflect rights to which someone (i.e. God and the victim) is entitled. See also 6 ABU 'ABD ALLAH IBN MUFLIH, FURU' 135-36 (n.d.), for whom corporal punishment for the *hadd* of theft and the liability for compensation coexist in the same cause of action; 2 MAJD AL-DIN IBN TAYMIYYA, AL-MUHARRAR FI AL-FIQH 'ALA MADHHAB AL-IMAM AHMAD IBN HANBAL 319 (Muhammad Isma'il ed., Dar al-Kutub al-'Ilmiyya 1999) (n.d.), wrote that the defendant is liable both to compensate the victim and undergo amputation; 10 'ALA' AL-DIN AL-MARDAWI, AL-INSAF FI MA'RIFAT AL-RAJH MIN AL-KHILAF 254 (Muhammad Isma'il ed., Dar al-Kutub al-'Ilmiyya 1997) (n.d.), said that the thief must either return the property or compensate the victim, while also being subject to *hadd* liability for

because of the other would jeopardize both the public's interest in deterring theft and the individual's security in possession and ownership.

In contrast, the Malikis were concerned that where the property in question is destroyed, the defendant may suffer two punishments for a single underlying offense.⁵¹ Not wanting to penalize the defendant twice for stealing, they struck a balance between a dual and single liability scheme. Thief is subjected to amputation, but his liability to compensate depends on whether he is capable of paying compensation. If Thief suffers from economic hardship between the time he steals the property and the time his hand is amputated, he is not liable to pay compensation. If, however, he is wealthy enough to afford to compensate Plaintiff, he must do so. Importantly, if he was impoverished between the time of the theft and the amputation but becomes wealthy thereafter, he is still not liable for compensation. Economic hardship from the time of the infraction to the time of enforcement of the corporal sanction negates any and all liability to remunerate Plaintiff.

To explain the Maliki view, the jurist and *qadi* Ibn Rushd I (d. 1126) reasoned that to impose compensatory liability where there is economic hardship would unduly harm Thief, since Thief would suffer two punishments: amputation of his hand and ongoing financial liability.⁵² This runs counter to the Qur'anic verse on theft, Ibn Rushd I argued, which specifies only one punishment against Thief, namely, amputation. If, however, Thief is wealthy enough to compensate Plaintiff, Thief's property is presumed to transmute into Plaintiff's property, which Thief must return pursuant to the rule of restitution noted above. By resorting

amputation. See also 2 IBN RUSHD AL-HAFID, *supra* note 49, at 662-63, who represented the above view as both Shafi'i and Hanbali.

51. For Malikis holding this position, see 8 AL-MAWQAQ, TAJ 425 (n.d.), who held that the *hadd* is the *haqq* of God and that the thief must provide compensation if he is wealthy; 2 IBN AL-JALLAB AL-BASRI, *supra* note 48, at 230, indicated that if the thief retains the property, he must return it, and if not then he must compensate the victim if he is wealthy enough to pay it; 8 KHURASHI, *supra* note 48, at 331-32, rendered the thief liable to both amputation and compensation if he is rich, but if he has no money, no compensatory liability exists since one cannot unite two punishments under the single crime; 2 SALIH 'ABD AL-SAMI' AL-AZHARI, JAWAHIR AL-IKLIL 438 (Dar al-Fikr, 1976) (n.d.), deemed the *hadd* to be a *haqq* of God, while limiting compensation to those circumstances where the thief is wealthy enough to do so. For jurists of other schools who represented the above view as the Maliki perspective, see 7 'AYNI, *supra* note 48, at 71; 9 SARAKHSI, *supra* note 48, at 156; 3 IBN AL-'ARABI, KITAB AL-QABAS 1027-28 (n.d.); 13 MAWARDI, *supra* note 49, at 342; 8 QAFFAL, *supra* note 49, at 78; 4 RAZI, *supra* note 48, at 355; 5 SHIRBINI, *supra* note 48, at 494.

52. 3 IBN RUSHD AL-JADD, MUQADDIMAT, *supra* note 48, at 224.

to a theory of transmutation, Ibn Rushd I attempted to uphold Plaintiff's interests without unduly penalizing a poor thief.

Taking this line of reasoning further, the Hanafis argued that if the stolen property is destroyed, Thief is not subjected to both amputation and compensation.⁵³ Instead, Thief is liable to amputation *or* compensatory liability. They justified their position by reference to a prophetic tradition in which Muhammad stated: "An owner of stolen property is not compensated if the *hadd* is applied to [the thief]."⁵⁴ The other schools, however, doubted the authenticity of this tradition, and thereby rejected any reference to it for the purpose of legal analysis.⁵⁵ Hanafi jurists retorted that despite authenticity issues, the Qur'an nonetheless specifies only one punishment. To impose a second punishment contravenes the Qur'an.⁵⁶ Al-Kasani, for instance, wrote

53. 9 KASANI, *supra* note 48, at 340. 9 SARAKHSI, *supra* note 48, at 156, held that punishment for the *hadd* is the only liability provided for in the Qur'an and the *hadith* negates liability for compensation. 1 MARGHINANI, *supra* note 48, at 419, found no liability for compensation if the property is consumed (*mustahlaka*). 7 'AYNI, *supra* note 48, at 71, related that the Hanafis disagreed if compensation is negated only when the property is consumed (*istihlak*) or also when it is destroyed (*halak*). Abu Yusuf dropped liability for compensation in both cases, whereas al-Shaybani required compensation where there has been consumption, but not full and total destruction. For jurists of other schools who represented the Hanafi view as not requiring compensation where the property is destroyed, see 7 BAGHAWI, *supra* note 48, at 386-87; 4 GHAZALI, *supra* note 49, at 145; 8 IBN QUDAMA, MUGHNI, *supra* note 48, at 271; 2 IBN RUSHD AL-HAFID, BIDAYA, *supra* note 49, at 662-63; 3 IBN AL-'ARABI, AL-QABAS, *supra* note 51, at 1027-28; 13 MAWARDI, HAWI, *supra* note 49, at 342; 8 QAFFAL, *supra* note 49, at 78; 4 RAZI, *supra* note 49, at 355; 5 SHIRBINI, MUGHNI AL-MUHIT, *supra* note 49, at 494.

54. 8 SUYUTI, *supra* note 46, at 93; 2 IBN RUSHD AL-HAFID, BIDAYA, *supra* note 49, at 662. See also 13 MAWARDI, *supra* note 49, at 184, who cited a different version of the *hadith* in which the Prophet is reported to have said, "If the thief is amputated, there is no liability for compensation" (*idha quti'a al-sariq fa-la ghurm*). For this version, see also 9 KASANI, *supra* note 48, at 341. 7 'AYNI, *supra* note 48, at 71 cited yet a third version of the *hadith*, stating: "There is no liability for compensation on the thief after his right hand has been amputated" (*la ghurm 'ala al-sariq ba'da ma quti'at yaminuhu*). Notably, 'Ayni said that this tradition occurs in the collections of both al-Nasa'i and al-Dar Qutni. *Id.* For other versions of this tradition, see also 3 DARAQUTNI, SUNAN AL-DARAQUTNI 129-30 (Al-Sayad Abdullah ed., 1966).

55. 2 IBN RUSHD AL-HAFID, BIDAYA, *supra* note 49, at 662-63. See also 8 IBN QUDAMA, MUGHNI, *supra* note 48, at 271. The Shafi'i al-Mawardi stated that in the time of the biblical Jacob, thieves simply compensated their victims for their crimes, but the *hadith* signals that the Qur'an abrogated that earlier law. 13 MAWARDI, HAWI, *supra* note 49, at 184. For the Hanbali Abu Ishaq Ibn Muflih (d. 804/ 1401), the *hadith* means that no one should be compensated for amputating a thief's hand (i.e., *ujrat al-qati'*). 9 ABU ISHAQ IBN MUFLIH, *supra* note 48, at 144.

56. 9 SARAKHSI, *supra* note 48, at 157; 9 KASANI, *supra* note 48, at 340-41. Al-

that the Qur'anic verse on theft uses the term *jaza'* to stipulate amputation as the only punishment for theft. He argued that the term *jaza'* linguistically refers to the completion or sufficiency of an act (*kifaya*).⁵⁷ If Thief must also pay compensation in addition to suffering the amputation, how can the Qur'an speak of amputation as full satisfaction for the crime of theft? If amputation were only part of the punishment meted out to Thief, the Qur'anic use of the term *jaza'* in the verse would be incorrect.⁵⁸

These different legal conclusions illustrate a dynamic form of Islamic legal reasoning that takes into account source-texts and a context-thick awareness of the competing interests at play in a legal issue. In Hanafi jurisprudence we find a concern for Thief's interests, although it is couched by reference to a prophetic tradition. The Malikis—who rejected that tradition—nonetheless were also concerned about Thief's interests and well-being, as well as those of Plaintiff and society at large. The Shafi'is and Hanbalis were not nearly as concerned about Thief's interests as were the Hanafis and the Malikis. They were keen to protect the rights of God and individuals, although for them the relevant individuals are victims who petition for redress. The premodern heuristic of “rights of God” and “rights of individuals” allows us to think creatively about the construction, development, and distribution of rights and entitlements.⁵⁹ Their modes of reasoning permit us to envision a concept of *shari'a* as a system of legal reasoning, as opposed to being primarily a catalog of rules.

'Ayni notes that the *hadith* is *mursal*, but indicates that it is still acceptable to Hanafi jurists. 7 'AYNI, *supra* note 48, at 71. A *mursal hadith* is one in which one link in the chain of transmission—such as a Companion between the Prophet and the Successor—is missing. See G.H.A. Juynboll, “Mursal,” in 7 ENCYCLOPAEDIA OF ISLAM 631 (P. Bearman et al. eds., 2d ed., 2008) available at http://www.brillonline.nl/subscriber/entry?entry=islam_SIM-4677.

57. 9 KASANI, *supra* note 48, at 340.

58. *Id.*

59. In the case of tort liability, for instance, the Common Law often reflects a particular balance between individual entitlements and social policy questions, such as in cases of personal injury, negligent misrepresentation, and pure economic loss. See, e.g., *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 (1928); *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); *Cooper v. Hobart*, [2001] 206 D.L.R. (4th) 193 (Can.); *Hedley Byrne & Co. Ltd v. Heller*, [1964] A.C. 465 (H.L.); *Can. Nat'l Ry. v. Norsk Pac. S.S.*, [1992] 91 D.L.R. (4th) 289 (Can.).

III. PRECEDENT AND LEGAL REASONING IN SHARI'A TODAY

To focus on the nature of legal reasoning in premodern *shari'a* discourses is not to deny the ongoing relevance of legal rules in framing contemporary debates in Islamic law. Indeed, rules often provide flashpoints for debate about what is, can, and should be the scope of Islamic law in contemporary Muslim polities. To suggest that all one needs to do is invoke concepts like “the rights of God” or the “rights of individuals” to overcome the power of precedent would be naïve. But such concepts do offer internal mechanisms of debate about Islamic legal requirements, and lead to a degree of indeterminacy in the law that could have negative political implications on the construction of identity in cases like Mindanao. This is not to suggest that attempts at conceptualizing *shari'a* as a tradition of reasoning be abandoned. Yet one cannot ignore the social, economic, and political implications of altering how we think about and define *shari'a*.

Understanding the politics of contemporary *shari'a* discourses, and engaging internal modes of legal reasoning, would offers scholars, policy advisors, and activists alike an opportunity to contribute to *shari'a* discourses in ways that are neither purely politicized nor purely legalistic, but rather reflect the relevance of both in any given instance. To illustrate what such an approach may look like, I consider the issue of polygyny, which is legalized in many Muslim countries, and is often criticized by human rights activists.

The Philippine Code of Muslim Personal Law permits polygyny in Article 27, stating, in relevant part:

Notwithstanding the rule of Islamic law permitting a Muslim to have more than one wife but not more than four at a time, no Muslim male can have more than one wife unless he can deal with them with equal companionship and just treatment as enjoyed by Islamic law and only in exceptional cases.⁶⁰

The provision emphasizes the importance of equal and just treatment, and even seems to limit the incidence of polygyny to “exceptional cases,” although the statute provides no clarity on what “exceptional” means.⁶¹

60. Code of Muslim Personal Law, *supra* note 27, Art. 27.

61. Egypt permits polygyny, on condition that the husband provides formal notice to the existing wife or wives of his desire to take another wife, ABDULLAHI A. AN-NA'IM, ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK 171 (2002), as does Pakistan, although with various regulatory measures involving state oversight. *Id.* at

Under Islamic law, Muslim men are allowed to marry up to four wives, but Muslim women have no such liberty. This rule is based on a particular reading of Qur'an 4:3, which states:

If you fear that you will not be just to the orphans, then marry women of your choosing, either a second, third or fourth. But if you fear you cannot be just, then [only] one. . .

The verse uses a conditional "if" clause about justice to orphans, which if satisfied, grants men the license to marry up to four wives as long as the men treat their wives justly. Who these orphans are is not clear from the verse.⁶² Nor is it clear whether the women being married are female orphans, or the mothers of orphans (whether boys or girls)—as "orphan" in premodern usage can mean a child whose father has died.⁶³ What seems clear, though, is that men have a conditional license to wed up to four wives.

Importantly, the premodern Islamic legal tradition reads out the precondition, and instead grants men an absolute license to wed up to four wives. Abu Bakr b. al-'Arabi (d. 954) wrote that scholars generally agree that "whoever knows he can be just to orphans can [still] marry whichever [of them], just as [marrying the orphans] is permitted to one who fears he cannot be just [to orphans]."⁶⁴ While the Qur'an limits the license to wed to those who fear they cannot be just to orphans, Muslim jurists read out the precondition, and instead consider the verse to provide a general license to marry more than one wife.

A second Qur'anic condition to the license to wed polygynously is that men must treat their co-wives justly (*'adl*). Muslim jurists, however, defined "justice" in this regard as "equality." Ibn al-'Arabi held that justice requires merely a fair division of goods (*qasm*). The contemporary scholar Yusuf al-Qaradawi considers the imperative of justice to require a husband to treat his co-wives equally "in the matter of food, drink, housing, clothing and expenses, as well as in the division of

233.

62. In relating the context of the verse, the Prophet's wife 'A'isha merely states that the (female) orphans of this verse are those whose property cannot be mixed with the property of those overseeing their affairs. Nonetheless, their money and beauty are enticing. The verse thereby permits such men to marry these orphans to avoid injustice to them or their fiscal well-being. But who these orphans are or how they became orphans is not addressed in the tradition. 1 ABU BAKR IBN AL-'ARABI, *AHKAM AL-QUR'AN* 309-10 ('Ali Muhammad al-Bukhari ed., Dar Ahia Al-Kutub Al-Arabiah, 1957).

63. 12 IBN MANZUR, *supra* note 44, at 645.

64. 1 IBN AL-'ARABI, *supra* note 62, at 310.

his time between them.”⁶⁵ And while some jurists such as al-Qurtubi (d. 1272) included intimacy and affection as part of the equality calculus,⁶⁶ Ibn al-’Arabi considered equality in passion, love and affection impossible. For Ibn al-’Arabi, while God may demand justice, God does not demand of anyone to manage his heart in that fashion.⁶⁷ Much as the United States Supreme Court upheld the doctrine of “separate-but-equal” in *Plessy v. Ferguson*,⁶⁸ many premodern Muslim jurists considered equality in material provisions tantamount to justice. Whether that is in fact the case, though is subject to dispute.⁶⁹

Despite critiques that can be made against the premodern approach to polygyny, the view that Islamic law upholds such a general license to marry up to four wives prevails in Muslim countries across the globe. But not all Muslim countries adopt the same rule on polygyny. Tunisia bans it entirely.⁷⁰ In taking a position against polygyny, though, Tunisia has been criticized for diluting the Islamic ethos of its polity in favor of modernizing the country in a way that appeases the West.⁷¹ The fact that technical legal critiques can be leveled at the premodern license of

65. YUSUF AL-QARADAWI, *THE LAWFUL AND THE PROHIBITED IN ISLAM* 191 (Kamal el-Helbawy trans., 1982).

66. 5 ABU ’ABD ALLAH AL-QURTUBI, *AL-JAMI’ LI AL-AHKAM AL-QUR’AN* 15 (1993).

67. 1 IBN AL-’ARABI, *supra* note 62, at 313.

68. *See generally Plessy v. Ferguson*, 163 U.S. 537 (1896).

69. Whether we look to al-Qurtubi or *Brown v. Board of Education*, 347 U.S. 483 (1954), which overturned *Plessy*, equality alone is not equivalent to justice. Many who critique the ruling on polygyny refer to Qur’an 4:129, which implicitly invokes a concern about reading equality as tantamount to justice. It states: “You will never be able to be just among women even if you tried.” The verse on polygyny and the one skeptical about justice among women are separated in the Qur’an by considerable space, and some might be inclined to distinguish them as being of limited relevance to each other. Nonetheless, whether Qur’an 4:129 is read as a gloss on Qur’an 4:3 or not may depend on how we choose to understand the relationship between a legislative-like verse (e.g. 4:3) and those which are less express, but instead can be classified as general principles of varying weight (e.g. 4:129). For examples of those who use 4:129 to gloss 4:3, see JOHN L. ESPOSITO & NATANA J. DELONG-BAS, *WOMEN IN MUSLIM FAMILY LAW* 100-02 (2d ed., 2001). Even if we refuse to read the two verses together, we are still faced with the choice of reading 4:3 broadly like premodern jurists, or narrowly. The text itself does not necessarily take a position one way or the other, and thus more than just reference to legal texts may be required. As suggested below, the heuristic of the “rights of God” and “individual rights” may offer an approach that is mindful of source-text, history, and the context of the modern state.

70. AN-NA’IM, *supra* note 61, at 182.

71. *See* Marion Boulby, *The Islamic Challenge: Tunisia Since Independence*, 10 *THIRD WORLD Q.* 590, 590-614 (1988).

polygyny seems of little concern to those who worry about the dilution of an Islamic ethos.⁷² Advocates of polygyny rely on the determinacy of *shari'a* rules to provide an Islamic ethos that lies in stark contrast to the imperial agenda of those powers that once dominated the Muslim world.

This is where the heuristic of the “rights of God” and “individual rights” may offer an opportunity for creative and deliberative discourse about *shari'a*, community, and identity in a modern Muslim polity that incorporates *shari'a* in some fashion.⁷³ For instance, if the “rights of God” are about public interests, then we can read the reference to “orphans” in Qur’an 4:3 and the resort to polygyny as a welfare-oriented institution for taking care of the vulnerable in society. A patriarchal reading may lead to reading a general license to polygyny, whereas a rights-of-God analysis offers a systemic, policy-oriented background to how we read the relevant verses. The verses before and after 4:3 speak of the need of caring after those who are less fortunate. A fuller Qur’anic context reads as follows:

Give to the orphans their property, and do not substitute the worthless for the valuable. And do not transform their property into your own, for it is a great sin. If you fear that you cannot be just to the orphans, then marry a second, third or fourth from among the women that please you. If you fear you cannot be just, then only one or those whom your right hand possesses. That is better, so that you avoid injustice. Give the women [whom you marry] their marriage dower as a gift. If they prefer to give you back a portion of it, then take it as a bounty. Do not give to those of feeble minds your property that God made as a means of support. Feed and clothe them with it, and speak to them with kindness. Examine the orphans until they reach the age of marriage. If you find in them sound judgment, then give them their property. Do not consume it quickly or extravagantly [before] they reach maturity. Whoever is wealthy, let him refrain [from taking remuneration]; whoever is poor, he may take what is reasonable [compensation]. When you pay to them their property, have it

72. For another example of such critiques, see generally Fazlur Rahman, *A Survey of Modernization of Muslim Family Law*, 11 INT’L J. OF MID. E. STUD., 451, 451-65 (1980).

73. While we can critique premodern jurists in the way they expanded the license granted in the Qur’anic verse, or critique those who rely on the premodern rules as constitutive bases for claims of political identity, there is still the need to proffer an argument of *shari'a*, especially if *shari'a* is a constitutive feature of the identity of a people and their claim to nationhood and statehood. Since Islamic law no longer exists in a vacuum and its premodern rulings are implemented to varying degrees by different states, any *shari'a*-based argument will need to account for the role the state plays in upholding the public weal, preserving individual interests, and managing conflict in a constantly changing world.

witnessed for them. God alone shall hold to account.⁷⁴

These verses speak to a need to protect and manage the property of orphans and others requiring institutionalized forms of care and concern. In a setting characterized by informal networks, kinship structures, and so on, polygyny offered an institutional framework for fulfilling a policy of care and concern. In this case, the license to marry polygynously is presented as an option for those who cannot adequately keep separate accounts. Whether the anticipated bride is the orphan herself or the mother of an orphan, polygyny may have been a mode of social welfare that ensured the well-being of those who had limited means to care for themselves.⁷⁵ But, to the extent the modern state assumes responsibility for orphans by funding children's aid societies, foster-care services, and other social welfare projects, the conditions that rendered the Qur'anic license meaningful arguably no longer prevail. The license for polygyny might seem irrelevant and inapplicable in the modern state, given how the modern state relies on other institutions to fulfill the social policy of care and concern. In other words, if the state manages social welfare functions that were once coped with by polygyny, any effort to preserve a general license to wed polygynously would counter the society-wide interests and stakes underlying the limited license in the Qur'an, as framed by a rights-of-God analysis.⁷⁶

In addition, the heuristic of the "rights of God" can account for the effect of polygyny today on society at large and to women as a class. Rebecca Cook and Lisa Kelly, for instance, suggest that polygynous relationships have various negative effects on women in such marriages. Such ills might include increased levels of stress and mental illness among co-wives, increased sexual and reproductive health risks, and economic instability despite what might be seen as increased aggregate wealth given the community of co-wives.⁷⁷ In other words, the effects of polygyny contribute to significant systemic justice problems that may be most appropriately addressed under a right-of-God analysis.

74. QUR'AN 4:3-6.

75. For this view, see AL-QARADAWI, *supra* note 65, at 190-91.

76. This approach to the issue of polygyny leaves open the possibility that it can have positive externalities in cases of a failed state, for instance. The social impact, value, and place of polygyny in modern states are issues that fall outside the scope of this study.

77. Rebecca Cook and Lisa Kelly, *Polygyny and Canada's Obligations under International Human Rights Law*, FAMILY, CHILDREN, AND YOUTH SECTION RESEARCH REPORT (DOJ Can.), Sept. 2006, at 12-16, available at <http://www.justice.gc.ca/eng/dept-min/pub/poly/poly.pdf>.

Furthermore, these harms would certainly affect the individual parties within a marriage, and thus raise important concerns about upholding the “right of individuals” in a marriage. Together, the focus on individual interests and public policy concerns suggest that the “rights of God” and “rights of individuals” heuristic may offer a conceptually coherent way to debate about the place and relevance of premodern rules of *shari’a* in a modern state setting.⁷⁸

IV. CONCLUSION

This article shows that premodern Muslim jurists developed complex heuristics to reason legally about private interests, public interests, and the need to ensure that both are protected to the greatest extent possible. Focusing on this heuristic permits us to suggest that models of reasoned deliberation in *shari’a* exist, which respect the internal concepts of *shari’a* without treating it as an all-or-nothing proposition. Reasoning to appropriate legal conclusions was never an easy matter for Muslim jurists. But it is no easy matter for jurists of any legal tradition. By shifting focus from the rules to this heuristic of legal reasoning, we can gain greater understanding of how Muslim jurists envisioned the *shari’a* as a site of complex legal reasoning, as opposed to a simple code of rules.

This is not to suggest, though, that the code-like rules themselves bear no relevance to our inquiry. The rules constitute a tradition that is of great importance to Muslims across the globe. As a matter of both religious commitment and political identity, the rules contribute to a tradition by which Muslims may frame their own place in the world. To picture *shari’a* as a code or system of rules certainly offers a clear and accessible guide for a Muslim seeking to “get good with God.” But to envision *shari’a* as unchangeable rules is to render it immune to the changes in our world.

Nevertheless, there is a tendency to consider these premodern rules as the beginning and end of any inquiry into Islamic law. Whether we look to the Philippine Code of Muslim Personal Law, or other similar personal status statutes in the Muslim world, we find Muslim polities

78. In doing so, we do not treat the state as a normative model of governance, but rather account for it as a socio-political fact that gives contextual content to legal analysis. To render the state a fact, and not a norm, takes account of the contemporary nature of governance, without ignoring the power the state exerts on a daily basis, sometimes to the detriment of some people and communities.

adhering to premodern rules of Islamic law as if the rules were themselves constitutive of all that *shari'a* has to offer. As suggested above, this adherence to *shari'a* as a system of rules reflects certain political contests over identity and community that cannot be ignored, but which rely on a contentious concept of law. A shift in focus to the heuristics of legal reasoning shows that for premodern Muslim jurists, source-texts and the legal rules offer starting points for a dynamic process of legal analysis that is always mindful of the competing interests at stake in any legal conflict. Like precedent in the Common Law tradition, premodern rules of Islamic law constitute points of first reference, but need not preclude ongoing legal analysis.

The challenge facing those desiring a shift in the concept of *shari'a* to deliberative legal reasoning stems, in part, from an inability, unwillingness, or simple failure to account within the concept of legality the embeddedness of *shari'a* in a constantly changing history with complex social, political, and economic dimensions. Those dimensions must be accounted for within any model of legal reasoning. But the immediacy of those dimensions may also explain why *shari'a* debates remain so powerful in Muslim polities, and why attempts to reform *shari'a* doctrines or reframe it as a site of reasoned deliberation often fall flat.

